3rd LABOR AND EMPLOYMENT LAW SEMINAR

KAMER ZUCKER & ABBOTT

May 12, 2000

Hiring Issues: Taking the Proper Steps to Avoid Problem Employees and Claims of Failure to Hire

By: Carol Davis Zucker, Esq. and Susan L. Gray, Esq.

I. INTRODUCTION.

The hiring process is the employer's best opportunity to take pro-active steps against potentially problem employees. Through this process, employers can assess an applicant by looking for "flags" on employment applications and in interviews, making inquiries into the applicant's background, and testing the applicant for his or her suitability for the position. However, employers must be cognizant that inquiries or procedures which overstep the proper boundaries may lead to charges of discrimination.

This article will walk through the hiring process, from recruitment, to the application and interview process, the research and testing process, and post-offer inquiries. By walking through the hiring process, this article will outline both the "flags" employer's should be watchful for, as well as the improper actions employers may mistakenly take.

II. RECRUITMENT.

An employer's recruitment process should target the appropriate applicant pool, but should be not be overly specific as to create inferences of discrimination.

A. Advertising.

1. Job Titles. Gender specific job titles such as "waitress" or "waiter" should be avoided, instead gender neutral titles should be utilized, such as "food server."

2. Job Description and Qualifications. Each advertisement should be modeled after the job description of the position sought, specifically listing the necessary skills and qualifications for the position.

B. Method of Dissemination.

Available positions should be disseminated in a manner which does not limit the opportunity of the general public to learn of the opening. For instance, advertisements in newspapers of general circulation is preferable to word of mouth dissemination.

III. APPLICATIONS.

Applications are one of the most useful tools an employer can use to screen out potentially poor employees. The application itself often provides "clues" as to an employee's work performance. Specifically, employers should look for gaps in employment history and whether an applicant has had multiple short-term positions, either of which could be an indication of a possible problem employee. These signs can also be indicators that the applicants are "salts," union members who seek to infiltrate a non-union company to attempt to organize its employees.

Not only can applications be useful to employers in avoiding potential problem employees, some applications can actually be the cause of discrimination charges, where the application seeks improper information. Often, employers are unaware that they are utilizing employment applications which make unlawful inquiries. Applications which seek information simply for identification can also create inferences of potential discrimination. Questions which should not appear on applications include:

1. age or date of birth (instead application should ask if over 18 or 21);
2. male or female;
3. eye or hair color;
4. marital status or dependents; and/or
5. place of birth.

Some employers are now using electronic or paperless applications. Employers utilize technology to simplify the hiring process and hope that an impartial computer program will be less susceptible to charges of discrimination. However, even electronic application programs have been challenged. Specifically, claims have been raised that such programs have a disparate impact on minorities by the use of "key words" which favor white applicants. If such programs are utilized, it is important to ensure that "key word" selections are tailored to the specific job.

Employers have also begun to accept applications over the internet. If electronic or internet applications are utilized, employers should take the following steps:

A. Electronic Applications.

1. All applicants must sign a certification indicating that he/she has reviewed the information provided on the application, affirms the truthfulness of the information, and acknowledges that false statements can be grounds for refusal to hire or termination.

2. In the event the electronic application process includes questions concerning protected status, similar to "tear offs" on a paper application, it should be explicitly stated that the information is not part of the hiring decision, but solely for record keeping purposes. In addition, applicants should be informed that the individuals reviewing the application will not have access to such information.

3. Documented policies should be utilized to prevent applicant screeners from having access to "tear off" information.

4. Such information should be stored separate from other applicant/personnel information, whether in an electronic or hard copy format.

5. Access to the computer terminals must be considered, as in the case of applicants who are confined to wheelchairs, etc. If access is not possible, applicants should be provided with a paper application which should then be scanned into or manually input into the computer.

B. Internet Applications.

1. The internet site should be used solely as an initial application process. All applicants should also provide standard applications with the appropriate certificate of accuracy. As such, the site should provide the appropriate disclaimers that the application is not "received" until a standard application has been completed and an "acknowledgment of receipt" has been provided by the employer to the applicant.

2. To prevent issues of "lost" applications, all applicants should receive an "acknowledgment of receipt" to verify that the application has been received.

3. In the event a service company maintains the internet site, strict guidelines should be imposed for confidentiality, forwarding applications, keeping records of submissions, as well as records of the site format.

