

ment Selection Process
Job description | Job specifications



Interview Guide

6th Edition

Conducting Post-Interview
A Resource for Supervisors and Others
Involved in the Selection Process

College and University Professional Association for Human Resources

| Age | Membership in organizations



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**A Resource for Supervisors and Others
Involved in the Selection Process**

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ACKNOWLEDGMENTS

CUPA-HR's *Interview Guide: A Resource for Supervisors and Others Involved in the Selection Process* has been a standard reference for higher education professionals since the early 1980s. Many association leaders, including Ronald A. Bouchard, Michale Kaelke, Nancy Deane, Gloria White and Robert Ford, Esq., have helped produce various editions during the last three decades.

The 2010 edition, the sixth since 1981, provides significant updates to prior versions. Writers/editors of this edition were Mary Ann Wersch, Andy Brantley and Greg Walters. Mary Ann Wersch recently retired from service as the director of human resources at Reed College in Portland, Oregon, and was chair of CUPA-HR's national board of directors during 1998-99. Andy Brantley is the president and chief executive officer of CUPA-HR. Prior to this appointment, he served as associate vice president for human resources and chief HR officer at the University of Georgia. Andy served as chair of CUPA-HR's national board of directors in 2000-01. Greg Walters was most recently assistant vice president for human resources at Lewis & Clark College and served as treasurer on the CUPA-HR national board from 2003-2008.

Mary Ann, Andy and Greg all have significant records of volunteer accomplishments with CUPA-HR. Greg is the recipient of the association's Distinguished Service Award, and Andy and Mary Ann are recipients of the Donald E. Dickason Award, the association's highest honor.

The *Interview Guide: A Resource for Supervisors and Others Involved in the Selection Process* is published by the College and University Professional Association for Human Resources, 1811 Commons Point Drive, Knoxville, TN 37932.

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INTRODUCTION

Most employers are aware that an effective and legally sound pre-employment screening program may well increase the chances of selecting qualified, motivated, dependable employees. Although this guide cannot answer every question that might arise in the pre-employment selection context, it does provide basic guidance on applicable federal and state laws and a sound process for pre-employment screening and interviewing.

As an employer, you want to select the applicant that is the best fit for the position. Your interviewers have critical responsibilities to select employees on the basis of job-related qualifications in accordance with all applicable laws and regulations. You, the employer, must carefully define the position and the qualifications it requires. Then, the process becomes a search for the right match of applicant to position.

Well-planned pre-employment interviews and carefully written applications or resumes can help ensure that you find the person who is the best match. For a hiring process to be effective, everyone involved must be aware that significant legal limitations impact an employer's selection decisions. Whether a faculty member, human resource professional, office manager, or first-line supervisor, the interviewer must know which information is fair game, which is not, and how to avoid unnecessary liability.

This guide is designed to provide an overview of key employment-related legislation with specific emphasis on the do's and don'ts in order to decrease the likelihood of mistakes that result in adverse legal action against the institution. The guide also includes pre-employment selection process suggestions and several applications to help managers with various parts of the selection process.

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SECTION I

GENERAL LEGAL CONSIDERATIONS

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

In 1978, the Equal Employment Opportunity Commission (EEOC) developed a uniform set of guidelines for employers to follow when using pre-employment testing or other selection procedures as a basis for any employment decision. These guidelines apply to all selection criteria, including educational degree requirements, job experience and skills tests. Under the guidelines, employers may not use selection criteria that have a disparate impact on applicants in protected classes unless the criteria have been "validated." An employment practice has a disparate impact if it has a significant adverse impact on a protected group.

The employer must make every effort to ensure that all employment selection tools, such as interviews, application forms, resumes, vitae and skills/abilities assessments directly relate to successful performance of the job. For example, employers might prefer applicants with a high school diploma or a college degree, related job experience and high scores on skill-based assessments. However, if these desired qualifications disproportionately screen out applicants in protected classes, they may be discriminatory. Similarly, subjective procedures may discriminate if they adversely affect a protected class of applicants. The employer may have to prove that such selection procedures are related to the job. Usually, such proof is difficult to produce because procedures must be validated in the same manner as professionally developed assessments.

When alternatives to selection criteria exist, employers are under an affirmative duty to investigate those that have an adverse impact, even if they are valid according to EEOC guidelines. If two or more alternatives that serve the employer's legitimate interest exist, the employer should use the selection criterion with the least adverse impact.

Employers cannot use pre-hire inquiries or qualifying factors that disproportionately screen out applicants in protected classes if the inquiries or factors are invalid predictors of successful job performance or unjustified by "business necessity." When employers devise or review application forms or seek information from job applicants, they should determine: (1) Will the answers to this question, if used in making a selection, have a disparate effect in screening out applicants in protected classes? and (2) Is this information essential to judge an applicant's qualifications for the job in question?

An employer should be able to demonstrate through statistical evidence that any selection procedure that has a disparate impact on groups protected by law is related to the job. If the employer cannot establish this claim or does not perform a technical validation study, he or she should discontinue or alter the procedure to eliminate the discriminatory effect. Even when a selection procedure with an adverse impact can be validated, an employer may not use it if other procedures would accomplish the same goal with less discriminatory effect.

STATE AND FEDERAL LAWS AND REGULATIONS GOVERNING EMPLOYMENT PRACTICES

In addition to the EEOC guidelines, many state and federal laws and regulations govern employment practices and affect the hiring process. The major federal laws that apply to most employers include:

- **Title VII of the Civil Rights Act of 1964** - Title VII prohibits employment discrimination based on specifically enumerated categories. Pre-employment inquiries concerning race, color, religion, sex or national origin might constitute evidence of discrimination prohibited by Title VII. Inquiries that either directly or indirectly result in the disclosure of such information, unless otherwise explained, might be a Title VII violation.
- **Equal Pay Act** - The Equal Pay Act bars wage differentials based on sex.
- **Age Discrimination in Employment Act** - The Age Discrimination in Employment Act bars age-based employment practices that discriminate against people 40 years of age or older, subject to certain exceptions.
- **Vocational Rehabilitation Act** - The Vocational Rehabilitation Act bars discrimination against individuals with disabilities.
- **Pregnancy Discrimination Act** - The Pregnancy Discrimination Act bars discrimination against pregnant applicants and employees.
- **Civil Rights Act of 1991** - The Civil Rights Act of 1991 provides remedies and protections, in addition to those previously available under Title VII, to applicants, employees and former employees who contend that they are victims of employment discrimination.
- **Immigration Reform and Control Act** - The Immigration Reform and Control Act makes it unlawful for employers to knowingly hire illegal aliens and mandates detailed record-keeping procedures for any employees hired, including U.S. citizens, regardless of the size of the employer or of the position involved.
- **Americans with Disabilities Act** - The Americans with Disabilities Act prohibits discrimination against qualified individuals with disabilities and requires reasonable accommodation for disabled applicants and employees who are capable of performing the essential functions of a position.

In addition, federal government contractors may be subject to Executive Order 11246, Section 503 of the Vocational Rehabilitation Act, and the Vietnam Era Readjustment Act, all of which require affirmative action in employment practices.

Additional state laws, regulations, guidelines, and local ordinances might apply to employment practices. Most states have fair employment or human rights commissions to interpret and enforce provisions of state law barring employment discrimination. Some state agencies have stricter rules than federal agencies. Employers must be familiar with all local laws and regulations pertaining to employment and hiring (for example, city ordinances banning discrimination based on the sexual orientation of applicants).

In reviewing and revising employment applications, resumes, vitae and other pre-employment inquiries, employers should closely examine applicable local, state and federal employment inquiry guidelines and consult legal counsel to ensure that the pre-selection process is in full compliance with the law.

SECTION II

PRE-EMPLOYMENT SELECTION PROCESS

DEFINING THE JOB

The job definition process has three distinct stages: (1) analysis of the job, (2) drafting of the job description and (3) identification of the job specifications (see Figure 1). Attention to each of these stages will enable the selection of the applicant best matched to the requirements of the position.

Job Analysis

In the first stage, job analysis, the key elements of the job are ascertained. The employer conducts a careful study of the tasks, duties, responsibilities and organizational relationships of the job to describe and specify its precise nature. Information for this study is usually gathered through interviews and questionnaires. Although the questionnaire is the more efficient method, it might elicit random and/or poorly articulated responses. Although more costly and time-consuming, in-person interviews elicit more valuable information because they allow personal contact and observation of the employee in the work setting. Whether the employer opts for the questionnaire, the interview or a combination thereof, employees should be asked to describe their duties and independence in performing them, the reason for those duties, and the skills required to carry them out.

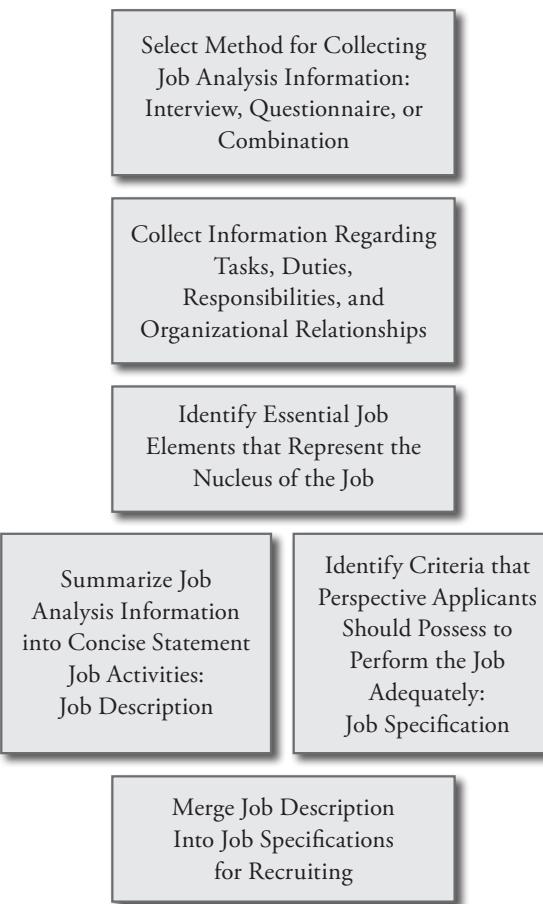
Job Description

The second stage of the job definition process is writing a job description, which should summarize clearly and concisely the essential information gathered in the job analysis. The description also should identify the essential functions of the job. (See Section IV for a more detailed explanation of essential functions.) The clear identification of key elements of the job more easily permits the translation of those elements into job specifications.

Job Specifications

The final stage of the job definition process is the preparation of job specifications, which identify the knowledge, skills and abilities that prospective applicants should possess to perform a job adequately. Job specifications traditionally have been expressed as minimum acceptable qualifications. Within this framework, education and experience typically are stated as exclusive entry

FIGURE 1
JOB ANALYSIS FLOW CHART



requirements. Rigid and exclusive requirements are difficult to sustain as the only requirements necessary for successful job performance. As such, they may not meet the job-relatedness test.

