

Lawful Hiring of Employees

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A. Legal Guidelines Governing Employee Selection and Termination

All employers know that one of the most important decisions that they make is who to hire. Despite this fact, many employers approach the employee selection process in a haphazard manner. This is very troublesome because the selection process is one of the most fertile areas for employment litigation. Hiring decisions give rise to potential liability under Title VII of the Civil Rights Act of 1964,¹ civil rights claims,² the Age Discrimination in Employment Act,³ the Americans with Disabilities Act,⁴ the Fair Credit Reporting Act,⁵ the Immigration Reform and Control Act,⁶ the Rehabilitation Act of 1973,⁷ the Vietnam Era Veteran's Readjustment Assistance Act,⁸ the Utah Antidiscrimination Act,⁹ and the Utah State Personnel Management Act,¹⁰ to name just a few. Additionally, an employer's communication of a job offer can also give rise to potential employment contract claims. It is imperative, therefore, that employers carefully attend to their employee selection process.

¹ 42 U.S.C. § 2000e-2(a)(1).

² 42 U.S.C. § 1981.

³ 29 U.S.C. § 623(a)(1).

⁴ 42 U.S.C. § 12112(a)

⁵ 15 U.S.C. § 1681b.

⁶ 8 U.S.C. § 1324a.

⁷ 29 U.S.C. § 971

⁸ 38 U.S.C. § 4212

⁹ Utah Code Ann. §§ 34A-5-101 to -108

¹⁰ Utah Code Ann. §§ 67-19-1 to -42.

1. Pre-Employment Issues

a. Discrimination Issues

The application and interview process is a significant area of concern. The very purpose of the process is to eliminate unqualified applicants or applicants who simply would not work well in the particular employment environment. The process of selecting an employee, therefore, requires an employer to discriminate—to choose between candidates and decide whom it prefers. In most instances, an employer is entitled to make a hiring decision based on its own preferences.¹¹ An employer cannot, however, make a hiring decision for a statutorily prohibited reason.

Federal law prohibits discrimination on the basis of age, sex, race, color, national origin, religion, or disability. State law closely follows these discrimination prohibitions, except that it also prohibits discrimination on the basis of pregnancy, childbirth, or a pregnancy-related condition.¹² Federal law also prohibits discrimination based on veteran status, military service, and use of FMLA leave.

The Equal Employment Opportunity Commission (EEOC) and the courts have interpreted the law to prohibit pre-employment inquiries that have the effect of disproportionately screening out members of protected classes and are not valid predictors of successful job performance or cannot be justified by business necessity.¹³ These decisions and regulations have identified improper pre-employment inquiries that run afoul of the statute. In 1981, the EEOC's Office of Public Affairs published a booklet entitled "Pre-Employment Inquiries and EEO Law," now out of print, that was useful in explaining what inquiries were out of bounds. Although not currently comprehensive enough to include disability discrimination, the booklet is still useful in

¹¹ See generally *Berube v. Fashion Centre, Inc.*, 771 P.2d 1033, 1040-42 (Utah 1989). *Berube* involves the question of a termination at the will of an employer rather than the hiring of an employee. However, the principles involved in the termination setting are equally applicable to the hiring of employees. See *Philadelphia Electric Co. v. Human Relations Commission*, 448 A.2d 701, 708 (Pa. Commw. 1982) ("It has always been the rule that an employer may be selective about the persons he employs as long as he does not unlawfully discriminate among the applicants.")

¹² Utah Code Ann. § 34A-5-105(1)(a)(D). Federal law treats pregnancy related discrimination as sex discrimination.

¹³ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); 29 C.F.R. § 1607.

assessing the appropriateness of inquiries on applications and in interviews. It gave this guiding principle:

In devising or reviewing application forms or in seeking information from job applicants, employers should ask themselves: (1) Will the answers to this question, if used in making a selection, have a disparate effect in screening out minorities and/or members of one sex (i.e. disqualifying a significantly larger percentage of members of a particular group than others)? (2) Is this information really needed to judge an applicant's competence or qualification for the job in question.

