

104 Recruiting, Hiring, and Retaining Employees

Bruce J. Hector

Associate General Counsel
Becton Dickinson and Company

Lori A. Middlehurst

Director, Employment Law
Sun Microsystems, Inc.

Lori L. Siwik

Vice President & Counsel
Risk International Services, Inc.

Faculty Biographies

Bruce J. Hector

Bruce J. Hector is associate general counsel at Becton Dickinson and Company in Franklin Lakes, New Jersey. He is responsible for all outside litigation including commercial, products liability, employment, environmental, and other matters. In addition, he counsels the company on a variety of matters including antitrust and compliance issues.

Mr. Hector joined Becton Dickinson as a staff attorney 20 years ago after spending 7 years as a civil litigator in New York.

Mr. Hector is president-elect of the ACCA's New Jersey Chapter, and is a member of the New Jersey State Bar Association and the Maritime Law Association of the United States.

Lori A. Middlehurst

Lori A. Middlehurst is associate general counsel at Sun Microsystems, Inc. and holds the title of director, employment law. Sun Microsystems is a leading provider of industrial-strength hardware, software and services that power the internet and allow companies worldwide to "dot-com" their businesses. At Sun, she provides a wide range of employment law advice, counsel and direction to human resources and management for the 30,000 employees in Sun's facilities in the United States, Canada, and Latin America.

Prior to joining Sun, Ms. Middlehurst worked for the international law firm of Baker & McKenzie, in their San Diego and Sydney offices and was a freelance editor and contributor to several of the Matthew Bender employment law looseleafs. She is a frequent speaker on employment issues, especially those affecting high tech companies.

Ms. Middlehurst is a graduate of the University of California San Diego and of King Hall School of Law at the University of California Davis.

Lori L. Siwik

Lori L. Siwik is vice president and counsel with Risk International Services, Inc., a risk management consulting firm that represents Fortune 500 companies and other policyholders. In addition to managing Risk's Cleveland office, Ms. Siwik's responsibilities include handling and negotiating settlements involving various types of insurance coverage, including product liability, toxic tort, and environmental claims. She is on the board of directors of Risk's parent company, Millennial Assurance Services, Inc.

Prior to joining Risk, Ms. Siwik was in private legal practice with the law firm Roetzel & Andress, in Akron, Ohio, where she handled all aspects of environmental, toxic tort, mass tort, and product liability litigation.

Ms. Siwik has served on the board of trustees and chaired several committees of the Akron Bar Association, and was also a member of the Ohio State Bar Association Council of

Delegates. She is currently a member of the ABA's Coverage Litigation Committee, and is involved in several ABA Coverage Litigation subcommittees. She is a member of ACCA's Northeast Ohio Chapter.

Ms. Siwik received a BA *magna cum laude* from Kent State University and her JD from the University of Cincinnati.

**The Hiring and Interviewing Process
Session 104: Recruiting, Hiring, and Retaining Employees**

**Prepared for the
ACCA 2001 Annual Meeting
October 15-17, 2001**

Lori L. Siwik, Esq.
Risk International Services, Inc.
4199 Kinross Lakes Parkway, Suite 220
Richfield, Ohio 44286
330.463.5000
Fax 330.463.5050
lsiwik@riskinternational.com
www.riskinternational.com

Lori Middlehurst, Esq
Director, Employment Law
Sun Microsystems, Inc.
901 San Antonio Rd.
Palo Alto, CA 94303
650.336.0948
lori.middlehurst@sun.com

HIRING AND INTERVIEWING PROCESS

I. The Hiring Process

A. Determine whether a hire is necessary

Factors to consider:

- Sufficient amount of work to justify another employee both currently and in the future
- Company needs and wants
- Specific job requirements

B. Before starting the hiring process, your company may require that you:

- Complete a personnel request form or other forms
- Create a thorough job description listing essential and marginal job functions
- Obtain approval from supervisor/manager

II. The Interviewing Process

A. Collect resumes

1. There are a number of sources for potential hires: personnel agencies, friends, business acquaintances, local schools, advertisements, on-line joblines, etc. If you use an agency, there is a cost associated with using the agency. Most large companies maintain data bases of the resumes of recent applicants which should be searched.
2. Sort the resumes for those meeting minimal qualifications
3. Review the resumes and decide which candidates you will bring in for an interview.
4. Schedule the interviews.

B. Interview goals - What to find out

1. Education
2. Experience
3. Technical skills

4. Value system
5. Professional goals
6. Personal/communication skills
7. Strengths and weaknesses
8. Expectations/understanding
9. Relocation/Visa requirements

C. First interview

The application process:

1. Provide applicant with an employment application (see Attachment 1).
2. Review the application with the applicant to explain information required and answer applicant's questions.
3. Tell applicant to answer all questions and provide complete information.
4. Carefully review completed application.
5. Confirm accuracy of spelling and addresses concerning past employment, references, educational institutions, etc.
6. Determine applicant's residence and how long he/she has lived there.
7. Ask the applicant if you will need additional information from him/her concerning any change of name, nickname, or use of an assumed name to allow you to check references and work record.
8. Review the applicant's educational training if it has a bearing on the job for which he/she is applying.
9. Ask if the applicant has been convicted of a crime. (You may not ask if an applicant has been arrested. You should check state regulations on inquiries about crimes as allowable questions may vary widely.) You should explain to the applicant that a conviction of a crime would not automatically bar employment. In determining whether or not to deny employment based on an applicant's conviction of a crime, you must consider the following facts:
 - a. the relationship of the crime to the job duties

- b. the nature, number, and circumstances of the offense(s) for which the individual was convicted
- c. the length of time intervening between the conviction(s) and the employment decision
- d. the individual's employment history
- e. the individual's efforts at rehabilitation

If you are concerned about the applicant's criminal past and its effect on fitness for the job, you may want to obtain a copy of the applicant's criminal record. Each state has different rules concerning the availability of these public records. Some possible sources of information are: the State Police, the Office of the State Attorney General, offices of the County Clerk in counties throughout the state and District Attorneys' offices. If you want to undertake a criminal background check, written consent by the applicant is required as this may constitute an investigation under the Fair Credit Reporting Act. Even if there is a criminal record, there are legal limitations on what information can be used by an employer. An employer may not ask about or consider information about arrests or detentions that did not result in conviction. Only convictions and pending cases can be considered. Further, an employer may not consider crimes that have been sealed or expunged, or where the applicant participated in a special pretrial alternative program. There are limits concerning misdemeanors and some states do not allow any inquiry into all or some misdemeanors. Many employers do ask about both felonies and misdemeanors on applications or during the interview process. A misdemeanor cannot be considered if probation was completed and the case dismissed.

10. If the applicant's duties will require driving, ask him/her for a valid driver's license and the driving record. (In many states, you can obtain a driving "abstract" for an applicant from the state Department of Motor Vehicles. You should call the local DMV to determine what information is available and how you can get it.)
11. Ask the applicant to sign a statement on the application form giving you permission to check all references and obtain information from previous employers. The statement should also release previous employers and others from liability for any information that is provided. Fair Credit Reporting Act language is required if you will be doing anything that could be considered an investigation.
12. Make sure the employment application advises applicants that the discovery of an omission, misrepresentation, or falsification of information will result in the rejection of the applicant or subsequent termination of employment.
13. If your company has an at-will policy it should be part of the acknowledgement signed by the applicant.

