

YOU CAN'T ASK THAT QUESTION: EMPLOYMENT INTERVIEW AND APPLICATION TIPS

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What is really a fair question to ask at a job interview or in a job application? Most employers and employees believe employment law problems can occur when employment commences; they do not focus on the pre-employment process. Of particular importance are the actual job application and interview. Two “hot-button” issues of late include the appropriate scope of background checks and the types of permissible and impermissible questions on job applications and on job interviews.

Hiring an Employee

Nevada recognizes the tort of negligent hiring, training and supervision. Unlike in cases of vicarious liability, when an employer is liable for the acts of its employees who commit torts while at work, the law of negligent hiring places the responsibility directly on the employer for failing to reasonably investigate the background of his applicants. The doctrine also exposes employers to torts employees commit on third parties. For that reason alone, the hiring process itself has become a central focus of employment litigation. Employers must carefully screen applicants to avoid liability. But the question remains, depending on the type of job, *what* type of employment screening is legal?

Background Checks

Preparing appropriate interview questions and performing adequate pre-employment background checks may help to insulate employers from liability for negligent hiring. Background checks provide some insulation from this liability, but employers should be apprised of the limitations, including the scope of both criminal and financial checks.

Criminal History Records

Under the Nevada statute regarding records of criminal history, a criminal justice agency, upon request for a name-based inquiry, must release to a prospective employer or designated representative any records of criminal convictions with respect to a prospective employee and any records that pertain to an incident for which the prospective employee is currently within the system of criminal justice, including parole or probation. Records of criminal history must be used solely for the purpose for which the record was requested, and no records of criminal history released to a prospective employer may be disseminated further by the employer without express authority of law or in accordance with a court order. The request submitted by the employer must contain the written consent of the prospective employee to release the information to the employer. An employer may consider the information received when making a decision to hire, retain, suspend or discharge the employee, and is not liable in an action alleging discrimination based upon the consideration of any such information.

Financial Checks: The Fair Credit Reporting Act (FCRA): 15 USC § 1681, et. seq.

Prospective employers are allowed to conduct a credit check. That credit check, however, is circumscribed by FCRA. Prospective employers must provide notice to applicants that their information may be used to conduct a background check. That notice must be a stand-alone document; it cannot be part of a job application. The applicants must sign off on the notice and be apprised of their rights under FCRA. If an employer is going to also look at consumer reports for the entire employment history, it should clearly state that, as well. Before an employer uses that information for an adverse action, e.g., chooses not to hire the applicant, the employer must provide both: (1) the applicant notice of the adverse action and a copy of the report on which the employer relied; and (2) a copy of the "Summary of Your Rights Under [FCRA]." After an adverse action is taken, an employer must provide the name, address and phone number of the consumer reporting company

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that provided the report used, a statement that the reporting company did not make the adverse action, and a notice of the applicant's rights to dispute the accuracy of the information. These rules generally apply to existing employees, too. There are some nuances,

however, for existing employees that should be carefully considered before taking an adverse action.

Applicants who suffer an adverse action have the right to sue the employer for both negligent and willful non-compliance with FCRA. Applicants could recoup actual damages, punitive damages and attorneys' fees and costs (15 USC §§ 616 and 617).

Interview Restrictions

In the United States, federal law (Title VII, ADEA and the ADA, and NRS §§ 613.330 and 613.340) prohibits employers from discriminating against job candidates on the basis of race, color, national origin, religion, sex, physical handicap or age. And in Nevada, sexual orientation is a protected category. Therefore, as a general rule of thumb, interview questions should concentrate on the applicant's ability to successfully perform the job duties fundamental to the position being filled. Questions that could actually reveal information protected by federal and state employment laws could violate the law.

Some examples of illegal questions include:

- **Are you a U.S. citizen?** Employers may ask whether you are authorized to work in the United States, but not specifically about citizenship. They may also ask for documents providing your authorization to work in the U.S. after you have been hired.

- **Are you married?** Employers are not allowed to discriminate on the basis of marital status.
- **Do you observe Yom Kippur/Good Friday/Ramadan, etc.?** Employers can ask whether you can work on holidays and weekends (if it's a job requirement), but not about the observance of specific religious holidays.
- **How many children do you have?** Employers cannot ask if a prospective employee has children. However, if the prospective employee brings up his or her children, an employer may ask general questions about them, such as how many or how old?
- **Have you ever had a workplace injury?** Employers are not allowed to ask about previous workplace injuries, as it could be a form of disability discrimination.
- **Have you even been in a car accident?** Generally, employers are not allowed to ask this question, unless it specifically relevant to the job applied for, such as a taxi cab driver.
- **Do you have a disability or chronic illness?** It is generally illegal to use disability or medical information as a factor in hiring. If the job would require some specific physical task, however, such as bending to install cable wires, the employer can ask if you could perform those tasks with a reasonable accommodation.
- **Do you have any tattoos?** Employers cannot discriminate against a prospective employee for tattoos that would be visible while on shift unless the employer has a bona fide and identifiable business reason. *See* 42 USC § 2000e-2(e)(1).
- **Can we have access to your Facebook account?** Employers who access a password-protected social networking website can be found liable in an invasion of privacy claim. However, in instances involving public profiles, it may be difficult for the job applicant to demonstrate that they have a colorable claim, since they may be unable to show that they have a reasonable expectation of privacy.

Conclusion

To try and avoid liability, such as negligent hiring, train those involved in the hiring process on how to perform lawful interviews. Maximize your knowledge of applicants with effective job applications, productive interviews, and thorough background checks. Adopt objective standards for qualifications to the greatest extent possible. Also, ensure that any pre-employment testing is lawful under federal and state antidiscrimination and privacy laws. ■

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