
PRE-EMPLOYMENT PRACTICES

There are certain simple guidelines in the area of pre-employment practices that, if followed, can be very helpful in avoiding the risk of litigation.

1

ADVERTISING

To minimize the risk of litigation in advertising for jobs, an employer must avoid all references in employment advertising that indicate preferences or considerations based on race, sex, age, national origin, or religion. Employers should avoid making subtle references that unknowingly betray a bias against particular groups. Older people between the ages of 40 and 70 constitute a group that employers should be careful not to discriminate against unknowingly in their ads. An employer should be careful to avoid implying in its ads that it prefers younger applicants. For example, an ad specifically requesting "college students" or "recent college graduates" to apply might be seen as discrimination against older people, because such an ad implies that a young person is preferred. If there is no real reason why the job requires a college student, or a recent as opposed to a non-recent college graduate. The risks are increased that the ad may be perceived as discriminatory. Among other practices to follow in advertising for jobs is indicating the employer is an Equal Opportunity Employer.

2

EMPLOYMENT APPLICATIONS

Employment application forms should be reviewed to assure that they comply with federal and state job discrimination laws and to preserve the employer's traditional legal rights to discharge at will" employees. Here are a few suggested inclusions in any application form: o An introductory statement declaring the purpose of the application and the employer's policy of complying with all laws banning discrimination. o Just above the employee signature line, a certification by the applicant that all information is true and accurate, as well as a printed warning that any falsification in any detail is grounds for disqualification from consideration for, or discharge from, employment. This is an important means of answering any claim by a rejected or subsequently discharged applicant that he had no idea of the severe consequences of any falsification. o Also above the signature line, a statement that the applicant recognizes his employment can be terminated at any time, with or without cause, at either his option or the option of the

employer. Some courts have held that this type of language expressly negates an argument by a discharged employee that he or she had a contract right to be discharged only for cause. This language also reaffirms to the employee that his employment relationship is to be considered "at will." o Also near the signature line, an acknowledgment that only specific officers of the employer have the authority to enter into employment contracts for a defined term. Sometimes an interviewer or a supervisor may make a remark that an employee may consider a binding commitment to a job for a specified period. By stating in the application form that only the president or some other officer can enter into an employment contract for a defined duration, the employer puts the employee on notice that his interviewer or supervisor does not have the authority to bind the organization to any sort of implied contract. o Alongside the foregoing statements, an authorization by the applicant that any former employer may give the present employer any information it has regarding the applicant. Such an authorization is important to reduce the litigation risk of defamation lawsuits by rejected applicants. To afford added protection, the authorization should also contain a statement releasing the employer and any provider of information from any liability in connection with the disclosure of information. The following sample language encompasses all of the foregoing suggestions: "I certify that the facts set forth in the above employment application are true and complete to the best of my knowledge. I understand that falsified statements on this application in any detail shall be considered sufficient cause for disqualification from further consideration for hire or for my dismissal. "I authorize [the Employer] to make any investigation of my personal or employment history and authorize any former employer, person, firm, corporation, credit agency, or government agency to give [the Employer] any information they may have regarding me. In consideration of [the Employer's] review of this application, I release [the Employer] and all providers of information from any liability as a result of furnishing and receiving this information. "I further agree that, if employed, I will conform my conduct to [the Employer's] rules and regulations and understand that, unless otherwise specifically agreed to in writing, my employment can be terminated with or without cause, and with or without notice, at any time, at either (the Employer's) or my option. I understand that no personnel recruiter, interviewer, or other representative of [the Employer] other than [specify title] has any authority to enter into any agreement for employment for any specified period of time. I also understand that any employment manuals or handbooks that may be distributed to me during the course of my employment shall not be construed as a contract."

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PRE-EMPLOYMENT INQUIRIES

Another danger area is that of pre-employment inquiries. Pre-employment inquiries should elicit information that leads to the selection of the most qualified candidates, but should not elicit information that has the effect of excluding, either intentionally or unintentionally, the qualified candidates on the basis of race, sex, age, or other unacceptable criteria. It is also absolutely vital that recruiters, interviewers, and supervisors be trained in proper interview techniques to avoid discrimination or employment contract claims. Sometimes there is a very subtle line between what is and is not a permissible area of inquiry, and recruiters and interviewers should know that those lines are to avoid a careless question or statement that may put the employer in an indefensible position. Any pre-employment inquiry that expresses, directly or indirectly, any limitation or specification as to sex is unlawful, unless the inquiry is based on a bona fide occupational qualification. The employer should not ask applicants to identify their race. The application form should not ask applicants to submit a photograph or physical description of themselves. Interviewers should be careful not to ask seemingly casual questions that might reflect a concern about the person's race. Once an untactful statement is made, it cannot be undone. Questions about height or weight are sometimes viewed as devices to screen out women, certain ethnic or national origin groups, and physically handicapped persons. These questions should be asked only if necessary and "related" to job performance- for example, for certain security jobs. An employer may ask prospective employees if they have been convicted of a crime.

4

RECRUITMENT

Title VII does not impose a duty to adopt recruiting procedures that maximize the hiring of minorities. On the other hand, however, if minorities are underrepresented in an employer's work force, it may be because of improper recruiting methods. Under these circumstances, the employer should be reviewing those methods. If it is relying on "word-of-mouth" recruiting, that might be the reason for underrepresentation. Perhaps minorities are overrepresented in unskilled jobs in its work force and underrepresented in professional jobs. That could be because the employer recruits professional people from one geographic area or school and recruits unskilled people from another geographic area or school. In these cases, the employer should be changing its recruiting methods, or it may be subjecting itself to a "disparate impact" discrimination claims.