

LABOR & EMPLOYMENT AND WORKERS' COMPENSATION SEMINAR 2006

THE APPRENTICE: HOW TO LEGALLY HIRE THE RIGHT CANDIDATE

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A. INTRODUCTION

As the make-up of today's workforce continuously and dramatically changes, employers are faced with many new challenges. Among the challenges is the need for employers to ensure that they are in compliance with numerous federal, state and local employment-related laws. Employers should be aware of the various rights and protections that employees, as well as job applicants, are afforded. Therefore, before undertaking any hiring or recruitment process, employers should be mindful of the applicable laws and prepare a "pre-hiring assessment" of essential and non-essential job requirements and qualifications for the position.

Employers should consider the following:

- ❑ What are the duties associated with the position?
- ❑ What are the physical requirements of the position?
- ❑ What are the essential functions of the position?

B. EMPLOYMENT LAWS TO CONSIDER

1. The Americans With Disabilities Act and The Minnesota Human Rights Act

The Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA) both prohibit discrimination against a qualified individual with a disability. An individual with a disability is considered qualified if he or she can perform the essential



functions of the job with reasonable accommodation (MHRA), or with or without a reasonable accommodation (ADA). Therefore, in order to determine whether an applicant is entitled to a reasonable accommodation to perform the job, it is important to determine what functions of the job are considered “essential” and what functions are not.

Under the ADA, “essential functions” are defined as the fundamental job duties of the employment position the individual with the disability holds or desires. Many times, in deciding the essential functions of a position, courts will consider:

- ❑ The employer’s judgment as to what constitutes the essential functions of a job.
- ❑ Written job descriptions prepared prior to advertising or interviewing applicants.
- ❑ The amount of time spent on the job performing the function.
- ❑ Consequences if the prior employee did not perform the function.
- ❑ Work experience of the incumbent employee in the job.
- ❑ Current work experience of the incumbent employee in similar jobs.
- ❑ Attendance. Many times, employers ask if attendance can be an essential function of the position—and the answer is "yes," and courts recognize this as an essential function of the position.
- ❑ What are the non-essential functions of the position?
- ❑ What are the physical requirements of the position?
- ❑ What are the mental/cognitive requirements of the position?
- ❑ What are the educational requirements of the position?

Employers always should consider four things when interviewing and, possibly, hiring a job candidate:

- Experience
- Education/certification
- Job-related experience, abilities and skills
- Personality traits

Under both the ADA and MHRA, a job applicant is entitled to a reasonable accommodation *upon request*. This reasonable accommodation may include providing large-print applications or assistance in completing an application. Employers should inform prospective applicants that they should provide advance notice of the need for an accommodation in the interview or testing process.

Further, the ADA and MHRA also permit employers to test applicants, as long as the tests given to applicants with sensory, verbal or manual skill impairments do not require use of an impaired skill unless the test is specifically designed to measure that skill (i.e., lifting). Employers must provide reasonable accommodations to qualified disabled applicants who request them. For example, oral tests and instructions should be given in writing for persons with a hearing impairment. Also, tests in large print or in Braille should be made available to visually impaired individuals. Finally, employers should provide extra time to complete the test for individuals with learning disabilities or impaired writing skills.

2. Title VII of the Civil Rights Act and the MHRA

Both Title VII and the MHRA make it illegal for employers to make any hiring decisions, including advertising, which reflect a preference or discrimination with respect to a candidate's:

- Race
- Gender
- National origin
- Religion
- Creed
- Age
- Disability or perceived disability
- Marital status
- Sexual orientation
- Status with regard to public assistance

- ❑ Veteran's status
- ❑ Membership on a local Human Rights Commission

Employers are specifically prohibited from inquiring into an applicant's protected class status. For example, employers cannot request or require an applicant, either on a job application or during an interview, to disclose his or her

- Race (i.e., "You have a beautiful skin color—do you tan?")
- Religion (i.e., "Are you involved in any church activities?")
- Sex (i.e., "You're not planning on getting pregnant anytime soon, are you?")
- National origin (i.e., "That's an unusual last name—where is it derived from?")
- Age (i.e., "When did you graduate from high school?")
- Marital status (i.e., "So what do you like to do on the weekends with your husband/wife?")
- Sexual orientation (i.e., "Tell me about your wife/husband.")
- Other protected class status (See pp. 9-12).

