

5 Easy Steps to Prevent “Accidental” Discrimination When Hiring

Presented by



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About Leah

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Learning Objectives

- Language to avoid when advertising and recruiting
- Checklist of right and wrong interview questions
- The definition of ‘reasonable accommodation’ for disabled applicants
- Precautions to take when conducting background checks
- Dos and don’ts of accessing social media accounts

Federal (and State) Laws Affecting Hiring



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Title VII of the Civil Rights Act of 1964

- Legally protected characteristics
 - *Race*
 - *Color*
 - *Religion*
 - *Sex*
 - *National origin*
- Applies to all stages of employment
- Cannot take action, or retaliate, against employees who oppose job discrimination, workplace harassment or take part in an investigation



Other Major Laws

- **Pregnancy Discrimination Act of 1978** prohibits discrimination against female workers on the basis of pregnancy, childbirth or related medical conditions
- **The Age Discrimination in Employment Act of 1967 (ADEA)** protects people age 40 or older from any type of job discrimination



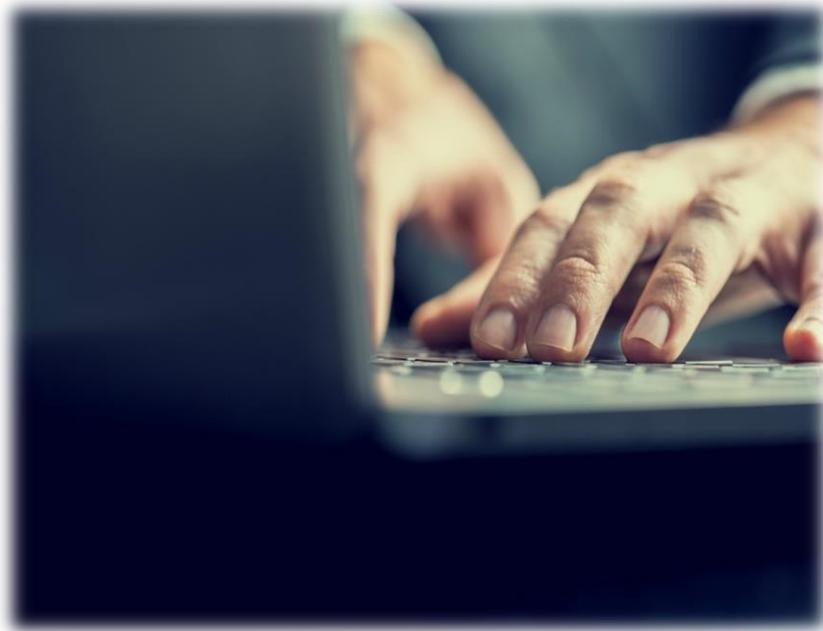
Other Major Laws

- Americans with Disabilities Act of 1990 (ADA)
- Immigration Reform and Control Act of 1986 (IRCA)
- Fair Credit Reporting Act (FCRA)
- U.S. Bankruptcy Code, Section 525
- Employee Polygraph Protection Act of 1988 (EPPA)
- Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
- Genetic Information Nondiscrimination Act (GINA)



Note: Most states have their own employment discrimination laws that include or expand the provisions of federal law.

Step 1: Recruit Fairly and Objectively



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A Job Description Should Include:

- Title
- Location
- Skills needed
- Minimum experience
- Responsibilities/duties
- Work schedule
- Education or training requirements
- Travel/transportation requirements



Legal Considerations with Job Advertisements

- Do not suggest a predisposition to hire a certain group
- Do not exclude a certain group of applicants based on illegal factors such as age, national origin or gender
- Avoid using gender-specific terms to describe a job position



Writing the Job Advertisement

- Emphasize your company's equal employment opportunity policy
- Clearly detail what the job involves, including minimum qualifications and essential job functions
- Only include job title, general duties and responsibilities, necessary skills, experience or education required, company background and how to apply
- Keep the wording focused on the position and the responsibilities

Step 2: Use Legally Sound Job Applications



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Legal Considerations with Job Applications

- Job application questions must protect the applicant's privacy and employment rights
- An application should never include questions that reveal an applicant's gender, age, race, religion, national origin, disability or marital status



Legal Considerations with Job Applications: Ban the Box

- Question now banned in 19 states and 100+ cities
- Refers to criminal history question on job applications:
Have you ever been convicted of a crime? YES NO
- When first introduced, ban the box laws applied only to government contractors and subcontractors
- Now ban the box laws have expanded to target private employers

Where Does Ban the Box Apply?

