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Preemployment Inquiries and the Hiring Process

The process of gathering information about applicants to assist in making an informed hiring decision is a crucial aspect of the hiring process. Responsible employers know that making reasonable and appropriate inquiries about an applicant can help ensure that the best candidate is hired for the position. However, the scope of such inquiries is subject to important limitations. Employers must give due consideration to federal and local equal employment opportunity laws, and respect an applicant's privacy. On the flip side, employers in some industries (e.g. child care, or care of the elderly) are required to screen applicants for certain types of convictions.

Navigating these treacherous waters is not an easy task, but if there is any guiding beacon for employers, it is this: Preemployment inquiries should be reasonably tailored in scope to that which is related to the applicant's suitability for the position at issue.

As a general principle, employers must refrain from any preemployment inquiry that would reveal the applicant's status in a protected category. Under federal law, these categories include the following:

- race/color
- national origin
- sex/gender
- religion
- age
- disability

State or local law may also include additional protected categories, such as sexual orientation or domestic partnership status.

The Equal Employment Opportunity Commission (EEOC) has recently updated its *Compliance Manual* section on race/color discrimination, which includes its position on employers' recruitment and hiring practices. The EEOC's *Compliance Manual* emphasizes that Title VII forbids not only recruitment practices that purposefully discriminate on the basis of race, but also practices that disproportionately limit employment opportunities based on race and are not related to job requirements or business needs. For example, according to the EEOC, screening candidate resumes to eliminate those from zip codes that are predominately black or Latino areas would violate Title VII.

All employee selection procedures must be job-related, and consistent with business necessity. Even seemingly legitimate screening criteria need to meet this standard. For example, education requirements can run afoul of Title VII, according to the EEOC, if the requirement has a disparate impact and exceeds what is needed to perform the job.

Inquiries Regarding Specific Categories

Race/color

There are no legitimate questions that an employer may ask regarding an applicant's race or color. Moreover, employers must avoid inquiries likely to elicit information regarding the applicant's race or color.

National origin/citizenship

There are no legitimate questions that an employer may ask regarding an applicant's national origin. However, an employer may inquire as to an applicant's eligibility to work in the United States.

It is illegal to discriminate against any individual because of that individual's national origin or citizenship status. It is also illegal to discriminate against work eligible individuals.

Once an employee is hired, employers are required to ensure that the employee fills out the Form I-9 when he/she starts work. However, employers are not permitted to require more or different documents from a particular individual for purposes of satisfying the eligibility verification requirements.

Age

No inquiries are permitted as to an applicant's age. Employment applications should not contain a request for the applicant's date of birth. Moreover, employers must eliminate from employment applications any requests for dates the applicant attended high school, college, or postgraduate school, as this may reveal the applicant's age.

Proof of age for the purpose of determining that a person meets minimum age requirements may be required after the individual is hired.

Sex/gender

Discrimination based upon sex/gender is illegal unless there is a bona fide occupational qualification (BFOQ) for one sex only.

Inquiries about an individual's sex/gender (other than what is revealed by a person's name) are unacceptable.

Sexual orientation

While sexual orientation is not considered a protected category under Title VII, it is nevertheless considered a protected category under state or local law in many jurisdictions.

Even in jurisdictions where there is no protected status based on sexual orientation, preemployment inquiries regarding an applicant's sexual orientation would be intrusive and inappropriate.

Marital status

It is not appropriate to inquire as to an individual's marital status or a spouse's job. Such questions are not job related, and are intrusive.

Moreover, separate questions/standards for women regarding this area of inquiry are prohibited by Title VII.

Several states now recognize civil unions or domestic partnerships and prohibit discrimination against individuals based on civil union status. Inquiries as to an applicant's civil union status would be prohibited under such laws.

However, marital status information needed for tax, insurance, or social security purposes may be obtained after the individual is hired.