Because of the difficulty of establishing the job-relatedness of specifications defined as minimum acceptable qualifications, the use of "equivalencies" has evolved. The following is an example of an equivalency specification statement: requires a bachelor's degree in business administration, accounting or a related field, or an equivalent combination of education and experience sufficient to demonstrate the ability to perform the job.

Another way to express job requirements in less quantifiable, nonspecific measurements is a knowledge, skills and ability (KSA) statement. Instead of identifying minimum acceptable levels of education and experience, a KSA contains narrative statements that describe the knowledge, skills and abilities necessary to perform the job. The following is an example of a KSA statement: requires a thorough knowledge of accounting principles and practices, with the ability to apply established methods to varied accounting transactions, and the ability to oversee a considerable volume of detailed work and to train and supervise accounting support personnel.

KSA statements purposely forego the precision used in expressions of specifications as minimum acceptable qualifications or equivalencies. Because they do not use arbitrary minimums to express job requirements, KSA statements are less likely to be challenged as being non-job-related. The ultimate objective of the selection process, to select the best applicant, is in no way undermined through the use of KSA statements.

PREPARING FOR THE INTERVIEW

By the time most job applicants reach the actual selection interview, they already have passed a careful evaluation of their education and experience and are considered to possess at least the minimum qualifications for the job. The purpose of the interview should be to collect additional information on the applicant's job-related knowledge, skills and abilities that would be helpful in deciding whether he or she is likely to succeed in the job. The degree to which the interview is valid is the extent to which it predicts job success. For information on common interviewer mistakes and rating errors that may reduce the validity of an interview, see Appendix A and Appendix B.

A selection interview should be as structured as possible. Each applicant should be evaluated according to the same general criteria. A selection interview that follows a general standard outline will produce more reliable and valid information for selection than an unstructured interview and is less likely to run afoul of laws and regulations governing the selection process.

Review the Job Description and Specifications

To elicit relevant information during the interview, learn as much as possible about the requirements of the job to be filled, the specific demands of the job, the salary level and the working conditions. Information compiled from exit interviews of the former holders of the job can be valuable in this respect. List the specific tasks performed on the job and

decide which of the tasks are critical to performance of that position. Then list the methods, techniques, tools, equipment and work aids used to accomplish these tasks.

Specify Information Predictive of Performance in Each Area

Identify the specific knowledge, skills and abilities required to perform the job tasks. On the basis of previous employees' performance, determine the qualifications essential to success on the job. What qualifications did unsuccessful employees lack? How much of the job did successful employees learn and develop while on the job?

Develop Questions

When developing interview questions, consider three rules of thumb: ask only for information that will serve as a basis for the hiring decision, know how the information will be used to make the decision and do not ask for information that will not or should not be used to make hiring decisions. (See Appendix C for sample allowable and non-allowable questions.) Develop questions based on each major task and responsibility in the position description and on the knowledge, skills and abilities required by the position. Include problem-solving questions that allow the applicant to think creatively. Also include questions that elicit more than a "yes" or "no" response.

Ask only for information that will serve as a basis for the hiring decision, know how the information will be used to make the decision and do not ask for information that will not or should not be used to make hiring decisions.

Select Interviewers

To ensure that the selection process is fair and defensible, all interviewers must have a clear and thorough understanding of the vacant position and a thorough knowledge and understanding of the laws related to selection and discrimination.

Improper questions, unkept promises and inappropriate remarks will reflect badly on the institution and might be legally indefensible. One effective strategy for some positions is to have all interviewers meet with the applicant as a group. This enables all interviewers to hear the same information and have a common basis for evaluating candidates and promoting productive discussion of each of the applicants. This approach also allows the hiring manager to maintain better control of the process and of the relative value of the information being collected and evaluated.

The number of interviewers used will vary based on the position. If a position has limited scope and responsibility and limited impact, one or two interviewers within the department may be sufficient. If the position impacts the work of many people and other departments or areas of campus, the number of interviewers should reflect the areas impacted by the position — not necessarily every area impacted by the position, but a representative sample to ensure adequate assessment of candidates' ability to perform duties from the perspective of the areas impacted.

Set Up the Interview

Determine approximately how long each interview will take, schedule interviews relatively close together for better comparison of the applicants, and reserve a room or location where the interviews will not be interrupted. Contact the applicants by phone or by letter, noting the day, time and location of the interview and the length of time they can expect to be on campus. If the interview will involve multiple people, send the applicants an agenda listing the names and titles of those who will be part of the interview process.

Review the Resume and/or Application

Review the application form, resume, results of any required skills assessments and any correspondence that is useful in understanding the applicant's background. Take note of areas that need follow up such as gaps in work history and frequency of position changes.

CONDUCTING THE INTERVIEW

Every hiring manager should have his or her own goals for the interview, but there are five goals that should always be included: (1) gather enough information to adequately evaluate the candidate's ability to perform the functions of the position, (2) create a positive image of the institution — the best candidates are probably being recruited by multiple employers, (3) present a realistic description of the position — the challenges, the rewards, why this role is important to the institution, (4) ensure that all applicants are treated fairly and that the process is consistently managed for all interviewees, and (5) establish adequate records in the event the hiring decision must be justified at some future date.

The steps to follow when conducting an interview are described below. Please note that the term "interviewer" is used in the singular for this discussion; however, in many cases an interview involves multiple interviewers.

Establish Rapport

In the job interview, the applicant's apprehension can impede the flow of useful information. The interview setting — ideally a private office where the applicant can be given undivided attention — should be conducive to good communication. Although some people have strong personal views on furniture arrangement and furnishings, these matters are not critical as long as both parties can feel comfortable and at ease as they face each other. In general, the emotional climate created by the interviewer is far more important than the physical environment.

The interviewer's first role is that of host. A warm greeting and a suitable introduction using both names and titles will help establish rapport and help create a pleasant atmosphere. Remember that creating a favorable impression is important. Research has shown that rapport between the interviewer and the applicant contributes substantially to the effectiveness of the interview.

Following the greeting, some "small talk" is usually of value. Small talk serves to relax both the interviewer and the applicant and helps establish mutual confidence. A friendly exchange of comments creates an atmosphere that allows communication to develop more freely and rapidly than it would otherwise.

Explain Purpose and Set Agenda

Take control of the interview and relax the applicant by letting him or her know what is to occur. Explain, for instance, that the applicant will be asked questions first, the job will be described briefly and the applicant then will have the opportunity to ask questions and take a tour of the building. Tell the applicant the scheduled length of the interview. If reading questions, explain that use of this technique is to ensure that all applicants are asked the same questions. Explain that you will be taking notes.

Gather Predictive Information

Interviews put the skills of listening, probing, reflecting, summarizing and evaluating into play. To control the interview, the interviewer must combine careful listening with good use of questions. Both skills should be used to encourage and guide the applicant's sharing of facts.

Ideally, the interviewer should talk no more than 25 percent of the time. Do not monopolize the interview. The interviewer's job is to listen and evaluate; as long as the interviewer is talking, nothing is being learned about the applicant. Give nonverbal signals of listening, such as head nodding, making eye contact and leaning forward. Avoid facial expressions, gestures or words that are unduly sympathetic or disapproving. Avoid giving personal opinions. Avoid asking questions that require only a "yes" or "no" answer. Instead, ask open-ended questions that encourage the applicant to express ideas and impart information.

For example, do not ask, "Did you like your previous job?" which might elicit a "yes" or "no" answer. Instead ask, "What things did you like most about the job?" which will elicit a response that indicates the applicant's motivations and interests.

Avoid asking leading questions such as, "We prefer a Macintosh environment, don't you?" The purpose of the interview is to obtain a clear and balanced picture of the applicant's qualifications for the job, not to indicate hoped-for responses. The use of words or phrases such as "why," "how," "what" and "describe" or "tell me about" will yield more revealing answers than leading questions such as "Do you like to work with people?" The question, "What type of work do you enjoy?" for example, will elicit more information than "Do you like to work outdoors?" If the applicant provides irrelevant information, bring him or her back on course by rephrasing the original question or asking a new question.

Ask follow-up questions that encourage further conversation, such as "Can you say more?" "Will you expand on that?" "Can you give more detail?" or "Could you give me an example?"

Comments also are important. Many interviewers fail to recognize the value of comments and concentrate exclusively on questions, causing the interview to resemble an interrogation. Make the task less difficult by encouraging spontaneous talk about topics that may be important.

Do not be overly apprehensive about silences. Sometimes applicants bridge a silence with additional information that turns out to be quite significant. The silence can be beneficial as long as it does not become a battle of nerves between the interviewer and the applicant.

Note-taking is essential but can be distracting. Try holding a clipboard or other support on the lap instead of taking notes at the desk. Jot down key words or phrases rather than trying to capture everything said. Try to maintain eye contact while making notes. Record job-related evaluations and additional information immediately following the interview.

The use of words or phrases such as "why," "how," "what" and "describe" or "tell me about" will yield more revealing answers than leading questions such as "Do you like to work with people ?"

Interviewing Protected Class Applicants

Questions related to sex, age, color, race, religion, national origin, sexual orientation or disability are inappropriate during interviews. Women, men and minority applicants should be treated in exactly the same way. Discriminatory behavior is improper, even when it is not intended. Appearance can be as important as reality. The facts that certain non-job-related questions are asked does not necessarily show intentional discrimination, but such questions can and have been used in a discriminatory way and have also been the source of legal action against employers. (See Appendix D for sample questions to determine if the applicant can perform essential job functions.)

The following suggestions, some relating to women applicants and others to minority applicants, should help ensure that no federal or state equal employment opportunity laws are violated during the interview. First, do not indicate interest in hiring a woman or minority individual to improve your department's affirmative action/equal employment opportunity profile. The application of different standards based on an applicant's gender or minority status is unlawful and insulting. Second, do not inquire into an applicant's marital status, parenthood or childcare arrangements; a spouse's income, probability of transfer to another locality or feelings about the applicant's work or travel; or views on birth control, abortion or women's issues. However, an applicant can be asked if he or she will have difficulty working the hours required by the job.

Do not make assumptions about a woman's competence based on her soft voice or feminine appearance or attire. Be professional and consistent in addressing men and women. If using first names, do so for all applicants. Behave toward all applicants in a completely businesslike yet relaxed way.

Avoid bringing up stereotypical prejudices about men or women—for example, that women should not travel alone, are too emotional or are not aggressive enough, or that men are ill-suited to clerical/administrative support positions.

Do not go to the opposite extreme by boasting about liberal views or giving an instant replay of female or minority success stories. If asked, give accurate information about the number of women or minority employees already in the organization.

