

Interviewing Job Applicants and Reducing the Risks of Reference Checking and Background Investigations

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Published on www.lorman.com - January 2019

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I. INTERVIEWING JOB APPLICANTS

After the application stage, the hiring process normally leads to the interview. Managers and supervisors with hiring responsibilities should be thoroughly trained in how lawfully to interview job candidates.

A. Questions an Interviewer Should Not Ask a Job Applicant

1. Do not ask the applicant how old he or she is.
2. Do not ask the applicant his or her date of birth.
3. Do not ask the applicant how long he or she has resided at his or her present address.
4. Do not ask the applicant what his or her previous address was.
5. Do not ask the applicant what church he or she attends or the name of his or her priest, rabbi or minister.
6. Do not ask the applicant what his or her father's surname is.
7. Do not ask the female applicant what her maiden name was.
8. Do not ask applicants whether they are married, divorced, separated, widowed or single.
9. Do not ask applicants who resides with them.
10. Do not ask applicants how many children they have.
11. Do not ask the ages of any children of applicants.
12. Do not ask who will care for children while the applicant is working.
13. Do not ask how the applicant will get to work, unless owning a car is a job requirement.
14. Do not ask the applicant where a spouse or parent works or resides.
15. Do not ask the applicant if he or she owns or rents his or her place of residence.

16. Do not ask the applicant the name of his or her bank or any information as to amount of loans outstanding.
17. Do not ask the applicant whether he or she ever had his or her wages garnished or declared bankruptcy.
18. Do not ask the applicant whether he or she was ever arrested.
19. Do not ask the applicant whether he or she ever served in the armed forces of another country.
20. Do not ask the applicant how he or she spends his or her spare time or what clubs he or she belongs to.
21. Do not ask the applicant what foreign languages he or she can speak, read or write (unless job requirement).
22. Do not write anything on the application form, except, if so desired, information as to:
 - a. Date to begin work, department.
 - b. Job related reason for rejection such as inability to do work, inability to work required hours, not legally permitted to work in U.S.A., no working papers or work permits, obviously under influence of intoxicants or drugs at time of interview.
23. Do not ask the applicant if he or she is for or against unions or whether the applicant was ever a union member.
24. Do not ask the applicant about prior work-related injury or illness.
25. Do not ask the applicant whether he or she has a disability.
26. Do not ask the applicant whether he or she has ever filed a workers' compensation claim.

B. Questions Related to Religious Beliefs

Both federal and state law prohibit questions during a job interview about a person's religious beliefs and practices. The EEOC's Religious Discrimination Guidelines specifically

discuss how an employer may question an applicant about religious limitations on his or her availability to work during scheduled working hours.

C. Questions Regarding Disabilities and Reasonable Accommodation

Under the Americans With Disabilities Act (“ADA”), employers are prohibited from discriminating on the basis of disability against employees and job applicants. The EEOC has issued guidelines on pre-employment inquiries under the ADA. Generally speaking, an employer may not ask a job applicant at the pre-offer stage any "disability-related" question, that is, any question that is likely to elicit information about a disability. Employers are also forbidden from requiring applicants at the pre-offer stage from submitting to a procedure or test that seeks information about physical or mental impairments or health.

Employers may ask an applicant whether he or she will need reasonable accommodation to complete the hiring process. Employers also may inquire about how an applicant would perform the job, including reasonable accommodation, under certain limited conditions, including when the disability is obvious, when the applicant has voluntarily disclosed a disability, and when the applicant has voluntarily disclosed the need for reasonable accommodation.

The guidelines "take a common sense approach" to allow employers to address reasonable accommodation under limited circumstances at the initial interview stage. Initially, the EEOC had advised that employers were not permitted to make any inquiries at the interview stage about whether an applicant would require reasonable accommodation to perform the essential functions of the position.

In question and answer format, the revised guidelines discuss the ADA's prohibition against asking disability-related questions at the various stages of the hiring process. The guidelines

provide specific examples of questions that may and may not be asked about drug and alcohol use and workers' compensation history, for example. They also provide guidance on the use of medical examinations and other types of pre-employment tests.

