

HIRING THE RIGHT PEOPLE THE RIGHT WAY:

A GUIDE TO ONBOARDING EMPLOYEES

I. INITIATION OF EMPLOYER-EMPLOYEE RELATIONSHIP

- A. AT THE TIME THAT AN EMPLOYEE SUBMITS AN EMPLOYMENT APPLICATION, THE PARTIES ARE AT ONE OF THE MOST CRUCIAL TIMES OF THE EMPLOYER/EMPLOYEE RELATIONSHIP.
- B. THIS IS THE TIME WHEN AN EMPLOYER CAN MOST EASILY PROTECT ITSELF FROM WRONGFUL DISCHARGE CLAIMS AND UNQUALIFIED CANDIDATES.
- C. ON THE FLIPSIDE, THE APPLICATION AND ONBOARDING PROCESS CAN RESULT IN SIGNIFICANT LIABILITY IF THE PROCESS IS CONDUCTED IMPROPERLY.

II. PAPER, PAPER, PAPER

- A. EMPLOYEES ARE MORE WILLING TO SIGN DOCUMENTS AT THE BEGINNING OF AN EMPLOYMENT RELATIONSHIP, AND EMPLOYER'S LEVERAGE IS TYPICALLY MAXIMIZED.
- B. EMPLOYERS SHOULD MAKE USE OF THIS FACT AND OBTAIN ALL APPROPRIATE DOCUMENTATION AND CONTRACTUAL PROVISIONS.
 - 1. Mandatory Arbitration
 - 2. Shortened Statute of Limitations (works for some but not all claims, e.g., for ADEA claims but not FLSA)
 - 3. Non-competes and NDAs
 - 4. Confidentiality agreements

III. IMPROPER INQUIRIES

- A. PHOTOGRAPHS – IT IS IMPROPER TO REQUIRE OR EVEN REQUEST A PHOTOGRAPH.
- B. AGE, RACE, RELIGION, HEIGHT, WEIGHT, MARITAL STATUS, SEX, NATIONAL ORIGIN.
- C. NON-JOB RELATED PHYSICAL AND MENTAL CONDITIONS; MEDICAL INFORMATION.
 - 1. Best to leave this line of questioning until after you make a conditional offer of employment. Offers of employment can be conditioned upon fulfillment of a pre-employment physical.
 - 2. It is recommended that no inquiries be made regarding physical handicaps, impairments, or abilities until after a conditional offer of employment. Offers can be conditioned upon fulfillment of a pre-employment physical.
 - a. Can you perform job-related functions with or without an accommodation?
 - b. Do you have any impairments, physical, mental, or medical that would interfere with your ability to do the job for which you have applied? (Legal under Michigan's Handicapper's Civil Rights Act, MCL 37.1101 *et seq.*)
 - 3. The ADA limits an employer's ability to make disability-related inquiries or require medical examinations at three stages: **pre-offer, post-offer, and during employment**. The rules concerning disability-related inquiries and medical examinations are different at each stage.
 - a. At the first stage (prior to an offer of employment), an employer may not ask any disability-related questions or require any medical examinations even if they are related to the job.

- b. At the second stage (after an applicant is given a conditional job offer, but before he or she starts work), an employer may ask disability-related questions and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
- c. At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.
 - i. an employee will be unable to perform the essential functions his or her job because of a medical condition; or
 - ii. the employee will pose a direct threat because of a medical condition.
- d. Workers Compensation – It is improper to inquire into an employee’s history of prior job-related inquiries which do not impair the ability of the individual to perform the essential functions of the present job.
- e. Military Records – Inquiries regarding military discharge may be found to create a disparate impact under federal civil rights law, e.g., disparate impact on certain demographic groups.
- f. Arrests – It is improper to inquire into arrests and detentions in which a conviction did not result.
- g. Criminal Records – Avoid discouraging applicants, pre-application, because they have a criminal record. The EEOC is actively soliciting employees to report employers doing this. A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law.

- i. There are two ways in which an employer's use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin ("disparate treatment discrimination").
- ii. Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.
- iii. Not all convictions are equal. The EEOC provides some guidance on how they assess an employer's use of criminal records and analyze whether the employer properly denied an applicant because the conviction was "job related and consistent with business necessity." There are two circumstances in which the EEOC believes employers may consistently meet the "job related and consistent with business necessity" defense:
 - (a) The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
 - (b) The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three

factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)).

The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen to determine if the policy, as applied, is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).

