

AVOIDING THE PITFALLS OF THE HIRING PROCESS

I. INTRODUCTION

The hiring of employees is an exciting stage in the growth of any business. Unfortunately, this process is fraught with pitfalls for the unwary. Various state and federal laws regulate the inquiries an employer may make of an applicant during the application process, the interview, and after a job offer has been made (such as background checks or medical exams). The complexity of these laws is compounded by the fact that some questions can only be properly asked at certain stages of the hiring process. Additionally, California allows employers to be held liable for negligent hiring – i.e., hiring an individual who the employer knew or *should have known* posed a danger to others. For these reasons, California employers are forced to navigate a narrow and treacherous strait: they must thoroughly investigate prospective new employees, but must not do so in a discriminatory or otherwise unlawful manner.

II. IDENTIFYING THE HAZARDS

California's Fair Employment and Housing Act ("FEHA") prohibits employers from discriminating against applicants and employees based on their "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation." In other words, each of the foregoing categories generally may not be considered in making a hiring decision. However, it may also be unlawful for an employer to base a hiring decision on a criterion that – though neutral on its face – has an adverse impact on a particular group protected by Federal or State law. For example, a pre-hiring test for an office position that requires applicants to carry 200 pounds up a flight of stairs may result in few women qualifying for the position. Since such a skill is probably not necessary for an office job, the test will likely be considered illegal. However, since such strength and agility are required of a firefighter, the test is considered appropriate for that position.

Notwithstanding the foregoing, both federal and California law permit employers to impose hiring standards that have an inappropriately negative impact on a protected group under certain circumstances. Under Federal law, the employer must be able to demonstrate that the standard is a "*business necessity*," meaning that passing the test is necessary because it demonstrates a level of proficiency in a skill that is necessary for the job. California words its test a bit differently, and recognizes the business-necessity defense only if there is "an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business," and only if there is no "alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." Other defenses to employment discrimination include an employer's need to conform to security regulations and bona fide occupational qualifications. With this general background in mind, we may now turn to limitations on particular areas of inquiry of which employers should be aware.

A. Age

Generally, employer policies that rely on age as a hiring criterion are unlawful unless they are supported by a bona fide business purpose as described above, or when the law compels such action. Absent these unique circumstances, an employer may only inquire whether a prospective employee meets the requirements of legal age of employment. In so asking, the employer should avoid asking questions that would or could reveal the age of the employee, including the employee's birth date or the date of attendance or completion of schooling.

B. Citizenship, National Origin, and Ancestry

An employer may not discriminate against an applicant because of the applicant's national origin, lack of citizenship, ancestry, status as a lawfully-admitted alien, or status as a refugee. At the same time, it is illegal for an employer to knowingly hire unauthorized aliens. Indeed, the knowing employment of an unauthorized alien can subject an employer to both civil and *criminal* penalties. Practically, this issue should not arise until a decision has been made to hire the applicant, at which time the applicant will be required to produce the documentation required pursuant to the I-9 form.

An employer may lawfully hire an applicant who is a citizen or national of the United States over another applicant who is an alien, so long as the two are equally qualified. As such, while employers should inquire whether a prospective employee can provide verification of their legal right to work in the United States, an employer cannot ask applicants to disclose their country of birth, or to provide *particular* proof of legal status. For example, an employer cannot demand that an applicant provide it with his or her Social Security card. Thus, when a new employee is completing the I-9 form, the employer must allow the employee to provide whatever documentation the employee wishes to satisfy the I-9 requirements.

C. Sexual Orientation

Employers may not discriminate against applicants on the basis of any actual or perceived sexual orientation. California's FEHA defines "sexual orientation" as including heterosexuality, homosexuality, and bisexuality. Thus, employers must refrain from inquiring into an applicant's sexual habits or preferences. Such questions could form the basis not only of a discrimination action, but a harassment lawsuit, for which the person conducting the interview may be personally liable.

D. Sex

It is common knowledge that an employer cannot legally take an applicant's gender into consideration when making an employment decision. However, this topic is broader than simply the sex of the applicant. Specifically, the FEHA includes conditions such as present or intended pregnancy, medical conditions related to pregnancy or childbirth, and gender identity issues under the umbrella of "sex." An employer cannot discriminate against a female employee because she is, or may become, pregnant, and should therefore refrain from asking whether an applicant has plans to become pregnant.

