

EMPLOYMENT APPLICATIONS IN MASSACHUSETTS

Some employers view employment applications as very simple forms used to obtain only basic background information from job candidates. Others see them as a tool to obtain more extensive information concerning prospective employees. Massachusetts employers need to know that there are some very specific requirements regarding both what *must* be contained in application forms and what *must not*. Moreover, we believe employers should also use employment applications to establish and protect their legal rights.

WHAT'S REQUIRED

Statements concerning volunteer work, lie detectors and criminal records

Applications normally contain a section in which applicants are asked to provide specific information concerning their prior work history. Massachusetts law requires that employers include a statement advising applicants that they may include in their work history "any verified work performed on a volunteer basis."

It is unlawful to require that applicants take a lie detector test as a condition of employment. Though perhaps relatively few employers would impose such a condition, Massachusetts law requires that all applications contain the following: "It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability."

If application forms request information concerning criminal records (as they often do), then employers must include the following: "An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' to an inquiry herein relative to prior arrests or criminal court appearances. In addition, any applicant for employment may answer 'no record' with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution." (Please also note the prohibition on certain inquiries regarding criminal records, discussed below.)

WHAT'S PROHIBITED

Inquiries revealing a protected status

Massachusetts law prohibits discrimination in hiring based

upon an applicant's race, color, religious creed, national origin, sex, sexual orientation, age ancestry, or disability. According to the Massachusetts Commission Against Discrimination (MCAD), employers may not make any inquiry, directly or indirectly, regarding any such "protected class status," including pre-employment inquiries "the response to which would likely disclose the applicant's protected class status." Thus, the MCAD takes the position that employers should not ask questions such as: "Where were you born? What is your primary language? Are you married? What is your maiden name? What is your date of birth?" As to age, the MCAD states that employers should not include questions about education or work experience designed to determine an applicant's age, such as requesting dates of graduation from high school or college.

Practical Tip: Before including a question in an application, an employer should ask itself: Could this question have a disproportionate effect in screening out minorities, females or older applicants? Is this information necessary to judge applicants' qualifications or competence for the jobs to be filled? Are there alternate non-discriminatory ways to obtain the necessary information?

Health and disability-related questions

Both federal law and Massachusetts law prohibit employers from seeking information concerning whether an applicant is disabled or was disabled in the past, or about the nature or severity of any disability. The MCAD maintains that questions concerning an applicant's history of absenteeism or illnesses are unlawful because they are likely to elicit information about a potential disability. Massachusetts law also expressly prohibits employers from including in applications any questions regarding admission of an applicant to a mental health institution.

Inquiries regarding workers' compensation history

The Massachusetts workers' compensation statute, M.G.L. c. 152, prohibits employers from refusing to hire someone because he/she has filed a worker's compensation claim or testified or cooperated in any workers' compensation proceeding. The MCAD explicitly states that employers cannot ask questions regarding applicants' workers' compensation history because the MCAD views such inquiries as designed to obtain information concerning whether the applicant is or was disabled. (Of course, questioning an applicant about any workers' compensation history may also be viewed as evidence of the employer's intent to discriminate on that basis in violation of M.G.L. c. 152.)

Inquiries regarding criminal records

Massachusetts law prohibits employers from requesting from applicants information concerning:

- an arrest, detention, or disposition regarding any violation of law in which no conviction resulted;
- a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace; or
- any conviction of a misdemeanor where the date of such conviction or the completion of any jail time, whichever is later, occurred more than five years prior to the date of application for employment (unless the person has been convicted of another offense within five years prior to the application).

Employers also may not discriminate against applicants who refuse to provide such information. Thus, requesting the information is unlawful in itself, and then not hiring someone who refuses to provide the information is a separate violation.

WHAT'S RECOMMENDED

EOE statements

Most employers call themselves "equal opportunity employers." We recommend that employers include in their application forms the following statement: "We are an equal opportunity employer and do not unlawfully discriminate against any applicant on the basis of race, color, religion, sex, national origin, age, disability, sexual orientation, or any other class protected by federal or state law." We suggest that employers place this statement prominently (*e.g.*, at the top) in the application under the heading "An Equal Opportunity Employer." Although the statement is really no more than an affirmation that the employer does not violate the discrimination laws, its prominent placement in an employment application sends the message that the employer takes its obligations seriously.

Releases for contacting references

Employers often (and should) perform reference checks on applicants before hiring. We recommend that employers include language in applications that expressly authorizes the employer to contact the references provided and, further, that releases the employer from any liability arising from such contacts. Employers should include a separate line for the applicant to sign, indicating the applicant's agreement and understanding that the release prevents him/her from instituting any legal claim based on information provided by the reference.

"At will" statements

We recommend that employers use applications to have

applicants acknowledge their understanding and agreement that, if hired, they will be employed "at will," meaning that employment is for no definite period and may be terminated at any time with or without notice or cause. The "at will" statement should state that nothing in the employer's other prior written or oral communications shall constitute an express or implied contract of continued employment, and that no future statements may change the "at will" nature of the person's employment unless in writing and signed by the president of the company (or other designated employer representative). Consider placing the statement in prominent type near the end of the application form and above where the applicant is asked to sign and date the application.

Properly prepared "at will" statements make it difficult for an employee to later claim that he or she was promised employment for a definite period or could only be discharged "for cause."

Certifications concerning the truthfulness of the information supplied

We recommend that employers also include a certification by the applicant that the facts contained in the application are true and complete to the best of the applicant's knowledge and that the applicant understands that, if hired, any falsified, omitted, or misrepresented statements on the application may lead to discharge. Such certifications are usually placed at the end of the application form and above where the applicant is asked to sign and date the application. Many employee lawsuits are significantly weakened when it is discovered that employees provided false or misleading information despite certifying to the contrary in their employment applications.

Require employees to complete and sign the application forms

Many applicants are hired based on resumes submitted, not applications completed. Often applications are not completed at all, or are partially completed after the person has been hired, sometimes with the person's resume attached. We recommend that all applicants be required to complete and sign the employer's application form. Information supplied through a resume submitted by the applicant (such as the applicant's employment history) can be incorporated into the application by reference, but the submission of a resume is not a substitute for the completion and signing of an application.

As evident from the above discussion, a good employment application will establish (and have applicants acknowledge) legal rights and obligations that may become very important later in the employment relationship.

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