According to both the Equal Employment Opportunity Commission (EEOC) and the Minnesota Department of Human Rights (MDHR), each of these questions creates a strong presumption of discrimination.

Finally, employers cannot obtain information from another source about the individual's protected class status. In other words, an employer cannot call a current or former employer to find out the applicant's age, marital status, or whether they received workers' compensation benefits.

3. Negligent Hiring

Employers must also protect themselves from persons who have demonstrated a propensity for violence or harm towards others. Minnesota recognizes a cause of action for negligent hiring when the claimant's injuries are the result of the employer's failure to take

reasonable precautions to protect the claimant from the misconduct of its employees. *M.L. v. Magnuson*, 531 N.W.2d 849, 856 n.3 (Minn. Ct. App. 1995) (citing *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 n.5 (Minn. 1993)). Liability is based on an employer's failure to exercise reasonable care in hiring an individual that the employer knew, or should have known, was incompetent or not fit for the particular employment, thus exposing co-workers or third parties to an unreasonable risk of harm. Although the anti-discrimination statutes may limit what an employer may ask applicants, it is still necessary for the employer to be thorough when investigating an applicant's background (a topic for another day). If the employer is less than thorough, it may leave itself open to a negligent hiring claim.

C. **PRE-HIRE SCREENING**

1. Reference Checks on Applicants

- a. Do thorough reference checks with all prior employers.
- b. Be alert for vague responses.
- c. Questions to ask in reference requests are:
 - i. Was the employee discharged or terminated?
 - ii. Was the employee proposed for discharge?
 - iii. What was the result?
 - iv. Did the employee resign under any of the following circumstances:
 1. Following an investigation?
 - i) Pending discharge for resignation?
 - ii) Upon request?
 - iii) Pursuant to a separation/settlement agreement?

2. Background Checks

- a. The Argument For Background Checks

- i. Avoid liability
- ii. Avoid risk
- b. Constraints on Using Criminal Background Checks
 - i. Public policy favors giving rehabilitated individuals another chance.
 - 1. Offender's Rehabilitation Act. A prior conviction may not be used to disqualify a person from either public employment or any position for which a license is required unless the conviction directly relates to the position sought. *See* Minn. Stat. § 364.03, subd. 1. Nonetheless, even if the position and the crime are directly related to each other, a convicted individual must be permitted the opportunity to show evidence of rehabilitation and present fitness for the job. *See* Minn. Stat. § 364.03, subd. 3.
 - 2. Anti-discrimination Statutes. Potential disparate impact. The EEOC has taken the position that an employer who rejects an applicant because of a prior conviction must show that its decision was justified by a consideration of the nature and gravity of the offense, the timeliness of the conviction and the nature of the job in question.
- c. Obtaining Criminal Records
 - i. An employer may access criminal records at individual county offices without obtaining the applicant's release.
 - ii. After obtaining a signed release from the applicant, an employer may obtain criminal records on a statewide basis through the Bureau of Criminal Apprehension (BCA) at 651.642.0610. An applicant's federal criminal history may also be obtained through the BCA provided the inquiry is permitted by statute.
- d. Reviewing Criminal Records
 - i. Information about previous convictions should be evaluated based on the following factors:
 - 1. the time, nature and number of conviction(s);

2. the relationship of the conviction(s) to the position sought;
3. the amount of time since the conviction(s) occurred;
4. the applicant's employment history before and after the conviction(s);
5. the facts surrounding each offense; and
6. the applicant's efforts at rehabilitation.

3. Skill Testing

- a. The use of such testing is not prohibited; however, employers should be aware that the use of such tests has become increasingly regulated under state and federal law. Minnesota has adopted very stringent requirements that must be satisfied before skill testing may be used in the hiring process. Under Minnesota law, tests may only be used if:
 - i. They measure only "essential" job-related abilities.
 - ii. They are required of all applicants for the position, regardless of potential disability.
 - iii. They accurately measure the applicant's aptitude, achievement level, or whatever factor it is that the test is intended to measure, as opposed to the applicant's impaired sensory, manual or speaking skills.