4. Records should be maintained detailing the format of the internet application process.

IV. INTERVIEWS.

Like applications, the interview process can lead to extremely useful information about a potential employee. However, improper inquiries can create inferences of discrimination if the applicant is not hired.

A. Subject of Inquiry.

Most employers are aware that they are not permitted to specifically inquire into an applicant's protected class status. However, employers often make the mistake of making other inquiries that could be construed as discriminatory.

1. EEOC Guidelines. The EEOC suggests that employers avoid making the following inquiries, unless necessary for successful performance of the position:

a. marital status, dependents, pregnancy;

b. plan for children or childcare arrangements;

c. English language skills;

d. height and weight;

e. arrest and conviction records;

f. discharge from military services;

g. citizenship;

h. credit history; and

i. availability for work on weekends or holidays.

2. Disability Inquiries. The Americans With Disabilities Act specifically prohibits inquiries as to whether an applicant is disabled. This includes inquiries into:

a. the existence of impairments;

b. limitations on major life activities;

c. workers' compensation history;

d. frequency of illness; and/or

e. if applicant needs a reasonable accommodation to perform the job or a particular task, except where a disability is obvious or voluntarily disclosed.

An applicant may be asked if he or she can perform the essential functions of the position with or without reasonable accommodation.

V. RESEARCH/TESTING.

Research into an applicant's background can provide an employer with valuable insight into a potential employee.

A. References.

Employers should always check all of an employee's references, whether they be personal references or professional references. In addition, former employers must also be contacted. While many employers will refuse to give references, at the very least, they should be able to confirm dates of employment, position, and rate of pay. Checking references and work history may not only reveal potential problem employees, but also may assist an employer in uncovering a "salt."

B. Background Checks.

Employers utilizing background checks need to be aware of the regulations addressing such inquiries and how such information may be utilized.

1. Fair Credit Reporting Act. The FCRA sets forth specific rules for conducting inquiries into a person's credit history. Specifically, employers must:

a. Provide the particular employee with a "clear and conspicuous" **written disclosure** at any time before the consumer report is ordered in a document that consists solely of the disclosure that informs the employee that a consumer report may be obtained for employment purposes. Disclosures made in an employment application or employee handbook are not sufficient to meet an employer's new legal obligation under the FCRA.

b. Obtain the employee's written authorization granting permission for his/her consumer report to be obtained. Both the disclosure and authorization may be contained in the same document. However, both must be separate from all other employment documents, including the application.

c. Provide certification to the consumer reporting agency that: (1) a proper disclosure was given to the employee; (2) a proper authorization was provided by the employee; (3) the employer will provide a copy of the consumer report and a summary of the employees' rights under the FCRA (as prescribed by the FTC) before any adverse action is taken; and (4) the information from the consumer report will not be used in violation of any applicable federal or state equal employment opportunity law or regulation.

d. If the employer obtains a consumer report and decides it may take adverse action based in whole or in part on the consumer report, *e.g.*, not hiring an applicant or promoting an employee, it must give the employee a "pre-adverse action disclosure," which consists of two documents (1) a copy of the consumer report; and (2) a copy of "A Summary of Your Rights Under The Fair Credit Reporting Act" as prescribed by the FTC.

e. After adverse action is taken, the employer must provide a "post-adverse action disclosure," serving as notice of the adverse action taken. It can be provided orally, in writing, or electronically. The disclosure must contain: (1) the name, address, and telephone number of the consumer reporting agency that furnished the report (including a toll-free number established by the agency if it maintains consumer files on a nationwide basis); (2) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and (3) a notice of the consumer's right to obtain a free copy of the consumer report issued directly from the consumer reporting agency if a written request is sent to the consumer reporting agency within sixty (60) days after transmittal of the "post-adverse action disclosure"; and (4) a notice of the consumer's right to dispute the accuracy or completeness of any information in the consumer report by contacting the consumer reporting agency directly.

2. Law Enforcement Background Checks.

Employers have begun to utilize law enforcement background checks to assist in making hiring decisions. However, an employer may generally seek information only regarding convictions. Unfortunately, many law enforcement background checks improperly include additional information including:

a. gender
b. age
c. race
d. national origin
e. marital status

f. arrests not resulting in conviction
g. evidence of a drinking problem.

