

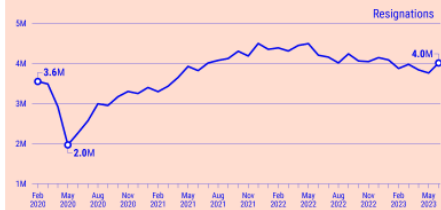
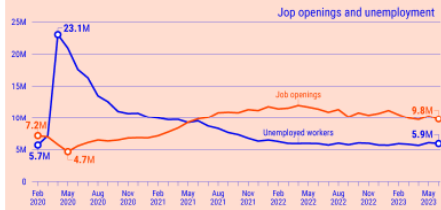
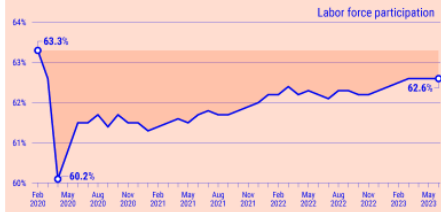
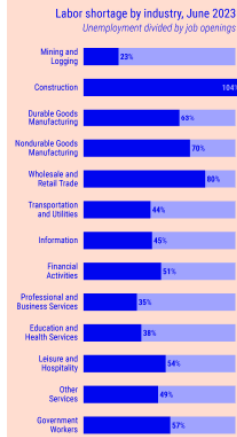
# To Hire or Not to Hire? Asking the Right Questions

- *Rich Cherry*
- *Leigh Schultz*
- *Brett Swearingen*



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## America's Labor Shortage



Sources: US Chamber of Commerce, Bureau of Labor Statistics

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3

## Today's Topics

- Understanding The Risks
- Finding the Right Pool of Applicants
- What NOT to Ask on Applications and During Interviews
- How to Lawfully Conduct Background Checks
- Pre-Employment Drug Testing

## FIRST: Always Beware of Discrimination Claims

## Unlawful Discrimination

It is unlawful to base any employment decision – including a decision to hire or not hire – on any protected status, classification or characteristic

**-OR-**

on past protected activity of the applicant

## Protected Statuses & Characteristics

- ⇒ Race & Color (including traits historically associated with race such as hairstyle and texture)
- ⇒ Sex
- ⇒ Religion
- ⇒ Age
- ⇒ Pregnancy, childbirth, or related medical conditions
- ⇒ Marital Status
- ⇒ Disabilities (actual, perceived or record of)
- ⇒ National Origin
- ⇒ Citizenship
- ⇒ Arrest Record
- ⇒ Military Status
- ⇒ Height
- ⇒ Weight
- ⇒ Sexual Orientation
- ⇒ Gender identity and expression

## Protected Activity

- Discrimination or retaliation claim made against past employer
- Past whistleblowing activity
- Past use of FMLA leave or need for accommodations
- Past union activity or other protected concerted activity

## Other Risk Factors

- “Disparate Impact”
  - Occurs when a selection criteria or test
    - (1) disqualifies members of a protected class at a significantly higher rate than it disqualifies others, and
    - (2) is not shown to be “job-related and consistent with business necessity.”
- “Reverse Discrimination”
  - Occurs when a decision not to hire a particular person is based on the person’s “majority” status, i.e., race, age, sex, etc.
  - Employers cannot set quotas or reserve employment opportunities for certain groups, even if you are trying to increase diversity

## How to Disprove Discrimination

- Always have a good non-discriminatory business reason for your decision and be prepared to articulate it
  - Ensure you have evidence to support that decision
  - Documentation is key
  - The evidence should be aligned with the job criteria
- Review your hiring statistics regularly
  - Compared to your applicant pool, are you hiring a disproportionate amount of white men (for example)?