D. CONDUCTING THE INTERVIEW

Having carefully considered the applicable federal and state laws prior to the recruitment process, employers must next determine how to conduct interviews in a manner that allows the employer to choose the most qualified candidate and remain in compliance with the various employment laws. Employers should consider the following when conducting interviews:

- **Consistency.** If all applicants are asked the same questions, applicants will have consistent treatment, making it unlikely for them to successfully claim differential treatment. It also ensures your ability to choose the most qualified candidate if you require all applicants to answer the same general set of questions.
- **Preparation.** Prepare your questions before conducting the interview and make sure there are no illegal questions.

- **Interviewing.** When interviewing the candidate, employers should focus on the candidate's qualifications for the position. Employers should consider:
 - the technical qualifications for the position.
 - the educational, as well as other, background relevant to the position.
 - the applicant's work experience.
 - the applicant's people skills.
 - the applicant's objectives and goals.

When conducting interviews, employers may want to consider asking some of the questions outlined below. Both the EEOC and MDHR have determined that the following inquiries are legal and acceptable.

- "Why would you like to work here?"
- "Where else have you worked?"
- "What job(s) have you held?"
- "What will your supervisor at XYZ tell me about your performance?"
- "Why did you leave XYZ?"
- "What do you think you did particularly well when you were at XYZ?"
- "Where, do you think, was there room for improvement in your performance at XYZ?"
- "Have you ever been discharged or asked to resign from any job?"
- "How well did you get along with your co-workers at XYZ?"
- "What positive things do you think you could bring to this position?"
- "Have you ever been warned or suspended for violating a company work rule?"
- "How did you do in your training course?"

Employers must also be careful to avoid any questions that would be considered illegal under state or federal law. As mentioned earlier, these "prohibited inquiries" could lead to a

strong presumption of discrimination. Below is a table that reiterates the illegal inquiries that an employer may not make, along with the legal inquiries (if any) that are permissible:

ISSUE	ILLEGAL INQUIRIES	LEGAL INQUIRIES
Age	<ul style="list-style-type: none"> • Age • Date of birth • Date of graduation from high school or college • Any inquiry for the purpose of excluding persons of a particular age. • Examples: <ol style="list-style-type: none"> (1) What are your retirement plans? (2) How long do you plan to work? (3) How can someone so young handle this job? 	<ul style="list-style-type: none"> • Whether the candidate meets the minimum legal age requirements
Arrest Record	<ul style="list-style-type: none"> • Inquiries about prior arrests and circumstances are not per se illegal, <i>however:</i> <p>Note: EEOC and many states prohibit use of arrest records for employment decisions because they are inherently biased against applicants in protected classes.</p>	<ul style="list-style-type: none"> • Inquiries about felony convictions that relate to performing a particular job.
Availability to work	<ul style="list-style-type: none"> • Inquiries directed only to persons of one sex • Inquiries about religious observations • Inquiries about child care responsibilities 	<ul style="list-style-type: none"> • Inquiring of all candidates whether they can work the hours scheduled
Citizenship	<ul style="list-style-type: none"> • Inquiries related to whether the candidate is a citizen of the United States 	<ul style="list-style-type: none"> • Inquiries as to whether the candidate is legally entitled to work in the United States
Conviction Record	<ul style="list-style-type: none"> • Inquiries regarding convictions that do not relate to performing the particular job at issue 	<ul style="list-style-type: none"> • Inquiries about felony convictions that relate to performing a particular job. <i>Include disclaimer stating that a conviction does not bar a candidate from consideration.</i>

