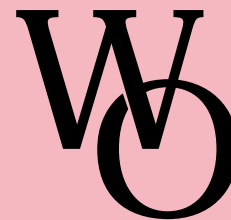

Wilson & Orcutt, P.C.

Business Law Newsletter



Wilson & Orcutt, P.C.
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Some Do's and Don'ts Of Hiring

In what most employers consider to be the good old days, you could make hiring and firing decisions for any reason, fair or unfair, so long as you did not discriminate on the basis of race, ethnic origin, sex or religion. Employee at will meant that the employee served at the will of the employer, and the employer could use any and all information available to make employment related decisions.

However, the legal environment concerning the workplace has drastically changed in recent years, employees and job applicants have been granted an ever expanding series of rights, and lawsuits have become more and more common.

Criminal Records

It may seem a matter of common sense that an employer considering a job applicant for a position requiring a high level of trust, such as point of sale clerk in a cash business, might well want to know if the applicant has a criminal record. Job application forms commonly ask the question "Have you ever been charged with a criminal offense?" or "Have you ever been convicted of a criminal offense?"

Massachusetts law, G.L. c. 151B, §4(9), prohibits an employer, in connection with any employment decision, including hiring or firing, from asking applicants and employees for information regarding:

- Any arrest not resulting in a conviction.
- A first offense for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbing the peace.
- Any misdemeanor conviction where the later of the conviction or the end of any jail term is more than five years old, unless the person has been convicted of a subsequent offense within the past five years.

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We advise that inquiries about criminal records be limited to the following:

1. Have you ever been convicted of a felony?
2. Within the past five years, have you been convicted of (or released from incarceration for) a misdemeanor (not including a first conviction for drunkenness, simple assault, speeding, a minor traffic violation, affray or disturbing the peace)?
3. If you have been convicted of any criminal offense within the past five years, were you at any time more than five years ago, convicted of any misdemeanor (not including a first conviction for drunkenness, simple assault, speeding, a minor traffic violation, affray or disturbing the peace)?

A separate statute, G.L. c. 276 §100A, requires that the following language appear on employment applications seeking information regarding criminal records:

“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. In addition, any applicant for employment may answer “no record” with respect to an inquiry relative to prior arrests, court appearances and adjudication 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.”

Credit Reports

Credit reports are gaining favor with employers seeking to hire honest and reliable employees. However, many employers do not know that a federal law, the Fair Credit Reporting Act (FCRA), governs the use of credit reports in making employment decisions.

The FCRA, which has been in effect since 1971, was adopted in order to protect the privacy of credit reports and to ensure their accuracy.

While the law specifically allows employers to review credit reports for the purpose of evaluating potential employees, it also requires the employer to disclose that fact to any applicant denied employment based upon the information in the report. In addition, the applicant must be provided with the name and address of the credit bureau making the report. This disclosure is required even if the credit report was not the main reason the applicant was turned down.

Although the law does not require the disclosure to be written, employers should provide written notices and keep copies for at least two years, in order to show compliance with the law.

The Problem With References

An employee terminated for cause seeks new employment and you receive a request for a reference. What do you say? If you give a negative reference which results in your former employee being turned down for the new position, you risk being sued for defamation. On the other hand, you may want to help the employee get the new job by giving a falsely positive reference in order to avoid an increase in your unemployment compensation experience rating. The problem is that the new employer may sue you for misrepresentation when they discover the truth (for example, you fire the employee for theft, you fail to disclose that reason, and the employee then steals from the new employer).

As a result of this dilemma more and more employers have adopted a policy that requests for references will be responded to only with confirmation of the dates of employment and a description of the job duties performed.

In deciding how to respond to requests for references, remember that truth is an absolute defense to a claim of defamation. If you are going to give a negative reference, be sure that your files contain evidence supporting your negative review, preferably in the form of written job evaluations and written statements by supervisors and co-workers.

Under no circumstances should you consider giving a falsely positive reference.

There May Be A Time Bomb In Your Computer System

If you use computers in your business there may be a bomb lurking in your system set to explode on January 1, 2000.

The use of computers for tracking customers, inventory, payables, receivables and the like grew exponentially during the past twenty years. At the beginning of that period, the next millennium seemed far off, and software writers innocently created programs by coding date fields in the format MM/DD/YY (June 25, 1996 appears as 06/25/96). In order to save space, only two digits were used to indicate the year.

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The two digit year affects any calculations comparing years. The problem is that "00", representing the year 2000, is less than "99" representing the year 1999. The result is that, after December 31, 1999, a program doing, for example, aging of accounts receivable, will produce nonsensical results. How will your employee time clock act after the ball drops in Times Square? The problem may even appear earlier if your software does any time projections into the future.

Although most recently written software uses relational databases which utilize a four digit year, most older software is susceptible to this problem. Unfortunately, there is no easy fix. You should inventory your software now, while there is still time to deal with the problem. Contact your software vendors to determine whether they are planning a "fix". Make sure you are up to date with your maintenance contracts.

NOTES OF INTEREST

In previous issues we have made reference to rules promulgated by the Equal Employment Opportunity Commission regarding the kinds of job interview questions prohibited by the Americans with Disabilities Act.

If you would like to receive a copy of those rules, just call us and we can fax them to you.

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