

Crucial aspects of the hiring process

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Attracting and evaluating job applicants, and retaining qualified applicants as employees, is crucial to any organization's success, including a medical practice, clinic, or hospital. Effective, lawful documents prepared so as to reduce the risk of discrimination and/or contract claims against the practice, clinic, or hospital are equally crucial. These documents will set the tone for the employment relationship, potentially protect the employer from liability, and reinforce any desired employment-at-will relationship.

Job Postings and Advertisement

Advertisements are generally the first instance when an employer and a prospective employee communicate. Title VII and the Age Discrimination in Employment Act ("ADEA") prohibit employers from advertising in a manner that indicates a preference for applicants based on their race, sex, religion, or age, or other protected classification, except in those rare instances when such characteristics are considered Bona Fide Occupational Qualifications ("BFOQ").

Employers should ensure that their advertisements avoid gender specificity. Likewise, advertisements

indicating age-based preferences or limitations must be avoided, such as "recent high school graduates are encouraged to apply." The advertisements should further contain an equal opportunity statement.

Employers must be equally careful not to create an implied contract of employment or any other such commitment. Guarantees as to job security, future advancement, permanency of the position, and employment for a specific duration must be avoided.

Wisconsin statutes §103.43(1) also forbids employers to influence, induce, or persuade an individual to accept employment by false or deceptive advertising. Employers may not misrepresent the kind of work to be performed, mischaracterize compensation to be paid, or misrepresent sanitary or other conditions of such employment. Likewise, employers who advertise for labor during a strike or lock-out are required to disclose that fact to prospective employees. As many medical-related employers hire nurses or other staff who are union members, this is particularly important.

Job Descriptions

Employers are well advised to review, revise, or create a job description for every job position. It is imperative that any job description, especially those for vacant positions, identify the position's essential functions of the job. Job descriptions containing the essential functions of a job facilitate an

employer's inquiry about an applicant's ability to perform both marginal and essential duties.

The Americans with Disabilities Act ("ADA") prohibits direct inquiries about an applicant's disabilities until an employer extends the applicant a bona fide conditional offer of employment. However, the ADA expressly provides that in determining the essential functions of a job, some deference will be given to job descriptions prepared by the employer prior to applicant interviews.

The creation of a job description identifying the position's essential functions should be carefully reviewed by management, prior to establishing the final job description. Ideally, the human resources department or professionals should review job descriptions in concert with management and supervisors.

Employment Applications

Employers should require applicants—particularly support staff—to fill out an application form prior to being considered for employment. Provided the use of application forms is not used to discriminate against protected groups, application forms are an effective information-gathering tool for employers, as well as a shield against later employment claims.

Although employment applications need not take specific forms, keep in mind that to make a well-informed employment decision, the application must provide the

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decision maker with credible information. Thus, the most qualified applicant can be selected, and the employer will minimize possible employment claims.

An application should contain statements advising applicants that if hired, the employment relationship will be at-will. Effective at-will employment statements should be highlighted and placed immediately above an applicant's signature line.

Inquiries as to Job-relatedness

Employers should be mindful when developing employment applications to consider whether the employer can demonstrate that the information sought by the employer substantially relates to an applicant's actual ability to perform the job sought by the applicant. Job descriptions, discussed earlier, including the essential functions of the job, ought to be available for an applicant's review.

Other Inquiries

As a general rule, just as employers are prohibited from discriminating against protected groups in employment, employers should also not ask questions on application forms about any such protected characteristics. Hence, questions regarding race, sex, disability, age, and the like should be avoided.

Suggested Statements for Inclusion in Employment Applications

Employment applications should include statements that the employer is an equal opportunity employer.

A statement in which an applicant provides verification as to the truthfulness and completeness of the information the applicant has provided should always be incorporated into an employment application. In addition to an applicant's verification, there should be an express warning to the applicant that the employer will not consider an

applicant who falsifies or omits information, and, if evidence of false or incomplete responses are discovered after an applicant is hired, such false or incomplete information will lead to immediate discharge.

Tests and Testing Procedures

The employment application form should also note whether the employer requires medical exams, drug and alcohol testing, or other testing procedures. The statement should also contain express language wherein the applicant consents to any such tests.

Reference Checks

Included within, or attached to, employment application forms are authorizations and releases to be used for employer verification of the information supplied by applicants. At a minimum, the applicant must authorize a prospective employer to investigate the truthfulness of the applicant's responses through contact with former employers or other listed references. The statement should clearly authorize any former employer or listed reference to respond, and release and hold harmless the prospective employer, and former employers or other listed references from liability associated with the information provided therein.

Offers of Employment

Although employers are not obligated to send written confirmation of offers of employment, it is generally good practice to do so. Employers ought to send newly hired employees a confirmation letter outlining the terms and conditions of employment, the wage or salary for the employee based upon an hourly or weekly amount—not an annual sum, the hours of work or shift, and the at-will nature of the employment relationship.

These letters must be carefully prepared, have some measure of uni-

formity throughout the employer's organization, and be approved by top management prior to sending the letters. Ideally, a management individual in the human resources area should approve the content of such letters. Employers should not let supervisors or administrative staff be solely responsible for preparing and sending such letters.

At a minimum, the position being offered should be identified, and the starting salary or wages should be clearly set out. Employee benefits can be summarized, provided there are appropriate disclaimers that any change in or termination of benefits from time to time may occur. The letter can reaffirm the employment-at-will relationship and identify required forms to be filled out at commencement of employment; identify medical exam requirements, if any; and refer to an employee handbook, provided such handbook has appropriate disclaimers.

Employment Contracts

Most companies only use general employment contracts for high-level managers and, sometimes, professional staff. As a general rule, do not use employment contracts. Employers have much more flexibility if they are not contractually bound. In a medical practice, perhaps a contract with your medical staff is standard. Other than these professional staff, other positions in a clinic or hospital (other than very large ones) likely would not have general employment contracts.

However, other types of contracts—such as non-compete agreements or confidentiality agreements—may be used, but must be carefully prepared consistent with the requirements of Wisconsin law. This is a very technical area that would need to be addressed in a separate article.

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