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Applicant Questions You Could Once, But Cannot Ask Anymore!

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Advertisement: "Wanted: Young, skinny, wiry fellows. Not over 18. Must be expert riders. Willing to risk death daily. Orphans preferred."

This actual help-wanted ad, which ran from April 1860 through October 1861, was used to recruit horse riders for the Pony Express. Because of the dangerous and physically demanding nature of the position, it was thought to be important that riders be both young and able-bodied, and orphans were preferred because of the risks of injury or death. "Skinny" was preferred to save wear and tear on the horses. In the nineteenth century (and, for that matter, most of the twentieth century), this type of advertising was commonplace. If this advertisement were published today, however, it would run afoul of many anti-discrimination laws and would likely subject the employer to discrimination liability for excluding non-skinny, non-wiry, female, older, and maybe even risk averse candidates.

Today, in order to comply with state and federal anti-discrimination laws, employers must carefully consider the method in which they seek out and employ job applicants. Job postings and interview questions, as well as any observations made during the hiring process must be carefully crafted to avoid legal liability for alleged discrimination.

Employment decisions must be based only on factors which are related to qualifications for and performance of the job, such as skills and licensure, work experience, references, wage and salary history, education, academic and personal achievement, cooperation in the recruitment process, attitude toward work and co-workers, and generally accepted job-related personal habits such as timeliness, courtesy, grooming and dress, responsibility, discipline, energy, and similar factors. Considerations of race, color, creed, religion, national origin, ancestry, sex, union membership or support, sexual orientation, marital status, receipt of welfare, disability, or age, cannot play a role in any of these decisions, and any questions asked or observations made during the hiring process should not suggest that they do. The same restrictions hold true for employment applications, interviewer statements, performance evaluations, written recommendations about candidates for positions, written hiring decisions, offers and rejection communications.

It is generally impermissible to discuss or ask for information about an applicant's status as a member of a protected class. The following questions, and any similar questions or observations which would improperly solicit or seek to confirm information about protected class status, should not be discussed with applicants or third parties such as former employers:

- How old are you?

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management labor and
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- Aren't you too old (too young) for this job?
- Are you a member of a union?
- Do you support union representation of our employees?
- Do you suffer from a handicap or disability?
- Have you ever received welfare benefits?
- Are you heterosexual (homosexual)?
- What is your national origin (or ancestry)?
- What is your marital status?
- When are you planning to be married?
- Are you a Lutheran (Catholic, Presbyterian, Jewish, Muslim, Hindu, etc.)?
- Where do you attend church/religious services?
- Are you married (single, divorced)?
- Do you speak Spanish (Italian, German, etc.)?
- Have you ever been arrested?
- What was your maiden name?
- Are you pregnant?
- Do you plan to have children? When?
- Do you have a physical or mental condition that could interfere with your work performance?

On the other hand, employers are permitted to ask questions which relate to the candidate's ability to perform specific job functions. The manner in which such questions are phrased is very important. Questions which might seem inappropriate, but which are nonetheless permissible, include:

- Are you a U.S. citizen, or an alien who is legally permitted to work in the U.S.?
- What languages do you speak, read or write? (Do not ask about specific languages.)
- What has been your work experience since graduation from school?
- Have you ever been convicted of or pled guilty or no contest to a criminal offense?
- Are you available for travel, overtime or weekend work?
- Do you plan to hold other employment or engage

in business activity during the same period as you work for our company?

Other appropriate questions to ask include the following:

- Are you available to work any time of the day or week as needed?
- Do you have a current, valid, unrestricted driver's license? (if any position applied for requires driving)
- Have you ever served in the military?
- What trade or professional licenses or credentials do you hold?
- Do you know any current or former employees?
- Have you ever had any periods of unemployment? If so, how did you spend this time?
- Have you ever been fired, laid off or asked to resign? Why?
- Are you willing to take a post-conditional offer drug and alcohol test or physical examination?
- Are there any policies you would not be willing to follow?
- Can we obtain information from your prior employers?

During an interview, interviewers may feel that the "tone" of the interview and the personality of the applicant would permit them to ask questions that are generally considered impermissible. Often, interviewers get caught up in friendly conversation and momentarily abandon their role as an interviewer and representative of the company. Engaging in casual conversation with an applicant is essential for the employer to determine how a potential employee might interact and fit in at the company and to get a more personal "feel" for the applicant, but such conversation must be approached with caution. Impermissible observations and questions, even if made offhand during a casual conversation, can result in legal liability for alleged discrimination if the applicant is not offered a position with the company.

Employers should consider the following policies and strategic defense measures to minimize the risks arising from recruitment and hiring decisions:

- Adopt an Equal Employment Opportunity/Anti-Harassment policy.

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- Reserve the right to evaluate and confirm all information supplied by an applicant and withdraw a conditional offer, if unsatisfactory.
- Condition employment on truthful application information, willingness to accept any and all job assignments, and at-will employment status.
- Require applicants to complete and sign your own employment application in your presence and have your own customized, legally prepared application form.
- Provide applicants with notice of your policies on at-will employment, mandatory overtime, travel, drug and alcohol use, confidentiality and non-competition/solicitation, and other critical policies and requirements.
- Do not accept outside referrals of job applicants unless you have specified acceptable sources in your policies.
- Establish lawful, written, job-related hiring criteria for positions.
- Ask applicants only standardized, job-related questions. Train your interviewers in lawful/unlawful questions and hiring criteria and in “best practices” for interviewers.
- Use validated screening devices.
- Have an experienced labor/employment lawyer review your hiring materials and employment policies.
- Do implement drug and alcohol testing and physical examinations for conditional offer recipients.

Contact any Seaton, Beck, Peters, Bowen & Feuss lawyer at (952) 896-1700 if you would like to “audit” your hiring practices and procedures to be certain you have adequate procedures to obtain the best candidates and can legally defend your hiring decisions. Happy hiring!

Are Your Employee Handbook And Employment Documents Protecting Your Firm Or Putting You At Risk?

If your Company’s employee policy handbook, hiring and discipline materials, drug and alcohol testing policies, or other critical labor or employment documents or policies are more than 2 years old (or non-existent), your Company is at risk. Call (952-896-1700) or fax (952-896-1704) us if you are interested in a complimentary review of your materials and information on our cost-effective “fixed fee” program to customize and update these materials for your Company. The cost is \$775.00 for handbook and employment materials (with 2 hours customizing time included) and \$375.00 for drug and alcohol testing policy and materials (with 1 hour customizing time included).

Seaton, Beck, Peters, Bowen & Feuss Welcomes Two New Attorneys

We are pleased to introduce you to the two attorneys who have most recently joined us.

Kyle Kustermann, who was born and raised in the Twin Cities, obtained his law degree from William Mitchell College of Law. Prior to joining our firm, Kyle practiced with the law firm of Aafedt, Forde, Gray, Monson & Hager, P.A., where he advised and represented employers and insurers in workers’ compensation and other employment-related matters .

Suzanne Hansen comes to SBPBF from the law firm of Gregg M. Corwin & Associates, where she also practiced labor & employment law. Suzanne, originally from Florida, received her law degree from Hamline University School of Law in St. Paul.

Welcome Kyle and Suzanne!

Fax, E-mail or “None of the Above?”

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