## Finding the Right Person



## The Candidate Pool

- Consider desirable characteristics
  - Relevant education, skills, experience
    - In tight labor market, what is really needed?
    - Carefully craft job description/posting
      - Clarify essential functions of the job
  - Diversity
    - Expand reach to diverse candidates using various tools, platforms, organizations
    - Avoid relying solely on word of mouth or employee referrals
    - Do not set quotas or express racial preferences in postings
      - However, do include your DEI statement in your ads and postings
  - Geographic location
    - Is remote work an option? Willing to pay for relocation?
    - Consider risks of hiring employees who will WFH in certain states (CA)



## Identifying Applicants

- Who is an “applicant”?
  - Federal regulations provide that an individual becomes an “applicant” when:
    - The employer has acted to fill a particular position
    - The individual followed the employer’s standard procedures for submitting application
    - The individual has indicated an interest in a particular position
    - The individual meets the basic job qualifications based on application
  - Any rejected applicant is a potential plaintiff, i.e., can sue for discrimination or retaliation based on “refusal to hire”
  - Define what’s required to “apply” to avoid legal obligations to unknown “applicants”

## Applications

## Big No-No Questions On Job Applications

**No, no, no**

- Never ask questions that will produce a response that would indicate an applicant's protected class (age, race, national origin, religion, disability, height, weight, sex, sexual orientation, gender identity, marital status, citizenship, arrest record, etc.)
- RULE: Always be sure that you are asking for information that is relevant to the question: "Is this applicant qualified to do this job?"



## Michigan Department of Civil Rights

- The MDCR has issued a helpful guide regarding what questions employers can ask during the hiring process.
- The guide covers both state and federal civil rights laws.

### Pre-Employment Inquiry Guide



What can employers ask before hiring someone in Michigan?

What is illegal?



## MDCR Guidance

- Most helpful is the MDCR's chart distinguishing between lawful and unlawful pre-employment questions.
- The MDCR's guide can be accessed on the agency's website at [www.michigan.gov/-/media/Project/Websites/mdcr/brochures/pre-employment-guide.pdf](http://www.michigan.gov/-/media/Project/Websites/mdcr/brochures/pre-employment-guide.pdf).

### Pre-Employment Inquiry Guide

Subject	Lawful Pre-Employment Inquiries	Unlawful Pre-Employment Inquiries
Address	Applicant's current and prior addresses	
Age	Are you 18 or older?	Applicant's age or date of birth
Arrests	Have you ever been convicted of a crime? Have you ever been arrested for a felony?	Misdemeanor arrests which did not result in conviction <i>unless</i> applicant is seeking a position with a law enforcement agency
Birthplace		Birthplace of applicant and applicant's relatives; birth certificate, naturalization and baptismal records, <i>unless</i> required by federal law <sup>9</sup>
Citizenship	Are you legally authorized to work in the United States?	These questions are unlawful <i>unless</i> asked as part of the Federal I-9 process <sup>10</sup> a.) Of what country are you a citizen? b.) Are you a naturalized or native-born citizen? c.) Are your parents or spouse naturalized or native-born citizens?
Disability	Ability to perform the essential functions of the job with or without accommodation <sup>11</sup>	Physical or mental conditions which are not directly related to the requirements of a specific job
Education	Applicant's academic, vocational or professional education and schools attended	
Genetic Testing		Applicant's genetic information; requiring applicant to undergo genetic testing
Height or Weight		Applicant's height or weight <sup>12</sup>
Marital Status		Marital status or children; titles such as Mr., Mrs., or Ms. <sup>13</sup>
Name	Applicant's name; other names used by applicant	Applicant's maiden name <sup>14</sup>
National Origin	Languages spoken and written by applicant	Applicant's lineage, ancestry, national origin or nationality (see note i) below)
Notice in Case of Emergency	Name, address and phone number of person to be notified in case of accident or emergency	Name, address and phone number of <i>relative</i> to be notified in case of accident or emergency
Organizations	The organizations and clubs to which applicant belongs; except as noted in the column to the right	Names of organizations to which an applicant belongs if information would reveal the race, color, religion, national origin or ancestry of the members of the organization
Photograph		Applicant's photograph <i>prior to hire</i>
Race or Color		Applicant's race, national origin or color
Religion		Religious denomination or affiliation; religious holidays observed
Sex		Applicant's gender; ability or desire to have children; child care arrangements

