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Mitigating risks in the pre-employment hiring process - by Scott Regan

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Though employers are understandably curious about their prospective employees' backgrounds, there are numerous federal and state laws that strictly limit which information employers can seek from job applicants, whether through job applications, interviews, and/or background/reference checks. In addition to needing a lawful basis for obtaining certain information from applicants, employers cannot make any employment-related decisions for an unlawful reason (e.g., refusing to hire someone based on certain information improperly obtained during the hiring process). While addressing every potential issue that employers may encounter is beyond the scope of this article, below are some issues that arise with enough frequency to warrant discussion.

Unlawful age-related inquiries. With limited exceptions, Massachusetts and federal law forbid age discrimination against individuals who are 40 years of age or older. Generally, the only proper age-related question is asking whether an applicant is under 18 because there are certain laws specifically tailored to the employment of such individuals. Thus, in addition to not asking applicants clearly improper age-related questions (e.g., how old are you?), employers should avoid questions about an applicant's background and/or experiences that are designed to elicit information about the applicant's age.

Improper race, color, and/or gender-related inquiries. Generally, employers should avoid questions about the race and/or color of an applicant. In addition to not asking direct questions to elicit such information, at least one Massachusetts court has held that a job application requiring individuals to identify their friends/relatives who worked for the employer was improper because the applicants' responses would ostensibly require them to disclose their protected class status, if any. Accordingly, that court denied the defendant employer's request to dismiss the underlying complaints of discrimination.

Similarly, and absent the unlikely scenario where an applicant's gender is a legitimate and lawful requirement for a job, employers should avoid asking questions about an applicant's gender. By way

of example, employers should not ask job applicants whether they have children and/or plan to have children because basing employment decisions on an individual's familial responsibilities may give rise to a claim of gender discrimination. Thus, even seemingly innocuous questions during the interview process may expose employers to potential claims.

Unlawful disability-related inquiries. In Massachusetts, employers are prohibited from discriminating against individuals because of their handicap or perceived handicap. Accordingly, employers generally cannot ask job applicants whether they are disabled, or other disability-related questions, to make that determination. The Massachusetts Commission Against Discrimination (MCAD), which is the state agency charged with investigating and prosecuting complaints of discrimination, has indicated that a disability-related question is any question that is likely to elicit information about a handicap from the job applicant.

According to the MCAD, examples of improper disability-related questions include the following: (i) do you a have a handicap/disability?; (ii) have you ever been hospitalized for medical or mental treatment?; and (iii) have you ever been absent from work due to illness? Importantly, an employer also cannot ask an applicant about the nature, severity, and/or treatment associated with any disability (even if an applicant's handicap is obvious).

Though employers should be cautious regarding an applicant's potential disability, employers are permitted to ask certain questions to ensure that an applicant can perform specific job functions before being hired.

For example, employers are generally allowed to ask applicants (i) whether they can perform the essential functions of a job with or without a reasonable accommodation (unless there is clearly a disability related to a certain job function); (ii) whether the applicant can meet the employer's attendance requirements for the position; and (iii) about the applicant's attendance record at his or her prior job.

Employers should be mindful that there are situations in which a reasonable accommodation must be provided to a candidate during the hiring process.

In addition, there are situations in which an employer may have a valid need for certain medical information to ensure that the applicant can perform the essential functions of a job. While a job offer may be conditioned on a post-offer medical examination in such cases, for example, the examination must be required of all applicants for that job category (e.g., for all truck drivers). Importantly, the examination must be conducted solely to determine whether an applicant, with or without a reasonable accommodation, can perform the essential functions of the job.

Even if employers (and employees) may view certain questions as a good-natured effort to establish a rapport, they should refrain from requesting any information that could subject them to unnecessary liability. Given the numerous issues that can arise during the pre-employment process, employers should consider consulting with an experienced employment law attorney about their hiring practices.

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