ISSUE	ILLEGAL INQUIRIES	LEGAL INQUIRIES
Credit Rating	<ul style="list-style-type: none"> Any inquiries regarding charge accounts, credit rating, etc. that do not relate to performing the particular job at issue 	<ul style="list-style-type: none"> Specific inquiries about credit rating that reasonably relate to performing the particular job at issue
Disabilities	<ul style="list-style-type: none"> Any inquiries that elicit information about disabilities or health Examples: <ol style="list-style-type: none"> Do you have any medical limitations that would prohibit you from performing this job? How many days were you out sick from work in your last job? Have you ever sought medical treatment for a mental health condition? 	<ul style="list-style-type: none"> May ask an applicant whether s/he can perform essential functions of the job with or without reasonable accommodation. If there is a known disability, an employer may ask an applicant to describe or demonstrate how s/he would perform the job, with or without reasonable accommodations.
Drinking	<ul style="list-style-type: none"> Inquiries relating to a candidate's use of alcohol 	<ul style="list-style-type: none"> None
Financial Status	<ul style="list-style-type: none"> Inquiries regarding whether candidate owns a car If wages have ever been garnished, unless financial considerations for the job in question exist Note: These questions are not per se illegal, but have been identified as likely to have a disparate impact. 	<ul style="list-style-type: none"> Credit references may be used if in compliance with the Fair Credit Reporting Act of 1970 and Consumer Credit Reporting Reform Act of 1996.
Foreign Language	<ul style="list-style-type: none"> Inquiries regarding how fluency in a foreign language was obtained 	<ul style="list-style-type: none"> Inquiries as to whether the candidate is fluent in another language, if required for the position
Height or Weight	<ul style="list-style-type: none"> In many jurisdictions, any inquiries about height or weight of a candidate unless bona fide occupational qualifications (BFOQ) exist 	<ul style="list-style-type: none"> Inquiries about height or weight if BFOQs exist
Home Ownership	<ul style="list-style-type: none"> Any inquiries about whether the candidate owns or rents his/her home Note: These questions are not per se illegal, but have been identified as likely to have a disparate impact. 	<ul style="list-style-type: none"> None

ISSUE	ILLEGAL INQUIRIES	LEGAL INQUIRIES
Marital and Family	<ul style="list-style-type: none"> • Child care issues • Unwed motherhood • Spouse’s preferences regarding job conditions • Inquiries indicating marital status • Number of children • Pregnancy • Maiden names or request to circle Miss, Ms., Mrs. or Mr. • Spouse’s protected characteristics 	<ul style="list-style-type: none"> • Whether all candidates can meet work schedule of job. • Whether all candidates have activities, responsibilities or commitments that may hinder meeting attendance requirements.
Military Record	<ul style="list-style-type: none"> • Fact of service • Type or condition of military discharge, unless it is the result of a military conviction 	<ul style="list-style-type: none"> • Type of experience and education in service as it relates to a particular job.
Name	<ul style="list-style-type: none"> • Inquiries about the origins of a name (e.g., "That’s an interesting name – is it Dutch?") • Inquiries about prior martial status (e.g., "Is Robinson your maiden name?") 	<ul style="list-style-type: none"> • Whether candidate has ever worked under a different name (for purposes of checking references)
National Origin	<ul style="list-style-type: none"> • Lineage • Ancestry • Descent • Mother language • Birthplace • Citizenship • National origin of spouse or parents 	<ul style="list-style-type: none"> • Whether candidate is legally eligible to work in the United States. • Investigating the applicant’s ability to read and write English when required for a specific job.
Organizations	<ul style="list-style-type: none"> • Inquiries about memberships to determine the race, color, religion, sex, national origin, age or other protected class of the candidate 	<ul style="list-style-type: none"> • Inquiries that do not elicit discriminatory information. • Inquiries about membership in professional organizations relating to the job.

ISSUE	ILLEGAL INQUIRIES	LEGAL INQUIRIES
Race or Color	<ul style="list-style-type: none"> • Specific race • Complexion or color of skin • Height or weight where it is not job related 	<ul style="list-style-type: none"> • None
Religion	<ul style="list-style-type: none"> • Religious preferences • Religious affiliations • Religious denominations 	<ul style="list-style-type: none"> • Whether candidate can meet work schedule of job.
Sexual Orientation	<ul style="list-style-type: none"> • Sexual orientation of candidate 	<ul style="list-style-type: none"> • None
Smoking	<ul style="list-style-type: none"> • Inquiries as to whether, or how much, candidate smokes 	<ul style="list-style-type: none"> • May inform candidate of no-smoking rules or smoke-free environment
Welfare Experience	<ul style="list-style-type: none"> • Inquiries about candidate's history of receiving welfare 	<ul style="list-style-type: none"> • None
Workers' Compensation	<ul style="list-style-type: none"> • Inquiries about whether or not candidate has ever filed for workers' compensation or been injured at work 	<ul style="list-style-type: none"> • None

The Bottom Line: Employers who stick to seeking information that is truly relevant to the applicant's ability to do the job in question will avoid 90% of the legal pitfalls. If you cannot legally use the information, do not ask for it!