E. Marital or Family Status

An employer should avoid asking an applicant whether he or she is married or engaged; whether the applicant currently has or plans to have children; the ages of any children; the names or addresses of relatives; the applicant's maiden name; or other such information. However, an employer may ask whether an applicant has used another name, if such information is necessary to perform a reference or background check.

Additionally, many employers have policies limiting the situations in which spouses may work in the same chain of command. Such policies do not run afoul of the FEHA, as employers are affirmatively granted the right "to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility." Accordingly, applicants can and should be informed of the existence of any "no-spouse" policy.

F. Religion

California prohibits discrimination on the basis of a person's "religious creed," which is defined to "include all aspects of religious belief, observance, and practice." Thus, an employer may not make any inquiry that expresses, directly or indirectly, any limitation or discrimination on the basis of religion unless the inquiry is job-related. For example, if working on Sunday morning is a job requirement, the employer may ask the applicant if he is available to work Sunday mornings even if it may lead to denial of the job and a discussion of the applicant's religious beliefs.

Very few employers would make the mistake of directly discriminating against an applicant on the basis of his or her religion. The more likely scenario is that an employer unknowingly poses questions that implicate this protected category. For example, an employer's attempts to determine an applicant's availability to work specific hours may very well encroach on the topic of the applicant's religious practices. While such inquiries are relevant to an applicant's suitability for the position, employers must use care to ensure that their inquiries are justified by business necessity, and are not framed in a manner that has "an exclusionary effect on the employment opportunities of persons with certain religious practices."

G. Criminal Record

California employers are obligated to inquire about the background of a prospective employee to avoid a claim of negligent hiring. As such, employers can and should investigate the criminal background of a prospective employee prior to hiring. However, California employers do not have free reign to inquire into *all aspects* of an applicant's criminal history. In fact, California law closely circumscribes the information that an employer may elicit via either an application form or an interview. Additionally, Federal law provides that a criminal conviction alone should not be an absolute bar to employment.

First, let us establish what an employer *can* ask an applicant about his or her criminal record. Subject to certain limitations detailed below, an employer may ask about a ***criminal conviction***, whether a felony or misdemeanor, as well as any charges or arrest for which the applicant is currently out on bail and is awaiting trial. However, because there are exceptions to

these general areas of inquiry, an employer must proceed with caution. For example, employers are prohibited from asking applicants about each of the following:

- arrests that did not result in a conviction;
- arrests for which a pre-trial diversion program has successfully been completed;
- marijuana-related offenses if the convictions are more than two years old; and
- convictions that have been judicially ordered sealed, expunged, or statutorily eradicated.

A common theme running through these restrictions is that an employer must avoid asking an applicant about his or her *arrests*; the applicant's *convictions* are generally a much less problematic area of inquiry (though it is still subject to some restrictions, as discussed above). And as with all pre employment inquiries, the questions regarding an applicant's criminal history should be job-related.

One final note on applicant criminal history investigation: an employer cannot use information obtained from California's Megan's Law website to make employment decisions except to protect a person at risk. The Megan's Law website provides information on the more than 63,000 persons in California who are required to register as sex offenders. While it would certainly be disturbing to discover that a prospective new employee appears to be a sex offender, an employer is statutorily prohibited from refusing to hire a person on that basis. Violation of this law could expose an employer to various damages, including a civil penalty of up to \$25,000.

H. Physical Abilities, Mental Health, and Medical Conditions

Under both Federal and California law, an employer cannot require *applicants* to take a medical or psychological examination or to reveal whether they have a disability or medical condition. Similarly, employers should avoid asking applicants any questions that would indicate a medical condition or mental or physical disability. The employer may, however, inquire about the applicant's ability to perform job-related functions and may respond to an applicant's request for reasonable accommodation. For example, if the job in question requires repeatedly lifting 30 pound bags of cement, the employer can ask the applicant if he or she is capable of performing this task because it is related to a job-related function. If the applicant identifies a condition that interferes with his or her ability to perform the job-related function, the employer must consider whether the applicant could meet the job requirements with reasonable accommodation. The issue of accommodation is complex and more appropriately addressed in a separate article.

The following questions would likely constitute prohibited inquiries:

- Do you have a disability?
- How many days were you sick last year?

- Have you ever filed for workers' compensation?
- Have you ever been injured on the job?
- How much alcohol do you drink each week?
- Have you ever been treated for alcohol problems?
- What prescription drugs are you currently taking?