It then specifically identified the following areas of concern:

- **Height and Weight Requirements.** These requirements are illegal if they screen out certain minority groups and the standards are not essential to job safety or performance.
- **Marital Status, Number of Children, and Provision of Child Care.** Inquiries regarding these issues often screen out women.
- **English Language Skill.** Inquiries are improper if language facility is not important to the job.
- **Educational Requirements.** Inquiries are improper if no direct job related requirement or business necessity can be proven.
- **Friends or Relatives Working for the Employer.** Such inquiries may be problematic if the effect is to hire relatives or friends to the exclusion of minorities. Additionally, anti-nepotism policies may have a disparate impact on women (in the instance of spouses not being permitted to work for an employer).
- **Arrest Records.** These inquiries are improper because certain minority groups are disproportionately arrested.
- **Conviction Records.** These inquiries are proper only if the conviction is related to a person's fitness for a particular job and only if accompanied by a statement that a conviction record will not necessarily be a bar to employment and that factors such as age and time of the offense,

seriousness and nature of the violation, and rehabilitation will be taken into account.

- **Discharge from Military Service.** Inquiries about honorable discharges from the military are improper because minority service members receive a higher proportion of general and undesirable discharges.
- **Age.** Age should not be inquired into except to assure that an applicant is old enough to comply with the child labor laws.
- **Citizenship.** This information should not be requested although proof of ability to work in the United States is appropriately obtained after an offer of employment is given to an employee.
- **Economic status.** Inquiries about bankruptcy, car ownership, rental or ownership of a house, length of residence, garnishment may be considered discriminatory.
- **Availability for Work on Weekends or Holidays.** Inquires about availability to work on particular days or holidays can be viewed as discriminatory to a certain religious group and thus should be avoided.
- **Data Required for Legitimate Purposes.** Martial status, number and age of children and similar matters which are necessary to insurance and reporting requirements should be gathered after employment is offered not during the hiring process.

The Utah Labor Commission, Anti-Discrimination and Labor Division, has promulgated regulations that include proper and improper pre-employment inquiries. The contents of the regulations¹⁴ are reproduced in table form here:

¹⁴ Utah Admin. Code R606-2-2.

AREA OF INQUIRY	PROPER PRE-EMPLOYMENT INQUIRIES	IMPROPER PRE-EMPLOYMENT INQUIRIES
Name	First, Middle, and Last Name and any other name used for prior employment.	Inquiry into original name cannot be used for discriminatory purposes. Inquiries concerning specific questions about the name which would indicate applicant's lineage, ancestry, national origin, or descent; or to require prefix to applicant's name, (Mr., Mrs., Miss, Ms.); or to inquire into marital status unless based on legitimate bona fide occupational qualifications or prior employment history are considered improper.
Address	Applicant's place of residence.	Inquiry into foreign addresses which would indicate national origin.
Birthplace	Proof of citizenship may be requested prior to hiring in accordance with the Immigration Reform and Control Act of 1986 (IRCA).	Inquire into birthplace of applicant, or birthplace of applicant's parents, spouse, or relatives. Require prior to hiring, birth certificate, naturalization or baptismal record.
Race or Color	None.	Any inquiry which would indicate race or color is prohibited.
Age	Are you under the age of 18? If there is a question as to applicant being of legal working age, proof may be requested in form of work permit.	Requesting an individual's date of birth prior to employment is prohibited, unless relative to whether the individual is a minor.

AREA OF INQUIRY	PROPER PRE-EMPLOYMENT INQUIRIES	IMPROPER PRE-EMPLOYMENT INQUIRIES
Disability	<p>a. an inquiry about ability to perform job-related functions as long as the questions are not phrased in terms of a disability.</p> <p>b. asking a job applicant to describe or demonstrate, with or without reasonable accommodation, his ability to perform job-related functions.</p>	<p>a. any inquiry whether an applicant is disabled or about the nature or severity of a disability.</p> <p>b. any requirement for an applicant to take a medical examination prior to an offer of employment.</p>
Sex	Where a bona fide occupational qualification is reasonably necessary to the normal operation of that business or enterprise.	Any other inquiry which would indicate sex or related conditions such as pregnancy or plans to have children. Inquiry into sex of applicant.
Photographs	Photograph may be requested only after hiring and then only for legitimate business purpose.	Any request for photograph prior to hiring is prohibited.
Religion-Creed	None.	Inquiry into an applicant's religious denomination, religious affiliations, church, parish, pastor, or religious holidays observed prior to hiring is prohibited.
Relatives	Inquiry into name and address and relationship of persons to be notified in case of emergency. For a minor it must be a parent or guardian.	Names and addresses of any relatives other than those listed as proper.
Organizations	Inquiry into organization memberships including professional, scientific and civic groups, but excluding any organization, the name or charter of which indicate the race, religion, color, sex, and national origin of its members.	Requirement that applicant list all organizations, clubs, societies, and lodges to which he belongs.

