

PRE-EMPLOYMENT INTERVIEWS: NEGOTIATING THE MINEFIELD

By Derrick Roberson

The task of screening applicants and selecting employees has always been a daunting one for the employer, who is often required to make these important decisions based upon the limited information available from an applicant's resume, one or two interviews, and the standard reference check from previous employers. Employers often feel further hampered in this task by limitations on the types of questions they are allowed to ask applicants in the pre-employment interview. The consequences of asking the wrong questions, however unintentionally, can be serious. A disgruntled applicant who failed to obtain the position can cost an employer tens of thousands of dollars to defend a discrimination suit, even if the employer ultimately prevails. The common advice given by most attorneys is to ask only job related questions, and to avoid any questions that may elicit information concerning the applicant's membership in a protected class. The following is a partial, although not exhaustive, list of information that should not be sought by the employer in the pre-employment interview:

- 1) the age or date of birth of the applicant;
- 2) race or national origin;
- 3) religious affiliation, or lack thereof;
- 4) gender;
- 5) marital or family status;
- 6) physical traits, medical conditions, or disabilities;
- 7) whether previous workers compensation claims have been filed by the applicant;
- 8) whether the applicant has ever filed for bankruptcy protection;

As with all general rules, there are exceptions. Although an employer should not ask an applicant's age, it is appropriate to confirm that the applicant is at least 18 years of age to satisfy child labor laws, or 21 as may be required by regulations governing specific types of employment. Additionally, some jobs may require a certain level of strength or fitness. In those cases, a limited inquiry is allowable. Often, however, the line between permissible and impermissible questions is a fine one. If the job requires an employee to perform certain physical tasks, these should be clearly identified and the applicant may then be asked if he or she would be able to perform these tasks, rather than simply asking the applicant if they have any disabilities.

Clearly the goal is to select highly qualified people, but from that group you also may want to hire those most likely to be reliable, long-term employees, who you believe will fit in well with the work environment, management structure, and other members of your team. How can you make these determinations without delving into an applicant's personal life? First, clearly identify in advance the traits you are looking for in an employee. Then focus your questions on those traits, while avoiding the prohibited areas listed above, and ignoring traditional stereotypes. For example, ask the applicant to describe his or her history of job longevity, absenteeism or tardiness, teamwork, and past experiences in handling business funds, etc. Then compare the applicant's responses with information obtained from reference checks of his or her previous employers.

Sometimes an employer will be sued for discriminatory hiring practices, no matter how careful they were during the pre-employment interview. In those cases, there are a few things every employer can do during the pre-employment interview to improve their chances of successfully defending such a claim. First, interview applicants with at least one other person from your business, and avoid one-on-one interviews. This provides you with a corroborating witness for your version of what was said in the interview. Second, have a detailed, written list of the job description and required duties, and organize all interview questions around that list. Third, ask all applicants the same questions, and follow the same procedures for all applicants throughout the selection process. Fourth, make your selection based upon the previously established job description and duties, and document your reasons for preferring one candidate over another. By taking careful notes, you will be in a better position to defend your decision months or even years later when a claim arises.

The keys to successfully defending, or avoiding altogether, claims of discriminatory hiring practices are planning and organization. If you go into every pre-employment interview with a clear idea of the job description and necessary employee traits, and stick to the map provided above, you can successfully negotiate the minefield of the pre-employment interview.