Do not place undue emphasis on conditions of employment (such as travel, heavy lifting, long hours and so on) in the hope of prompting the applicant to withdraw his or her application. Do not assume that the institution is located in the wrong place for a single person or for minorities or state or imply that the applicant may be unhappy there. Do not use language that reflects an age bias—for example, do not state that the desirable applicant is "young, up and coming" or "mature, stable." Avoid assumptions about the tasks an applicant with a disability is able to perform. Review essential functions of the job with all applicants.

In making a selection or recommendation, avoid making assumptions such as:

- supervisors or managers might prefer men or employees of certain ethnic/racial origins,
- coworkers or those who come in contact with your employees might not want to deal with women or minorities or might think that a woman's work may lack credibility,
- the job might involve travel or travel with the opposite sex or members of certain ethnic/racial backgrounds that would disqualify the applicant, or
- the job might involve unusual working conditions that would disqualify the applicant.

Describe the Job and the Organization

An interview is a two-way process. The applicant needs to know details about the position and the organization. Provide sufficient facts, both favorable and unfavorable, about the position, the department and the institution in a straightforward manner so that the applicant can make an intelligent decision about the acceptability of the position. Save a detailed description of specific duties until the end of the interview to avoid coaching the applicant.

In light of recent court decisions in employment-at-will cases, caution should be exercised in describing the prospective job. Do not, for example, assure the applicant that if hired, he or she can count on a long career, that there are no layoffs, that discharges always require "just cause," or make similar comments. Discussion of salary, promotional opportunities and tenure or other job security must be carefully worded. Otherwise, the person hired for the job might interpret this information as an implied employment contract. Any promises made during the interview might subject the employer to lawsuits by discharged employees for breach of implied contract. Description of a job should be consistent with the personnel policy manual.

Do not, for example, assure the applicant that if hired, he or she can count on a long career, that there are no layoffs, that discharges always require "just cause," or make similar comments. Discussion of salary, promotional opportunities and tenure or other job security must be carefully worded.

Answer Questions and Allow the Applicant to Add Information

The applicant's objectives are to gather information about the job and institution and to sell himself or herself. Provide the opportunity for applicants to accomplish these objectives.

Conclude the Interview

A comfortable way to end the interview is to thank the applicant for his or her time and to outline what will happen next. Tell the applicant when you expect to be back in touch regarding next steps in the hiring process. It is also beneficial to tell the candidate the anticipated start date for the position.

CONDUCTING POST-INTERVIEW PROCEDURES

Evaluate Information

As interview results are assessed, review the minimum qualifications, other job description details and other items quoted in the advertisement for the position to determine the applicant that is the best match for the job. Remember to use only information that is job related. Usable information includes applicants' knowledge, skills and abilities that directly relate to successful performance of the duties and responsibilities of the position. Do not use information that is unrelated to an applicant's ability to perform the job satisfactorily.

Check References

Letters of recommendation often lack candid and specific assessments of work performance. Therefore, check appropriate references before making a formal job offer. This task can be accomplished in ways that give the supervisor appropriate and accurate information about an applicant while protecting the rights of the applicant.

First, obtain written releases from applicants before checking references and obtain an applicant's permission before contacting a current employer. Request only job-related information that can be verified, such as dates of employment, job titles and duties, length of service in each position, promotions, demotions, attendance, salary, reason for end of employment (if applicable), would this individual be eligible for rehire, and other information for which the responder may have documentation. Note that many businesses

Letters of recommendation often lack candid and specific assessments of work performance. Therefore, check appropriate references before making a formal job offer.

maintain policies that limit reference information to the date of employment and last position held. Do not ask for subjective information or information that could be considered discriminatory; if the information is offered, ignore it. Since the information gathered through reference checks is confidential, communicate it only to those who have a business need to know.

If the information gathered during a reference check is used to justify hiring an interviewee, the hiring manager should check references on all interviewees. For example, if part of the justification for hiring an individual is "because of documented outstanding performance comments shared

by the former supervisor during a reference check," then this could be a discriminatory statement if all candidates did not have the same opportunity for their references to share comments regarding past performance.

Notify Applicants of Their Status

Inform all applicants that their resumes have been received, that their credentials have been reviewed and that they are or are not final applicants. Once the selection procedure is complete, the unsuccessful finalists should be notified — ideally in writing — that they have not been selected for the position. Neutral language, conveying that the employer is unable to make an offer at this time, is preferable. If possible, avoid orally informing an applicant of his or her non-selection. If an oral discussion is unavoidable, just tell the candidate that following a thorough review of all candidates another candidate was chosen.

Make a Job Offer

The hiring supervisor should contact the selected applicant by telephone to offer the position. Salary, benefits, hours of work, specific job title, starting date, assistance with moving expenses if appropriate, and any other appropriate conditions of or information about employment should be conveyed at that time. When the employee has accepted the position, follow up with a letter of confirmation. (See Appendix E for a sample letter.)

Require or Do Not Require a Pre-Employment Physical

Some positions require the selected applicant to pass a pre-employment physical as a condition of employment. Only the applicant who was offered and has accepted the position should be required to take the physical. It should be made clear on the job application that the offer of employment is conditional on passing the pre-employment physical.

Pre-Employment Background Check

Institutions should always verify academic credentials with the institution that awarded the degree or certification. Criminal background checks should also be conducted on all new hires. (See Arrest and Conviction Records on page 21.)

Collecting Applicant Background Data and Preparing Interview Records

Federal and some state laws require that employers maintain records on all job applicants, including data on their race, sex and ethnic background. Data on race and ethnic background can be collected in one of two ways: by visual identification or by contacting applicants by mail and asking them to furnish the information voluntarily.

Many institutions have a form that is mailed with the “we received your application” letter or online forms that can be completed as an optional part of the application process. Forms requesting this information should explain that the data are needed to satisfy federal requirements and will not be used to make an employment decision. Questions about disability or Vietnam-era veteran or disabled veteran status can be asked only of the person who has accepted the offer of employment. Such information should be kept separate from application forms, resumes, interview records, and later from his or her employee file.

To make applicant record keeping manageable, the term “applicant” can be restricted to those individuals who express an interest in a posted vacancy. The definition of “applicant” should be defined in institutional policy to ensure compliance with federal reporting guidelines. In addition, applications can be considered “active” for the shortest possible time — for example, 30 days and no more. Otherwise government agencies can consider quite old applications relevant when determining whether the applicants are “potential class” members or “affected class” members entitled to monetary relief if an audit finds that unlawful hiring discrimination occurred. Indeed, it is a good idea to place a notice on each application stating the number of days for which the application will remain active.

In addition to retaining records on race, gender and ethnic background of applicants, keep records of all applicants interviewed, descriptions of the jobs they applied for, and the reasons for the decisions to hire or not to hire them. These interview records should identify the factors used to evaluate job applicants and indicate the interviewer’s assessment of them with respect to each factor.

SECTION III

SPECIFIC LEGAL CONSIDERATIONS

CITIZENSHIP

EEOC Guidelines

Equal Employment Opportunity Commission (EEOC) Guidelines indicate that consideration of an applicant's citizenship may constitute evidence of discrimination on the basis of national origin. Because federal law protects all individuals (citizens and noncitizens) in the United States against discrimination, inquiries into an individual's citizenship have no basis. Moreover, when citizenship requirements have the purpose or effect of discriminating against people of a particular national origin, they are prohibited. The EEOC guidelines expressly prohibit discrimination against a lawfully immigrated alien residing in the United States on the basis of his or her citizenship, unless such discrimination is required for national security reasons.

The Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act (IRCA) significantly changed employment practices. First, the act made it unlawful for employers to knowingly hire illegal aliens. Second, it mandated detailed record-keeping procedures for the hiring of any employees, including U.S. citizens, regardless of the size of the employer or the position involved. Third, to avoid a backlash against the hiring of foreign-looking or foreign-sounding individuals, IRCA included provisions that prohibit discrimination on the basis of an employee's national origin or citizenship status.

Under IRCA's record-keeping requirements, all employers must examine documentation from all new employees to verify their citizenship status or right to work in the United States. Employers must use an I-9 form to verify an employee's identity and employment authorization. New employees must complete the I-9 within three business days of "hire," which INS regulations define as the actual commencement of employment.

Advise all applicants and new employees that IRCA verification will be a condition of their employment. To satisfy IRCA's verification requirements, ask applicants whether they can supply either (1) a document that establishes both identity and employment eligibility or (2) a document that establishes identity and a document that establishes employment eligibility (see lists A, B and C, p. 13). These documents must be presented and accepted by the employer within three days of hire.

IRCA and E-Verify Requirements

The E-Verify requirements as passed by Congress require federal contractors and subcontractors, including colleges and universities, to use the U.S. Citizenship and Immigration Services' E-Verify system to verify the employment eligibility of new hires and existing employees. Participating in E-Verify does not obviate the requirement to "complete,

maintain and make available for inspection Forms I-9” for employees. In addition to maintaining these forms, the employer must enter the identity and employment eligibility information of the employee into the E-Verify system, which then verifies this information. (See Federal Acquisition Regulation; FAR Case 2007-013, 48 CR Parts 2, 22 and 52, implementing Executive Order 12989, available at <http://edocket.access.gpo.gov/2008/E8-26904.htm>).

Only those federal contractors with contracts for more than 120 days and valued above \$100,000 are required to use E-Verify. For subcontractors, any services or construction over \$3,000 triggers the requirement. ***Institutions of higher education need only verify those employees who are actually assigned to a covered federal contract.*** Employees are “assigned” to a contract if they “normally perform support work, such as general company administration or indirect or overhead functions,” as opposed to those with “substantial duties” under the contract.

LIST A	LIST B	LIST C
Documents that establish both identity and employment eligibility:	Documents that establish identity:	Documents that establish employment eligibility:
<ol style="list-style-type: none"> 1. U.S. Passport (unexpired or expired) 2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551). 3. An unexpired foreign passport with a temporary I-551 stamp. 4. An unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I688A, I-688B) 5. An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer 	<ol style="list-style-type: none"> 1. Driver's license or ID card, issued by a state or outlying possession of the United States, with a photograph or information such as name, date of birth, sex, height, eye color and address 2. ID card, issued by federal, state or local government agencies or entities, with a photograph or information such as name, date of birth, sex, height, eye color and address 3. School ID card with a photograph 4. Voter registration card 5. U.S. military card or draft record 6. Military dependent's ID card 7. U.S. Coast Guard Merchant Mariner Card 8. Native American tribal document 9. Driver's license issued by a Canadian government authority 	<ol style="list-style-type: none"> 1. U.S. social security card issued by the Social Security Administration (other than a card stating it is not valid for employment) 2. Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350) 3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States and bearing an official seal 4. Native American tribal document 5. U.S. Citizen ID Card (INS Form I-179) 6. ID card for use of Resident Citizen in the United States (INS Form I-179) 7. Unexpired employment authorization documents (other than those in List A) issued by the INS
	<p style="text-align: center;">For persons under age 18 who are unable to present a document listed above:</p> <ol style="list-style-type: none"> 10. School record or report card 11. Clinic, doctor or hospital record 12. Daycare or nursery school record 	

EDUCATIONAL BACKGROUND

Employers commonly use level of education as a minimum requirement for employment. Minimum educational requirements must relate to the requirements of the position. For example, a requirement that all applicants possess a high school diploma may not be a valid measure of the skills necessary to perform the duties of a position. A court could hold such a requirement to be discriminatory unless truly necessary for the position.

