

CURRENT ISSUES IN HIRING PRACTICES

SUMMARY

Another BMA, entitled "Effective Hiring Practices Can Cut Costs and Turnover," deals with basic hiring procedures. Experience and new developments in personnel law demand that other issues or expanded practices must be addressed by the prudent employer in today's environment. Therefore, this BMA is designed to supplement the original.

The hiring process has taken on more significance than the traditional business costs and employee morale. To be sure, the costs to a company of hiring an individual with a drug or alcohol problem are great. Recent studies reflect that employers lose about \$25 billion each year because of drug abuse. This is not surprising since drug and alcohol abusers are involved in *three times* the accidents as non-users, and experience vastly less productivity, also leading to lower productivity among non-users. Your company also has legal responsibilities, under federal, state and local labor laws, that actually begin at the point when the employer decides to hire new personnel and begins recruitment.

In short, the following topics cover additional issues and nuances of old issues related to the hiring process. Used in conjunction with the previous BMA, your company can take proper steps to establish sound procedures for recruitment and hiring.

UNSOLICITED APPLICATIONS

Often overlooked in protecting the employer in the recruitment process is the problem of unsolicited applications. One way an owner can avoid potential legal problems surrounding recruitment is to handle unsolicited applications or resumes properly in order to eliminate potential lawsuits for discrimination, either for hiring on an impermissible basis or rejecting a legally-protected category of applicants. If you keep such documents on file indefinitely, you are creating a possible "ticking bomb" for every applicant not ultimately hired. This is true even when the company has no positions available.

The key to solving this potential problem is to initiate the hiring process *only* when you have a position that needs to be filled. At all other times, the employer should not make its application form available and, when an unsolicited contact is made, the company should respond with a letter stating that applications are not being accepted. The company should not circulate the applications or resume in-house and the letter should carefully avoid representing that any "review" or "consideration" was given to the application or resume.

Further protection can be provided by adopting a formal policy requiring that all applications must be on the company's official form. Also, adopting a policy that any solicited or unsolicited application or resume must be handled by the

personnel department or manager will ensure uniform treatment.

If the employer has turnover that necessitates frequent or on-going hiring, the company policy should expressly limit applications to a short active period, such as 30 days. That way, the company has placed every applicant on notice that he or she must reapply to continue to be considered for employment. This periodic "closing out" of files prevents charges by unsuccessful applicants that they were discriminated against.

THE APPLICATION FORM

As suggested, the company may benefit by insisting that only an official application form be used, thereby making it clear that any other contact has been treated as merely an expression of interest by the job-seeker. This approach enables the employer to ensure it does not receive inquiries or resumes that indicate that the potential applicant is in a legally-protected class. Your application form should be reviewed by the company's attorney so that all illegal questions are removed. Obviously, the application form must not ask any questions that are prohibited in the interview process (discussed in a subsequent section).

The use of a formal application also enables the employer to establish several protective disclaimers at the outset of the hiring process:

- The job-seeker should sign a statement that there is no contract of employment guaranteeing employment for any definite period of time;
- The job-seeker should sign a statement that any work relationship that may arise may be terminated at any time by either party;
- The job-seeker should sign a statement that all information he or she provides is true and accurate, and that the applicant understands that any falsification of the application is grounds for rejecting the application (or for immediate discharge if the falsification is discovered after employment);
- The job-seeker should sign a statement giving permission to the employer to contact any reference named by the applicant and acknowledging that the employer is free to act on the information provided by the references;
- The job-seeker should sign a statement, giving the employer permission to conduct a drug screening agreeing that the results of any such tests will be the property of the company, and that failure to take such examination will disqualify the applicant from consideration for employment;
- The formal application should contain language that no promises have been made concerning job security or long term advancement opportunities, and that the applicant understands that no potential supervisor has authority to change the terms of employment explained in the application.

PRE-EMPLOYMENT POLYGRAPH TESTING

It is now illegal, under federal law, for most private sector businesses to use lie detector or polygraph tests as part of the hiring process. Beginning December 27, 1988, most applicants cannot be tested by any mechanical or electrical device at all for pre-employment purposes. The only exception to the ban exists for employers who contract with government intelligence agencies — they may use polygraph with notice to the applicant, administered only by a licensed examiner, under certain restrictions governing the questions, the length of the examination and other legal rights of the examinee. (Security-related companies and companies involved in the manufacture or sale of controlled drugs are also exempt.)

Furthermore, it is unlawful for a company to deny employment to an applicant because he or she has filed any complaint or instituted any proceeding related to this law. Also, if the company fails to limit polygraph use properly or discriminates against the applicant for a previous incident, the applicant may sue for up to three years after the violation.

INTERVIEWING DO'S AND DON'TS

Beyond normal advice for conducting a helpful interview, such as putting the applicant at ease, not rushing, or not allowing interruptions, the good interviewer must remember to limit himself or herself to *job-related* factors. Among the permissible subjects legally open for discussion, there are several topics which should always be addressed:

- Work history, including any gap in employment and previous employment circumstances and reasons for leaving;
- Skill levels required for each position held;
- Motivational factors causing the applicant to excel;
- Previous criminal conviction record, if any; and,
- Citizenship status.

By comparison, there are a number of topics which are restricted, prohibited, or suspect and which the interviewer should avoid:

- Information related directly to subjects legally establishing employer discrimination if used-age, race, national origin (including place of birth) or handicaps;
- Marital, family status, need for child care;
- Religion;
- Military record;
- Life insurance or credit rating;
- History of claims for unemployment or workers' compensation; and,
- Arrests or charges *not* leading to a conviction.

Within these do's and don'ts of subjects that arise during interviews, there are often ways to phrase a question in an acceptable form to obtain permissible information or even to obtain indirectly restricted or prohibited information. For example, a company may inquire about whether the individual has had any on-the-job injuries requiring medical treatment within the last five years, even though you cannot ask about any workers' compensation claims. Similarly, the employer can ask if the applicant has had a physical examination in the last two years, although the company cannot ask if the person has ever used habit-forming drugs. As these examples show, careful phrasing and planning can result in successful interviews.

EMPLOYER'S RESPONSIBILITIES UNDER NEW IMMIGRATION LAW

Under recent changes to the immigration law, the employer has new responsibilities: (1) to ensure that the company does not "knowingly" hire illegal aliens, *and* (2) to ensure that the company does not use unfair immigration-related practices in hiring. Accordingly, although the company should *not* attempt to verify the employment status of applicants, the employer should take steps to assure that it can comply with the "three-business day" verification requirement. The best approach is to place a notice in the application form stating that, if hired, the new employee will have to provide appropriate documentation under the immigration law. Some companies are also giving applicants a copy of the list of proper identification documents so that the required INS Form I-9 can be completed more easily after hiring.

Although the employer has an obligation to verify, the company should resist the temptation to verify *applicants*. Requesting such information from an applicant who is ulti-

mately not hired could subject the company to a discrimination charge based upon the individual's national origin or citizenship status. The immigration anti-discrimination provision applies to all employers with four or more employees. However, for the employer covered under Title VII of the Civil Rights Act, the best-protection is to follow the normal EEOC procedures to avoid national origin discrimination and then apply the verification procedures uniformly. Do not ask any more in the way of documentation from a person who appears to be an alien than is asked of the person who grew up in town.

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