## Limits on Inquiries Related to Medical Conditions

- Don't ask: Virtually all medical inquiries are **prohibited**, until after a bona fide job offer has been made.
  - An employer *may not* ask questions that could tend to elicit information about a disability, such as:
    - Do you have any impairments that would interfere with your ability to perform the job for which you are applying?
    - What medications are you currently taking?
- Examples of questions you *may* ask:
  - More on this in a moment...

## At-Will Language and Attestation

- Always include language that says if employed, the individual will be employed at will and their employment can be terminated at any time by either the individual or the employer, with or without notice and with or without cause (can add a carve out for potential bargaining unit positions)
- Always have applicants sign attesting to the truth of the information provided in the application and the hiring process, and acknowledging that if it is later found that false or inaccurate information was provided, it will be grounds for termination of employment
- Include at end of application how long it will remain "active". Thereafter it is applicant's burden to resubmit.

## Shortened Statute of Limitation Language

- **Example:** I agree that any lawsuit against EMPLOYER and/or its agents arising out of my application for employment, my employment, or the termination of my employment, including but not limited to claims arising under State or Federal civil rights laws, must be brought within the following time limits or be forever barred: (a) for lawsuits requiring a Notice to Sue from the E.E.O.C., within 90 days after the E.E.O.C. issues that Notice; or (b) for all other lawsuits, within (i) 180 days of the event(s) giving rise to the claim, or (ii) the time limit specified by statute, whichever is shorter. I agree to waive any statute of limitations that exceeds this time limit.

### **CAUTION!**

- Be careful if you initially deny employment to an applicant and then subsequently, offer them a job a later date. Make sure you have them fill out a new application or agree to this language separately in writing.
- This language is generally NOT enforceable in a Handbook alone

## Ban the Box



- Several states (ex. CA and WA) have enacted laws that prohibit asking about an applicant's criminal history early in the hiring process
- In MI in 2018, statute went into effect the prohibits local governments from enacting Ban the Box ordinances for private sector employers
- The City Grand Rapids did anyway, effective 12/1/19
  - History of criminal conviction may be considered in employment decisions, although arrest with no conviction may not be considered. An outright ban on prospective employees with a criminal background is prohibited. Employers must carefully consider, on a case-by-case basis, the nature and severity of the crime, the age of the individual at the time of the crime, whether there have been repeat offenses, whether the individual maintained a good employment history before or after the conviction, evidence of rehabilitation efforts, and whether the crime for which the individual was convicted may pose a demonstrable risk to the health, safety or welfare of other employees or persons or to property.

# Interviews

## Best Practices for Interviews

- Utilize same team throughout process from screening applications through decision
- Educate interviewers on “do’s and don’ts” (what can be asked and what cannot, the goals and objectives, important criteria, etc.)
- Determine each persons’ role in the interview
- Follow script of questions that is the same for every candidate
- Keep good notes that are focused on job-related criteria. Avoid extraneous comments, especially about protected classes or past protected activity
  - Subjective impressions are real and may be considered: enthusiasm, creativity, ideas, confidence, etc.

## What You *May* Ask About

- Any information relevant to the job, including work experience, qualifications, education, training, special skills
- Explanations for gaps in school and work history
- The applicant's prior jobs and duties
- Why the applicant left a prior job
- What the applicant liked or disliked about a prior position
- What kind of reference the applicant would receive from a former employer
- What kind of job duties and work environment the applicant is seeking now
- The applicant's long-term job or career goals
- Why the applicant applied for this job
- What hours, days, or schedule the applicant is available to work, including necessary overtime