IV. MICHIGAN NEW HIRE FORM 3281

- A. FEDERAL LAW REQUIRES PUBLIC AND PRIVATE EMPLOYERS TO REPORT ALL NEWLY HIRED OR REHIRED EMPLOYEES WHO ARE WORKING IN MICHIGAN TO THE STATE OF MICHIGAN.
- B. SUBMITTED WITHIN 20 DAYS OF HIRE.
- C. ONLINE/ELECTRONIC REPORTING AVAILABLE.

V. FAIR CREDIT REPORT ACT (FCRA) COMPLIANCE

- A. IF YOUR COMPANY GETS BACKGROUND INFORMATION ON CANDIDATES, SUCH AS CRIMINAL OR CREDIT REPORTS, IT'S VERY LIKELY YOU'RE COVERED BY THE FAIR CREDIT REPORTING ACT, A FEDERAL STATUTE.
- B. BEFORE YOU GET A BACKGROUND SCREENING REPORT, THE FCRA REQUIRES YOU TO MAKE CERTAIN DISCLOSURES AND OBTAIN THE CANDIDATE'S AUTHORIZATION. HOW YOU DO SO IS CRUCIAL TO AVOIDING LIABILITY.
- C. KISS FOR FCRA
 - 1. Complying with FCRA's disclosure requirement for use of background screening reports is easy; you can do it in a few sentences:

- a. Disclosure – “clear and conspicuous”
 - b. Authorization
 - c. And nothing else!
2. Don’t include language that claims to release you from liability for conducting or using the report.
 3. Don’t include a certification by the candidate that all info in application is accurate.
 4. Delete any wording that purports to require the candidate to acknowledge that your hiring decisions are based on legitimate, non-discriminatory reasons.
 5. Get rid of overly broad authorizations that permit release of info that the FCRA doesn’t allow to be included in a background report, e.g., bankruptcies that are 10+ years old.
- D. THIS EXTRA LANGUAGE OPENS THE DOOR TO A LAWSUIT. IF YOU WANT ANYTHING BEYOND THE DISCLOSURE AND AUTHORIZATION, PUT THEM IN A SEPARATE DOCUMENT.
- E. TAILOR THE FCRA CONSENT/AUTHORIZATION FORM TO THE INFORMATION YOU ACTUALLY NEED AND ONLY REQUEST THE INFORMATION FOR A JOB THAT REQUIRES IT:
1. Wouldn’t credit check a janitor
 2. But you very well might want to credit check a bookkeeper/accountant
 3. “I acknowledge and understand that through this authorization the Company and its third-party designee may obtain information, including, but not limited to, credit histories, criminal records, motor vehicle reports or driving records, investigative consumer reports, reference checks, workers’ compensation history reports, educational records, and all employment records, including any and all disciplinary

reports, letters of reprimand or other disciplinary action contained in my record with any employer or former employer.”

- F. NOTIFICATION REQUIREMENT IF THE CREDIT/BACKGROUND REPORT IS “USED AGAINST” THE CANDIDATE.
- G. VIOLATIONS = \$3,750 PER VIOLATION, PLUS EMPLOYEE GETS ATTORNEY FEES (\$\$\$).
- H. COTTAGE INDUSTRY FOR FCRA LITIGATION.
- I. CLASS ACTION EXPOSURE.
- J. *SPOKEO, INC. V. ROBINS*
 - 1. Is there any harm? Spokeo requires a “concrete” injury and more than a “bare procedural violation”
 - 2. But the reality is that Spokeo has not killed FCRA suits
- K. MUST CERTIFY TO COMPANY OBTAINING REPORT THAT YOU.
 - 1. Notified applicant and got permission
 - 2. Complied with all FCRA requirements
 - 3. Won’t discriminate or misuse the info
- L. IF YOU TAKE ADVERSE ACTION BASED ON THE REPORT:
 - 1. Provide notice to candidate that includes a copy of the report
 - 2. Provide a “Summary of Your Rights Under the Fair Credit Reporting Act” – opportunity to review report and explain negative info
 - 3. Inform applicant rejected because of the report
 - 4. Inform application right to dispute accuracy of report

VI. LIVE AUDIENCE POLLING REGARDING LAWFUL & UNLAWFUL QUESTIONS

| Topic | Unlawful | Lawful |
|------------------------------|---|---|
| Marital Status | What are your child care arrangements? | Would you be willing to relocate, if necessary? |
| National Origin and Ancestry | What is your native tongue? Where were your parents born? | Are you authorized to work in the U.S.? |
| Military and Veteran Status | Have you ever served in the military? Were you honorably discharged? | |
| Height and Weight | How much do you weigh? (MI law) How tall are you? (MI law) | |
| Arrest Record | Have you ever been arrested? | Have you ever been convicted of a crime (if relevant to position) |
| Credit | Do you have good credit? | Are you willing to sign this background check form authorizing us to run a credit report? |