- 12 states regulate how **public** employers may use criminal records
 - ✓ California, Colorado, Connecticut, Delaware, Georgia, Maryland, Nebraska, New Mexico, New York, Ohio, Virginia and Vermont
- Seven states extend ban the box laws to **private** employers
 - ✓ Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon and Rhode Island



Ban the Box: Employer Rights

- You're not prohibited from conducting a legally sound background check on an otherwise qualified individual
- Ban the box legislation shifts the criminal history inquiry from the initial application stage until later in the hiring process, when you hold an interview or extend a conditional job offer



Ban the Box Compliance

- Review and revise all employment applications to be certain they don't include a criminal history question
- Modify your hiring procedures to delay any inquiries about criminal history until it's appropriate

Application for Employment

Equal access to programs, services and employment is available to all persons. Those applicants requiring reasonable accommodation to the application and/or interview process should notify a representative of the Human Resources Department.

Name _____ Applicant ID # _____
Address _____
Telephone # (____) _____ Cellular/Other Phone # (____) _____ E-mail Address _____
Position(s) applied for _____ Date of application ____/____/____

Referral Source (Please check the appropriate category and list the source.)

<input type="checkbox"/> Walk-in	<input type="checkbox"/> School
<input type="checkbox"/> Employee	<input type="checkbox"/> Job Fair
<input type="checkbox"/> Advertisement	<input type="checkbox"/> Staffing Agency
<input type="checkbox"/> Company's Website	<input type="checkbox"/> Government Employment Agency
<input type="checkbox"/> Other Internet	<input type="checkbox"/> Other

If necessary, best time to call you is _____
 Home Cellular/Other

May we contact you at work? Yes No
If yes, work number and best time to call: _____

If you are under 19 and it is required, can you furnish a work permit? Yes No
If no, please explain: _____

Have you submitted an application here before? Yes No
If yes, give date(s) and position(s): _____

Have you ever been employed here before? Yes No
If yes, give dates: From ____/____/____ To ____/____/____

Is this application a request for reemployment following an extended military leave of absence from this company? Yes No
If yes, additional information may be requested.

Are you legally eligible for employment in this country? Yes No

Date available for work: ____/____/____

What is your desired salary range or hourly rate of pay?
\$ _____ Per _____
 Full-Time Part-Time
 Seasonal Temporary

Will you relocate if job requires it? Yes No

Will you travel if job requires it? Yes No

If they have been explained to you, are you able to meet the attendance requirements of the position? N/A Yes No

Will you work overtime if required? Yes No
If no, please explain: _____

Are you able to perform the "essential functions" of the job for which you are applying (with or without reasonable accommodation)?
This question is not designed to elicit information about an applicant's disability. Please do not provide information about the existence of a disability, particular accommodations, or whether accommodations is necessary. These issues may be addressed at a later stage in the select process by law.

Yes No Need more information about the job's "essential functions" to respond

Driver's license number required if driving may be required in the job for which you are applying: _____ State _____

Have you ever been bonded? Yes No
Answering "yes" to the following question does not constitute an automatic bar to employment. Factors such as date of the offense, seriousness and nature of the violation, rehabilitation and justice sought will be taken into account.

Have you ever pleaded "guilty" or "no contest" to _____
or been convicted of a crime? Yes No
If yes, please provide date(s) and details: _____

Have you entered into an agreement with any former employer or other party (such as a non-compete agreement) that might, in any way, restrict your ability to work for our company? Yes No
If yes, please explain: _____

AN EQUAL OPPORTUNITY EMPLOYER Page 1

Step 3: Steer Clear of Inappropriate Interview Questions



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Interview Questions/Topics Checklist

- ✓ **Address** - Don't ask where the applicant was born
- ✓ **Age** - Avoid directly asking for the applicant's age or date of birth
- ✓ **Citizenship** - Don't ask if the applicant or his or her family members are naturalized or born U.S. citizens. Rely on the I-9 documentation process after making a conditional job offer.
- ✓ **Disabilities** - Never ask if an applicant has any physical or mental disabilities
- ✓ **Driver's License** - Only request if driving is a necessary part of the job
- ✓ **Education** - May not ask when the applicant attended or graduated from school or whether the school has any religious, cultural or racial affiliations