## What You May Ask About (Cont.)

- What the applicant believes are their strengths and weaknesses for the job opening
- Whether the applicant has a legal right to work in the United States
- Languages that are necessary for the position
- Whether the applicant has the necessary writing, math, communication and technical skills
- The applicant's ability to perform the essential functions of the position, with or without reasonable accommodations
- Salary, benefit, promotion expectations
- Applicant's concerns about the employer's policies, corporate culture, work environment, and the like
- Membership in job-related organizations, such as professional or technical associations

## Making the Offer

- Apply criteria consistently when making decision
- Communications to applicants
  - Confirm decisions in *writing* to each applicant, and do it *promptly*
    - Need not include a detailed explanation of reasons (but have it documented well internally)
    - Make sure offer letters state the offer is contingent on background check and drug test, if applicable
    - Include at-will language in offer letters, along with the fact that employment policies apply
    - Make it clear that it is not a contract

## Background Checks (Post-Offer)

## EEOC: Guidance re Criminal Records

- Based on potential for disparate impact
  - To defend against potential “disparate impact” claims, you must be able to show that the policy or practice is “job related and consistent with business necessity.”
- Do not make any decisions based on arrest alone, only convictions
- Have a consistent policy – treat criminal history information the same for all applicants, regardless of race
- Always conduct an individualized assessment to determine if the policy – as applied to that individual – is job-related and consistent with business necessity

## The FCRA and “Consumer Reports”

- The FCRA dictates the steps necessary for employers when consumer reports are used for employment purposes
- A consumer report is a written, oral or other communication of information by a consumer reporting agency that bears on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living
- If you use a third-party consumer reporting agency to conduct criminal background checks or credit checks, the report generated is a consumer report covered by the FCRA

## The FCRA Does Not Apply...

- To employers that obtain background information directly from the source and do not use a consumer reporting agency to obtain it for them
- For example, the Internet Criminal History Access Tool (ICHAT) allows the search of public criminal history records information in Michigan.
  - Anyone can perform a search through ICHAT with the person's full name and date of birth.

## FCRA – Stages of Compliance

1. Disclosure
  - Tell the applicant – in writing - that you might use information from a consumer report in making employment decisions.
2. Authorization
  - Must be in writing on its own form – it cannot include other information or be part of a larger document.
3. Notice
  - Before taking adverse action based on consumer report, you must give the person a pre-adverse action disclosure that includes a copy of the report and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.”
4. Adverse Action
  - After taking adverse action, give the person an adverse action notice which includes: (a) name, address, and phone number of the consumer reporting agency that supplied the report, (b) statement that the CRA did not make the adverse action decision and, (c) notice of the person's right to dispute the report and to receive a free copy of their report upon request within 60 days



## Should You Stop Doing Background Checks?

- Michigan law: Employers have duty to avoid “negligent hiring”
  - Employer hires employee, even though it knew or should have known of the employee’s violent propensities
  - Employer must use “reasonable care” to avoid selecting or retaining employee who it knows or should have known, based on past acts, had a violent or vicious nature which was likely to result in injury to someone
  - MI Supreme Court has ruled that the mere fact that someone has a criminal record does not establish that they have propensity for violence and employer is negligent in hiring them
    - Individualized assessment is important
- Certain industries (e.g., healthcare, education, legal, financial services) may be legally required to conduct criminal background checks

## Additional Sources Of Useful Information

- Educational records
  - Beware of resume fraud!
  - A written release will be required
- Licensing and certification records
  - Publicly available for many licensed occupations
  - Always check
  - Get the candidate’s consent
- Personal and Professional References
  - May be unreliable

# Pre-Employment (Post-Offer) Drug Testing

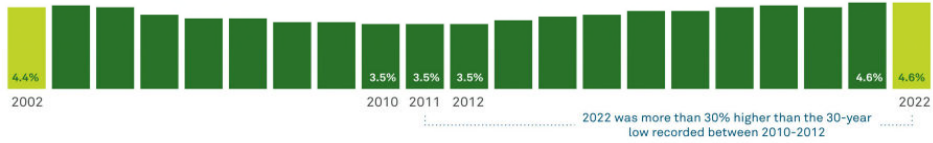
## What Has Changed?



