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ALERTING MANAGEMENT TO BREAKING LABOR AND EMPLOYMENT LAW DEVELOPMENTS

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Lawful Employment Recruitment Questions and Procedures
By Douglas P. Seaton

Although the economy continues to experience layoffs, many employers have begun to hire again. The increased applicant pool should encourage employers to “tighten up” applicant screening procedures which were abandoned while applicants were scarce. Employers should be careful not to “tighten” their hiring criteria too much, however, in order to avoid legal liability for alleged discrimination.

Employment recommendations and decisions must be based on factors which are related to qualifications for and performance of a job, such as job-related skills and licensure, if appropriate, work experience, references, wage or salary history, education, academic and personal achievement, cooperation in 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 lawfully play a role in any of these decisions, and questions asked 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.

The following guidelines are designed to offer a reminder about permissible and non-permissible inquiries for recruitment interviews and applications, references, and for other employment related information gathering.

Since protected class status should not be a factor in employment-related decisions, it is generally impermissible to discuss or ask for information about such status. 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, even if some of them would be obvious in an interview setting (race, gender):

- How old are you?
- Aren't you too old (young) for this job?
- Are you a member of a union?
- Do you support a union for our employees?
- Do you suffer from a handicap or disability?
- Have you ever received welfare benefits?
- Are you heterosexual (homosexual); “straight” (“gay”)?
- What is your national origin (or ancestry)?
- What is your marital status?
- When are you planning to be married?
- What church do you attend?
- Are you married (single, divorced)?
- Have you ever filed for worker's compensation?
- Have you ever been arrested?
- What was your maiden name?
- Are you pregnant?
- Do you plan to have children?

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Questions which might seem inappropriate, but which are nonetheless permissible, include:

- Are you a U.S. citizen, or an alien authorized to work in the U.S.?
- What languages do you speak, read or write?
- What has been your work experience since graduation from school?
- Have you ever been convicted of or pled guilty to a criminal offense?
- Are you available for overtime and weekend work?
- Do you plan to work a second job?
- Are you eligible for recall or referral for work?

Appropriate questions to ask include the following:

- Are you available to work any time as needed?
- Have you ever been convicted of a crime?
- Do you have a valid driver's license (for driving positions)?
- Have you ever served in the military?
- What trade licenses do you hold?
- Do you know any current or former employees?
- Have you ever been unemployed?
- Have you ever been fired or asked to resign? Why?
- Are you willing to submit to a post-conditional offer medical examination?
- Are there any policies you would not be willing to follow?

There are serious risks for employers in indiscriminately hiring unqualified employees to “fill a quota,” and there are risks in failing to hire employees who later claim discrimination on the basis of protected class status. Employers simply cannot afford to hire “warm bodies” with the expectation of easily weeding out the under-performers, since “hire first, check later” practices can result in potentially costly liability, nor can they exclude applicants based on illegal criteria which cannot be defended. The following policies and strategic defense measures can be critical to an employer seeking to minimize the risks arising from recruitment and hiring decisions:

1. Adopt an Equal Employment Opportunity/Harassment policy.
2. Reserve the right to evaluate and confirm all information supplied by an applicant.
3. Condition employment on truthful application information.
4. Condition employment on willingness to accept any and all job assignments.
5. Condition employment on at-will employment status.

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Are Your Employment Related 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 firm 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 firm. The cost is \$775.00 for policy 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).

6. Require applicants to complete and sign your own employment application in your presence and have your own customized, legally prepared application form.
7. Provide applicants with notice of your at-will employment, mandatory overtime, travel, cross-trade work assignment, drug and alcohol, solicitation, and other critical policies.
8. Do not accept outside referrals of job applicants or specify acceptable sources in your policies.
9. Prepare a lawful, written policy incorporating all of your hiring and recruitment policies including all of the above.
10. Establish lawful, written job-related hiring criteria for positions.
11. Ask applicants only standardized, job-related questions.
12. Use validated screening devices.
13. Train your interviewers in lawful/unlawful questions and hiring criteria and in “best practices” for interviewers.
14. Have an experienced labor/employment lawyer review your hiring materials and employment policies.

Contact any Seaton, Beck & Peters 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.

<p>DO YOU NEED HUMAN RESOURCES’ ASSISTANCE?</p> <p>We are aware of several experienced Human Resources and labor relations professionals who are in the market for employment, as well as several who provide consulting assistance by the day or hour. If you need assistance with human resources or labor relations functions, either on a full-time or part-time consulting basis, contact Doug Seaton at 952-921-4604 or fax us at 952-896-1704, and we may be able to refer you to an experienced person to help.</p>	<p>SEATON, BECK & PETERS, P.A. <i>Practice dedicated to advising and representing employers in labor and employment law matters</i></p> <table style="width: 100%; border: none;"> <tr> <td style="width: 60%;">Barak J. Babcock</td> <td style="width: 40%; text-align: right;">Suite 320</td> </tr> <tr> <td>Alec J. Beck</td> <td style="text-align: right;">7301 Ohms Lane</td> </tr> <tr> <td>John F. Bowen</td> <td></td> </tr> <tr> <td>Marc T. Chrismer</td> <td style="text-align: right;">Edina, MN 55439</td> </tr> <tr> <td>Robin N. Kelleher</td> <td></td> </tr> <tr> <td>Elizabeth M. McDowell</td> <td style="text-align: right;">Tel: 952-896-1700</td> </tr> <tr> <td>Gregory L. Peters</td> <td style="text-align: right;">Fax: 952-896-1704</td> </tr> <tr> <td>Douglas P. Seaton</td> <td style="text-align: right;">Firm@seatonlaw.com</td> </tr> <tr> <td>Gregory P. Wilken</td> <td></td> </tr> <tr> <td>Robert L. Grossman, of counsel</td> <td></td> </tr> </table> <p>The Upper Midwest’s premier management Labor and employment law firm</p>	Barak J. Babcock	Suite 320	Alec J. Beck	7301 Ohms Lane	John F. Bowen		Marc T. Chrismer	Edina, MN 55439	Robin N. Kelleher		Elizabeth M. McDowell	Tel: 952-896-1700	Gregory L. Peters	Fax: 952-896-1704	Douglas P. Seaton	Firm@seatonlaw.com	Gregory P. Wilken		Robert L. Grossman, of counsel	
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