

Ready, Set, Hire!

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Today's Topics

- Employment Applications
- Offer Letters
- Form I-9
- Handbooks
 - What to Have
 - What to Avoid
- Questions

Hiring

- Consider your hiring “success stories”:
 - Any common themes?
- Consider your hiring “failure stories”:
 - Any common themes?

Employment Applications

Everyone Wants That Perfect Employee



Warning: Legal Risks Begin Before Hiring

- Legal risk occurs when companies say the wrong things during an interview
- You might get stuck with a bad employee (e.g., candidate may have lied about their skills, not a good fit).
- Applicants might sue YOU if they do not get the job

What's an employer to do?



Bare Bones Requirements

- EEO statement / direction for accommodation
- Date of application / period of consideration
- Position applied for
- Authorized to work
- Education (no years)
- Employment experience
- References
- Certification and Agreement

Things to Consider

- Employment History: Pay or salary information
- Criminal history and convictions
 - Previous convictions and explanations
 - Pending charges
- Drug testing information or requirement
- Valid only for a certain period of time and then must reapply
 - “Salting”?

What Should You Avoid?

- Birth dates / dates associated with education
- Maiden name
- Social Security Numbers
- Citizenship
- Specific reasons for military discharge
- Attendance history or concerns

Certification and Agreement

1. Definitions
2. Certification of Truthfulness
3. Authorization for Employment / Educational Information
4. [optional] Drug Testing Notice
5. At-Will Statement
6. Authorization to Work
7. Limitation on Claims
8. Need for Accommodation (Michigan)
9. [optional] Background Checks
10. Consideration for Employment

Interviews

Conduct Proper Interviews



Discrimination in Hiring

- Supervisors need to know what questions are unlawful and what questions are lawful
- Supervisors need to know and enforce the job requirements
- Supervisors need to be thoughtful and intentional with the questions they ask



What the Employer May *NOT* Ask About

Anything on the “**Cheat Sheet**” (aka legally protected categories)

Aka, you cannot ask questions that would indirectly elicit the applicant’s legally protected categories

The Cheat Sheet: The Protected Categories

- Race
- Color
- Sex
- Religion
- Age
- Pregnancy
- Marital Status
- Disabilities
- National Origin
- Citizenship
- Height
- Weight
- Genetic Information
- Misdemeanor Arrest Record
- Military Status
- Sexual Orientation
- Gender Identity

What the Employer May *NOT* Ask About

Unlawful	Lawful
▪ How old are you?	▪ Are you 18 years or older?
▪ Have you ever been arrested ?*	▪ Have you ever been convicted of a crime or arrested for a felony ?
▪ Of what country are you a citizen?*	▪ Are you legally authorized to work in the United States?

What You *May* Ask About

- Any information relevant to the job, including work experience, qualifications, education, training, special skills
- Explanations for gaps in the applicant's school and work history
- The applicant's prior jobs and duties
- Why the applicant left a prior job

What You *May* Ask About

- 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

What You *May* Ask About

- Personal and professional references and recommendations
- Criminal convictions*
 - Grand Rapids employers: beware of the city's 2019 Human Rights Ordinance that effectively functions as a "Ban the Box" restriction

Offer Letters

Offer Letters

- Confirmation of at-will employment
- FLSA status (or explanation of method of compensation and eligibility for overtime)
- Disclaimer that the offer letter is not a contract for any set compensation, benefits, or term of employment

Form I-9

I-9 Compliance

- ALL employees hired after November 6, 1986, are required to have an Employment Eligibility Verification Form (Form I-9) on file with the employer
 - Includes U.S. citizens!
- The I-9 must be completed within 3 business days of the date employment begins
 - Employee may complete Section 1 after the job is accepted.
- DHS requested money from Congress to hire approximately 700 new positions in 2023, signaling a likely increase in Form I-9 audits.

