

The Basics of the Hiring Process:

By CLAUDIA M. WILLIAMS

What Employers **Can Do** ... and What Employers **Should Avoid**

CAREER

The hiring process can be exciting, frustrating, scary, or some combination of all these. With the ability to identify potential pitfalls, employers can spare themselves the time, expense, and energy of defending a lawsuit.

First, we begin with the application process. Résumés are not legal documents. A résumé is merely a summary of one's job experience. Applications for employment, however, are legal documents. Therefore, only applicants should write on actual job applications.

If employers would like to take notes during job interviews, they should do so on a photocopy of the application or on a separate sheet of paper. When taking notes, employers should not use secret codes or anything that will make it difficult to remember the meaning of the interview notes a year or perhaps three years later if they have to provide testimony when an aggrieved applicant files a discrimination-based lawsuit for failure to hire.

Next we will examine the "dos" and "don'ts" of the job interview. So, what's in a name? It depends on why you are asking. If an employer is trying to determine whether an individual is a Miss, Ms., or a Mrs., the question is unacceptable. It is acceptable, though, to ask for any legal names for the purpose of conducting proper background checks or employment history searches.

It is not acceptable to ask an applicant how old he or she is. The PHRA and Title VII of the Civil Rights Act (Title VII) prohibit employers from discriminating against employees and applicants on the basis of their race, color, religion, national origin, and sex.

Employers can ask applicants if they are U.S. citizens, but they cannot ask if an applicant is a native-born citizen.

In addition, it is improper to ask applicants to submit photographs of themselves during the application

process. Rather, employers may take photographs of employees after they are hired for the purpose of providing photo identification badges.

With limited exception, employers cannot ask applicants if they can work on Christmas or Hanukkah or any other religious holiday. It is reasonable for employers to establish an expected work schedule, but it is not permissible for employers to craft a schedule with the intent of excluding a class of individuals from employment eligibility.

The PHRA and the Americans with Disabilities Act, as amended (ADAAA), prohibit discrimination on the basis of disability. The question is whether the applicant is capable of performing the essential functions of the job with or without a reasonable accommodation.

It is acceptable to ask applicants if they are able to lift 50 pounds if the job in question requires employees to do so. It is not acceptable, however, to ask candidates if they have a history of suffering work-related injuries or if they are prone to injury or illness.

Employers may engage in post-offer, pre-employment medical testing that focuses on the specific requirements of the job. Questions raised regarding an applicant's ability to perform the essential functions of the job require the opinion of a physician or other, acceptable, licensed medical professional. Employers are not in a position to opine as to a candidate's physical abilities, nor should they.

If an employer has multiple job classifications with different physical requirements, a single medical questionnaire will not work. The employer should have the forms tailored to each specific job category.

The Genetic Information Nondiscrimination Act (GINA) is the latest girl on the employment block. GINA prohibits employers from discrimination against applicants and employees on the basis of their genetic information. Genetic information can



include, for example, information contained in medical histories.

Similar to the ADAAA, employers should ask only those questions with regard to medical background that are necessary to determine whether the employee can perform the functions of the job. GINA has given new meaning to the phrase "ignorance is bliss."

As part of the pre-employment process, many employers make candidates a conditional offer of employment pending successful completion of background checks, which may include criminal background information, credit histories, driving records, and interviews with neighbors and friends.

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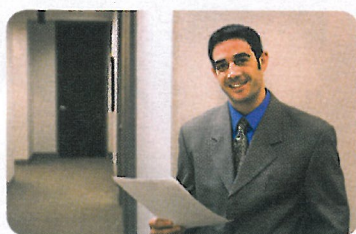
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Background checks are permissible, but they, too, come with their own set of issues. First, employers must get a signed authorization from the candidate. The form must advise the candidate of the type of background check that will be conducted, and it must advise the candidate of his or her rights under the Fair Credit Reporting Act (FCRA) if the background check constitutes a consumer report or an investigative consumer report (which it usually does).

Further, under the FCRA, employers may not take adverse action against a candidate based on the information returned in a covered report without first providing him or her with notice in writing. This is known as the "pre-adverse action notice." Only then can an employer take action based on the report.

Finally, more and more employers are conducting electronic searches (i.e., "Googling" candidates) to see if any information exists in cyberspace that would reflect poorly on the organization or otherwise constitute grounds to disqualify someone from employment.

The problem with reviewing Facebook or any other account is that it may contain personal information. For example, a candidate's Facebook page may track her breast cancer treatments, or it may show pictures of the candidate with visible disabilities that would not otherwise be known if the employer had not seen the photos. If any candidate is denied the job, he or she may claim that the decision was based on information that should not have been considered in the first place.

Luckily for employers, there are third-party vendors who conduct electronic searches, and the vendors screen the information they provide to the client so that the client receives only the information that they need and that complies with the law.

In summary, the key to a successful process is being able to recognize landmines. If employers can identify the landmines, then they can give themselves an opportunity to prevent and/or correct any issue that would otherwise subject them to liability and a costly litigation process. 

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