The U.S. Supreme Court has found an employer's requirement of a high school education discriminatory in locations where statistics showed that the requirement disqualified blacks at a much higher rate than whites and for which there was no evidence that the requirement related to successful job performance in any significant way. The job-relatedness standard applies to all groups protected under Title VII and is relevant to all questions related to educational attainment

The employer must carefully evaluate whether an applicant who has no high school diploma or no college degree but has practical experience and training can perform the duties of a position as well as an individual with a high school diploma or college degree. If so, a minimum education requirement might be ill-advised. Employers should determine whether such a requirement is necessary and how education does or does not qualify the individual to perform the essential tasks of the position.

LANGUAGE PROFICIENCY

Many U.S. employers prefer that employees be proficient in written and spoken English, but state and federal law may prohibit establishment of an English language proficiency requirement or administration of a language proficiency test. When the use of such a test has an adverse effect upon a particular minority group, and English language skill is not a requirement of the job, Title VII liability is created.

If an employer institutes an English language proficiency policy that adversely affects minority applicants, federal law requires that policy be related to job performance. If the employer cannot establish the link between proficiency and performance, courts will find the language proficiency policy unlawful. Therefore, employers should determine whether proficiency in the English language is necessary to perform the essential tasks of the position in question.

WORK EXPERIENCE

Like educational background and language proficiency, work experience is a valid job criterion when such experience is related to the qualifications for the position. Minimum work experience requirements that effectively exclude applicants in protected classes should be carefully scrutinized. Be wary of insisting on a certain level of work experience in occupations and professions that have historically been dominated by non-minorities or one gender.

MARITAL STATUS, GENDER AND NEPOTISM

An applicant can be asked whether he or she is male or female provided that the inquiry is made in good faith and for a nondiscriminatory purpose. Inquiries that directly or indirectly limit, specify or discriminate on the basis of gender are prohibited unless they are related to a bona fide occupational qualification (for example, male actor role). Such questions, in most cases, are prohibited because they are not job-related and do not bear upon the job in question or the qualifications needed to perform it.

When requesting information about gender, the employer should state that the information is not a basis for an employment decision.

Pre-employment questions that indicate the applicant's marital status are unacceptable. If an institution has an anti-nepotism policy, an applicant can be asked whether he or she has a family member who is presently an employee of the institution. In most cases, such information cannot be a basis for an employment decision. The employer can refuse to place family members in the same department, division or facility if the work involves potential conflicts of interest or other conflicts greater for married employees than for other individuals. If the institution does allow family members to work in the same department or division, reasonable efforts must be made to assign job duties to minimize problems of supervision, safety, security and morale.

An employer must not refuse to hire married women or to pay a married woman less than a married man for the same work. All applicants are entitled to fair and equal consideration.

PREGNANCY, CHILDREN AND CHILDCARE

The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964. The act prohibits discrimination on the basis of pregnancy, childbirth or related medical conditions. The basic principle of the act is that women affected by pregnancy and related conditions must receive the same treatment as other applicants or employees on the basis of their ability or inability to work.

Pre-employment questions about marital status, pregnancy, future childbearing plans, and number and age of children are a violation of Title VII. The Equal Employment Opportunity Commission has issued guidelines that prohibit employers from using pregnancy or related conditions as a reason for rejecting applicants for employment. The guidelines state that an employer cannot refuse to hire a woman because of her pregnancy-related condition as long as she can perform the major job functions. Pregnant applicants may be rejected only if the pregnancy prevents them from satisfactorily performing the duties of the position. An employer cannot refuse to hire a pregnant applicant because of the prejudices of coworkers, clients or customers. Requiring pre-hire information about childcare arrangements from female applicants is also unacceptable.

AGE

The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age for people aged 40 years of age or older. State laws may prohibit discrimination based on age as well. A request that an applicant state his or her age may indicate discrimination based on age. Any time an applicant is asked to provide his or her age, the reason for the inquiry should be stated. Generally, however, this question should never be asked on the application or during the selection process. Nor should the date of graduation from high school be requested as it generally will be an indication of the applicant's age.

Unless age relates to successful performance of the job (for example, actor for a particular role), it is unlawful to ask the applicant to provide it. An applicant can be asked whether he or she is over the age of 18 for the purpose of determining whether he or she is old enough to be lawfully hired. If an individual's age must be ascertained for health insurance or other reasons, the information should be obtained after the individual is hired.

SEXUAL ORIENTATION

As of the writing of this publication, federal law has not recognized individuals with particular sexual orientations as protected classes for the purpose of applying federal antidiscrimination laws. However, refusal to hire a qualified applicant on the basis of his or her sexual orientation could run afoul of state or local laws or give rise to a claim of violation of state or federal constitutional rights. Some states and local communities have enacted laws that prohibit discrimination on the basis of sexual orientation, which includes homosexuality, bisexuality or transgendered individuals. Pre-hiring employment practices should reflect any such laws.

Courts have struggled with the issue of whether employers can make employment decisions on the basis of an employee's sexual orientation. This controversial area of the law continues to evolve. Some courts have held that all discrimination based on sexual orientation constitutes a violation of the employee's right to privacy. Other courts distinguish between an individual's First Amendment right to proclaim his or her homosexuality and his or her actual homosexual conduct. Some states protect an individual's expression of his or her homosexuality under laws protecting political causes. Employers should seek the assistance of legal counsel to determine whether state or local laws in their area address the issue of sexual orientation.

In the absence of federal and/or state laws, many higher education institutions have developed policy statements to prohibit discrimination based on sexual orientation.

PERSONAL APPEARANCE

No federal law prohibits discrimination against an individual on the basis of outward appearance for the purpose of recruitment or hiring. Some states, however, expressly prohibit such discrimination (see, for example, District of Columbia Human Rights Act, Subchapter II, § 2-1402.11).

Employers could get into trouble when standards concerning appearance or grooming requirements have the effect of discriminating against applicants in protected classes. Limiting or prohibiting hair or dress styles, which may be symbolic of race, national origin or religion, could constitute a form of discrimination unless a reasonable business purpose for doing so can be shown. As a general rule, reasonable standards of dress and grooming can be established where uniformly applied, as long as such standards do not have a disproportionate impact on applicants in protected classes or discriminate against individuals on the basis of religion, race, national origin or any other impermissible factor.

Similarly, the EEOC and the courts have ruled that minimum height and weight restrictions are illegal if they screen out a disproportionate number of applicants in protected classes. Height restrictions may, for example, have an adverse impact on women and ethnic minorities (for example, Asians) who are historically smaller in stature. Height and weight requirements rarely relate to successful job performance and often have prevented otherwise qualified applicants from obtaining employment.

Therefore, such standards must be shown to be essential to the safe performance of the job and must be made on the basis of business necessity. If such requirements are necessary, they must be uniformly applied to all applicants.

MEMBERSHIP IN ORGANIZATIONS, RELIGIOUS PREFERENCE AND NAMES OF RELATIVES

Prehire questions that concern membership in organizations, religious preference or names of relatives can lead to liability for discrimination based on race, religion, national origin and other factors. Such questions should be avoided because they are an invalid basis for evaluating an individual's qualifications for a particular position and historically have been used as pretexts for discrimination.

CREDIT RATINGS AND REPORTS

Private employers who seek information about applicants typically hire private firms to conduct background checks. These firms compile credit reports on applicants and investigate creditworthiness, character, reputation and experience. Federal and state laws extensively regulate the use of such reports. As a general rule, credit reports should be used only if a business necessity exists, in part because the reports may contain information about prohibited areas of inquiry, such as arrests.

Pursuant to the federal Fair Credit Reporting Act (FCRA), a credit reporting agency can be used to obtain a credit report on a job applicant. Two conditions apply: (1) the applicant or employee must be notified in writing of the intention to have a credit report prepared; and (2) if an applicant is denied a position because of information contained in a credit report, he or she must be told about the information and given the name and address of the agency that provided the report. The EEOC and the courts have determined that denying an applicant employment because of a poor credit rating has a disparate impact on minority groups and have found this practice unlawful unless the employer demonstrates a business necessity for engaging in it.

In addition, the FCRA prohibits employers from asking applicants about any of the following: assets, liabilities, charge accounts, bank accounts, credit ratings, past wage garnishments, home ownership and car ownership. Inquiries into an applicant's financial status — for example, past-due loans, number of revolving charge accounts, and the like — are prohibited. An applicant can be asked how long he or she has lived in the area to determine whether he or she is a stable resident of a geographic area without inquiring about home ownership. If car travel is necessary, the applicant can be asked whether he or she has the use of a reliable car.

The FCRA provisions overlap with state law in many respects. For example, California's Investigative Consumer Reporting Agencies Act ensures that entities engaged in the assembly and evaluation of information on consumers for employment purposes do so fairly, impartially and with respect for the consumer's privacy. Where federal and state acts overlap, the federal provisions supersede the state provisions. However, state law applies if it goes further than the FCRA to protect the consumer.

DISCHARGE FROM MILITARY SERVICE

A preference for honorably discharged over dishonorably discharged armed services members might have a disparate impact upon minorities and could be a violation of Title VII. Some courts have held that because minority service members have a higher proportion of dishonorable discharges from the armed services, employers cannot lawfully prefer honorably discharged applicants unless they can establish that the requirement has a strong relationship to successful performance of the job.

In at least one instance, a court has held that an employer can ask an applicant about his or her military service record if the information is not used to make a hiring decision but to decide whether to further inquire into the applicant's background and qualifications. If additional investigation revealed nondiscriminatory grounds for denying employment, the applicant could then be denied employment.

A request for information about a dishonorable discharge could discourage minority applicants and have an adverse impact on them, giving rise to discrimination. Such questions should be avoided unless a business necessity for requesting the information can be established. Employers who ask about military service should preface the inquiry with a statement that a dishonorable or general discharge is not an absolute bar to employment.

SMOKING

In an effort to contain healthcare costs, absenteeism and diminished productivity, some employers consider applicant lifestyles in making hiring decisions. However, employment decisions made on the basis of lifestyle factors could face potential problems under federal and state law. Such decisions could violate the Americans with Disabilities Act (ADA) or state fair employment and hiring practices laws (see Section IV). Under state and federal law, employers must not take lifestyle factors into account in making hiring decisions if conditions brought on by lifestyle choices are disabilities under the ADA or comparable state laws.