Interview Questions/Topics Checklist

- ✓ Experience - Don't ask for the specific discharge an applicant received from the military
- ✓ Marital status and pregnancy - Ask nothing
- ✓ Name - May not ask about the origin of the applicant's name
- ✓ National origin or ancestry - Don't ask about primary language
- ✓ Organizations or activities - Don't get into discussions of organizations that reveal protected status
- ✓ Race, color, physical traits - Ask nothing

Interview Questions/Topics Checklist

- ✓ **References** - Fine to ask (for basic verification)
- ✓ **Relatives** - Don't ask for marital status, number of dependents, or the name or address of an applicant's spouse
- ✓ **Religion** - Ask nothing
- Remember to take notes on a separate piece of paper
- Don't indicate anything that could be perceived as discriminatory
- Use written, objective criteria for evaluating candidates and apply that criteria consistently to everyone
- Ask the same questions to all candidates

Step 4: Accommodate Applicants with Disabilities



Americans with Disabilities Act (ADA)

- In 1990, the Americans with Disabilities Act (or ADA) was passed to help prevent discrimination against individuals with disabilities
- Federal law applies to employers with 15 or more employees
- However, all employers should consider these guidelines when interviewing candidates with disabilities



Interviewing Guidelines

- Conduct interviews in accessible locations
- Honor requests for a reasonable accommodation
- Inform candidates of any tests ahead of time
- Treat applicants with disabilities with the same respect and dignity you treat all applicants
- Wait until the applicant mentions accommodations
- Focus on the essential functions of the job
- Use appropriate language when taking notes

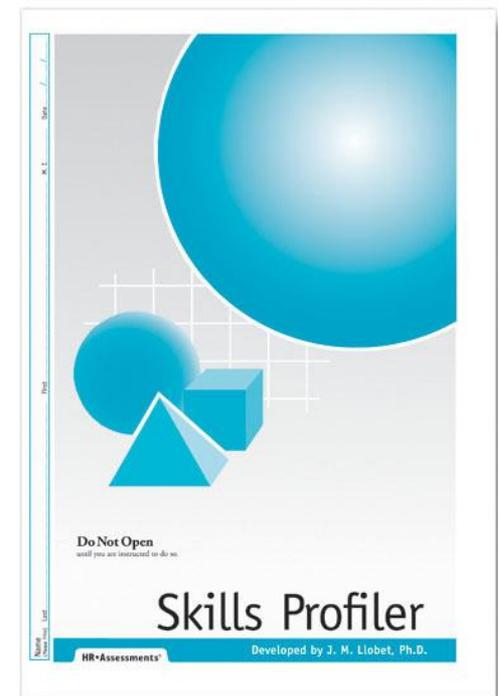
Step 5: Screen Thoroughly Within the Law



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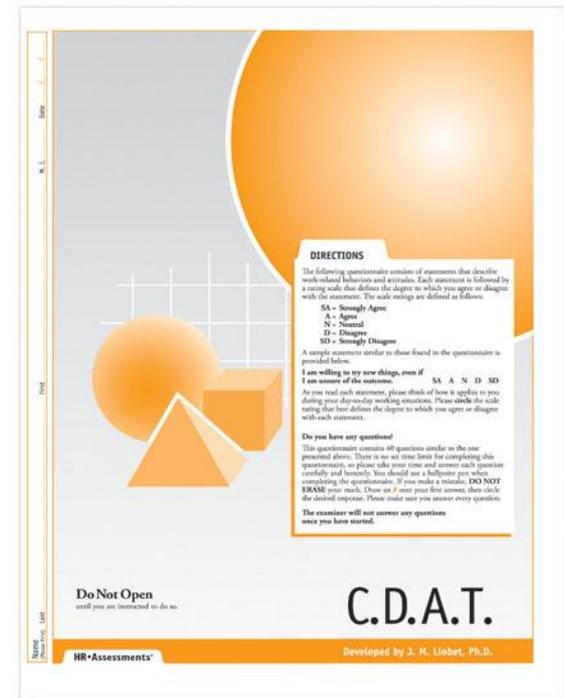
Pre-employment Testing

- Pre-employment testing helps assess candidates and take some of the guesswork out of measuring skills
- Most employers administer tests in two areas:
 - *Personality, attitudes and behaviors, such as work ethic, dependability, ambition and service orientation*
 - *Skills, abilities and aptitude, such as vocabulary, math and reasoning, reading comprehension and problem solving*