Children/pregnancy

Pregnant women are protected from discrimination under the Pregnancy Discrimination Act. Therefore, inquiries as to whether an applicant is pregnant are prohibited.

Inquiries as to an applicant's future child-bearing plans or the number or ages of the applicant's children are not appropriate.

However, it is lawful to make a general inquiry about any commitments or responsibilities that would preclude the applicant from meeting work/travel schedules.

Inquiry regarding an individual's dependents needed for tax or insurance purposes is acceptable after the individual is hired.

Disabilities

The Americans With Disabilities Act (ADA) prohibits preemployment inquiries about an individual's medical history, illnesses, diseases, or any physical/mental impairments.

Also prohibited are questions pertaining to predisposition to disabilities, family medical history, and current medical care/medication. A preemployment physical examination can not be required.

Medical examinations are permitted only after an applicant has been offered employment, provided medical examinations are required of all individuals in the same job classification or job position. The results of an examination must be kept confidential. The results of an examination may be disclosed only:

- to determine if the person can perform the essential functions of the job in question;
- to determine what, if any, accommodations are needed;
- if a health or safety issue arises.

The focus of inquiry must be on the applicant's ability to perform the essential functions of the given job and any reasonable accommodation necessary toward that end. The focus must not be on the disability. In fact, discussion of possible accommodations needed by the applicant may not take place until after a job offer is made, unless the applicant has an obvious disability that the employer reasonably believes would require an accommodation, such as an individual who is blind applying for a job as a computer programmer.

Religion

As a general rule, there are no acceptable inquiries regarding religion.

It is unlawful to discriminate against an applicant upon the basis of religious denomination, beliefs, practices, or dress.

An exception applies to religious institutions, associations, and the like that have a bona fide occupational qualification that makes it reasonably necessary to limit hiring to individuals whose practices and beliefs are consistent with the religious precepts of the institution.

Criminal History Record Information

Criminal history record information must be used carefully by employers. Some states have laws regulating the use of criminal history record information in the context of hiring, and employers should ensure that any criminal history screening of applicants or new hires complies with any applicable law in this regard. For example, the Commonwealth of Pennsylvania prohibits the consideration of mere arrests, and permits the consideration of an applicant's conviction record only to the extent it is related to the job.

Even in states with no law regulating the use of criminal history records, employers must limit their use of such information based on a potential disparate impact claim with regard to minorities. The EEOC has taken the position that upon a showing of disparate impact, employers also must be able to justify criminal history selection criteria as job related and consistent with business necessity. The EEOC states that with respect to conviction records, the employer must show that it considered the following three factors: (1) the nature and gravity of the offense; (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.

Off-the-Job Conduct

An employer's inquiries into an applicant's personal life and conduct is a grey area legally. Generally speaking, employer's should limit such inquiries to that which is job related, and not make any unnecessary investigation into an applicant's private life.

Smoking

While it is permissible for employers to prohibit smoking in the workplace, some states have passed legislation making it illegal for employers to make hiring or firing decisions based on off-duty smoking by workers or applicants. Some states go even further, and prohibit discrimination on the basis of all legal behavior. Employers who are located in jurisdictions that prohibit discrimination based on off-duty smoking must not ask applicants if they are smokers.

Credit history

Employers are permitted to obtain an applicant's credit report under the Fair Credit Reporting Act (FCRA). The employer must inform the applicant with a clear, conspicuous written notice that a credit report will be obtained for employment screening purposes. The job candidate must provide written authorization before the employer can contact the credit agency. Before denying an applicant employment, an employer must provide the applicant with a copy of the credit report and advise the applicant of his/her rights under FCRA, which include the right to dispute information in the credit report, and the name, address, and telephone number of the credit reporting agency.

The EEOC takes the position that policies relating to employee's credit history are subject to the disparate impact analysis.

For additional information about preemployment inquiries and other legal issues, see www.nacweb.org/info_public/legal.htm

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