



LEGAL GUIDELINES ON HIRING EMPLOYEES
Prepared & Presented by Christopher A. Tinari, Esquire
Margolis Edelstein

There are numerous Federal, State and Local rules regarding hiring employees, and most large companies maintain in-house legal counsel and human resource departments to deal with these rules. But, if you are a small company, these are unaffordable luxuries. Therefore, here are some simple common-sense guidelines for hiring employees:

- Do not discriminate based on race, color, gender, religion, disability status, etc.
- Respect the applicant's right to privacy: marital situation, economic background, personal life, etc.
- Don't imply things you can't deliver: job security, benefits, etc.
- Observe all laws relating to minimum wage, hiring young or immigrant workers.
- Follow the IRS guidelines for hiring independent contractors.
- Follow all IRS and State new hiring requirements.

References:

The law protects employer's right to give and receive references from possible defamation claims. The law, generally, allows for a qualified privilege under common law if the references are provided in good faith, limited to topic of inquiry, communicated to a person with a need to know, information is related to the job requirement, must be true and must be done without malice or an evil intent. Good practice: Secure authorization from employee to supply reference.

Background Checks:

The law varies from state to state. Some states allow for purposes of evaluating a person's qualification for hiring. Some states ban all forms of background checks to pre-screen applicants. Some states actually require extensive pre-employment screening requirements for certain professions such as schools, child care and healthcare facilities. Employers must look carefully at their state's specific statute to determine its function, applicability, and compliance.

Fair Credit Reporting Act (FCRA):

This Act applies if the employer uses an outside agency to do a background check and prepare a "consumer report". The employer must obtain the applicant's written consent. The employer must give the applicant a copy of the report's findings and allow the applicant to challenge the findings before taking any adverse action.

Job Offer Letter:

Employers should extend job offer letters to employees for the purpose of eliminating any misunderstanding of the conditions of employment. It should not be contemplated or drafted as a contract. Place in the letter language stating that the employment is "at will". Generally, include a starting date but not a term of employment. Good practice: Do not use the term "probationary period" but rather use term of "introductory period" since the relationship is "at will". "Probationary" implies a possible contract between employer and employee.

Employment Agreements:

An employment agreement is any agreement, whether written or oral, between the employer and employee relating to conditions of employment. An employee will not be considered "at will". Employment agreements should only be used when an employer decides to treat an individual employee differently from others. Terms must be specific and supported by consideration. Employment agreements generally contain a specific term of employment, non-compete, solicitation, severance, return of property and arbitration provisions.

Interviewing:

Questions in the interview process from the employer can potentially violate the law and "sow the seeds" for later employee wrongful discharge claims. Accordingly, a checklist should be utilized by the employer to be certain there is compliance with the law. Below are general (varies from state to state) legal and illegal questions to ask applicants in the hiring interviews:

Address

YES: Place, length, current or previous

NO: Specific inquiry into foreign address (national origin), names with whom reside

Age

YES: If minor, proof of age/permit, younger than regular retirement age

NO: Age, age group, DOB, birth/baptismal certificate, graduation date (implying age)

Ancestry/National Origin

YES: After employment, can you submit proof of citizenship or legal to work

NO: Birthplace, native born/natural, customs, parents origin, first language, birth certificate

Citizenship

YES: U.S. Citizen, legal to work, need proof of citizenship if hired

NO: What country from, native born/naturalized, parents origin, date of citizenship

Credit Rating

NONE

Disabilities

YES: Carry out all necessary job functions and perform in safe manner

NO: Specific or general inquiries of disabled, sick, applied for worker compensation or disability benefits in past

Family/Relatives

YES: Names of family already employed by company, name of parent of minor

NO: Name of spouse, relative, earning power of family members, addresses of family

Gender/Sex:

NO: Any inquiry concerning gender including height, weight, strength

Health/Physical Condition:

YES: Have any physical or mental disabilities that may affect work performance which may impact job placement.

NO: Disabilities, handicaps, worker compensation benefits

Marital:

YES: Meet specific work schedule or has responsibilities that may hinder work schedule (must be asked to both sexes)

NO: Marital status, single, divorced, number of children, pregnancy, child care

Military Service:

YES: Inquiry into service in U.S. Armed Forces, branch, rank, military discharge certificate

NO: Military records, type of discharge, serving in foreign military

Name:

YES: Ever worked under another name, general identification

NO: Name to seek out ancestry, why changed name, maiden name, Miss, Ms., or Mrs.

Organizations:

YES: Professional organizations, offices held

NO: Request all club memberships, request names of organizations that would suggest religion, ancestry etc.

Race/Color:

YES: None

NO: Any inquiry that would indicate race, color of hair, eyes, skin

Religion:

YES: Can ask of normal work hours and days

NO: Religion, denomination, pastor, rabbi, religious holidays, customs, references from clergy etc.

Christopher A. Tinari is a partner in the Employment Practices Liability Department at the law firm of Margolis Edelstein in Philadelphia, Pennsylvania. He may be contacted by phone at (215) 931-5895 or by e-mail at ctinari@margolisedelstein.com.

www.margolisedelstein.com