II. REDUCING THE RISKS OF REFERENCE CHECKING AND BACKGROUND INVESTIGATIONS

In recent years, employers have faced a growing number of lawsuits by individuals who claim they have been injured by false, misleading, or prejudicial information provided by former employers during the pre-employment investigation process. As a result, employers have increasingly restricted the amount of information that they will provide about job applicants. While this may protect the former employer from a defamation or invasion of privacy lawsuit, it leaves the prospective employer to make hiring decisions without critical information about the applicant and to face the possibility of unknowingly hiring an individual with a history of employment problems, which may include disruptive or violent behavior.

Employers face the potential for negligent hiring or negligent retention liability if they fail to conduct an adequate pre-employment investigation into an applicant's background. If an employee has a history of misconduct indicating a propensity for violent behavior or other misconduct that an employer could have discovered through a background investigation, the employer could be liable for resulting injuries. Failing to adequately investigate prior to hiring can expose the employer to liability for actual injuries, pain, suffering, and even punitive damages under "common law" theories of negligence. An employer incurs a similar risk if it fails to take action against an employee after knowing or suspecting that an employee poses a risk of harm to co-workers, customers, or others.

In addition to the "rank, file, and salary" information often provided as the only response to a reference check from a former employer, a prospective employer may broaden the search to include public records on felony and misdemeanor convictions. However, even if a search turns up a criminal conviction, its use is limited to situations where there are job-related reasons for disqualifying an applicant due to misconduct, such as criminal negligence, assault, battery, fraud, theft, and other crimes involving violence or dishonesty.

While this information is generally available to the public, searching through public records is a time-consuming task. Consumer reporting agencies, investigative services and other document and information retrieval services may be helpful but costly. For that reason, it is advisable to devise guidelines as to when such additional information is necessary. Such guidelines should be applied consistently and uniformly to avoid any appearance of discrimination or unfair treatment of certain job applicants. Additionally, the federal Fair Credit Reporting Act, as well as some state laws, require employers to provide applicants with specific notice and to disclose certain information obtained from consumer reporting agencies, and an applicant's credit history may only be used in making hiring decisions if the information is reasonably related to the position being sought. Again, guidelines may help to streamline the process and assure consistency and fairness. (See, discussion above on pre-employment screening for more information on the FCRA.)

Even if an employer is willing to spend the time and money on this kind of background investigation, these sources may not yield the type or depth of information that is critical when making the important decision to hire or not to hire the applicant. This kind of information is most often available only from a former employer. However, as mentioned above, employers have a reluctance to provide information about former employees beyond confirming

dates of hire and termination. They fear reprisal if statements or opinions are viewed as negative, unfair, not supported by the facts, or overly critical.

A. Navigating the Obstacles to Reference Checks

Employers are not without recourse to obtain information to screen out individuals with records of criminal conduct or other undesirable behavior and to conduct background investigations of applicants to avoid the pitfalls of negligent hiring. As mentioned above, using a reliable document search or investigative service or credit reporting agency may be appropriate for certain positions involving high degrees of trustworthiness, honesty, sensitivity, or fiduciary responsibilities.

Short of taking such steps, employers can make use of the basic information that a job applicant provides as part of completing an employment application. First, all information regarding educational experience, degrees and licenses held, and employment history should be verified. Second, all references should be checked, both business and personal. Third, all applicants should sign a consent and release form giving the employer permission to check references and releasing it from all claims that might arise as a result. The application should state that all information will be verified and all references will be checked. It should also state that any information will be kept confidential and only communicated to those individuals who are directly involved in the screening and hiring process. The applicant should be asked to sign the statement as part of completing the employment application. The statement may be amended to the application or be part of a separate acknowledgment that also states that employment is "at will" and may be terminated at any time by either party.