After the application has been discussed with the applicant:

1. Provide company materials.
2. Explain about the company.
3. Explain the position - if you will be discussing a confidential project you should have the applicant sign a non-disclosure agreement
4. Fill in resume holes-education, employment, etc.
5. Clarify other skills and abilities.
6. Obtain a very good understanding of the candidates' skills. Probe and probe. Many positions require good computer skills; if the position you are hiring for requires good computer skills, make sure that the candidate has the necessary skills.
7. Ask candidate about his or her current job, ask why s/he is considering a move and whether s/he is bound by any sort of non-competition agreement
8. Discuss compensation, past and expected.
9. Determine GPA's if university/graduate school record is relevant.
10. Introduce the company values and mission statement.
11. Ask interview questions from the Interview Question List (see Attachment 2).

D. After the first interview

1. Check all personal/character references of the applicant. If you discover the references are generally family members, for example, ask the applicant for other references.
 - a. How do they know the applicant?
 - b. How long have they known him/her?
 - c. Upon what is the reference based (personal observation/secondhand information)?
 - d. Do you need to ask the applicant for more current references?
 - e. Document all comments you receive.

2. Check all professional/employment references (see Attachment 3).
 - a. Determine job duties (do they coincide with those on the application?)
 - b. Determine length of employment.
 - c. Determine reason(s) applicant left previous job.
 - d. Determine if former employer was satisfied with applicant's performance.
 - e. Document all comments you receive, as well as all investigative and screening efforts you have made.
 - f. Ask about the applicant's reliability, honesty, and tendency for violence. (While the reference is unlikely to provide such information, simply asking the questions provides the employer with a defense to a negligent hiring claim as it will be difficult for a third party to show that an employer "should have known" of an employee's prior violent conduct if the employer sought, but was refused, that information).
3. Confirm educational information provided by applicant.
4. Order a copy of the applicant's driving record, if driving is required for the job.
5. Request a consumer credit report from a consumer credit reporting agency, if necessary. (However, you must comply with the Fair Credit Reporting Act and similar State Acts.)
6. Speak with the applicant again if you need clarification or additional information.
7. Review the application and the information about the applicant with other decision-makers within the company. Caution: Only those individuals within the company who have a reason to know the information should be included in this review. Discuss the applicant in detail. Discussion should be limited to the requirements of the position and the applicant's suitability for that position.
8. Consult with immigration/export control specialists to determine if company will need to take action to apply for visa and/or export license, whether company will be able to obtain those and timing of same
9. Make a decision based on relevant and job-related factors as to which candidate is best qualified for the job.

E. Second interview

1. Ask questions from the Interview Questions List (see Attachment 2).
 - a. Probe values. Very important!
 - b. Probe skill levels for position.
 - c. Determine expectations and assumptions of the candidate.
2. Discuss the employee handbook, including benefits.
3. Explain the company processes (appraisals, etc.).

F. Third interview (handled only when you are ready to recommend a hire)

1. Hiring manager/supervisor should submit the hiring/interview process materials to the person(s) conducting the third interview. The materials should include: the original personnel hire request form, the candidates resume, job application, your interview notes, evaluation forms, your notes from the reference calls, and a memorandum of your thoughts regarding the candidate.
2. For the third interview, the interviewer(s) should determine candidate values, understanding of the vision and commitment to the company.
3. The interviewer(s) should discuss education, experience, and technical skills of the candidate.
4. Discuss professional goals.
5. Determine the candidate's personal communication skills, both written and oral.
6. Discuss the company: strengths, benefits, and compensation.
7. Complete the Evaluation Form (see Attachment 4); prepare a memo regarding your thoughts on the candidate, do/do not sign off on the personnel request form. If signing off on the personnel request form, make sure that a criminal background check is undertaken before a job offer is made.

III. Additional Steps to Consider Before a Job Offer is Made

A. Drug Tests

1. Check state and federal laws (the ADA and federal contractors and employers governed by Department of Transportation or other federal agency regulations) before using drug tests as part of your selection process.
2. Obtain applicant consent prior to testing (see Attachment 5).

3. Although drug tests themselves may be administered pre-offer, employers who conduct post-offer medical exams typically combine the two to save money and time.
4. Maintain confidentiality and establish procedures for confirmation tests, if not already specifically regulated for your industry.

B. Pre-employment Testing

1. Most pre-employment tests are designed to quantitatively measure specific attributes such as an applicant's knowledge, skills, aptitudes or attitudes that are necessary to do a particular job. With the right test, an employer can use a test's scores to predict which of the many applicants will perform the best. To test or not to test is an important policy decision. A test cannot tell you whether or not to hire an individual nor can it tell you how a person will actually perform on the job. A test is one tool that may be able to tell you some things about applicants you may not learn through other sources.
2. Employers must address the following policy issues prior to implementation of a testing program and review periodically while conducting tests:
 - a. What proof is there that the test is based on the specific job requirements and is predictive of future behavior?
 - b. What procedures are in place to ensure that the tests are administered appropriately and in a standardized manner?
 - c. What documentation exists supporting the test's validation on our employee population?
 - d. Are there any adverse impact statistics arising from use of this test?
 - e. Do our competitors test? What benchmarks exist supporting this test?
 - f. Has this program been recommended by consultants? What did counsel recommend after review of the proposal?
 - g. Is the test cost-justified? Has the cost of the program been quantified and budgeted? Are expenses appropriate to the return?
3. Be certain that tests are job-related and an accurate predictor of performance in the job (tests should be validated to support this).
4. Administer the same tests under the same conditions to all applicants for the same position.

5. Accommodate people with disabilities by modifying the test or testing conditions or eliminating the testing requirement.

C. Credit Reports

Although the Fair Credit Reporting Act (FCRA) permits an employer to obtain and consider an individual's credit report, the FCRA tempers this use by imposing certain duties and responsibilities upon the employer. When an employer desires to incorporate the information contained in a credit report into employment decisions, such as hiring, promoting or terminating an individual, the FCRA imposes obligations regarding: (1) when the employer seeks to obtain a report; (2) when the employer intends to take an adverse action with respect to an individual based upon information contained in a report; and (3) when the employer implements an adverse employment action, such as the failure to hire, promote or retain.

The following checklist can assist employers in determining their compliance with FCRA:

In Obtaining a Consumer Report, Do You:

- Disclose in writing to the individual that the report may be obtained and utilized for employment purposes?
- Obtain the individual's written consent authorizing that the employer may obtain and use the report for employment purposes?
- Certify to the consumer reporting agency that the individual authorized the employer's receipt of the consumer report after the individual received appropriate disclosure from the employer?
- Certify to the consumer reporting agency that if the employer intends to take adverse action, it will comply with FCRA and that the report will not be used in violation of any state or federal equal employment opportunity laws?

Intention to Take Adverse Action, Do You:

- Provide the individual with copy of the report?
- Provide the individual with a copy of a summary of their rights under FCRA?

Implementing Adverse Action, Do You:

- Notify the individual of the adverse action?
- Provide the individual with information related to the consumer reporting agency?

- Inform the individual that the consumer reporting agency was not responsible for and lacks knowledge concerning the adverse action?
- Inform the individual of their right to receive a free copy of the report from the consumer reporting agency?
- Inform the individual of their right to dispute information contained in the consumer report with the consumer reporting agency?

If you answer “No” to any of the questions in the checklist, you are violating FCRA. The penalties for failing to comply with FCRA can result in potential civil liability for actual and punitive damages, as well as costs and attorneys’ fees in suits brought by individuals who suffered adverse employment actions against them that were based, in part, on credit reports. If an adverse credit report is the result of your investigation, the form at Attachment 6 can be used to advise the applicant.