E. ADDITIONAL TIPS FOR MAKING THE MOST OF AN INTERVIEW

- Have a process (ideally in writing) for the interview and follow it.
- Set a comfortable tone—a “chat” with a purpose (not an interrogation).
- Be flexible. You should guide the interview from general to specific, sensitive to harmless, without losing track of where you are in the interview.
- Probe—follow up on hunches or unusual statements (“You know what that’s like.”).
- Avoid “magic questions” (If you could be any kind of animal, what would you be?).
- Prepare. Review resume/application, job description, etc.
- Ask open-ended, job-related questions.
- Focus the interview on things that are significant and important to the job.
- Concentrate on behavior—past performance is the best indicator of future performance.

- Documentation—be clear and careful.
- Silence
- Close the interview by thanking applicant for his/her time and explaining what happens next.
- Interview evaluation (rating sheets)
- It is okay to be supportive, nice, tactful and open as a person, but you must also be a straightforward, job-focused, reasonably structured information gatherer who is in control of the interview.

F. MOST COMMON INTERVIEWING MISTAKES

- Dropping too many hints—"This job requires attention to detail. Are you good at that?"
- Inaccurate job analysis—fitting the person to the job vs. hiring the person that fits the job.
- Asking obvious questions—"Do you get along well with people?"
- Asking illegal questions—"Are you married?"
- Focusing too much on applicant's self-assessment. Ask questions that provide substantive answers—"Tell me about the most difficult management decisions you had to make and how you handled the situation(s)."
- Fear of probing for information—"I was let go from my last job because of a personality conflict."
- Being over-influenced by first impressions—person went to unknown school and dresses "frumpy."
- Missing clues—stressing "big picture person" while you really need person to handle details.
- Relying too much on past credentials (e.g., grades)

G. POST-OFFER SCREENING

1. Drug/alcohol Testing

a. Applicants

- i. Minnesota law permits an employer to require applicants to submit to drug testing once they have been made a conditional offer of employment. Minn. Stat. § 181.951, subd. 2.
- ii. However, such testing can only be required if the employer has previously adopted a written drug and alcohol testing policy that is in conformity with Minnesota law. Minn. Stat. § 181.951, subd. (1), (7).
- iii. An employer may test for the use of illegal drugs/alcohol only if a test is required for all applicants in the position.
- iv. Applicant drug testing may be conducted if:
 1. It is conducted pursuant to a written policy that complies with Minnesota law (Minn. Stat. § 181.951, subd. 1);
 2. A conditional job offer has been made (Minn. Stat. § 181.951, subd. 2);
 3. A test is required of all job applicants offered the position (*Id.*);
 4. The applicant is given opportunity to explain a positive result within three days after a confirmatory re-test (Minn. Stat. § 181.953, subd. 6(c));
 5. If the employer has complied with all the provisions above, the offer may be withdrawn. (Minn. Stat. § 181.951, subd. 2).

2. Medical Examinations

- a. Pre-offer medical examinations are prohibited.
- b. Post-offer medical examinations are lawful if the examination tests only job-related requirements.
- c. If an employer requires an applicant or an employee to submit to a physical exam, the employer must bear the full cost of that examination. Minn. Stat. § 181.61.
- d. Health history questionnaires are prohibited under Minnesota law.

- e. Under Minnesota law, if any health care records or medical information adversely affects any hiring decision, the employer must notify the affected party of that fact within 10 days of the employer's final decision.
- f. Under state and federal law, all medical information on applicants (and employees) must be kept confidential.
 - i. Limited exceptions:

Medical information may be given to, and used by, decision-makers involved in the hiring process who need to know the information. The information also may be used for the purpose of determining reasonable accommodations for the individual. The information may be communicated to third parties for that purpose. *See EEOC, Enforcement Guidance on Preemployment Inquiries under the Americans With Disabilities Act.*
- g. Medical information must be kept in a separate file from employees' personnel files. The confidentiality obligation does not end when the person is no longer an applicant or employee. 42 U.S.C.A. § 12112(d)(3); *See EEOC, Enforcement Guidance on Preemployment Inquiries under the Americans With Disabilities Act.*

This is a general summary of the topics and is not a substitute for legal advice.