

Employment Applications: Be Careful What You Ask For

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Employers should be careful in formulating employment applications that they do not inadvertently provide an applicant with a legal claim. Specifically, the New Jersey Law Against Discrimination makes it unlawful to refuse to hire an individual because of his or her membership in such protected categories as race, national origin, disability, age, marital status, familial status, sexual orientation and gender identity. In addition, the New Jersey Workers' Compensation Act makes it illegal to retaliate against an employee for taking leave pursuant to that law. It is worth noting that along with the don't-ask questions on employment applications, there is one important do-ask question—whether an employee has a post-employment restriction.

It may be obvious that an employer should not directly ask a potential employee on the application if he or she is a member of a protected category because the potential employee may, even if mistaken, believe that the employer based its hiring decision on the fact that the employee is in a protected group. Keep in mind also that an application should not then indirectly ask for protected category information either. With respect to age discrimination, for example, an application should clearly not ask for the applicant's date of birth, and furthermore, it should not ask for the individual's date of high school graduation as an indirect method of determining a person's age. Likewise, an employer should not ask the religion of an applicant on the application, and should stay away from questions that indirectly provide the same information, such as, "is there any day of the week you can't work for religious reasons?" Similarly, an employer should not ask on an application whether a person is disabled, and an employer should not indirectly attempt to determine whether there is a disability by asking how many days the individual was absent last year at a prior job.

Apart from making sure that the job application does not ask questions that could be considered discriminatory, there are other potential pitfall questions. For example, one question often seen on job applications is "have you ever filed a workers' compensation claim?" If an employer does not hire an individual who answers yes to this question, the employee could claim workers' compensation retaliation. In addition, New Jersey has a "ban the box" statute which makes it illegal to ask on an application whether an individual has been convicted of a crime.

One question employers should consider asking on an application is whether an individual has any post-employment restrictions from a prior job. This question is important to ask for several reasons. Many post-employment restriction agreements contain a clause wherein the employee agrees to tell his or her new employer about the restrictions. If the applicant you are considering does not do so, that may tell you something about his or her honesty. Also, a new employer may be liable for "tortious interference with contract" or similar claims if the employer knows about post-employment restrictions and violates them anyway. Moreover, if the newly hired employee does not tell you about the effective restrictions, you may receive a call from the former employer causing you to have to deal with a messy situation that may include deciding whether to terminate the new employee or continue to violate the post-employment restrictions and gamble with potential legal consequences.

TAKEAWAY: Review your employment application carefully to ensure it does not provide applicants with potential claims.

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