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Getting the Hiring Process Off on the Right Foot

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By June D. Bell

The best job applications do far more than gather a prospective employee's work history and educational background. They're a valuable screening tool as well as protection against litigation. They complement a thorough interview and become an integral part of the hiring process.

"A job application, like any other component of a personnel file, is a piece of evidence," says Shannon Marie Jenkins, a partner in the employment law practice of Tredway, Lumsdaine & Doyle in Irvine, Calif. "It's as important as any legal document."

If an employee ever sues, the job application becomes crucial. It can provide insight into the worker's truthfulness and history—and determine whether the case will be resolved in court or through arbitration. Because so much hinges on this document's contents, it's vital for HR professionals to understand what best practices entail and to insist that their companies follow suit.

Hewing to an established, approved job application is especially important when businesses need to bring on staff quickly because errors in judgment and hiring are most likely to happen when companies move too fast. They may be expanding so rapidly that they're desperate to increase headcount. They might feel pressured to add a large number of workers in a very short time to meet seasonal demands. Or they're looking to fill the ranks due to high turnover. In all cases, employers should rely on the safeguards in their job-application process to prevent making costly mistakes they'll pay for down the line.

Start with a Custom Application

"Gone are the days when you could just walk into an office supply store and get a template you can use across the board," says Nicole Cox, chief recruitment officer at Decision Toolbox Inc., a recruitment company in southern California. Because laws vary from state to state on what a prospective employer can ask, a generic application may not only be incomplete but also contain illegal questions.

Off-the-shelf applications may also lack vital areas of inquiry such as, "Are you able to perform the essential functions of this job?" says Jenkins, the attorney. That question is vital because it shields the interviewer from asking potentially discriminatory questions.

For example, it's illegal to ask a female job applicant if she's pregnant. But a pregnant woman is unable to do certain jobs, such as operating an X-ray machine. A job application that requires her to state whether she can perform the job's essential functions effectively screens her from the position without opening the door to a discrimination claim.

The ideal application has sections for a job seeker's education history and references from nonrelatives. It should also include an area for job-related experience, which the candidate should be instructed to complete even if she supplies a resume, says Maria Rodriguez of DLA Piper in Los Angeles. "I like that, because you're making them commit to something in writing," says Rodriguez, an employment-law specialist. "It doesn't have to be *War and Peace*. It can be five lines."

Resist temptation to streamline the hiring process by doing away with a formal job application in favor of a resume, CV (curriculum vitae) or biography. Professionals with extensive work experience often use these documents to expand on their accomplishments, speaking engagements, publications or discoveries. They can be a helpful supplement, but they are not a substitute for a signed job application, which requires the applicant to attest that everything she claims is true.

Closing the Gaps and Filling in the Blanks

Spaces that are left blank on a job application may be innocent omissions by a nervous or hurried applicant. Or they can be red flags, alerting employers to a troublesome past that a prospective employee would prefer not to reveal.

If a job history has gaps, it's acceptable to ask applicants to explain them, Rodriguez says. Answers such as "I was caring for a sick parent" or "I was in prison" or "I was being treated for depression" are all acceptable and should not disqualify a candidate from consideration.

Hiring managers are permitted to ask candidates why they left their last job and whether they were fired. They should listen carefully to the responses, says Michael Ludwig, a partner in the employment, benefits and labor group of Blank Rome's Los Angeles office. "I often encourage clients to be suspicious about vague answers."

Should a candidate refuse to enlighten a hiring manager, you can remove him or her from consideration for the job. "You're not trying to sandbag legitimate candidates," Rodriguez says. "You're trying to uncover things that will get the relationship off on the wrong foot due to a lack of candor."

There are no laws barring businesses from asking job candidates if they've ever sued a former employer. But Rodriguez advises against asking this on a job application because it can't be used to make a hiring decision. If an applicant thought he was passed over for a job solely because he had been involved in litigation, he could sue. A better strategy, Rodriguez says, is to uncover this information through a background check.

Prior Criminal History and Convictions and Litigation

Applicants with criminal records have more safeguards in California than in many other states. State law prohibits job candidates with criminal records from being excluded from consideration if the convictions aren't relevant to the job they are seeking. A registered sex offender's conviction wouldn't be considered relevant for a warehouse position at a shipping company. But an applicant's theft and embezzlement convictions would be grounds for a prospective employer to refuse to consider her for a cashier or accounting job.

California job applications can require candidates to list prior convictions—but only those convictions related to a prospective job's duties, and only those marijuana-related convictions that occurred in the past two years, Ludwig says, noting, "California is different [from other states] and generally more protective of the employee." (The two years is from the date of the application.)

A job application cannot ask candidates if they use marijuana recreationally, but an HR professional can inform candidates that the company requires a drug test before offering a job.

Careful Review

Part of the intake process should include a review by an HR professional to flag any spaces or sections left blank. If an area does not apply, the applicant should write “N/A” rather than leaving it empty, employment lawyers say.

Any information the candidate supplies should be verified. Did he attend the schools he claimed and receive the degrees he says he holds? Are the years he lists for education, prior jobs and military service accurate?

When Rodriguez was defending a company in a sexual harassment case brought by an employee, she ran a background check that uncovered multiple falsehoods on the man’s resume. He had not attended the university he claimed was his alma mater. He had never worked at the business where he said he spent two years. And he hadn’t served in the military. Had the employer been as thorough as Rodriguez, the man would have never been hired. The company could have saved itself time, legal fees and a \$60,000 settlement.

Sign, Seal and Deliver

A watertight application should contain a clause that requires any lawsuit the worker files to be resolved through arbitration, rather than in court. The application should also require the candidate to affirm that employment is at will.

For attorneys who defend businesses in litigation, the employee’s signature is the most important part of the document. That signature affirms, under penalty of perjury, that everything supplied on the application is accurate and truthful. Should the applicant lie on the form and later sue her employer, her credibility will be undermined because she perjured herself on the application. “Credibility is huge for litigation,” Jenkins says. A signed application “can save you tens or hundreds of thousands of dollars in litigation.”

Say No to Notes

Interviewing multiple candidates can exhaust busy HR professionals and require hours of their time. To help them remember who’s who, interviewers might be tempted to scribble a few reminders on resumes or job applications, noting the applicant’s jewelry, background or other distinctive garb, such as a gold cross or a miniskirt. Resist that temptation. Those notes could be used as evidence of discrimination in a lawsuit over hiring practices. Jotting a single word such as “burqa” on a document “could create 10 levels of hell for an employer,” Jenkins says.

Destroying the job applications of the candidates who weren’t hired might seem like a wise move to save space. But Jenkins says it’s better to err on the side of caution and retain them for four years—the statutory limit in California for failure-to-hire lawsuits.

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