AREA OF INQUIRY	PROPER PRE-EMPLOYMENT INQUIRIES	IMPROPER PRE-EMPLOYMENT INQUIRIES
Notice in Case of Emergency	Name and address and relationship of “Persons” to be notified in case of accident or emergency.	Name and address of all others except those listed as proper.
References	Persons willing to give references.	Request of names of applicant’s bishop, pastor, or religious leader.
Military Experiences	Inquiry into applicant’s military experience or duties in United States Armed Forces.	To require copy of military discharge paper or type of discharge, unless such inquiry is based upon a bona fide occupational qualification.
Experience	Inquiry into work experience.	Any inquiries into work history which are not work-related.
Character	Permissible to ask applicant for character references.	Questions about applicant’s sexual preferences or economic status.
Number of Dependents	This information may be requested only after hiring for legitimate purposes.	Asking an applicant’s number of dependents prior to employment is prohibited.
Color of Hair or Eyes	None. Asking questions regarding hair color and eye color are not job relevant.	
Height and Weight	None.	It is unlawful for an employer to set minimum height or weight requirements for hiring unless based on a bona fide occupational qualification.
Education	Inquiry into what academic, professional, or vocational schools attended.	It is unlawful to ask specifically the nationality, racial, or religious affiliation of a school attended by the applicant.
Prior Arrest Record	None. It is not proper to ask about arrest records.	
Criminal Record	Have you ever been convicted of a felony? It is proper to ask about a felony conviction.	Inquiry advisable only if job related.

AREA OF INQUIRY	PROPER PRE-EMPLOYMENT INQUIRIES	IMPROPER PRE-EMPLOYMENT INQUIRIES
Economic Status	None.	It is generally prohibited to inquire as to bankruptcy, car ownership, rental or ownership of a house, length of residence at an address, or past garnishment of wages as poor credit ratings have a disparate impact on women and minorities.

B. Why Recruitment Documents and Advertisements Should be Kept After Hiring

Documents that are used to advertise available positions and upon which recruitment decisions are based can serve as good evidence of a lack of discriminatory intent in the hiring process. As discussed in part I.E above, lack of these records can be presumed to be discriminatory.

In a well-designed employee recruiting system, employers will have created specific job descriptions which include the following information:

- Job title
- Job location
- Overtime eligibility (exempt or non-exempt status)
- Summary of the job responsibilities, including purposes and typical duties
- Essential functions of the job, including specific necessary physical and mental requirements, tasks, duties, and responsibilities
- Nonessential job functions
- Minimum qualifications, including necessary skills, experience, and educational requirements
- Special training or credentials
- Description of the work environment, including any unique or hazardous conditions

When a job posting or advertisement has been placed, the advertisement will specifically reference the job description. In order to avoid liability concerns, the ad will have these attributes:

- State the employer's equal employment opportunity policy
- State the job title, general duties and responsibilities, company background, necessary skills, experience, and education required, and response information
- Avoid any statement that can indicate discriminatory intent, i.e., "youthful," "waitress," "bus boy."

Employers will also have specially designed application forms that only request information that is relevant to the particular job. Although use of a general form is appropriate, employers should be careful to limit the questions that an applicant is required to answer. For instance, if a person is applying to be a receptionist at a phone book distributing company with duties only to answer phones, it would be unnecessary to ask for a copy of his or her driver's license.

Interviews are where most problems arise. All employees who will be interviewing job applicants should be trained about proper and improper questions. Additionally, interviews should be conducted with a specific purpose in mind. Ideally, a standardized interview sheet that includes objective interview criteria should be used. The interviewer will note only objective, legal criteria in his or her notes.

Of course, any materials supplied by the applicant including resumes, references, writing samples, test results, etc., will be a part of the interview record.

Having gathered all of the available and relevant data on all of the applicants, the employer is required by law to keep copies of its advertisement and recruitment documents for two years if a public employer and one year if a private employer.¹⁵

C. Creating a Standardized Process for Handling Applications and Resumes

As discussed above, use of forms will greatly benefit an employer. Of even more significance will be an employment process that uses a consistent and standardized

¹⁵ See *supra* part I.E.

method to review applications and resumes and uses the same pool of employees to review those documents. By doing so an employer minimizes the risk of being accused of inconsistent hiring practices.