IV. Offer Letters

A. Terms to consider

1. Basics
2. Manager
3. Title
4. Salary

B. Contingencies

1. Limited time offer—offer expires as of x number of days
2. Proof of unrestricted right to work in the US
3. Signing proprietary information agreement
4. Graduation by x date if university grad hire

C. Instructions

1. What does offeree have to do to accept offer (generally, sign and return by x date)
2. What does offeree have to do to begin employment/ contacts if other than manager

D. Other common provisions

1. Sign-on bonus details
 - When payable
 - Whether employee must repay if leaves company
2. Relocation details
 - Reimbursed or arranged and paid directly by company
 - Whether repayment required if employee leaves company
3. Details of stock and/or bonus plans

4. Any non-standard negotiated terms (additional vacation, repayment of relo or sign on to prior company)
5. At-will language which can only be modified by designated person

V. Special Considerations for Hiring in the Merger & Acquisition Context

1. Pre-offer considerations:
 - a. Nature of deal
 - Asset or stock purchase
 - Public or non-public
 - b. Specific negotiated terms
 - c. Due diligence
 - Employees: who are they, what do they do, where do they work, when did they start, and how much do you need them to make the deal successful?
 - Are there essential contractors/temps?
 - What are the target's hiring plans? Are there outstanding offers
 - d. International Concerns
 - TUPE concerns
 - works councils/ union or industry agreements
 - e. Mapping into company's organization
 - will this be a new and separate division or will they be integrated into existing organization?
 - f. Determine pay scales/ compensation plans considering
 - prior pay
 - your company's pay scale
 - legal requirements caused by CBA/works councils/international laws
 - determine incentive pay framework
 - g. Benefits issues
 - accrued vacation
 - flex plans
 - medical and childcare spending accounts
 - 401k rollover/loans
 - pension plans
2. Offer Letters - specific provisions you may wish to consider
 - a. Contingent on close of deal
 - b. New title, position, pay
 - c. Details of stock
 - d. For stock purchase: this offer supercedes terms of employment with target;
For asset purchase: contingent on resignation so that warn/severance not triggered
 - e. Contingent on waiver of acceleration rights
 - f. Whether service credit will be given and up to what maximum

- g. How accrued vacation/sabbatical will be treated
- h. All other normal contingencies/ regular terms

VI. Un-hiring

1. Determine legitimate business reason
 - a. Can not obtain visa or export license for individual
 - b. Change in business conditions
2. Considerations
 - a. Whether offer has been accepted
 - b. Whether offeree has taken steps in reliance
Quit job
 - c. Began move to area, gave up lease, sold house, paid deposits etc.
3. Offer of "un-hire" bonus in exchange for release and waiver (only in the Silicon Valley????)

VII. Post Employment Issues

A. Medical Exams

Pre-employment medical inquiries of applicants are prohibited. Once a conditional offer of employment is made, broad based medical inquiries are permitted as long as they are made for all similarly situated persons. Medical inquiries of current employees may be made (a) incident to the employee's request for a reasonable accommodation under ADA or (b) to resolve objective, job-related concerns over safety and health.

Keep in mind the following when addressing medical inquiries at the post-offer stage:

- Notify applicants of the requirement for a medical exam in advance.
- Provide the physician with details of the job in question.
- Consider how medical conditions affect the particular individual's ability to safely and effectively perform the job for which they are applying and whether any accommodations can be made to aid performance of essential functions.
- Maintain confidentiality. The employer may only share the medical information with individuals involved in the decision making process who need to know the information. It is not always appropriate for every person involved in the decision-making process to be informed about an employee's medical-related information. The medical information must be maintained in a secure, separate file and not placed in an employee's non-medical personnel file.

Attachment 1

APPLICATION FOR EMPLOYMENT¹ (#1)

We are an equal opportunity employer and do not unlawfully discriminate in employment. No question on this application is used for the purpose of limiting or excluding any applicant from consideration for employment on a basis prohibited by local, state, or federal law. Equal access to employment, services, and programs is available to all persons. Those applicants requiring reasonable accommodation to the application and/or interview process should notify a representative of the organization.

Applicant name: _____ Date: _____

Position(s) applied for or type of work desired: _____

Address: _____

Telephone #: _____ Social Security #: _____

Type of employment desired: _____ full-time _____ part-time _____ temporary

Date you will be available to start work: _____

Are you able to meet the attendance requirements? _____ Yes _____ No

Do you have any objection to working overtime if necessary? _____ Yes _____ No

Can you travel if required by this position? _____ Yes _____ No

Have you ever been previously employed by our organization? _____ Yes _____ No

Can you submit proof of legal employment authorization and identity? _____ Yes _____ No

If you are under 18, can you furnish a work permit if it is required? _____ Yes _____ No

Have you ever been convicted of a crime in the last 7 years? _____ Yes _____ No

If yes, please explain (a conviction will not automatically bar employment): _____

Drivers license number (if driving is an essential job duty): _____

How were you referred to us? _____

Employment History

Please provide all employment information for your past four employers starting with the most recent.

Employer: _____ Position held: _____

Address: _____ Telephone #: _____

Immediate supervisor and title: _____

Dates employed: from _____ to _____ Salary: _____

Job summary: _____

Reason for leaving: _____

Employer: _____ Position held: _____

Address: _____ Telephone #: _____

Immediate supervisor and title: _____

Dates employed: from _____ to _____ Salary: _____

Job summary: _____

Reason for leaving: _____

Employer: _____ Position held: _____

Address: _____ Telephone #: _____

Immediate supervisor and title: _____

¹ From hrtools.com

Dates employed: from _____ to _____ Salary: _____

Job summary: _____

Employer: _____ Position held: _____

Address: _____ Telephone #: _____

Immediate supervisor and title: _____

Dates employed: from _____ to _____ Salary: _____

Job summary: _____

Reason for leaving: _____

Other Skills and Qualifications

Summarize any job-related training, skills, licenses, certificates, and/or other qualifications:

Educational History

List school name and location, years completed, course of study, and any degrees earned:

High school: _____

College: _____

Technical Training: _____

Other: _____

References

List 3 references names, telephone numbers, and years known (do not include relatives or employers):

I hereby authorize the potential employer to contact, obtain, and verify the accuracy of information contained in this application from all previous employers, educational institutions, and references. I also hereby release from liability the potential employer and its representatives for seeking, gathering, and using such information to make employment decisions and all other persons or organizations for providing such information.

I understand that any misrepresentation or material omission made by me on this application will be sufficient cause for cancellation of this application or immediate termination of employment if I am employed, whenever it may be discovered.

If I am employed, I acknowledge that there is no specified length of employment and that this application does not constitute an agreement or contract for employment. Accordingly, either I or the employer can terminate the relationship at will, with or without cause, at any time, so long as there is no violation of applicable federal or state law.

I understand that it is the policy of this organization not to refuse to hire or otherwise discriminate against a qualified individual with a disability because of that persons need for a reasonable accommodation as required by the ADA.

I also understand that if I am employed, I will be required to provide satisfactory proof of identity and legal work authorization within three days of being hired. Failure to submit such proof within the required time shall result in immediate termination of employment.

I represent and warrant that I have read and fully understand the foregoing, and that I seek employment under these conditions.

Applicant signature: _____ Date: _____

Provided by HRTools.com.