Example: In Nevada, the Nevada Highway Patrol("NHP") provides a service to employers seeking background information on applicants. However, the information contained in NHP reports includes much of the above data. In addition, NHP requires that the applicant provide a written authorization for the release of this report. The authorization itself also raises concerns inasmuch as it requires the applicant's age and race.

Because these reports contain such extraneous information, it is strongly recommended that employers not use such reports. If such reports are utilized, however, the employer MUST screen out all extraneous information and provide the person or persons making the hiring decision with only the relevant information.

C. Testing.

1. Medical Testing.

The ADA specifically prohibits pre-offer medical examinations. However, an employer may choose to require newly hired employees to submit to post-offer physical and medical examinations before the employee actually commences work, provided all such employees are required to submit to testing. An employer may also require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination. If the employer elects to do so, however, the employer must ensure that:

a. all entering employees are subjected to such an examination regardless of disability;

b. information obtained regarding the medical condition or history of the applicant is collected and maintained in separate forms and in separate medical files and is treated as confidential medical records; and

c. the results of such information is used in accordance with the ADA.

Although post-offer medical examinations are not required to be job-related and consistent with business necessity, an employer must nevertheless ensure that if an employer elects to withdraw an offer because the examination reveals that the employee does not satisfy certain employment criteria, the exclusionary criteria must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, **or** (the criteria) must be job-related and consistent with business necessity. In addition, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job.

2. Genetic Testing.

The Nevada legislature recently passed legislation prohibiting employers from requiring prospective employees to undergo genetic tests, or to deny employment based on genetic information. One purpose of genetic testing has been to determine whether an employee is predisposed to a particular disease.

3. Polygraph Testing.

The Employee Polygraph Protection Act prohibits employers from requesting applicants to take a polygraph test or to use results of such a test in making an employment decision.

4. Integrity and Personality Tests.

With proper validation, integrity and personality tests are generally permissible. However, personality tests could run afoul of the ADA if such tests are construed as psychological tests and to the extent the tests attempt to assess whether an applicant has a mental disorder or impairment. Tests utilized to determine an applicant's propensity for truthfulness, tastes, and habits are also lawful, provided the tests have been validated.[1]

---

[1] While testing can assist employers in determining whether an applicant is qualified for the position sought, any testing which has an adverse impact on a protected class of individuals constitutes discrimination, unless such testing can be justified. This requires the test to be validated through a validity study. A validity study should consist of empirical data which demonstrates that the test is predictive of, or significantly correlated with, important elements of job performance, which shows that the content of the test is representative of important aspects of performance on the job, or which shows that the test measures the degree to which applicants have identifiable characteristics that have been determined to be important to successful performance of the position sought.

5. Ability Tests.

With validation, ability tests are generally permissible where they are evenly applied to all applicants for the position and where the tests are directly related to the functions of the position.[2] However, an employer could face disparate impact claims if it requires applicants for semi-skilled positions to take cognitive examinations. Courts have found such testing to have a disparate impact on minorities.

6. Drug Testing.

Drug testing is discussed in depth in Section E.

VI. POST-OFFER.

A. I-9 Forms.

The documents provided by the applicant in filling out an I-9 form may contain specific information about an applicant's protected status, such as age, gender, race, or national origin. As such, I-9 documentation should never be requested prior to a job offer being made. However, an employer may ask if the applicant is able to provide the necessary I-9 documentation if offered the position.

The Office of Special Counsel for Immigration Related Unfair Employment Practices ("OSC"), a division of the Department of Justice, is responsible for prosecuting I-9 violations by employers. The agency also provides information to employers to assist in fulfilling their I-9 requirements. If an employer has questions about its I-9 obligations, it can contact the OSC at 1-800-255-7688. OSC also maintains a website with general information for employers at *www.usdoj.gov/crt/osc*.

[2] See fn. 1 on page 5.

B. Record Keeping.

Good record keeping on the part of an employer can assist in providing evidence to refute claims of discriminatory failure to hire, not only through statistical data to establish that the employer maintains a diverse workforce, but also through careful documentation of the hiring process and reasons for the decision not to hire the applicant.

Interview Notes and Test Results.

Such information can be invaluable in defending a failure to hire claim. Interviewers are often unlikely to remember a specific applicant, much less why that applicant was not selected. Thus, notes and test results can also be useful in establishing that the individual hired had better qualifications than the applicant challenging the hiring decision.

