



# Hiring

## Who, What, Why . . .

*Who does it apply to:* Every employer, but especially those subject to discrimination laws (over 15 employees).

*What pre-search considerations are there:* There are a lot of things to consider before you even announce a job. You should determine if you will search internally, outside the company, through the newspaper, or use the internet. Whatever you select, make sure that your posting reaches all demographics. For example, considering only local residents in an almost all black neighborhood would be discriminatory toward Hispanics. Prepare your job description in advance and base it on the actual needs of the position and not your personal views. Just because a job is physically demanding is not a reason to exclude people over 40. Make sure you use an application form that does not suggest discrimination or ask for information on protected characteristics such as age and religion.

*What should I know about checking references:* Most employers are afraid to give up any information on past employees for fear of being sued for defamation. Some of this concern can be allayed by requiring applicants to sign a consent permitting former employers to share. Additionally, you can inform the former employer of the protection under Tex. Lab. Code §§ 103.001 – 103.005 that makes employers immune from liability unless they lie.

*Can I consider criminal history:* You may, but businesses providing in-home services or residential deliveries are required to do so by law. Note that background check companies are only allowed to give history for the past 7 years unless the job pays more than \$75,000.00 or involves selling insurance.

*Should I “google” applicants:* It seems that everyone has an “internet persona” these days and many employers have taken to searching Google® for information about potential applicants. While the search is potentially harmless, it may yield information that an employer should not consider such as a person’s participation in a particular church.

*Are credit checks allowed:* Many employers like to run credit checks on applicants. It is allowed, but there are some things to be aware of. First, it is not legal to allow a prior bankruptcy to influence your decision to hire. Next, you absolutely must make the applicant aware that you are running a check and may use the results in your hiring decision. Additionally, you need written consent which should be on a separate dedicated form. Finally, if you use the report as a basis not to hire, you have to give the applicant the report and an explanation of their rights.

*What considerations are there for the actual interview:* Be careful to avoid questions that could be interpreted as giving you a discriminatory bias. You can’t avoid noticing the person’s race and sex, but avoid other protected characteristics such as pregnancy, military status, religion, national origin, and age. Focus on objectively determining the person’s ability for the job and getting to know their personality. If you do your job descriptions right (see last month’s EH piece), they can be a tool for avoiding discrimination. Use it as a checklist to gauge applicants and hold on to the results.

*Is there anything I should do for applicants I do not hire:* You are best off not to communicate with them. If you have to, keep it brief and say the candidate hired was a “better fit.” Internally, document your reasons for not hiring each candidate you passed on. The EEOC requires that you retain the records for at least a year and I would advise keeping them three to get past any statutes of limitations.

*Can I test an applicant’s physical ability to perform the job:* The government came up with an effective way to isolate employment decisions based on disability. Businesses cannot ask disability-related questions or give pre-employment physicals until after a prospective employee is given an offer of employment, conditional only on the physical screening. All other background checks and other impediments to hire must be passed before testing may begin. If an employer decides not to hire the applicant based on the results of the exam or because of a disability, they must give the applicant the reason within ten days.

*When can I start drug testing:* You can drug test potential new hires. You need to be sure to use a licensed testing company that confirms its results with a gas chromatograph and be sure to get written consent from the applicant.

*Are pre-employment polygraphs legal:* See the EH piece on the Employee Polygraph Protection Act. Simply put, you cannot give a polygraph but there may be other pen and paper psychological tests that give comparable results.

### **Common Situations:**

*The Pepsi® challenge:* Can you refuse to hire any person for any position because they have been arrested or convicted of a criminal offense? Pepsi® found out: No. The EEOC considers it potentially discriminatory to use arrest and criminal conviction histories as a blanked basis not to hire someone. The EEOC's logic? Blacks are arrested and convicted of crimes more often than any other race. Unless the business can demonstrate some sort of business necessity for considering them as a factor, they should not be used.

*User ID and password, please:* Calvin Cautious requires job applicants to hand over their Facebook® password so he can review their account for indiscretions before hiring them. Is Calvin out of bounds? It depends on your point of view. Facebook has a policy that its members cannot share their password with anyone. Of course, the applicant is the only one who would suffer for violating the policy. Even so, it just does not feel right to ask an applicant to violate policies to get a job working for you. What message does that send? Of course, that doesn't mean you cannot require the applicant to "friend" you so that you can see their profile. If you do though, be wary

because you may be exposed to information about protected characteristics you do not want to know about.

*No openings at this time:* Saul's Supermarket gets applications non-stop even when it is not hiring because the front office clerk keeps giving them out. Saul goes through the applications about once a month and tosses out the ones he does not like and holds on to those he does. Has Saul done anything wrong? Of course you know I would not have floated this point unless there was a problem. Employers who "cherry pick" applications to hold may be perceived as discriminating because they are not giving equal consideration to all applicants. In the hands of an angry prospective employee, that might be enough for a claim that becomes a lawsuit. Either toss them all or keep them all.

### **What should I do:**

*Good:* Make sure your application form is neutral in its questions. Obtain consent for all background checks with clear notification that it may be the basis of an employment decision. For applicants under 18, get parental consent.

*Better:* In addition to the items above, prepare a formal job description before beginning the hiring process. Have applicants answer on paper about their ability to meet the requisites of the job description and sign off on it. If they lie about their qualifications or overstate them, you will have great evidence to use to defeat their unemployment benefits claim.

*Best:* All of the above, plus have your counsel review your application forms, consents, and pre-hire testing procedures. Also, consider hiring a third party to do internet checks to get information sanitized for protected class information.



Michael Kelsheimer is a Shareholder in the employment law section at Looper Reed & McGraw where he is joined by a number of employment law attorneys with experience in all areas of employment and labor law. Michael recognizes that the cost and expense of litigation makes resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@lrmlaw.com](mailto:mkelsheimer@lrmlaw.com) or by phone at 214.237.6346