APPLICATION FOR EMPLOYMENT² (#2)

(Please Print)

SOC. SEC. NO. _____ - _____ - _____

NAME: _____ DATE _____
Last First Middle

ADDRESS: _____
No. Street City State Zip

TELEPHONE: (_____) _____

Are you 18 years of age or older? q Yes p No

If hired, can you provide written evidence that you are authorized to work in the U.S.? q Yes p No

EDUCATION

Type	Name/ Location	Course	Number of Years Completed	Degree/ Diploma
Elementary & Jr. High	_____	_____	_____	_____
High School	_____	_____	_____	_____
College	_____	_____	_____	_____
Technical or Other	_____	_____	_____	_____

EMPLOYMENT RECORD

Company Name and Address	Kind of Work	Date Started/Left	Rate of Pay	Reason for Leaving
1. _____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____
4. _____	_____	_____	_____	_____
5. _____	_____	_____	_____	_____

Type of Work Desired _____ Salary Desired _____

How Were You Referred To Our Organization?

Do You Have Any Relatives Who Are Employed By This Organization q Yes p No

Please Specify:

² From hrfree.com

Is there any information we would need about your name, or use of another name, for us to be able to check your work record: q Yes p No Please Specify:

Please list any additional information that relates to your ability to perform the job for which you have applied—such as licenses, professional memberships, hobbies, etc.

U.S. MILITARY SERVICE

Branch of Service _____ From _____ to _____

Rank and Type of Service _____

Training/Experience Received _____

REFERENCES (Do Not Include Relatives)

Name	Occupation	Years Known	Address
1. _____	_____	_____	_____
2. _____	_____	_____	_____
3. _____	_____	_____	_____

APPLICANT'S STATEMENT

I understand that the employer follows an "employment at will" policy, in that I or the employer may terminate my employment at any time, or for any reason consistent with applicable state or federal law; this "employment at will" policy cannot be changed verbally or in writing, unless the change is specifically authorized in writing by the chief operating officer of this organization. I understand that this application is not a contract of employment. I understand that federal law prohibits the employment of unauthorized aliens; all persons hired must submit satisfactory proof of employment authorization and identity; failure to submit such proof will result in denial of employment.

I understand this application will be active for a period of one year; after that time, if I wish to be considered for employment, I must submit a new application.

I understand that the employer will thoroughly investigate my work and personal history and verify all data given on this application, on related papers, and in interviews. I authorize all individuals, schools, and firms named therein, except my current employer if so noted, to provide any information requested about me, and I release them from all liability for damage in providing this information.

I certify that all the statements herein are true and understand that any falsification or willful omission shall be sufficient cause for dismissal or refusal of employment.

Your Signature: _____

APPLICATION FOR EMPLOYMENT³ (#3)

PLEASE PRINT ALL INFORMATION
REQUESTED EXCEPT SIGNATURE



APPLICANTS MAY BE TESTED FOR ILLEGAL DRUGS

PLEASE COMPLETE PAGES 1-5. DATE _____

Name _____
Last First Middle Maiden

Present address _____
Number Street City State Zip

How long _____ Social Security No. ____ - ____ - ____

Telephone (____) _____

If under 18, please list age _____

Position applied for (1) _____ Days/hours available to work
 and salary desired (2) _____
 (Be specific) No Pref _____ Thur _____
 Mon _____ Fri _____
 Tue _____ Sat _____
 Wed _____ Sun _____

How many hours can you work weekly? _____ Can you work nights?

Employment desired FULL-TIME ONLY PART-TIME ONLY FULL- OR PART-TIME

When available for work? _____

TYPE OF SCHOOL	NAME OF SCHOOL	LOCATION (Complete mailing address)	NUMBER OF YEARS COMPLETED	MAJOR & DEGREE
High School				
College				
Bus. or Trade				
Professional				

HAVE YOU EVER BEEN CONVICTED OF A CRIME? No Yes

If yes, explain number of conviction(s), nature of offense(s) leading to conviction(s), how recently such offense(s) was/were committed, sentence(s) imposed, and type(s) of rehabilitation. _____

³ from www.toolkit.cch.com

DO YOU HAVE A DRIVER'S LICENSE? <input type="checkbox"/> Yes <input type="checkbox"/> No			
What is your means of transportation to work? _____			
Driver's license number _____ State of issue _____			
<input type="checkbox"/> Operator <input type="checkbox"/> Commercial (CDL) <input type="checkbox"/> Chauffeur Expiration date _____			
Have you had any accidents during the past three years?		How many? _____	
Have you had any moving violations during the past three years?		How many? _____	
OFFICE ONLY			
Typing <input type="checkbox"/> Yes <input type="checkbox"/> Yes <input type="checkbox"/> No _____ WPM		10-key <input type="checkbox"/> Yes <input type="checkbox"/> No _____ Processing <input type="checkbox"/> Yes <input type="checkbox"/> No _____ Word	
Personal Computer <input type="checkbox"/> Yes <input type="checkbox"/> No		PC <input type="checkbox"/> Mac <input type="checkbox"/> Other _____ Skills _____	

Please list two references other than relatives or previous employers.

Name _____	Name _____
Position _____	Position _____
Company _____	Company _____
Address _____	Address _____
Telephone () _____	Telephone () _____

An application form sometimes makes it difficult for an individual to adequately summarize a complete background. Use the space below to summarize any additional information necessary to describe your full qualifications for the specific position for which you are applying.

MILITARY	
HAVE YOU EVER BEEN IN THE ARMED FORCES?	<input type="checkbox"/> Yes <input type="checkbox"/> No
ARE YOU NOW A MEMBER OF THE NATIONAL GUARD?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Specialty _____	Date Entered _____ Discharge Date _____

Work Experience Please list your work experience for the past five years beginning with your most recent job held. If you were self-employed, give firm name. Attach additional sheets if necessary.

Name of employer Address City, State, Zip Code Phone number	Name of last supervisor	Employment dates	Pay or salary
		From To	Start Final
	Your last job title		
Reason for leaving (be specific)			
List the jobs you held, duties performed, skills used or learned, advancements or promotions while you worked at this company.			

Name of employer Address City, State, Zip Code Phone number	Name of last supervisor	Employment dates	Pay or salary
		From To	Start Final
	Your Last Job Title		
Reason for leaving (be specific)			
List the jobs you held, duties performed, skills used or learned, advancements or promotions while you worked at this company.			

May we contact your present employer? Yes No

Did you complete this application yourself Yes No

If not, who did? _____

PLEASE READ CAREFULLY

APPLICATION FORM WAIVER

In exchange for the consideration of my job application by _____ (hereinafter called "the Company"), I agree that:

Neither the acceptance of this application nor the subsequent entry into any type of employment relationship, either in the position applied for or any other position, and regardless of the contents of employee handbooks, personnel manuals, benefit plans, policy statements, and the like as they may exist from time to time, or other Company practices, shall serve to create an actual or implied contract of employment, or to confer any right to remain an employee of _____, or otherwise to change in any respect the employment-at-will relationship between it and the undersigned, and that relationship cannot be altered except by a written instrument signed by the President /General Manager of the Company. Both the undersigned and _____ may end the employment relationship at any time, without specified notice or reason. If employed, I understand that the Company may unilaterally change or revise their benefits, policies and procedures and such changes may include reduction in benefits.

I authorize investigation of all statements contained in this application. I understand that the misrepresentation or omission of facts called for is cause for dismissal at any time without any previous notice. I hereby give the Company permission to contact schools, previous employers (unless otherwise indicated), references, and others, and hereby release the Company from any liability as a result of such contract.

I also understand that (1) the Company has a drug and alcohol policy that provides for preemployment testing as well as testing after employment; (2) consent to and compliance with such policy is a condition of my employment; and (3) continued employment is based on the successful passing of testing under such policy. I further understand that continued employment may be based on the successful passing of job-related physical examinations.