Each of the foregoing questions could expose an employer to a discrimination action, leaving the employer to try to defend its actions and establish that the improper inquiry had nothing to do with the employment decision – often, a very difficult fact to establish.

Notwithstanding the foregoing, an employer may require a standard of all applicants that ensures that the applicant does not pose a direct threat to health or safety in the workplace. Additionally, *after* an offer of employment has been made, but *before* the commencement of employment duties, an employer can require the prospective employee to successfully complete a medical or psychological examination as a condition of employment, so long as the examination is job-related and consistent with business necessity and all entering employees in the same classification are subject to the same exam. Additionally, California applicants must be given the opportunity to provide the employer with the results of an independent medical exam prior to a final employment decision being made.

I. Rehabilitated Drug and Alcohol Users

An employer may refuse to hire an applicant who, due to his or her current use of drugs or alcohol, is incapable of performing the duties of the position in a manner that would not endanger the health and safety of the applicant or others. The illegal use of drugs includes the abuse of prescription medication. However, employers may not discriminate against applicants who (i) are participating in a supervised rehabilitation program and no longer engage in such use; (ii) have successfully rehabilitated from past drug use and no longer engage in such use; or (iii) who are erroneously regarded as someone who was engaged in illegal drug use. Furthermore, an employer must reasonably accommodate a prospective employee who is currently undergoing a rehabilitation program, so long as the accommodation does not impose an undue hardship on the employer. These restrictions do not prohibit an employer from requiring all prospective employees to undergo a drug screening test as a condition of employment after an offer of employment has been made, but prior to hiring.

J. Personal Appearance and Dress Standards

It is lawful for an employer to impose standards of dress and personal appearance. Furthermore, an employer's grooming policy that differentiates in some respects between male and female employees does not, by itself, constitute discrimination. For example, policies that require male employees to have short hair and that impose no similar restriction on female employees have been held to be permissible. Additionally, in one case employers were permitted to require female employees (in this case, bartenders) to wear makeup and nail polish.

An employer should ensure that any appearance standards it imposes are based on actual job requirements. Furthermore, in establishing these policies, and in pre-screening applicants on the basis of such policies, employers must be cautious not to impose grooming or appearance criteria that have a discriminatory affect. For example, in separate cases, a no-beard policy has been found to constitute religious and racial discrimination under federal law based on the individuals who were disqualified by the policy. California also forbids employers from prohibiting employees from wearing pants based on the employee's sex, and requires dress codes and similar standards to be "flexible enough to take into account religious practices." As such, employers must use caution in drafting appearance standards, as this is another potentially fertile ground from which a discrimination claim could spring.

K. Education Requirements

As with any pre-screening requirement, an employer's demand that applicants have a certain level of education should fit the actual needs of the position. Unnecessary qualifications – and particularly those that may disparately affect minorities or other protected groups – may expose an employer to liability.

A common example is an employer's requirement that its employees speak English fluently. Generally, an employer may assess oral communication skills – including English proficiency – when they are reasonably related to job performance. However, an employer can refuse to hire an applicant based on his or her accent or inability to communicate in English only where the lack of fluency would "materially interfere" with job performance. Employers must exercise great caution in basing hiring decisions on qualifications such as the ability to speak English, as improper use of this criterion could easily be argued to be discriminatory on the basis of race, national origin, or other protected characteristics.

L. Veterans

Generally, employers may use veteran status as a factor in employee selection, and may give veterans special consideration, without violating the FEHA. However, federal law (specifically, the Uniformed Services Employment and Reemployment Rights Act of 1994 ["USERRA"]) prohibits discrimination against members of uniformed services on the basis of past or current membership in the service, or the obligation to serve in the future. In order to avoid inquiries that could be construed as discriminatory on the basis of service, employers should limit their questions to the relevant skill sets acquired during military service. Inquiries into the dates or type of discharge from the military, or general questions regarding service in a foreign military, may expose an employer to liability.

M. Credit Report or Financial Circumstances

From a discrimination standpoint, employee selection criteria that take applicants' financial circumstances into consideration may have an adverse impact on protected classes, and employers should therefore use caution in requiring prospective employees to submit to credit reports. Again, such inquiries may be defensible if the running of a credit report is directly and closely related to the position sought, such as a job requiring financial management skills. Additionally, employers should avoid running a report that would disclose information that is

otherwise illegal to inquire about, such as marital status or age. Finally, even where the type of position justifies the employer's running of a credit report, an employer cannot discriminate against an individual because he or she (i) has filed for bankruptcy, (ii) was insolvent prior to filing for bankruptcy; or (iii) has failed to pay a debt that was discharged in bankruptcy.