In addition there are also statutory record keeping requirements for employers. These requirements are set forth in **Appendix A** attached hereto.

VII. CONCLUSION.

By properly utilizing the hiring process, employers can take steps to avoid hiring an applicant who potentially may become a problem employee. In addition, by careful application of its hiring procedures, employers can avoid charges that it improperly failed to hire or used discriminatory practices in hiring.

APPENDIX A[1]

Statute		Records To Be Retained	Period of Retention	Form of Retention
Title VII, Civil Rights Act of 1964	Americans With Disabilities Act	Any personnel or employment record made or kept by employer; including application forms and records concerning hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.	One year from date record made or personnel action taken, whichever is later.	No particular form specified.
		Personnel records relevant to bias charge or action brought by EEOC or Attorney General against employer, including records relevant to employee or comparative employees.	Until final disposition of charge or action.	
		Apprenticeship programs: chronological list of names and addresses of all applicants, dates of application, sex and minority group identification, or file of written applications containing same information; and other records pertaining to apprenticeship applicants.	Two years from date application received or period of successful applicant's apprenticeship, whichever is longer.	
		Employers with 100 or more employees: Copy of EEO-1, Employer Information Report	Copy of most recent report filed for each reporting unit must always be retained at each such unit or at company or divisional headquarters.	
Family & Medical Leave Act		All records pertaining to compliance with FMLA's general requirements for leave. In addition to basic payroll data, the dates and hours (if less than a full day) of FMLA leave taken, copies of employer notices, documents describing employee leave benefits and policies, premium payments of employee benefits, and records of disputes with employees over FMLA benefits.	Three years.	No particular form specified. However, employers to make, keep, and preserve records in accordance with FLSA, and to make records available for inspection, copying and transcription.
Rehabilitation Act of 1973		Federal contractors and subcontractors: For applicants and employees with disabilities, including those involuntarily terminated, records including but not limited to, those relating to requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications and resumès, tests and test results, interview notes, and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.	Two years from date record was made or personnel action occurred; except for contractors with fewer than 150 employees or government contracts of less than $150,000 for which retention period is one year.	Accurate and complete records accessible during normal business hours for on-site compliance review and complaint investigations and for inspection and copying of records, including computerized records.
		Where complaint of discrimination filed, compliance review initiated, or enforcement action commenced; personnel records relating to the aggrieved person and all other employees holding positions similar to that held or sought, application forms, test papers, etc.	Until final disposition of complaint, compliance review, or enforcement action.	

Statute	Records To Be Retained	Period of Retention	Form of Retention
Age Discrimination Act	Payroll or other records containing each employee's name, address, date of birth, occupation, rate of pay, and compensation earned per week.	Three years.	No particular form specified.
	Personnel or employment records relating to (1) job applications, resumès, or other replies to job advertisements, including applications for temporary positions and records pertaining to failure or refusal to hire; (2) promotion, demotion, transfer, selection for training, lay-off, recall, or discharge; (3) job orders submitted to employment agencies or unions; (4) test papers in connection with employer-administered aptitude or other employment tests; (5) physical examination results considered in connection with personnel actions; (6) job advertisements or notices to public or employees regarding openings, promotions, training programs, or opportunities for overtime work.	One year from date of personnel action to which record relates.	
	Employee benefit plans, written seniority or merit rating systems.	Full period that plan or system is in effect, plus one year after termination.	If plan or system not in writing, summary memorandum to be kept.
	Personnel records, including above, relevant to enforcement action brought against employer.	Until final disposition of action.	No particular form specified.
Immigration Reform and Control Act	INS Form I-9, Employment Eligibility Verification Form.	Three years after date of hiring or one year after date of employee's termination, whichever is later.	INS Form I-9, signed by new-hire and employer; to be readily available upon request.
Fair Labor Standards Act (includes Equal Pay Act of 1963)	Basic records containing employee information, payrolls, individual contracts or collective bargaining agreements, applicable certificates and notices of Wage-Hour administrator, sales and purchase records.	Three years.	No particular form specified.
	Supplementary basic records, including basic employment and earnings records; wage rate tables, work time schedules, order, shipping, and billing records; records of additions to or deductions from wage paid; and documentation of basis for payment of any wage differential to employees of opposite sex in same establishment.	Two years.	
	Certificates of age.	Until termination of employment.	

* Table taken in part from Fair Employment Practices Manual 441.11 (BNA) (1996).