I understand that, in connection with the routine processing of your employment application, the Company may request from a consumer reporting agency an investigative consumer report including information as to my credit records, character, general reputation, personal characteristics, and mode of living. Upon written request from me, the Company, will provide me with additional information concerning the nature and scope of any such report requested by it, as required by the Fair Credit Reporting Act.

I further understand that my employment with the Company shall be probationary for a period of sixty (60) days, and further that at any time during the probationary period or thereafter, my employment relation with the Company is terminable at will for any reason by either party.

Signature of applicant _____ **Date:** _____

This Company is an equal employment opportunity employer. We adhere to a policy of making employment decisions without regard to race, color, religion, sex, sexual orientation, national origin, citizenship, age or disability. We assure you that your opportunity for employment with this Company depends solely on your qualifications.

Thank you for completing this application form and for your interest in our business.

PLEASE PRINT ALL INFORMATION
REQUESTED EXCEPT SIGNATURE

POST EMPLOYMENT INFORMATION FORM			
TO BE COMPLETED AFTER EMPLOYEE HAS BEEN HIRED			
Height _____ ft. _____ in. Weight _____ Birth date _____			
Married <input type="checkbox"/> Yes <input type="checkbox"/> No If married, how long? _____			
<input type="checkbox"/> Single <input type="checkbox"/> Separated <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed			
Full name of spouse _____		Occupation _____	
Name of company _____		Telephone (____) _____	
PERSON TO BE NOTIFIED IN CASE OF EMERGENCY			
Name _____		Telephone (____) _____	
Address _____		Relationship _____	
FOR INSURANCE PURPOSES ONLY: LIST ALL DEPENDENTS			
NAME	RELATIONSHIP	BIRTH DATE	SSN

**TO BE COMPLETED
BY EMPLOYER**

Date of employment _____ Job title _____ Dept. _____

Location _____

Rate of pay _____ Full-time Part-time Salaried

Applicant's signature acknowledging above information _____

Drug test confirmation number _____

Name of person verifying information _____

Name of person authorizing employment _____

Applicant Selection Criteria Record

JOB TITLE			
CANDIDATES CONSIDERED (INCLUDING MINORITIES AND FEMALES)			
NAME	MALE/ FEMALE	ETHNIC CODE*	ON LAB SECTION/ OFF LAB
*ETHNIC CODES: 1-BLACK, 2-ORIENTAL, 3-HISPANIC, 4-AMERICAN INDIAN, 0-OTHER			
CANDIDATE SELECTED			
NAME	MALE/ FEMALE	ETHNIC CODE	SOURCE
SELECTION CRITERIA			
REASONS CANDIDATE SELECTED WAS PREFERABLE TO OTHERS			
	ORIGINATOR'S SIGNATURE	DATE	

Attachment 2**INTERVIEW QUESTIONS*****Personality***

1. How would a person who dislikes you describe you to me?
2. Do you consider yourself tactical or strategic? Give examples.
3. Have you ever had to go out on a limb to do something you thought was right?
4. Give me three adjectives to describe yourself.
5. What are your favorite leisure time activities?
6. Do you consider yourself creative or analytical? Give examples.
7. What books have had the most impact on your life, and why?
8. Who are your heroes?
9. Do you have any crusade or soap box issues?
10. How do you motivate yourself?
11. What magazines do you subscribe to at home?
12. What are you going to be doing at 2:00 p.m. on Saturday afternoon?

Values

1. Have you ever made any mistakes at work? Discuss.
2. Tell me about your ethics.
3. Have you had any major disappointments in your work? Discuss how you handled them.
4. Describe your value system.
5. Tell me about a situation where you had to violate your standards. What caused you to make the decision?
6. How do you manage your emotions?
7. What are your most important deeply held values?
8. Give me an example of _____ (a value) that is really meaningful to you.
9. What is your personal philosophy about life?
10. How do you deal with situations at work when company events contradict your philosophy or values?

Teamwork

1. Who was your best boss, and why?
2. Who was your worst boss and why?
3. What have you found to be the most effective way to change someone's mind?
4. In which of your previous positions did you most enjoy working with your immediate work group? What factors made it rewarding?
5. What kind of people do you like working with?
6. How do you take direction?

Goals and Objectives

1. How do you define success?
2. What is the most important goal around which you organize your life?
3. What are your short- and long-term career goals?
4. Why do you want this job? What do you most deeply hope for in a new job with us, if we bring you aboard?
5. Why do you want to leave your current job?
6. What is really important to you, not only in your role as a worker, but also as a whole individual outside of work?

Qualifications for Employment at Company/Expectations

1. Now that you have met with us on several occasions and understand our organization and style, tell me how you would fit in and why.
2. How can you uniquely contribute to _____ (company)?
3. Tell me your understanding of the job.
4. What expectations do you have of your supervisor?
5. What would be your expectations as an employee?
6. What interests you about the position?
7. Do you have any questions about what is important to you at _____ (company)?
8. What information have you found out about _____ (company) that you did not know before?

Assessment

1. In what areas could your boss have done a better job?
2. Tell me about an instance where your work or your ideas were criticized.
3. Do you think your former boss(es) evaluated you fairly?
4. What was the biggest business risk you ever took? Why was it a risk? What was the outcome?
5. What do you consider/analyze before deciding to take a risk?
6. What did you really like about your last job?
7. What bothered you or stressed you the most about your last job?

Perseverance

1. Describe a work situation where you faced incredible odds but prevailed.
2. Describe a similar situation where the odds against succeeding were so great that you gave up.
3. What was the most difficult adjustment you have had to make in your career? Why was it difficult? What did you do? What was the result?

Teachability

1. What work style or personality characteristics do you think are most valuable for success? Which do you possess? Which do you not possess or would you like to improve?
2. What kinds of things do you learn quickly?
3. What kinds of things do you find difficult to learn?

Management Questions

1. How many people have you hired?
2. How many people have you fired, and why?
3. What is your style with employees you supervise? How do you handle difficulties?

For more information, see "Interviewing Job Applicants" by James K. Cowan Jr. and Laura Effel, from *ACCA Docket*, March 2001.

CHART OF LEGAL QUESTIONS

Following is a quick reference detailing legal and potentially discriminating interview questions.

<u>Topic</u>	<u>Legal Questions</u>	<u>Discriminatory Questions</u>
Family Status	Do you have any responsibilities that conflict with the job attendance or travel requirements? <i>Must be asked of all applicants.</i>	Are you married? What is your spouse's name? What is your maiden name? Do you have any children? Are you pregnant? What are your child-care arrangements?
Race	None.	What is your race?
Religion	None. <i>You may inquire about availability for weekend work.</i>	What is your religion? Which church do you attend? What are your religious holidays?
Residence	What is your address?	Do you own or rent your home? Who resides with you?
Sex	None.	Are you male or female?
Age	If hired, can you offer proof that you are at least 18 years of age?	How old are you? What is your birthdate?
Arrests or Convictions of a Crime	Have you ever been convicted of a crime? <i>You must state that a conviction will be considered only as it relates to fitness to perform the job being sought.</i>	Have you ever been arrested?
Citizenship or Nationality	Can you show proof of your eligibility to work in the U.S.? Are you fluent in any languages other than English? <i>You may ask the second question only as it relates to the job being sought.</i>	Are you a U.S. citizen? Where were you born?
Disability	Are you able to perform the essential functions of this job with or without reasonable accommodation? <i>Show the applicant the position description so he or she can give an informed answer.</i>	Are you disabled? What is the nature or severity of your disability?