The 2008 amendments to the ADA may allow employees to bring nicotine addiction claims, as the definition of "disability" is now expanded, and cases disallowing such claims have been superseded by these amendments. Additionally, some states (for example, Tennessee and Indiana) prohibit employers from basing employment decisions on an individual's off-the-job smoking. Further, many local municipalities have enacted ordinances prohibiting discrimination against employees who assert their right to smoke.

POLYGRAPH EXAMINATIONS AND PERSONALITY TESTS

Federal law limits the circumstances under which employers may request that employees submit to polygraph exams. This practice might be a violation of federal law under the Employee Polygraph Protection Act of 1988 (EPPA). The EPPA prohibits covered employers from (1) requiring, requesting or causing, directly or indirectly, a prospective employee to take or submit to a lie detector test or suggesting that he or she take one; (2) using or accepting the results of a lie detector test taken by a prospective employee or inquiring about these results; and (3) denying employment to a prospective employee for refusal or failure to take or submit to such a test or for exercising any rights afforded by the EPPA.

The definition of a lie detector test includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or any other similar device that an employer uses to render a diagnostic opinion regarding the honesty or dishonesty of an individual. The term "lie detector" under the EPPA does not include medical tests used to screen for controlled substances or alcohol. The term also does not include written or oral honesty tests; paper and pencil tests, machine scored or otherwise; or handwriting tests. The EPPA defines the term "polygraph" as an instrument that records continuously, visually, permanently and simultaneously any changes in cardiovascular, respiratory and electrodermal patterns and that an employer uses to render a diagnostic opinion concerning honesty or dishonesty.

The EPPA has some exceptions. It does not prohibit the administration of lie detector tests by certain defense and intelligence contractors, private employers whose primary business consists of providing security personnel, or certain drug manufacturers and distributors. Employers should consult legal counsel before administration of lie detector tests under any of these exceptions and comply with procedural strictures set forth in the EPPA. These strictures include written notice to the employee of (1) the date, time and location of the test; (2) his or her rights (for example, to consult with legal counsel or an employee representative

before each phase of the test); and (3) the nature and characteristics of the tests and instruments involved.

Analysis of polygraph tests is a highly interpretive specialty. Therefore, the references and qualifications of a polygraph examiner — a potential witness as well as a technical professional — should be checked before he or she is retained. Moreover, the results of polygraph tests are difficult to introduce into evidence in court proceedings. Many states have ruled such results inadmissible as evidence of guilt or falsity.

A majority of states have statutes that prohibit employers from demanding or requiring that an applicant for employment submit to a polygraph, lie detector, or similar examination as a condition of employment. Many of these laws ban such examinations in their entirety or regulate their use. Nonetheless, California employers should request and administer polygraph tests to applicants with extreme caution. Applicants can easily claim duress; a request that an applicant submit to a polygraph test as an alternative to more rigorous or lengthy types of screening could constitute a prohibited demand if the applicant who refuses a test is not further screened or considered for employment. In addition, successfully demonstrating voluntariness in the event of a dispute might prove difficult.

The use of written tests to evaluate an applicant's work ethics and attitudes, and scoring and scaling the tests to detect qualities and characteristics that they deem undesirable is strongly discouraged. Many of these standardized personality tests have come under scrutiny; some applicants have challenged them in the courts, contending that the tests violate an individual's right to privacy and do not indicate true job performance.

The law pertaining to pre-hire personality testing remains unclear. Therefore, state and local laws and regulations should be consulted before an applicant is asked to take a personality profile test. At a minimum, the examinee should be informed in writing of his or her right to refuse to participate in such a test before it is administered. However, prior written notice and acknowledgment might not be a protection against liability for the use of personality profile tests.

PRE-HIRE DRUG AND ALCOHOL SCREENING

Drug and alcohol screening of employees is a widely accepted standard practice in private industry but unfortunately continues to be avoided by many higher education employers unless specifically required by state law (for example, law enforcement officials, individuals who drive university vehicles — particularly multiple passenger vehicles). The rights of the employer to conduct pre-employment drug testing vary widely from state to state. Some states have stringent rules concerning the extent to which an employer may test job applicants. Others do not specifically address the issue.

Some states have ruled that mandatory pre-employment drug and alcohol testing is a violation of a right to privacy under their state constitutions, unless the employer can show a job-related requirement for the test. Federal decisions regarding constitutional protections under the Fourth Amendment to the U.S. Constitution offer some guidance but are not necessarily dispositive.

Although some federal rulings have allowed testing under the Fourth Amendment if the intrusion is not unreasonable, some state courts have held that employers must establish a "compelling interest" because of a potential right to privacy invasion (see, for example, California Constitution, Article I, Section 1). States also have differentiated between drug testing for safety-sensitive and non-safety-sensitive positions. Therefore, legal counsel should be consulted to ensure that drug or alcohol screening programs are in compliance with all applicable state and federal laws.

ARREST AND CONVICTION RECORDS

Historically, members of some minority groups have been arrested and convicted of crimes more often than whites in proportion to their numbers in the population. Accordingly, hiring decisions based on such records can have a disproportionate effect on the employment opportunities of members of these minority groups.

The courts and the EEOC have held that without proof of business necessity, an employer's use of arrest records to disqualify job applicants is unlawful discrimination. Even if an employer does not consider arrest information, the mere request for such information discourages some minority applicants. Therefore, employers should exercise caution when requesting arrest and conviction records.

Arrests must be distinguished from convictions. A conviction is a determination establishing violation of a particular crime. An arrest is merely an accusation and possible detention of a person for the alleged crime. An arrest without a conviction does not prove that the arrested individual committed any illegal act. In the absence of a conviction, arrest alone is irrelevant to the individual's ability or competency to perform a given job. On the basis of this distinction, many courts have held that employer inquiries into records of arrests where no convictions resulted are unjustified by claims of business necessity.

Some states have statutes that prohibit employers from using arrests with convictions in any phase of employment decisions (see, for example, California Labor Code Sections 432.7(a) and (b)). Other states have statutes that restrict the scope of preemployment inquiries concerning arrests and convictions. (See, for example, Washington State Human Rights Commission Fair Pre-Employment Inquiries, WAC 162-12-140. *et seq.*: "inquiries concerning convictions (or imprisonment) will be considered to be justified by business necessity if the crimes inquired about relate reasonably to the job duties, and if such convictions (or release from prison) occurred within the last ten years.")

Under the EEOC guidelines, an employer cannot use a misdemeanor or felony conviction as an absolute bar to employment but can consider the relationship between a conviction and the applicant's fitness for a particular job. Therefore, the number, nature and date(s) of the conviction(s) can be used to determine whether the applicant is suitable for the position. Inquiries about conviction records should be accompanied by a statement that such records will not necessarily preclude employment and that the following factors will be considered:

- 1. The frequency and severity of violations.** The violation might be a minor offense that is not job related. Such offenses should not unduly influence an employment decision.
- 2. The age of the applicant at the time of the illegal act.** Impulsive, reckless and irresponsible behavior might stem from age. One or two offenses in an applicant's youth should not be of great concern compared with a chronic or recurring pattern of violations later in life. A mature adult with a recent record of criminal convictions presents a much more serious question.
- 3. The time elapsed since a conviction.** If a reasonable amount of time has elapsed since the only or latest conviction, the applicant might have seen the error of his or her ways.
- 4. The whole person.** The aptitudes, abilities, attitudes, interests, demeanor, experience, qualifications and education of the applicant, not merely one aspect of his or her personal history, should be taken into account. The applicant's past may have little or no effect on his or her value as an employee.

The critical question is whether a given offense directly relates to job performance. An individual with a history of traffic violations who is applying for a position as a delivery truck driver or an individual with recent embezzlement or theft convictions who is applying for a position as a bank teller with access to large amounts of cash should be carefully scrutinized. Without doubt, these offenses are job related. However, if the applicant with traffic violations applied for the bank teller position, the convictions probably would not disqualify him or her.

NEGLIGENT HIRING, RETENTION AND EMPLOYER LIABILITY

The consequences of failure to discover information about employees who have conviction records or serious disciplinary issues, such as sexual harassment, can be significant. Under the negligent hiring form of tort liability, the employer may be held liable for an employee's misconduct even when the employee does not act within the course and scope of his or her employment. Courts have cited several steps that must be taken in the pre-employment hiring process to avoid liability for negligent hiring. These steps are: (1) requiring all applicants to complete and submit a written job application form; (2) conducting a job interview; (3) checking the applicant's past work references, including documented disciplinary actions; (4) confirming the applicant's possession of valid diplomas and licenses; and (5) checking relevant criminal convictions.

Acceptance of employer liability for negligent hiring (and retention) is growing nationwide. Negligent hiring (and retention) torts seek to hold the employer primarily liable for the acts of its employees that injure third parties (such as business customers, clients and coworkers) by virtue of the employer's act of negligently hiring (or retaining) an unfit employee. These torts arise when an employer knew or should have known that an applicant (or employee) posed a foreseeable risk of harm in the position in which he or she was placed. When an employer knew an applicant was unfit for employment but hired him or her anyway, or when an employer should have known that an employee was unfit for employment but failed

to take the necessary steps to ascertain fitness, the employer may be subject to a negligent hiring or negligent retention claim by a third party injured by that employee.

Negligent hiring (and retention) torts are different from vicarious liability, which involves claims against the employer because of actions of an employee in the course and scope of his or her employment. In the vicarious liability situation, the employer is held liable for its employees' acts by virtue of the employer-employee relationship.

Vicarious liability claims might be unavoidable because even good employees will occasionally make unintentional mistakes that injure third parties, but negligent hiring and retention claims should be largely avoidable through proper screening and placement of personnel. To prevent such claims, four questions should be asked: (1) What is the nature of the job to which the employee is assigned? (2) What responsibilities will be entrusted to the employee? (3) What questions can and should be asked to make a reasonable investigation of applicant fitness? (4) What should be done if an applicant is determined to be unfit?

Different employers may be held to different legal standards in their dealings with the public. For example, common air carriers are held to a high standard of care in providing for passenger safety. If a position carries with it a legal duty greater than that normally imposed on employees in contact with the public, a greater duty to investigate employee fitness might exist. Development of personnel policies concerning employees in regular contact with the public should reflect consideration of (1) the events to be prevented, (2) the possibility of an existing problem, (3) the possible remedies available, and (4) the questions that should be asked of applicants to ascertain their risk of unfitness for employment. At a minimum, employers should use the customary hiring practices in its industry.