Employers should also establish a standard procedure for interviewing and evaluating applicants, including checking references and verifying information. Interviewers and others involved in the hiring process should be trained in how to conduct an effective and lawful interview. Once all information has been gathered and verified to the extent possible, the applicants should be evaluated based on all relevant, job-related factors in light of the requirements for the position and the staffing needs of the facility.

B. Checklist to Help You Avoid Mistakes in Hiring

To help employers avoid mistakes when hiring employees, Jackson Lewis has developed the following checklist. The basic procedures outlined below may reduce the chance that hiring decisions could lead to allegations of mismanagement, unwanted negative publicity, and unlimited liability.

I. INITIAL MEETING

1. _____ Provide application, which has been reviewed by legal counsel, to prospective employee.
2. _____ Meet applicant face-to-face in private area.
3. _____ Review the blank application to explain information required and answer applicant's questions.
4. _____ Tell prospect to answer all questions and provide complete information.
5. _____ Carefully review completed application.
6. _____ Confirm accuracy of spelling and addresses concerning past employment, references, educational institutions, etc.
7. _____ Determine applicant's residence and how long he/she has lived there.
8. _____ Ask the applicant about any gaps in his/her employment history.

9. _____ Ask the applicant if you will need additional information from him/her concerning any change of name, nickname, or use of an assumed name to allow you to check references and work record.
10. _____ Review the applicant's educational training if it has a bearing on the job for which he/she applies.
11. _____ Ask if the applicant has been convicted of a crime. (You may not ask if an applicant has been arrested). You should explain to the applicant that a conviction of a crime will not automatically bar employment. In determining whether or not to deny employment based on an applicant's conviction of a crime, you must consider the following facts:
 - a. the relationship of the crime to the job duties;
 - b. the nature, number and circumstances of the offense(s) for which the individual was convicted;
 - c. the length of time intervening between the conviction(s) and the employment decision;
 - d. the individual's employment history; and
 - e. the individual's efforts at rehabilitation.
12. _____ If the applicant's duties will require driving, ask him/her for a valid driver's license and the driving record. (In many states, you can obtain a driving "abstract" for an applicant from the state Department of Motor Vehicles. You should call the local DMV to determine what information is available and how you can get it.)
13. _____ Ask the applicant to sign a statement on the application form giving the employer permission to check all references and obtain information from previous employers. The statement should also release previous employers and all others from liability for any information that is provided.

II. AFTER THE INITIAL MEETING

1. _____ Check all personal/character references of the applicant. If you discover the references are generally family members, for example, ask the applicant for other references.

- a. _____ How do they know the applicant?
 - b. _____ How long have they known him/her?
 - c. _____ Upon what is the reference based? (personal observation/secondhand information).
 - d. _____ Do you need to ask the applicant for more current references?
 - e. _____ Document all comments you receive.
2. _____ Check all professional/employment references.
- a. _____ Determine job duties. (Do they coincide with those on the application?)
 - b. _____ Determine length of employment.
 - c. _____ Determine reasons applicant left previous job.
 - d. _____ Determine if former employer was satisfied with applicant's performance.
 - e. _____ Document all comments you receive.
3. _____ Confirm educational information provided by applicant.
4. _____ Order a copy of the applicant's driving record, if driving is required for the job.
5. _____ If you are concerned about the applicant's criminal past and its effect on fitness for the job, you may want to obtain a copy of the applicant's criminal record. Each state has different rules concerning the availability of these public records. Some possible sources of information are: the State Police, the Office of the State Attorney General, offices of the County Clerk in counties throughout the state, District Attorneys' offices, and your attorney.
6. _____ Request a consumer credit report from a consumer reporting agency, if necessary. (However, you must comply with the Fair Credit Reporting Act and applicable state laws.)

7. _____ Speak with the applicant again if you need clarification or additional information.
8. _____ Review the application and the information about the applicant with other decision-makers within the organization. Caution: Only those individuals within the organization who have a reason to know the information should be included in this review.
9. _____ Discuss the applicant in detail. Discussion should be limited to the requirements of the position and the applicant's suitability for that position.
10. _____ Make a decision based on all relevant and job-related factors as to which candidate is best qualified for the job.

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