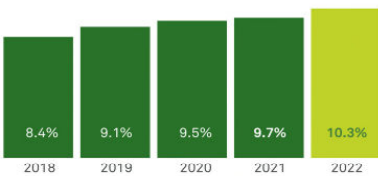
## 2023 Quest Diagnostics Drug Testing Index™

Based on more than 9.2 million combined U.S. workforce urine drug tests collected between January and December 2022

**Overall positivity rate in the combined U.S. workforce continues at its highest level in 20 years**

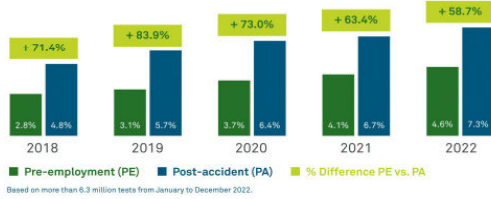


**Post-accident positivity climbed over five years**  
For General U.S. Workforce



Based on more than 6.3 million tests from January to December 2022.

**% Difference between post-accident and pre-employment positivity rates for marijuana urine drug tests**  
For General U.S. Workforce, as a percentage of all tests for marijuana



Based on more than 6.3 million tests from January to December 2022.



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37

## Drug Testing

- Is it necessary or advisable to test applicants who will primarily be working remotely?
- Does pre-employment drug and alcohol testing make sense in this hiring environment? For all jobs? Some jobs? What message does that send to the organization?
- Should employers modify drug testing protocols to exclude marijuana due to the legal issues associated with legalization and medical use for disabilities?

## Marijuana in Employment

### MARIJUANA: *WHAT'S LEGAL FOR EMPLOYERS*

- Employers can ban employees from using marijuana, based off company policy
- Employers can test for marijuana usage
- Employers can randomly test for marijuana usage
- Employers can discipline/fire an employee for breaking marijuana policy

## Drug Testing

- Marijuana isn't like alcohol or many other drugs:
  - Employers can test directly for impairment with alcohol
  - Not so with marijuana, which stays in the system for a long time
    - Urine test – up to 13 days, Hair test – more than 30 days after use
- Oral swab/saliva tests are available and appear to narrow the timeline of when marijuana was ingested, but there is still not a good test to tell you if someone is “under the influence” or “impaired” at the time.

## Drug Testing (Cont.)

- Some employers have removed THC from pre-employment drug testing altogether
  - As of 6/12/23, Michigan no longer requires pre-employment marijuana testing for state jobs
- If you go this route, we would not recommend getting rid of post-employment drug testing, including for marijuana
  - Test for “in your bodily system”, not “under the influence”
  - Ensure that applicants/new hires still know about the drug testing policy and that they will be subject to discipline or discharge if they test positive after employment begins
- Other employers have modified policies to continue pre-employment THC testing, but to allow for “last chance”

## Drug Testing (Cont.)

- Have a well-defined written policy
- Distribute it to applicants and employees
- Apply it consistently and uniformly
- Always obtain written consent from applicant or employee before testing



# QUESTIONS?



**Rich Cherry**

269.226.2987

[cherry@millerjohnson.com](mailto:cherry@millerjohnson.com)



**Leigh Schultz**

269.226.2983

[schultzl@millerjohnson.com](mailto:schultzl@millerjohnson.com)



**Brett Swearingen**

616.831.1836

[swearingenb@millerjohnson.com](mailto:swearingenb@millerjohnson.com)

**DETROIT**

409 E. Jefferson Ave  
Fifth Floor  
Detroit, MI 48226

**GRAND RAPIDS**

45 Ottawa Ave SW  
Suite 1100  
Grand Rapids, MI 49503

**KALAMAZOO**

100 W Michigan Ave  
Suite 200  
Kalamazoo, MI 49007

[millerjohnson.com](http://millerjohnson.com)