As noted above, employers' ability to obtain information to prevent an unsuitable applicant from being hired is limited. Federal, state and local law may prohibit employers from asking any questions that concern past criminal activity. In addition, both state and federal law may require that criminal records be expunged or sealed. Furthermore, former employers might not want to give out information for fear of a defamation suit.

Disclaimer: Employment law is quite complex with significant variations depending on the state or states in which your higher education institution operates. The specific legal considerations included in this guide are meant to provide a broad overview of the most significant federal employment laws.

SECTION IV

HOW THE AMERICANS WITH DISABILITIES ACT AFFECTS THE HIRING PROCESS

Title I of the ADA generally forbids discrimination in hiring on the basis of disability. The 2008 amendments to the ADA broadened the definition of "individual with a disability" and made other changes that significantly expanded the coverage of the ADA, which means that a much larger number of applicants and employees will have standing to bring ADA claims. Congress intended to shift the focus in ADA cases to whether applicants and employees are otherwise qualified and to the reasonable accommodation process.

The ADA amendments did not change any of the existing rules regarding pre-employment inquiries and examinations. Those restrictions were already broad. Prior editions of the Interview Guide focused not on whether particular impairments were disabilities, but on the issues of qualification, essential job functions and other defenses, such as when health or safety considerations justify denying employment based upon an applicants medical condition. These issues do not turn on whether a particular impairment is a disability or is regarded as a disability, and are unchanged by the ADA amendments.

Employers are still subject to a lawsuit if they ask unlawful questions or require prohibited examinations, even without discrimination against an applicant or employee. See National Employment Law Institute's Resolving ADA Workplace Questions: How Courts and Agencies are Dealing With Employment Issues, Sept. 2008 (hereinafter NELI). But Congress recognized that unlike race or national origin, physical or mental impairments can render an applicant unable to perform the duties of a job, so there are questions that can be asked pre-employment and factors that can be taken into account in selection. The ADA does regulate what can be asked, when, and how that information can be used.

Congress encourages employers not to consider the physical or mental impairments of applicants. If an employer elects to do so, the ADA establishes a process whereby the employer must assess a disabled applicant's ability to perform the "essential functions" of the specific job desired, and it places limits on permissible reasons for refusing to hire persons with disabilities. Where an applicant or employee's physical or mental impairments might impede performance of essential job functions and a reasonable accommodation is requested, the ADA requires the employer to take affirmative steps to "reasonably accommodate" the applicant to overcome the impediments. The employer does have various defenses, notably the defense that an accommodation creates an "undue hardship" on the employer.

In extremely general terms, the following seven rules govern hiring under the ADA:

- **Employers cannot discriminate in any aspect of the hiring process by refusing to consider individuals with disabilities.**
- **Employers cannot discriminate in hiring a “qualified individual with a disability.”** A “qualified individual with a disability” is a person who satisfies the prerequisites for the position and is able to perform the essential functions of the job with or without “reasonable accommodation.”
- **If an applicant requests a reasonable accommodation to allow him or her to do a job, the employer must determine the availability of an accommodation that would not pose an undue hardship.** Employers cannot refuse to consider requests for reasonable accommodation or reject applicants because they might need a reasonable accommodation.
- **The obligation to make reasonable accommodations extends to the hiring process itself, including applications and interviews.**
- **The ability of employers to ask questions about an applicant's physical or mental condition before offering employment is substantially restricted.** The ADA prohibits all questions related to disabilities and medical examinations, even if job-related (see NELI). Employers can make pre-offer inquiries to determine whether an applicant is “qualified” to perform essential functions (i.e. employers may ask an applicant whether they can satisfy the physical requirements of the job or whether the applicant can perform these functions with or without reasonable accommodations). Medical examinations and inquiries can be conducted only after a conditional offer has been made. See EEOC ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Examinations (10/10/95). These rules also apply to background checks.
- **Employers can use pre-employment tests at any stage of the hiring process to determine whether an applicant possesses the requisite skills.** However, they might have to make reasonable accommodations in the testing process and must ensure that the tests measure necessary skills and abilities, not disabilities.
- **Employers should ensure that the selection criteria they use in their hiring processes are not discriminatory.** They cannot discriminate on the basis of stereotypes, a speculative risk of future injury, or the possible need for additional accommodations.

Given the expanded protections and coverage of the ADA Amendments Act of 2008, prudent employers should consider the following:

- 1) Every time an employer plans to take action where it has knowledge that a physical or mental condition factors into declining performance or violations, the employer should assume the ADA may protect the applicant or employee, even if the condition is temporary (i.e. will not last more than six months), and focus on the individual's qualification to perform essential functions.
- 2) When applicants or employees say they want or need something because of a physical or mental condition, employers should initially treat the request as one under the ADA and analyze the reasonableness of the request.

- 3) Employers should never ignore or reject applicant requests (even those that are oral or informal) based on a physical or mental condition.
- 4) Employers should consider whether the request is something the employer has done for others, whether it relates to essential functions, and whether the burden imposed is slight and/or merely temporary. If the burden is not great, the employer should accommodate and document. If the burden is greater than the employer would normally agree to, the employer should consider: a) whether the individual is covered under the amendments; b) whether they are qualified to perform essential functions with the accommodation; and c) whether there is another defense such as undue hardship or fundamental alteration.

The ADA does not require “affirmative action” in hiring (i.e. does not require that disability be used as a favor factor in selection decisions). The ADA does not change the obligations of federal contractors and recipients of federal assistance under the Rehabilitation Act of 1973; employers covered by that law must comply with those provisions and the ADA. The ADA does impose an affirmative obligation to make reasonable accommodations to “qualified individuals with disabilities.”

In making a hiring decision, employers can legitimately refuse to hire any person with a disability who:

- lacks the minimum qualifications for the job;
- is unable to perform the essential functions of the job;
- requires a reasonable accommodation that would be an undue hardship;
- would pose a direct threat to the health or safety of himself, herself or others;
- is less qualified than other applicants; or
- fails to meet any other criteria that are job-related and consistent with business necessity.

DETERMINING “QUALIFIED” APPLICANTS WITH A DISABILITY

The starting point for analysis of alleged discrimination in hiring is whether a disabled applicant is “qualified” to perform the essential functions of the job. The ADA prohibits discrimination only against “qualified” individuals with disabilities.

According to the EEOC, the determination of whether an individual with a disability is “qualified”:

- is to be made at the time of the employment decision;
- cannot be made on the basis of concerns that the employee might become unable to perform essential functions in the future or might cause an increase in health insurance or workers' compensation premiums;
- cannot be made on the basis of stereotypes or speculation; and
- must be made on the basis of medical evidence and on an analysis of whether a particular applicant is qualified to perform a particular job.

The EEOC has identified two steps in making this determination.

Step 1 - Prerequisites

Determine if the individual satisfies the position's prerequisites, such as appropriate educational background and skills. According to the EEOC, prerequisites might include:

- education;
- work experience;
- training;
- skills;
- licenses or certificates; and
- other job-related requirements, such as good judgment or ability to work well with other people.

All applicants, regardless of disability, can be required to possess all state or federal licenses or certificates required to perform the duties for which the applicant is applying. But licenses and certificates are only the most obvious prerequisites. Any prerequisites for education, experience or background can be specified as long as they do not have a disparate impact on applicants with disabilities. If prerequisites or minimum qualifications have a disparate impact on individuals with disabilities, they can still be used if they are "job-related" and "consistent with business necessity." Applicants lacking the minimum skills, qualifications or other requirements for a job are not protected by the ADA.

Step 2 - Ability to Perform "Essential Functions"

Determine whether the applicant can perform the "essential functions" of the position desired "with or without reasonable accommodation." (See Appendix D, "Sample Questions to Determine Whether the Applicant Can Perform Essential Job Functions.") If a disability physically prevents an applicant from performing essential functions with reasonable accommodation, he or she is not protected by the ADA. If the applicant is qualified and able to perform essential functions, and no other applicant is better qualified, the applicant is protected by the ADA.

Legitimate reasons for rejecting the applicant might remain, but these reasons must be scrutinized under other standards. Such reasons include: (1) the applicant's inability to perform nonessential functions, requiring consideration of job restructuring as a reasonable accommodation/undue hardship problem and/or (2) health or safety concerns raised by the applicant's employment. These concerns must be analyzed under a direct threat standard. A job does not have to be restructured to eliminate essential functions; an applicant's inability to perform such functions is a defense against liability.

ALLOWABLE AND NONALLOWABLE INQUIRIES ABOUT DISABILITIES

Allowable Inquiries (if asked of all persons applying for a particular category of job):

- Do you need any reasonable accommodations or assistance during the interviewing process?
- Are you able to perform essential job functions?
- Are you able to perform, with or without a reasonable accommodation, all of the essential functions identified in the job description?
- Can you perform the essential functions of this job safely?
- Are you using illegal drugs or abusing alcohol?
- Can you meet our institution's standards and expectations as stated in policies on unacceptable drug use, on-the-job alcohol consumption, smoking and attendance?
- Do you possess the minimum qualifications such as education, experience, licenses, training, basic reading and writing skills, and mathematical skills required for the position?
- How many days were you absent from or late to work last year for any reason?
- Have you ever been involved in an on-the-job accident that injured coworkers or members of the public or that damaged property?
- How would you perform job-related tasks and (if the applicant indicates that he or she can perform the tasks with an accommodation) what accommodations would you require?

*Note: Applicants can be asked to voluntarily disclose whether they have a disability if and only if the employer:
(1) is a federal contractor with obligations under the Rehabilitation Act, (2) receives federal funding of programs, (3) has affirmative action obligations under state law, or (4) has a voluntary affirmative action program for persons with disabilities. Applicants also can be asked to explain or demonstrate how they can perform the essential functions of the job, with or without a reasonable accommodation, if they have an obvious or known disability that might prevent them from performing these functions.*

Nonallowable Inquiries:

- Do you have or have you had a disability?
- Have you had any serious illness (such as AIDS), back problems, a history of mental illness or any other physical or mental condition?
- When did you become disabled?
- What is the prognosis for your recovery?
- What is the nature or severity of your disability?
- Do you wear a hearing aid or need to wear glasses while on the job?
- Do you require time off for medical treatment for a disability?
- Have you had any on-the-job injuries in the past?
- Have you ever been treated for any mental condition?
- What conditions or diseases have you been treated for in the past?
- Have you ever been hospitalized and, if so, for what condition?
- Have you ever been treated by a psychiatrist or psychologist and, if so, for what condition?
- Do you have or have you had a major illness?
- Have you ever been treated for drug addiction or alcoholism?
- How many days were you absent from work last year because of illness?
- Have you been taking any prescribed drugs?
- Do you have a sexually transmitted disease?
- Have you ever requested or received assistance or assistive devices in performing past jobs?
- Do you need or have you received medical or disability benefits?
- Describe your past drug use or alcohol use.
- Have you ever been a drug addict or an alcoholic?
- Have you ever filed a workers' compensation claim?
- Have you ever been awarded workers' compensation benefits?
- Have you ever been found to be disabled?
- Do you have a spouse, children or friends with disabilities?
- Have you had any problems because of a disability?