Attachment 3

PROFESSIONAL/EMPLOYMENT REFERENCES

REFERENCE CHECK

Candidates Name: _____ Date of reference: _____

Reference Name/Title: _____

Reference Company/Phone: _____

Relationship to Candidate: _____

Person obtaining reference: _____

Please use the following questions as they may apply to the work they did for the company. Expand on any area you feel appropriate.

1. Can you verify the dates of employment for this individual?
2. Why did they leave?
3. Is this person eligible to be re-hired? (note: some companies have a no re-hire policy) Yes No
4. What were the specific job duties required for (name)'s position?
5. Could you elaborate on this individuals' technical skills pertaining to his/her position?
6. Did (name) meet the expected requirements for this position? Yes No
7. What specific accomplishments were achieved in this position?
8. How would you describe his/her performance in comparison with other people at the same level of experience?
9. How effectively did this individual interact with co-workers and/or users or customers?
10. For the following, comment on a scale from 1-5, (5 being most acceptable)

- Attendance

- Dependability (re: deadlines, commitments)

- Ability to take work responsibility and follow through
- Professionalism

- Communication skills written _____ oral _____
- Work attitude

- Degree of supervision required

11. Did he/she have any personal difficulties that prevented them from performing the required duties of the job? Yes No
12. Are there any additional comments I have not asked about that you would like to share?
13. What are the candidate's strengths?
14. What are the areas this individual needs to improve in?

Reference Checking Guidelines:

1. What was (or what is) the basis of knowledge about the candidate?
2. What was your role at the time? What was the candidate's role? What was the reporting relationship?
3. What was (or were) the time frame(s) in which the two of you worked together?
4. What were the candidates key accomplishments in this role?
5. What was not accomplished as well as it might have been?
6. What were the candidates overall strengths in this role?
7. What developmental needs or weaknesses did they display?
8. To what extent was teamwork required in this position?
9. What is your perception of how well they functioned as a team player (or team leader)?
10. What prompted you to select or appoint the candidate into their role?
11. How were their responsibilities and challenges different?
12. Looking back, what kind of growth did they demonstrate in this job versus earlier ones in which you knew them?
13. Based on what I've told you, how do you see the candidate performing in this role?
14. In what areas would you feel most comfortable about their ability to perform?
15. What areas do you think would pose the greatest risks - to the candidate and the organization?
16. Is there a question which I did not ask or something additional you feel I should know?

REFERENCE CHECK

To: _____	From: _____
(Company)	(Company)
_____	_____
(Attention)	(Attention)
_____	_____
(Address)	(Address)
_____	_____
(City) (Zip)	(City) (Zip)
_____	_____
(Phone #)	(Phone #)

I _____ hereby give my permission to _____
 (Applicant's name) (Company)

to verify my past employment history with your company. Please release all information necessary regarding my past employment history.

 (Applicant's Signature/Date)

 (Applicant's Social Security #)

Applicant Data

1. Was employed by your company? ____ Yes ____ No
2. Employment Dates: _____ to _____
3. Starting Position: _____
4. Starting Salary: _____
5. Ending Position: _____
6. Ending Salary: _____
7. Applicant's Responsibilities: _____

Rate the applicant's performance by using the following scale: 1 lowest - 5 highest rating

Performance/Behavior	Rating	Comments
Attendance		
Attitude		
Cooperation		
Job Skills		
Initiative		
Productivity		
Reliability		
Quality of Work		

Please state the applicant's

Strengths:

Weaknesses:

Would you rehire the applicant? Yes No

Why did this person leave?

Comments:

Completed by: _____ Date Completed: _____

Attachment 4

CANDIDATE EVALUATION

(to be completed by interviewer)

Applicant's Name _____

Date: _____

Position Sought _____

Location _____

Candidate is Internal candidate External candidate

Position is Managerial Experienced professional/technical
 Other Entry-level professional/technical

Please keep specific requirements of position in mind and rate only those items that relate to position requirements.

Education

- Exceeds minimum requirements
- Meets minimum requirements
- Equivalent to minimum requirements
- Below minimum requirements

Comments: _____

Experience

- Exceeds minimum requirements
- Meets minimum requirements
- Equivalent to minimum requirements
- Below minimum requirements

Comments: _____

Experience (relevance to position)

- Highly relevant
- Relevant
- Somewhat relevant
- Not appropriate

Comments: _____

This article is reprinted with the permission of the authors and the American Corporate Counsel Association as it originally appeared in the *ACCA Docket*, vol. 19, no. 3, at pages 40–48. Copyright 2001, the American Corporate Counsel Association, all rights reserved. For membership or subscription information, call 202/293-4103.

Interviewing

Can I Ask This Question?

Job Applicants

The hiring process is the first workplace hazard facing employers. Many seemingly innocent or well-intentioned preemployment questions that managers ask or want to ask are illegal. As corporate counsel, you should advise all of your hiring managers to bear in mind the cardinal rule: All preemployment inquiries should focus on an applicant's ability to do the job. Rejected applicants (and the courts) will assume

by James K. Cowan Jr.
and Laura Effel

that your company used all information that applicants provided, both in job applications and in interviews. If your managers asked questions that are not job-related, they may ascribe discriminatory intent. Any time your company rejects a job applicant, it runs the risk that the applicant will file a "failure to hire" discrimination claim, usually under Title VII of the Civil Rights Act of 1964, the Age

James K. Cowan Jr. and Laura Effel, "Interviewing Job Applicants: Can I Ask This Question?" *ACCA Docket* 19, no. 3 (2001): 40–48.

Question

Lawful

Unlawful

It Depends

(poor question but probably not illegal per se)

1. Do you have any health problems?	_____	<u>X</u>	_____
2. Have you ever been arrested?	_____	<u>X</u>	_____
3. Have you ever been convicted?	<u>X</u>	_____	_____
4. To what clubs or societies do you belong?	_____	_____	<u>X</u>
5. [To female applicants] Have you made arrangements to have your children taken care of while you work?	_____	<u>X</u>	_____
6. Some of the organizations you belong to are listed by initials only. What do the initials stand for?	_____	_____	<u>X</u>
7. Where were you born?	_____	<u>X</u>	_____
8. That's an unusual name. What nationality is it?	_____	<u>X</u>	_____
9. Are you single, married, or divorced?	_____	_____	<u>X</u>
10. I noticed that you were limping as you came in. Are you ok?	<u>X</u>	_____	<u>X</u>
11. Do you own your home, or are you renting?	_____	_____	<u>X</u>
12. Where have you lived during the past five years?	_____	_____	<u>X</u>
13. Did you receive an honorable discharge from the Army?	_____	<u>X</u>	_____
14. [Of a naturalized citizen] If you are hired, we will need proof of citizenship. Could you then give us copies of your naturalization papers?	_____	<u>X</u>	<u>X</u>
15. Do you have fluency in any foreign language?	_____	_____	<u>X</u>
16. [To a divorced woman] Do you have any other sources of income, such as alimony payments?	_____	<u>X</u>	_____
17. When did you graduate from high school?	_____	<u>X</u>	_____
18. How old are you?	_____	<u>X</u>	_____
19. Have you ever belonged to a union?	_____	<u>X</u>	_____
20. [To a woman] Do you have any concerns working on a job with a lot of men?	_____	_____	<u>X</u>
21. This position requires lifting heavy equipment. Is there anything that would prevent you from meeting this requirement?	_____	<u>X</u>	_____
22. Have you ever worked for any company under a different name?	<u>X</u>	_____	_____
23. This job frequently requires overtime. Can you satisfy this requirement?	<u>X</u>	_____	_____
24. [Of a male applying to work as your secretary] I have always had a woman secretary. Do you think you would be happy in this job?	_____	<u>X</u>	_____
25. How long have you lived at your current address?	<u>X</u>	_____	_____
26. We need a photograph. If you are hired, will you bring one in for your personnel file?	<u>X</u>	_____	_____
27. We would like a photo to attach to your application, since so many are applying. Would you mind giving us one?	_____	<u>X</u>	_____
28. How many days did you miss work last year?	<u>X</u>	_____	_____
29. How many days were you out sick last year?	_____	<u>X</u>	_____
30. Have you ever been injured on the job?	_____	<u>X</u>	_____
31. Do you currently use illegal drugs?	<u>X</u>	_____	_____
32. Have you ever used illegal drugs?	<u>X</u>	_____	_____
33. Have you ever been addicted to drugs?	_____	<u>X</u>	_____
34. Have your wages ever been garnished by a credit company?	_____	<u>X</u>	_____
35. Who referred you for a position here?	<u>X</u>	_____	_____
36. [After listing job duties] Can you perform these job functions with or without reasonable accommodation?	<u>X</u>	_____	_____
37. [After listing job duties] Will you need any accommodations to perform these job functions?	_____	<u>X</u>	_____
38. [To applicant with obvious or known disability] Will you need any accommodations to perform these job functions?	<u>X</u>	_____	_____
39. What is your experience in this kind of work?	<u>X</u>	_____	_____