There are other regulations governing an employer's ability to run a background check or credit history on its prospective employees. California employers wishing to run an applicant's credit history are required to comply with the federal Fair Credit Reporting Act, the California Consumer Credit Reporting Agencies Act, and/or the California Investigative Consumer Reporting Agencies Act, depending on the type of information sought. These laws set forth various procedural requirements for an employer's inquiry to be lawful. For example, both Federal and State law require specific disclosures to be provided to an applicant, although the precise requirements differ by jurisdiction. Additionally, the employer must obtain an applicant's written authorization prior to running a credit or background report, and usually must provide the applicant with a copy of the report it receives. Finally, when a person's employment is denied due to information obtained via a credit or background report, additional disclosures and obligations are required by the employer. The complexities of this aspect of hiring cannot adequately be discussed in this article. Suffice to say that, prior to running a background check or credit history report on an applicant, an employer would be well-served to first consult with knowledgeable legal counsel.

III. RECOMMENDATIONS

A. Ensure That All Pre-Employment Inquiries Are Justifiable.

A common theme throughout the foregoing "hazards" of pre-employment inquiries is that many inquiries are not *necessarily* illegal, and may be justified on the basis of the position sought by the applicant. As such, a good touchstone for any inquiry by the employer is that it be based on the actual requirements of the position.

For hiring practices that tend to exclude a protected class – for example, persons over a certain age – the employer's practice must be shown to spring from a *bona fide occupational qualification*. Under California law, the employer must be able to show that the occupational qualification is necessary to the normal operation of the business, and that virtually all of the protected class would be excluded from the position as a result. Thus, an employer that imposed a requirement for a position that no persons over 50 years old would be considered, would be required to show that, due to the particular requirements of the position, virtually no one over the age of 50 would be able to successfully perform in the job.

For hiring practices that are facially neutral, but which have a disproportionate effect on members of a protected class – for example, a physical performance test that tends to favor one gender or a particular race – an employer must be able to show that its practice is necessary to ensure safe and efficient job performance (the "*business-necessity*" test). Thus, if an employer could demonstrate that the facially-neutral physical examination (such as the fireman's physical agility test discussed earlier) it required was necessary for the safe and efficient performance of a

job, the employer could escape liability even if the test results appeared to favor women applicants.

B. Don't Ask Irrelevant Questions.

Proving discrimination in the hiring process usually focuses on two main issues: (i) the statistical exclusion of members of a protected class, and (ii) the qualifications of applicants who were rejected compared to those who were hired. In such circumstances, an errant or irrelevant remark or question by an interviewer can have a major effect on the litigation, because the employer and applicant have such a limited history from which to draw. As such, employers can help to avoid liability by ensuring that they do not elicit irrelevant information during the application and interview process. In other words, if you can't legally use the information to reach an employment decision, then you don't want to know.

IV. CONCLUSION

While conducting a legally-compliant hiring process often feels like a stroll on a tightrope, early consultation with legal counsel can help to navigate and minimize the inherent dangers. Additionally, once an employer has certified that its practices are legal, the threat of a discrimination claim brought by someone whom the employer *never employed* diminishes greatly. With guidance, the applicant screening process can be a revealing and straightforward exercise, and can result in the business accruing considerable value in the form of human capital.



Jeffrey Wertheimer is a Partner in the Employment and Labor Department of Rutan & Tucker, LLP, where he draws on more than two decades of litigation and counseling experience to protect business and employer interests. Mr. Wertheimer has successfully defended clients in a variety of employment matters, including class action and multi-plaintiff wage and hour, harassment, disability discrimination, retaliation, wrongful termination, and breach of contract claims. Mr. Wertheimer may be contacted at jwertheimer@rutan.com.



Brandon Sylvia is an Associate in the Employment and Labor Department of Rutan & Tucker, LLP. Mr. Sylvia's practice involves representing employers in a broad range of employment-related litigation, including wage-and-hour class action disputes, trade secret litigation, and retaliation, harassment, and discrimination claims. Mr. Sylvia may be contacted at bsylvia@rutan.com.