DETERMINING “ESSENTIAL FUNCTIONS”

Guidance regarding “essential functions” can be found in the EEOC ADA Title I Technical Assistance Manual and other EEOC guidance included in the EEOC Compliance Manual, which is available on the EEOC’s website. The basic principles of essential functions are as follows.

Whether a particular function is “essential” is a factual determination that the EEOC says must be made on a case-by-case basis. “Essential functions” are those functions that the individual who holds the position must be able to perform unaided or with the assistance of reasonable accommodation. The EEOC says that any inquiry into whether a particular function is “essential” initially focuses on whether the employer actually requires current or prior employees in the position to perform those functions.

For example, any employer may state that typing is an essential function of a position. If, in fact, the employer has never required any employee in that particular position to type, this will be evidence that typing is not actually an “essential function” of that position. EEOC regulations and guidance describe three factors that should be weighed in determining whether functions are essential:

1. Whether performance of a function is the reason that a position exists.

If an individual is hired to lift and load bags, the ability to lift and load bags is an essential function because it is the only reason the position exists.

2. The number of other employees available to perform the function.

Employers can be required to restructure jobs and redistribute nonessential job duties to other employees as a reasonable accommodation. If an employer has a relatively small number of employees for the volume of work to be performed, otherwise nonessential functions might become essential.

3. The degree of expertise or skill required to perform the function.

In a profession or highly skilled position, the employee is hired for his or her expertise or ability to perform a specialized task that would be an essential function.

Several examples may help clarify the difference between essential and nonessential functions. If an employee spends the vast majority of his or her time entering data into a computer, operation of a computer is an essential function. If an employer never requires library employees to add paper to the photocopy machines in the library, the task is not essential. If an individual is hired to process class registrations at the beginning of each semester, use of the registration forms is an essential job function because this activity is the only reason the position exists.

The EEOC has stated that the inquiry into essential functions is not intended to second-guess an employer's business judgment with regard to production standards or to require employers to lower production standards. If an employer actually requires a typist to be able to type 75 words per minute, the employer will not be asked to explain why a typing speed of 55 words per minute would not be adequate. This exception is a significant exception to the general prohibition of selection criteria that have a disparate impact unless they are “job-related” and “consistent with business necessity.” If an employer actually requires employees

to perform at a certain level, then job applicants must be able to perform at that level, regardless of disability.

A written job description is evidence of the “essential functions” of the job. A written job description prepared before a job is advertised or applicants are interviewed will be more credible and given more weight than descriptions prepared after a disabled applicant is rejected. If a job description omits particular functions, it could be viewed as evidence that the functions were not essential.

DETERMINING “REASONABLE ACCOMMODATIONS”

Title I protects job applicants who can perform the essential functions of a job with the assistance of “reasonable accommodation.” The ADA’s reasonable accommodation requirement imposes three types of obligations on employers:

1. Making reasonable accommodations in the way the job is performed, including provision of auxiliary aids or equipment;
2. Making reasonable accommodations in procedures, such as job application, testing and training; and
3. Making reasonable accommodation of non-work areas, facilities, fringe benefits and so on to give disabled employees equal access to the privileges of employment.

The first two obligations arise during the hiring process; all three apply to employees.

Employers have a defense if the “reasonable accommodation” would impose an “undue hardship.” What constitutes “reasonable accommodation” and “undue hardship” is an extremely complex issue.

Extension of Duty of Reasonable Accommodation

An employer’s duty to provide reasonable accommodation extends only to the known physical or mental limitations of an otherwise qualified applicant. As a general rule, employers are not obligated to provide reasonable accommodations until an applicant makes a request. Generally, the disability is disclosed by the applicant during the interviewing process or is revealed by pre-employment tests or medical examinations. If the applicant does not disclose his or her disability and the employer has no knowledge of it, the ADA does not require the employer to provide accommodation.

The EEOC regulations do not expressly require an employer to address the subject of reasonable accommodation with an applicant who has an obvious and readily apparent disability known to the employer, unless the employer intends to reject the applicant on the basis of his or her inability to perform essential functions.

Consider the following situation. An individual who uses a wheelchair applies for a position as a campus security monitor. The applicant does not notify the employer of his disability until the job interview and does not seek accommodation. The position requires the applicant to monitor television screens to detect any employee or student crime. The screens are located in a second-floor security booth with elevator access. Although the employer is under no obligation during the initial interview process to discuss accessibility to non-work areas, such as restrooms, the employer should discuss at that time (or at least before rejecting

the applicant) accessibility to the security booth as well as accommodations needed for the applicant to perform essential job functions while in the booth.

If an applicant has an obvious disability, or one known to the employer, the employer is permitted to make certain inquiries regarding the applicant's ability to perform essential functions. The intent of this rule appears to be to allay an employer's greatest concerns early in the interview process.

Addressing Reasonable Accommodation During Selection

Reasonable accommodation issues arise two different ways during the selection process.

The most obvious is when an applicant asks for some type of accommodation during the selection process itself. Common examples might include assistance in filling out an application; use of an interpreter during interviews; accommodations for learning disabilities during any pre-employment tests (such as extra time or waivers of requirements); and requests that interviews be held in accessible facilities.

In such cases, the individual is usually "qualified" for that stage of the application process. The employer is permitted to request documentation of the disability and need for an accommodation. The accommodations needed will rarely be an undue hardship. In evaluating such requests, an employer cannot consider whether the applicant can actually do the job, only the burden of providing the accommodation during the selection process.

The other issue that arises is when applicants make it clear that they are likely to need accommodations on the job, or the applicant discloses a disability and the employer wants to address possible job accommodations. Applicants cannot be rejected solely because they have asked for job accommodations, or because such accommodations would impose some burden. When these issues arise (whether made by the applicant or in limited circumstances by the employer), the EEOC envisions an employer making a limited number of inquiries into an employee's ability to perform essential functions with reasonable accommodation. The ADA then permits broader disability-related investigations that can be made after a conditional offer of employment is extended.

Ordinarily, the reasonable accommodation process requires discussion of the nature and extent of an applicant's disability among the applicant, the applicant's physician, the employer (preferably the human resource office and not the supervisor), the employer's physician, rehabilitation experts and others. The EEOC takes the position that such disability-related inquiries cannot be made before a conditional offer of employment, but would have to be made before an applicant is rejected on the basis of inability to perform essential functions.

Reasonable Accommodation Inquiries

If during the application and hiring process an applicant indicates that he or she has a disability and might require a reasonable accommodation or at the pre-offer stage an otherwise qualified individual indicates that he or she might require a reasonable accommodation to perform essential job functions if hired, the employer may (but is not required to): (1) inquire about the types of accommodations the individual believes might be necessary and/or (2) require the individual to document functional limitations and discuss with him or her the nature and costs of the accommodations that might be necessary.

If no accommodation is requested, these inquiries — especially inquiries concerning the applicant's limitations — can be made only after an offer of employment. If the individual has an obvious disability or a disability that the employer believes will interfere with the applicant's *ability to complete the pre-employment procedures, including pre-employment testing*, the employer must raise that concern with the individual and inquire whether he or she will require any reasonable accommodation during the hiring process.

ENSURING NONDISCRIMINATION IN RECRUITMENT AND APPLICATIONS

Recruitment and advertising literature, including newspaper ads, job announcements, posted positions and literature about the employer, cannot expressly discriminate against persons with disabilities. Just as this literature cannot expressly say, "women (or men) preferred," employers cannot express a preference for "healthy, strong laborers." Because specific physical or mental abilities could be necessary to perform essential functions of the job, recruitment and advertising literature can set forth physical or mental requirements for a job, or list the essential functions of the job that involve physical or mental abilities and state that the capability to perform these tasks is required.

The ADA fundamentally changed the information that was previously collected and considered by employers. Under the ADA, an employer may not use an application form listing many potentially physical or mental impairments and ask the applicant to check any that he or she may have. Inquiries into areas that have no relevance to the applicant's job duties and the use of resulting information in denial of employment are specifically prohibited by the ADA.

While the courts remain divided on this issue, the EEOC takes the position that employers can be liable for making improper inquiries, even if the information is not used to discriminate or a particular applicant with a disability would not have been hired. Examples of such inquiries include asking whether an applicant wears a hearing aid, unless the ability to hear without an aid directly relates to the applicant's ability to perform his or her job-related functions, and asking an applicant whether he or she has had any sexually transmitted diseases, including AIDS.

MAKING PRE-OFFER INQUIRIES

The ADA imposes significant restrictions on pre-offer inquiries. The EEOC Technical Assistance Manual, along with more recent EEOC guidance, discusses these restrictions in more detail. The general rules are that employers:

- cannot inquire whether an individual has a disability;
- can ask questions that relate to the applicant's ability to perform job-related functions;
- cannot refuse to hire an applicant with a disability because the disability prevents him or her from performing nonessential functions.

The reason that employers are not allowed to make pre-employment inquiries about subjects that might touch on the protected classifications of age, race, sex, pregnancy, marital status, religion or national origin but are allowed to make inquiries that relate to an applicant's disability as long as they focus on the applicant's ability to perform the essential functions of the job is that, unlike race, sex or other protected classifications, a disability can affect the individual's ability to perform these functions.

The safest approach to take under the ADA — and the one suggested by the EEOC — is to revise interviewing inquiries to narrowly focus on the applicant's ability to perform job functions instead of on the applicant's disabilities. One permissible method is to describe or demonstrate the job function or present the applicant with a comprehensive job description listing all essential functions and to inquire whether the applicant can perform the functions with or without reasonable accommodation. An applicant also can be asked to describe or demonstrate how, with or without reasonable accommodation, he or she would be able to perform job-related functions.

For example, if a bookstore job requires the lifting of heavy boxes to restock shelves, an applicant can be asked if he or she will be able to perform that function with or without reasonable accommodation. An individual with one leg who applies for a position as a campus bus driver can be asked to demonstrate or explain how, with or without reasonable accommodation, he or she would be able to drive for extended periods of time and load and unload passengers. However, an inquiry about the nature or severity of the disability is not allowed. Therefore, the individual cannot be asked how he or she lost a leg or whether the loss of the leg is indicative of an underlying impairment.

RESTRICTIONS ON WORKERS' COMPENSATION INQUIRIES

EEOC regulations specifically prohibit pre-offer inquiries regarding workers' compensation issues because such inquiries do not relate to the applicant's (or employee's) ability to perform job-related functions. The EEOC prohibits job application or medical questionnaire inquiries about on-the-job injuries or the filing of workers' compensation claims.