Discrimination in Employment Act (“ADEA”), or the Americans with Disabilities Act (“ADA”). To establish a failure to hire claim, an applicant generally must prove that the applicant (1) was a member of a protected class, (2) applied for an available position, and (3) was qualified for the position and (4) that, after he or she had been rejected, the employer continued to seek applicants. If the rejected applicant meets this test, the employer must prove that it had legitimate, nondiscriminatory reasons for rejecting the applicant and that these legitimate reasons are not a “pretext,” or cover, for unlawful discrimination.¹

Teaching your managers to recognize and avoid asking illegal and dubious questions during job interviews can help protect your company from failure-to-hire claims. Interview questions implicate issues under current federal employment discrimination laws. In addition to U.S. statutes, a myriad of state and local employment laws, both statutory and common law, such as statutes prohibiting discrimination on the grounds of sexual orientation and the tort of negligent hiring, also apply to the hiring process. You should train your managers to observe federal laws and their respective state and local laws during the interview process. They should be able to identify the red flags that each of the following 39 questions, evaluated as to its lawfulness, raises. These questions appear in a handy list for nonlegal managers on the previous page.

QUESTIONS ABOUT HEALTH, DISABILITY, AND DRUG USE

Unlawful:

- Do you have any health problems?
- This position requires lifting heavy equipment. Is there anything that would prevent you from meeting this requirement?
- Have you ever been addicted to drugs?
- [After listing job duties] Will you need any accommodations to perform these job functions?
- Have you ever been injured on the job?

Lawful:

- I noticed that you were limping as you came in. Are you ok?
- Do you currently use illegal drugs?
- Have you ever used illegal drugs?

- [After listing job duties] Can you perform these job functions with or without reasonable accommodation?
- [To applicant with obvious or known disability] Will you need any accommodations to perform these job functions?

Applicable Law:

- Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*
- Rehabilitation Act of 1973, 29 U.S.C. §§ 706, 791-94.
- State workers' compensation statutes.

All of the foregoing questions implicate the Americans with Disabilities Act, which prohibits discrimination against qualified individuals with disabilities. The ADA applies to employers with 15 or more employees and any agent of such employer. The act is unique because it expressly prohibits certain inquiries and examinations at the interview or preoffer stage of the hiring process. The Equal Employment Opportunity Commission (“EEOC”) has issued detailed guidance regarding permissible and impermissible inquiries under the ADA.²

Employers may generally ask questions about an applicant's abilities, but not about an applicant's disabilities. At the preoffer stage, you cannot ask questions that are “likely to elicit information about a disability.” Similarly, at the preoffer stage, you cannot seek information about an applicant's physical or mental impairments or general health. You can ask whether an applicant can perform a function “either with or without reasonable accommodation.” But you must steer clear of questions about whether an accommodation would be needed, if the applicant were hired. You may ask, however, about the need for an accommodation for an obvious disability, such as a visible physical limitation.

Although the law generally prohibits preemployment inquiries regarding disabilities, the EEOC regulations do not prevent your managers from asking questions that are not likely to elicit information about a disability. You may ask about a prospective employee's well being, for example, by inquiring simply, “How are you?” You may also ask a job applicant who looks tired or ill or is sneezing or coughing whether he or she is feeling ok or whether the person has a cold or allergies. Similarly, you may ask a prospective employee questions about nondisability-related impairments, such as “How did you break your leg?”

The federal disabilities law does not protect current and former illegal drug use from pre-employment questioning, but you may not ask an applicant questions about a past addiction to drugs or alcohol.

You also may not inquire about previous on-the-job injuries. Most states prohibit retaliation or discrimination against job applicants who have had workers' compensation injuries or claims.

You should know that the Rehabilitation Act of 1973, which applies to businesses entering into contracts with the federal government that exceed \$10,000, also prohibits discrimination on the basis of a disability.

GENDER BIAS MAY ALSO UNDERLIE QUESTIONS ABOUT MARITAL STATUS, WHICH HAS NO RELATION TO A JOB. QUESTIONS ABOUT MARITAL STATUS CAN ONLY RESULT IN ANSWERS THAT LEAD YOU ONTO THIN ICE.

QUESTIONS SPECIFIC TO FEMALE OR MALE APPLICANTS

Unlawful:

- [To female applicants] Have you made arrangements to have your children taken care of while you work?
- [To a divorced woman] Do you have any other sources of income, such as alimony payments?
- [Of a male applying to work as your secretary] I have always had a woman secretary. Do you think you would be happy in this job?

It Depends. Poor Question But May Not Be Illegal:

- [To a woman] Do you have any concerns working on a job with a lot of men?
- Are you single, married, or divorced?

Applicable Law:

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Title VII prohibits discrimination on the basis of sex, as well as race, color, religion, sex, or national

origin. It applies to employers with 15 or more employees and any agent of such employer.

You run into the problem of gender bias if you pose certain questions to a female applicant, such as the one above concerning child care, but not to a male applicant, and vice versa. You should also avoid questions that assume stereotypical sex roles, such as that a male applicant would not be satisfied in a support job as a secretary. Such questions are not job-related and may indicate gender bias.

Gender bias may also underlie questions about marital status, which has no relation to a job. Questions about marital status can only result in answers that lead you onto thin ice.

QUESTIONS ABOUT BACKGROUND AND FAMILY

Unlawful:

- Have you ever been arrested?
- Where were you born?
- That's an unusual name. What nationality is it?
- We would like a photo to attach to your application, since so many are applying. Would you mind giving us one?
- Have your wages ever been garnished by a credit company?

Lawful:

- Have you ever been convicted?
- How long have you lived at your current address?
- Have you ever worked for any company under a different name?
- Who referred you for a position here?
- We need a photograph. If you are hired, will you bring one in for your personnel file?

It Depends. Poor Question But May Not Be Illegal:

- Do you own your home, or are you renting?
- Where have you lived during the past five years?
- Do you have fluency in any foreign language?

Applicable Law:

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*
- Civil Rights Act of 1866, 42 U.S.C. § 1981.
- Civil Rights Act of 1991.

