



By Marcy R. Frost



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HIRING BASICS

Finding the right person for the job can be difficult, and avoiding the legal landmines in the hiring process makes it even more challenging. Understanding some of the basics of hiring can help your company hire the best candidate without running afoul of the law.

What Should Be the First Step in Every Hiring Process?

The first step always should be to define clearly the position that needs to be filled. The best way to do this is to refer to an existing job description and update it as appropriate or create a job description if there has never been one before or it is a new position. The job description should include the job title, the pay grade (if appropriate) or pay range, the FLSA classification, the department to which the position will be assigned, to whom the person in the job will report, the education required and/or desired for the position, the experience (years and type) required and/or desired, the essential functions and responsibilities of the position (including management responsibilities), the additional duties associated with the job (including, "as may be assigned"), the physical and mental requirements of the job, and a description of the work environment.

Should an Employer Always Try to Hire from within First?

Employers are not obligated to open positions up to internal candidates before opening them to the public. If the employer is confident that there are no viable internal candidates or wants someone to come into the company from the outside, then it is better to not post than to post and then not take any candidates seriously. It is problematic to depend solely on employee recommendations to fill positions because referrals tend to mirror the demographics of the employees, which could lead to a perpetuation of race, religious, or age characteristics among employees. When advertising a position, it is acceptable to do targeted advertising (such as at certain schools or in industry publications), but employers need to make sure that advertising

will reach different races and age groups, so an additional general advertisement often is appropriate.

What Kinds of Problems Are There with Job Applications?

There are a lot of applications in use that violate certain laws, ask for unnecessary information, or are missing important elements. Although it is not against the law to ask for a social security number, there is absolutely no reason to do so. In today's privacy-conscious world, many applicants will be put off by that question. It is best to leave it off the form. Forms should not ask for the year of high school graduation because that reveals age. Applications should not ask about physical disabilities or workers' compensation claims. The new EEOC guidance regarding background checks **suggests** that employers not ask about convictions on applications at all, but if an employer does so, the question should be limited to convictions that are job related and consistent with business necessity. Asking about military information is permitted, but it can be problematic. If an employer is actively seeking military personnel, it is probably best to try to get the information in an interview when the employer can explain why the company is interested in that kind of experience.

What Are Some Common Mistakes Made by Interviewers?

Interviewers sometimes try to "make conversation" and end up asking impermissible questions. For example, if someone has an unusual name, the interviewer might comment and ask about the name, which could reveal national origin information. Questions about kids can lead to problems because the employer may be perceived as judging women with children by a different standard than men with children. The same would be true about inquiries regarding parents. Interviewers need to avoid questions about spouses or significant others. Interviewers have to tread very carefully around health issues. If the individual does not raise a health

concern and does not have an obvious disability, the interviewer should not ask any questions about the person's health. Instead, the interviewer can describe the job and ask if the person would be able to perform the duties. If the person has an obvious disability or mentions a disability, the interviewer does not have to ignore the issue. Rather, the interviewer should describe the job and ask if the person would be able to do the job. The interviewer also can ask how the applicant would do the job.

Can Employers Conduct Background Checks?

Employers can conduct background checks on applicants, but they must comply with state and federal laws regarding the process, and they must be wary of potential adverse impact discrimination claims. The two laws that guide the process for background checks are the federal Fair Credit Reporting Act and the Minnesota Access to Consumer Reports Act. Before a background check can be performed, the applicant has to be given notice and sign an authorization. Under Minnesota law, the notice needs to accompany the application and has to include a check off box to receive a copy of the report. Under the federal law, the notice must stand alone (although it can be combined with an authorization). In order to obtain a background check, the employer will need the applicant's birth date. Of course, that means that the employer will know the applicant's age and set itself up for a potential claim of age discrimination if the applicant is ultimately denied the position. To accommodate both laws and avoid the potential for an age discrimination claim, it is best to have a stand-alone disclosure, including the check off box, that is given at the time of the application and a separate authorization form that is only given upon a contingent offer of employment.