D. How Interview Records Can Protect Against Allegations of Unfair Hiring

Use of an interview record is an excellent tool to minimize allegations of unfair hiring. First, by use of a standard form, an employer is able to focus those interviewing applicants on relevant job qualifications and minimizes the risk that questions will be asked in improper areas. Second, the record allows the interviewer to focus more on objective criteria in weighing the strengths and weaknesses of the applicants. Third, a written record of an interview can substantially minimize spurious claims of improper and/or biased questioning in an interview.

E. Protecting the Company Through Applicant Testing, Verification, and Reference Checks

As the world becomes more and more specialized, employees feel less loyalty to their employers, and people become more and more litigious. Employers are finding it necessary to become more proactive in inquiring about the backgrounds of their clients. Where employers, such as banks, medical offices, law firms, accounting firms, have fiduciary duties to their customers and where employers employ people to drive vehicles or deal with the public in stressful positions, the threat of litigation over a careless hiring decision is real. Accordingly, many employers feel it necessary to do more thorough investigation of their applicants. Hence, employers are now more often conducting background checks of their job applicants and asking them to take drug tests.

1. Background Checks

Some employers use background checks to investigate the background of their employees who have fiduciary obligations, such as money management, driving duties, or have high-profile positions with the company. The Fair Credit Reporting Act applies to any of these background checks performed by a consumer reporting agency for an employer.¹⁶ The act requires that, if an employer intends to do a background check, the

¹⁶ See 15 U.S.C. § 1681a(d).

employer must notify the person in writing—in a document consisting only of the notice and nothing else—that a report may be used.¹⁷ The person must also authorize the procurement of the report.¹⁸

If an employer determines to refuse to hire a person on the basis of a background report, **before it takes any action** it must give the person a pre-adverse action disclosure which includes a copy of the report and a written description of the rights that person has under the Fair Credit Reporting Act.¹⁹ **After the adverse action is taken**, an employer must also (1) provide oral, written, or electronic notice of the adverse action, (2) provide the applicant the name, address, and telephone number of the consumer reporting agency that furnished the report and a statement that the consumer reporting agency did not make the decision and is unable to provide the specific reason for the adverse action, and (3) provide the applicant a notice of his or her right to obtain a free copy of the report for 60 days and the right to dispute with the consumer reporting agency the accuracy or completeness of the information furnished by it.²⁰

2. Drug Testing Issues

Utah law permits pre-employment drug tests.²¹ However, an employer must have a written drug testing policy in place and permit the prospective employee to review the policy prior to the test if he or she wishes.²² An employer should be careful to avoid any questions regarding past drug abuse, rehabilitation, or continuing treatment for past drug abuse. Such inquiries can run afoul of the ADA. Additionally, employers should be careful to establish a drug testing policy that avoids disclosure of medical information to all but the medical testing personnel and only after the drug test demonstrates a necessity for requesting the information to establish that no drug abuse has occurred.

¹⁷ *See id.* § 1681b(b)(2).

¹⁸ *See id.*

¹⁹ *See id.* § 1681b(b)(3).

²⁰ *Id.* § 1681m(a).

²¹ Utah Code Ann. § 34-38-3.

²² *Id.* § 34-38-7.



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D. Scott Crook, a founding partner of Smith Hartvigsen, represents both private and public sector employers and employees in most areas of employment law, including creation and negotiation of employment-related documents, including personnel policies, employee handbooks, employment agreements, severance agreements, and non-competition agreements. He has successfully handled employment contract claims, labor disputes, and discrimination claims in administrative agencies and courts at all levels, including the Equal Employment Opportunity Commission, Utah Anti-Discrimination and Labor Division, Merit Systems Protection Board, and the National Labor Relations Board.

Mr. Crook also has an active litigation and appellate practice, recently serving as chair of the Appellate Practice Section of the Utah State Bar. He has represented clients in state courts in Utah and Idaho, the Utah federal District Court, the Utah Court of Appeals, Tenth Circuit Court of Appeals, and Utah Supreme Court. He has lectured or written on employment law, constitutional matters, appellate practice, real property, and jury selection procedures.