Title VII, as discussed above, prohibits discrimination on the basis of race, color, religion, sex, or



*From this point on...
Explore information related to this topic.*

- Americans with Disabilities Act—Employment Provisions at www.acca.com/protected/legres/ada/fmbada.html.
- Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787 (1993).
- Employment Compliance Policy at www.acca.com/protected/infopaks/compliance/mdc/index.html.
- Equal Employment Opportunity Commission website at www.eeoc.gov.
- RONALD M. GREEN AND RICHARD J. REIBSTEIN, EMPLOYER'S GUIDE TO WORKPLACE TORTS: NEGLIGENT HIRING, FRAUD, DEFAMATION, AND OTHER EMERGING AREAS OF EMPLOYER LIABILITY (BNA Books 1992), summary and order form at Bureau of National Affairs website at www.bna.com/bnabooks/publications/details/d_egwt.htm.
- List of employment-related laws at www.acca.com/protected/infopaks/compliance/employ.html.
- Mark Minuti, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods of Avoiding the Hiring of Dangerous Employees*, 13 DEL J. CORP. L. 501 (1988).
- Linnea Sinclair-Bernadino, *Negligent Hiring Doctrine Opens More Doors for Pre-Employment Screening*, at www.pimall.com/nais/n.hire.html.
- FRED S. STEINGOLD, THE EMPLOYER'S LEGAL HANDBOOK (4th ed. Nolo.com 2000), summary and order form at Nolo.com's website at www.nolo.com.
- U.S. Dept. of Justice ADA Home Page at www.usdoj.gov/crt/ada/adahom1.htm.
- USERRA website at www.dol.gov/dol/vets.

national origin. Section 1981 of the Civil Rights Act of 1866 prohibits race discrimination in the formation of contracts, including employment contracts, and applies to all employers. It does not

have Title VII's requirement of 15 employees. The Civil Rights Act of 1991 amends provisions of Title VII, the ADA, and the ADEA. Among its provisions are those codifying disparate impact theories of discrimination in race cases and extending the territorial reach of antidiscrimination statutes to U.S. citizens working abroad for U.S. companies.

Even a seemingly neutral policy, rule, or question may have a discriminatory impact on a protected group and thus be considered improper. Questions about the number of a job applicant's garnishments by creditors are one example. Another example is the use of arrest records to determine an applicant's suitability for employment. The EEOC has determined that this practice has a discriminatory impact on nonwhites; some state laws also prohibit it. In most states, you can ask an applicant, however, whether he or she has been convicted of any crime. If the answer is affirmative, you should ask the applicant to provide details, including the dates. Your manager should advise applicants that a conviction is not an absolute bar to employment and will be considered only in relation to the specific job requirements. Many states have laws regarding criminal convictions, so you should exercise caution. Past criminal convictions should bar employment only if they have a direct relationship to the requirements of the particular job.

The EEOC has found non-job-related questions regarding ethnicity and/or nationality to be improper under Title VII's prohibition on national origin discrimination. Questions about language fluency may be discriminatory if they are not job-related.

Any questions that you ask pertaining to economic status, such as home ownership, frequency of residency changes, or area of residence, may be interpreted as indicating bias against economically disadvantaged groups, if they are not job-related. The location of an applicant's residence during past years may implicate immigrant status, nationality, or ethnicity.

Questions about prior names may sound invasive, but they probably are not illegal, especially if they assist in conducting a background investigation. You may conduct background checks, which may be required in some job categories and are use-

ful in avoiding liability for negligent hiring claims.³ Like all inquiries, they should pertain to matters affecting job performance.

Many questions that are problematic during the interviewing timeframe, such as those designed to elicit information about race and ethnicity, are often permissible after the employment relationship begins.

QUESTIONS THAT REVEAL AGE

Unlawful:

- When did you graduate from high school?
- How old are you?

Lawful:

- What is your experience in this kind of work?

Applicable Law:

- Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

The ADEA prohibits discrimination on the basis of age against persons over age 40. It is unlawful “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his/her compensation, terms, conditions, or privileges of employment, because of such individual’s ‘age.’” The act applies to employers with 20 or more employees and any agent of such employer. State law may also prohibit age discrimination, and the age limit may not be the same as that of the federal ADEA.

You should avoid any non-job-related questions that elicit a job applicant’s age.

QUESTIONS ABOUT NON-JOB-RELATED INTERESTS AND CONCERNS

Unlawful:

- How many days were you out sick last year?

Lawful:

- This job frequently requires overtime. Can you satisfy this requirement?
- How many days did you miss work last year?

It depends. Poor question but may not be illegal:

- To what clubs or societies do you belong?

- Some of the organizations you belong to are listed by initials only. What do the initials stand for?

Applicable Law:

- Title VII.
- ADA.
- Other statutes.

Non-job-related questions that may elicit information about a protected group to which the applicant belongs are generally poor and should be avoided. You should not ask broad questions

about non-work-related clubs and organizations to which the applicant belongs or activities in which the applicant engages because they could infringe upon statutory protections concerning the applicant’s religion, national origin, age, disability, or other class.

You may ask whether or not an applicant can fulfill a requirement of the position, such as overtime. But you cannot use Saturday scheduling to eliminate otherwise eligible applicants whose religious observances prevent their working on that day. Similarly, your questions regarding former job performance, such as attendance, are usually acceptable when you do not phrase them to elicit information regarding a protected class. Asking why someone missed work, however, could elicit information regarding a disability and run afoul of the Americans with Disabilities Act.

QUESTIONS ABOUT MILITARY SERVICE

Unlawful:

- Did you receive an honorable discharge from the Army?

Applicable Law:

- Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), 38 U.S.C. § 4301 *et seq.*



The USERRA prohibits discrimination against persons who serve in the uniformed services and provides certain reemployment rights if they are called to active duty. You should not question former servicemembers about their discharges.

QUESTIONS ABOUT WORK AUTHORIZATION

Unlawful:

- (Of a naturalized citizen) If you are hired, we will need proof of citizenship. Could you then give us copies of your naturalization papers?

Applicable Law:

- Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324.

IRCA requires employers to ensure that employees are lawfully authorized to work in the United States, but also limits what proof of work authorization employers may demand. You should not ask job applicants whether they would provide proof of citizenship that the IRCA says an employer cannot request.

QUESTIONS ABOUT UNION ACTIVITY

Unlawful:

- Have you ever belonged to a union?

Applicable Law:

- National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*

The NLRA protects employees' right to form, join, or assist labor organizations and to engage in other concerted activities for the purpose of mutual aid or protection. It also protects the right of employees to refrain from all such activities. The Act applies to all employers. You should not ask job applicants about their previous union activity.

CONCLUSION

If you train your company's managers to stay within these legal guidelines, you will go a long way toward avoiding liability in the hiring process. But you must do more than give your managers a list of questions and answers. You should carefully review the questions that managers are asking job

applicants. Are they job-related? Do they focus on an applicant's skills and abilities? Are managers being consistent in their questions? Although managers need to maintain some flexibility in interview questions, they should generally ask all applicants for the same position the same questions. Are your managers obtaining meaningful information about job applicants that allow them to make well-reasoned decisions about who is qualified for the job?

A disgruntled job applicant may, of course, sue your company even if you take precautions. In assisting management with recognizing the legal red flags in the preemployment process, you will at least have minimized the risk of litigation and prepared your company to defend itself. ■

NOTES

1. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny.
2. The EEOC guidelines pertaining to the ADA are at www.eeoc.gov (last checked Jan. 12, 2001).
3. See Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787 (1993); Linnea Sinclair-Bernadino, *Negligent Hiring Doctrine Opens More Doors for Pre-Employment Screening*, at www.pimall.com/nais/n.hire.html (last checked Jan. 12, 2001).