Once the background check is complete, the FCRA and Minnesota law dictate the steps that need to be taken if the employer is going to reject the applicant based on the information. The federal law has a cumbersome process of providing a notice that adverse action is possible and then a second notice stating that the decision has been made. The intention is to give the applicant an opportunity to correct a faulty record or explain the circumstances of the conviction, but the law does not require a specific interval of time nor does it require that the applicant be afforded an opportunity to explain. That opportunity to explain, however, is critical under a newly released guidance by the Equal Employment Opportunity Commission. Under the new guidance, individualized decisions are required, and the employer must take into account such factors as the passage of time and the circumstances of the crime. The EEOC's concern is that African Americans and Hispanics are convicted of crimes at a disproportionate rate, so a blanket exclusion of people with criminal records has an adverse impact on minority groups. A person should only be eliminated from consideration from a position

if the crime has direct implications for performance of the job and is not too remote in time.

Can Employers Use Social Media to Investigate an Applicant?

There are federal laws that deal with unauthorized access to websites that would prevent "hacking" into sites and arguably prevent coerced access to passwords. Even if it is legal, employers have to consider whether they are going to get more information than they want. If an applicant knows that the employer has accessed a social network site, then the applicant might assume that a job was denied based on information that could be gleaned from the site. Social media could contain a lot of information about an applicant that the employer would not otherwise have – a spouse or significant other of a different race, information about disabilities, or religious affiliation. The employer should consider what kind of information it wants about the applicant and whether having that information is worth risking getting other information. For very high-level positions or for positions where there will be a lot of public exposure, it may be worthwhile. For the run-of-the-mill applicant, it is unlikely that there is anything crucial that could be gleaned that is worth the risks.

Is it Worth Even Asking for References?

Many employers have a policy that they will only confirm dates of employment, the last position held, and sometimes the wages. It also is true, however, that individuals violate these policies all the time. Even if the policy is followed, confirmation of dates of employment and position is worth having because they are easily falsified. Employers should not read anything negative into a former employer's refusal to provide any information. Also, remember that the applicant is handpicking the person who will give the reference. A positive reference may be a reflection of a friendship rather than stellar work.

When Should the Applicant be Given a Non-Compete Agreement?

In Minnesota, a reasonable non-competition agreement that is signed at the commencement of employment is enforceable because it is given in exchange for getting the job. When the circumstances suggest, however, that the non-compete was not a part of the package offered and accepted, it is considered to be without consideration even if signed before employment begins. Accordingly, the latest time at which the applicant should be informed of the non-compete (*i.e.*, given a copy) is **in conjunction** with the offer of employment. It is important to avoid the situation where the applicant gives notice of resignation to a current employer and **then** learns about the requirement of signing a non-compete.

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Besides a Non-Compete, What Should be Part of the Offer?

The offer needs to set out everything upon which the offer is contingent. This could include: verification that the applicant is not bound by a non-compete, successful completion of a pre-employment drug screen, successful completion of a background check, execution of an employment agreement (which should be attached), or verification of licenses. Eligibility to work in the United States does not need to be included because the applicant will be hired before the I-9 process is completed. The offer needs to clearly state that employment is at-will (or should attach an agreement that provides for limitations on the right to terminate). The offer should include the start date and the location where the applicant should report to work. The job title, person to whom the individual will report, FLSA status, and hours expectations should be included. A statement of the compensation is important, but benefits only need to be spelled out if they were raised

as an issue during the interview process, differ from what is offered to other employees, or have a unique feature that needs to be explained.

What Happens If an Employee's I-9 Papers Were False?

The I-9 process protects employers from liability for employing an illegal worker. Unless the documents are obviously fraudulent (e.g., wrong number of digits in social security number, bad “Photoshopping” job, clear erasures, standard text misspelled), the employer should accept the documents and proceed. There is no liability if the employer did not have actual knowledge or if the documents were not blatantly falsified.

Conclusion

Hiring one person to do a job usually means rejecting many other candidates. Careful planning and adherence to the law can help identify the best candidate while minimizing claims by other candidates.