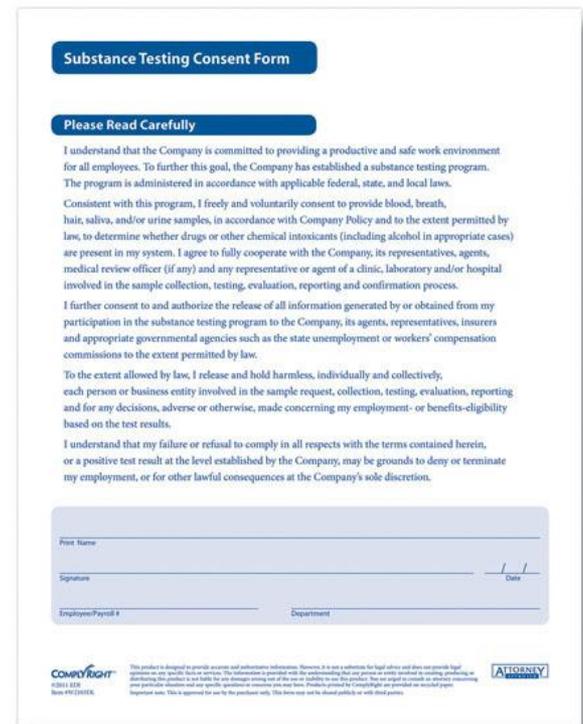
Pre-employment Testing Guidelines

- Use the right tests
- Ask the right questions
- Test at the right time
- Test all applicants
- Make the right accommodations



Background Checks

- First, inform the applicant
- Requesting consent protects your business from applicant privacy claims and can save everyone time
- Explain that a previous conviction does not automatically dismiss the applicant, but that anyone who tries to withhold information or falsify a previous criminal record will be disqualified



Substance Testing Consent Form

Please Read Carefully

I understand that the Company is committed to providing a productive and safe work environment for all employees. To further this goal, the Company has established a substance testing program. The program is administered in accordance with applicable federal, state, and local laws.

Consistent with this program, I freely and voluntarily consent to provide blood, breath, hair, saliva, and/or urine samples, in accordance with Company Policy and to the extent permitted by law, to determine whether drugs or other chemical intoxicants (including alcohol in appropriate cases) are present in my system. I agree to fully cooperate with the Company, its representatives, agents, medical review officer (if any) and any representative or agent of a clinic, laboratory and/or hospital involved in the sample collection, testing, evaluation, reporting and confirmation process.

I further consent to and authorize the release of all information generated by or obtained from my participation in the substance testing program to the Company, its agents, representatives, insurers and appropriate governmental agencies such as the state unemployment or workers' compensation commissions to the extent permitted by law.

To the extent allowed by law, I release and hold harmless, individually and collectively, each person or business entity involved in the sample request, collection, testing, evaluation, reporting and for any decisions, adverse or otherwise, made concerning my employment- or benefits-eligibility based on the test results.

I understand that my failure or refusal to comply in all respects with the terms contained herein, or a positive test result at the level established by the Company, may be grounds to deny or terminate my employment, or for other lawful consequences at the Company's sole discretion.

Print Name: _____

Signature: _____ Date: _____

Employee/ Payroll # _____ Department _____

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Reviewing an Applicant Background Check

- How long has it been since the conviction?
- What is the nature of the offense?
- What is the nature of the job?
- Does your business have certain criminal history restrictions?

Bottom line: You must have a clear connection for why someone's criminal record makes him or her unfit for the job



Drug Testing

- Drug-testing laws vary widely from state to state
- Contact your state department of labor to learn your area rules
- The ADA prohibits testing until after a conditional job offer has been made
- Treat all applicants for the same job in the same way



Reference Checks

- Confirm dates of employment, title and salary history -- Do they match what the candidate shared on application?
- Read between the lines for clues from the person giving the reference
- Within reason, ask additional questions that won't lead to any potentially discriminating details
- Document your efforts



Social Media Considerations

- Any improper use of information viewed on social media may be discriminatory since an individual's race, gender, age and ethnicity can be revealed
- When in doubt, don't!
- Never request passwords for social media accounts and only review publicly available information
- Consider creating a written company policy that clearly informs hiring managers about what information can and can't be considered



Final Notes



Final Notes

- Stay away from high-risk language when recruiting and advertising job openings
- Use fully compliant job applications that capture important job-related information without crossing into illegal territory
- Follow an approved list of interview questions to keep the conversation job-focused and above board
- Familiarize yourself with the legal protections for applicants with disabilities, including how to handle reasonable accommodations
- Follow the proper precautions with screening tools, such as pre-employment testing, background checks and drug testing

Thank you!