Why Do Employers Complete The I-9

- Employers must verify two things (1) the employee's identity; (2) work authorization
 - Examine one document from List A or one document from List B and one from List C
 - Employer cannot specify which documents they will accept from an employee

Types of Documents



Updating and Reverification

- Updating and Reverification
- THIS IS CRITICAL!
 - Employee name changes
 - Employee leaves and is rehired
 - Work authorization expired

Questions

- What are some of the most common mistakes during the hiring process?
- Can you discuss the new E-verify + and how this will change document verification for employers, especially when hiring remote workers
- Is it okay to ask about felonies, misdemeanors, or any pending charges on an application or in a phone interview?
- What are some areas of the employee handbook that you recommend be updated for current complaint?
- What is acceptable for background checks? Does it need to be limited to what is applicable for their job?

More Questions

- What are some examples of illegal interview questions. How can we reframe them to get some of the information we need legally?
- Do we need to list sexual orientation in our harassment policy

Handbooks

**When was the last time your
organization revised
its Employee Handbook?**

Provisions: “Legal” Policies

- Statement of At-Will Employment
- Handbook Coverage
- Equal Employment Opportunity
- Qualified Individuals with Disabilities
- Pregnant Workers’ Fairness
- Workplace Harassment
- Social Security Number Privacy Policy
- National Labor Relations Act Disclaimer

Provisions: Payroll & Time

- Employee Classifications
- Work Week
- Work Hours
- Wage Payment
- Overtime Pay
- Timekeeping Requirements
- Absentee/Tardy Policies

Provisions: Safety & Security

- Work Environment Safety
- Technology, Equipment, and Electronic Communications
- Security of Company Property
 - Who can access the physical property?
 - Return of company property upon termination
 - Confidentiality of company information
- Business Ethics
- Prohibited Substances
- Weapons and Violence
- Work-Related Injuries & Illnesses

Provisions: Vacation & Leave

- Holiday
- Paid Time Off / Vacation
- Family and Medical Leave Policy (if you have at least 50 employees!)
- Michigan Paid Medical Leave (if you have at least 50 employees!)
- Jury Duty Leave
- Military Leave
- Court Attendance Leave
- Bereavement Leave (optional)

Provisions: Human Resources

- Internal Dispute Resolution Procedure
- Performance Reviews
- Personnel Records
- Corrective Action, Discipline, and Termination
- Conduct
- Social Media
- Outside Employment
- Solicitation & Distribution

Acknowledgement

- Authority to Contract
 - Designate who has the authority to enter into an employment contract
- Limitations on Claims
 - Claims or lawsuits that require a Notice of Right to Sue from the EEOC within 90 days after the EEOC issues that Notice; OR
 - All other claims, within 180 days of the event(s) giving rise to the claim, or the time limit specified by statute—whichever is shorter
- Return of Company Property
- Reimbursement
- Choice of Law
- Acknowledgment

Watch Out For NLRA Pitfalls!



Brief NLRA Update: Old vs. New Standard

Old Standard

- Weighed a policy's potential impact on employee rights against the employer's legitimate business justification for the policy.

New Standard

- Weighs only how an employee would understand the policy.
 - Employer intent is "immaterial"
 - Existence of a reasonable, non-problematic interpretation also immaterial
 - Whether it actually *did* chill an employee in the exercise of their rights is immaterial

Handbooks: New Standard

- A rule is presumptively unlawful if an *economically dependent* employee *could* interpret a rule to restrict protected activity.
- Only Defense: an employer can rebut the presumption if it can prove both:
 - The rule “advances a legitimate and substantial business interest”
 - There is no way to advance that interest with a more narrowly tailored rule.

Provisions With Increased Risk Now

- Anti-Union Philosophy Statement
- Requiring employees to treat each other with “mutual respect” or “civility”
- Prohibiting “disrespectful” language or behavior
- Requiring employees to deal with issues “directly” with each other or their supervisor
- Prohibiting employees from harming the company’s reputation or business interests

Where To Include Disclaimers?

- In addition to a disclaimer at the beginning of the handbook, consider putting disclaimers at the end of these policies:
 - Attendance/Absenteeism
 - Uniforms / Dress Code
 - Social Media
 - Work Rules / Conduct
 - Privacy / Post-Employment Reference Rules
 - Confidentiality
 - Acknowledgement



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