Inquiries regarding workers' compensation issues are permitted at the post-offer stage as a part of an employment entrance examination. The EEOC recognizes that employers have a need to collect such information, particularly in those states that relieve an employer from financial responsibility under workers' compensation laws if injuries are a recurrence or aggravation of a prior covered injury.

But the EEOC's regulations make the screening out of applicants with a history of filing workers' compensation claims tougher because they force the employer to identify this history or some medical condition as a basis for withdrawing a job offer. In addition, the regulations specifically prohibit employers from rejecting applicants because they might incur injuries in the future.

MAKING THE HIRING DECISION

The ADA specifies criteria that can and cannot be used in making hiring decisions.

Criteria that cannot be used include:

- the need to make a reasonable accommodation (unless the accommodation would pose an undue hardship);
- an applicant's inability to perform nonessential functions;
- a speculative or remote risk of future injury; and
- possible increase in insurance or workers' compensation costs.

Criteria that can be used include:

- an applicant's inability to perform the essential functions of the job; and
- a direct threat to the health and safety of the applicant or others.

The process of designing appropriate selection criteria and the defenses available to employers are described in the ADA Compliance Manual, published by CUPA-HR. The major points are summarized in the sections below.

Selection Criteria With a Disparate Impact

Many commonly used selection criteria, including insurance restriction; vision or hearing; mobility or reach; and lifting requirements directly affect persons with disabilities. The ADA prohibits use of qualification standards, employment tests or other selection criteria that screen out or tend to screen out applicants on the basis of a disability unless the criteria are shown to be "job-related for the position in question and consistent with business necessity."

The EEOC and developing case law has provided some guidance on when selection criteria can meet the test of "job-relatedness" and "business necessity," but there is still substantial ambiguity. Consider the following scenario. An employer interviews two applicants for a position, one of whom is legally blind. Both are equally qualified. The employer decides that although a driver's license is not essential to the job, it would be convenient to have an employee who could be asked to run errands by car, and hires the individual who has a driver's license.

Although possession of a driver's license is a uniformly applied neutral criterion, it screens out applicants with disabilities who cannot drive. Thus, the employer would have to show that the criterion is job-related and consistent with business necessity. In this example, the requirement clearly does not relate to the performance of essential functions, so the EEOC would take the position that there is no business necessity.

"Direct Threat" Standard

When a selection criterion that is claimed to be necessary for health or safety reasons screens out or tends to screen out disabled individuals, it must usually be demonstrated that the individual would pose a "direct threat" to himself or others. The EEOC characterizes such a threat by specifying that the risk of harm to others must be a "significant" risk and that there must be a "high probability" of "substantial harm."

Thus an applicant who disclosed during the interview that he has AIDS cannot be rejected for a campus custodial position. The finding on transmission of AIDS from the Center for Disease Control leaves little, if any, room for an employer in an institution of higher education to reject such an applicant. A speculative or remote risk of future injury to

others is insufficient to constitute a direct threat. An unsubstantiated risk of an increase in workers' compensation or insurance premiums is similarly insufficient. A college or university policy that for insurance reasons prohibits the hiring of individuals with bad backs cannot be defended as job-related and consistent with business necessity under the EEOC's interpretation unless a substantial probability of significant injury to the particular individual exists because of the job's particular functions.

If lifting is required only for nonessential functions of the job, the policy is not consistent with business necessity because the job can be restructured to reasonably accommodate the disabled individual. If, on the other hand, lifting is usually required for essential job functions, provision of some device to assist in lifting must be considered to minimize potential injury.

If this accommodation is "reasonable" and it decreases the risk of potential injury, no defense of a direct threat to the health or safety of the individual or others exists. If an accommodation cannot be made without lowering production standards or the time in which the task must be conducted, it is not reasonable. If, after considering all options, the risk cannot be reduced and the evidence shows the risk to be substantial, the applicant can be rejected.

The EEOC and courts indicate that in assessing direct threat issues, employers should consider the risk's duration; nature and severity of the harm posed by the risk; how likely it is that harm will occur; and whether the potential harm is imminent. The EEOC takes the position that the determination of direct threat must be made on the basis of objective factual evidence about the nature and effect of a particular disability, not on subjective perceptions, irrational fears, patronizing attitudes or stereotypes.

Input from the individual with the disability and opinions of medical doctors, rehabilitation counselors and physical therapists, although not absolutely required, are relevant and might be useful in this determination. Other evidence can be used but must relate to the particular circumstances of the individual with a disability, not the general experiences of individuals with similar disabilities. Employers will encounter less difficulty in defending a challenge brought by a disabled applicant when medical examinations were performed as part of the hiring process.

The direct threat to health or safety defense allows the screening out of disabled applicants unless a reasonable accommodation would allow the individual to perform the essential job functions without posing a direct threat to himself or herself or others. A detailed analysis of the accommodations available and the likelihood that such accommodations would permit the disabled employee to perform the essential job functions without posing such a threat must be made. According to the EEOC regulations, the risk of "substantial harm" need not be eliminated entirely but only to the level at which it is no longer significant.

One issue that has led to litigation under the ADA is whether safety standards can ever be adopted and defended across the board without requiring an individualized determination of direct threat. This issue arose after the Exxon Valdez accident, when the employer adopted standards that tanker captains must be clean and sober, i.e. no recent history of alcoholism, but there are similar examples of a standard adopted for safety reasons that screens out individuals with disabilities, but does not involve an individualized evaluation of risk.

“Direct Threat” of Applicants and Employees Who Have a Communicable Disease

Decisions about the hiring of applicants who possess infectious diseases communicable through the performance of their essential job duties are subject to the “direct threat” analysis already mentioned. The reasonable accommodation/undue hardship analysis applies with one distinction. Reasonable accommodation must be provided only for individuals with a communicable disease that is transmitted to others through the handling of food and only when the risk of transmitting the disease can be eliminated, not merely reduced.

Issues involving the transmission of communicable diseases are most likely to occur in food handling positions. As part of a legislative compromise, Congress directed the U.S. Department of Health and Human Services to prepare and annually update a list of contagious diseases that are transmitted through the handling of food. Because many colleges and universities have food handling positions, they could inquire (post-offer) whether persons have these diseases but could not screen out individuals without considering whether reasonable accommodations would eliminate the risk. If no such accommodations are possible, hiring of the applicant is not required.

IN CONCLUSION

The focus of the EEOC’s regulations is on what employers cannot do, rather than on what they can do. What employers are permitted to do under the ADA is:

- freely structure positions in their workforce in any way that makes sense, defining what are considered to be essential functions for each job;
- set performance standards at whatever level they choose, provided that the standards are applied equally to similarly situated employees;
- require that all applicants be able to perform the essential functions of the job and meet performance standards;
- devise selection criteria and administer tests to predict, to the greatest extent possible, which applicants are likely to be best able to perform essential functions of the job and meet employment standards;
- inform all applicants for a position that any offer of employment is conditional on the satisfactory results of a medical examination, if one is essential and legally defensible; and
- select the best applicant for the job.

Ultimately, all selection criteria and hiring procedures are imperfect measures to try to predict which applicant is likely to be the best person for a particular job. Hiring procedures and criteria designed to indicate the best person for the job regardless of disability (or other protected classifications) will be most defensible against ADA claims. Nothing in the ADA suggests that a qualified individual with a disability must be preferred to a better qualified or even an equally qualified nondisabled applicant. Hiring procedures that focus on qualifications are the best defense to ADA claims.

APPENDIX A

COMMON INTERVIEW MISTAKES AND THEIR CONSEQUENCES

MISTAKE	CONSEQUENCE
Failing to establish rapport with the applicant.	The interview never gets off the ground.
Not knowing what information is needed.	The interviewer does not know what questions to ask the applicant.
Concentrating exclusively on the applicant as a person.	The interviewer does not compare an applicant's demonstrated abilities and experience with the actual job requirements.
Not remaining silent or listening long enough.	The interviewer talks too much and fails to obtain meaningful information from the applicant.
Not allowing sufficient time to observe the applicant's responses and behavior.	The interview is too short and superficial. (An interview of about an hour increases the chances that the applicant will impart meaningful information.)
Incorrectly interpreting information obtained from the applicant.	The interviewer draws the wrong conclusion about the applicant's ability to perform.
Unawareness of or inability to deal directly with biases for or against certain types of applicants (stereotyping).	Hiring decisions are made for reasons that may be indefensible.
Allowing one characteristic or trait of an applicant to be overly influential (either favorably or unfavorably).	Hiring decisions are made for reasons that may be indefensible.
Making a decision on the basis of intuition or first impression instead of on analytical judgment.	Candidates who perform well during the interview might be overlooked.
Using stress techniques designed to trap or fluster the applicant.	The interviewer might not collect relevant information.
Conducting a poorly structured or an unstructured interview.	The interviewer fails to collect relevant or necessary information.
Comparing an applicant's life with one's own life.	Time that should be spent on obtaining information relevant to the job is wasted.
Failing to control or direct the interview.	The interviewer fails to collect all the job-related information.
Asking questions answerable by a simple "yes" or "no."	The interviewer fails to obtain sufficient information.
Making judgmental or leading statements.	The interviewer communicates desired responses to the applicant.

APPENDIX B

COMMON RATING ERRORS

NAME OF ERROR	DESCRIPTION
Halo effect	The tendency to rate a person high on all factors even though the person was outstanding on only one factor
Horns effect	The opposite of the halo effect
Central tendency	The inability to rate all or most applicants anywhere but in the middle
Similar to me	The tendency to rate higher those people who look, act, or have a background most like the interviewer
First impression	Making the hiring decision within the first few minutes of the interview, instead of evaluating all the information from the full interview

APPENDIX C

SAMPLE INTERVIEW QUESTIONS AND INAPPROPRIATE TOPICS

QUESTIONS TO ASK

PAST WORK EXPERIENCE IN GENERAL

1. Please describe your present responsibilities and duties.
2. How do you spend an average day?
3. How has your current position changed from the day you started until now?
4. Describe the most complex problem you had to solve in your last/current position.
5. Discuss some of the problems you have encountered in past positions.
6. What do you consider to be your most important accomplishments in the last three positions you have held?
7. What were some of the setbacks or disappointments you experienced in the last three positions you have held?
8. Why did you leave your last employer/why would you consider leaving your current employer?
9. What would you want in your next job that you are not getting now?
10. Describe your involvement with committees, your role on the committees, and what you learned from each experience.
11. In previous positions, how much of your work was accomplished alone and how much as part of a team effort?
12. What was the most radical idea you ever introduced to an employer, and what was the result?
13. Give me an example of a time when you questioned a policy or procedure when it might have been better or easier to go along with it.
14. What kinds of policies and procedures have you created and to whom did you take them for approval?
15. Describe the most difficult interpersonal challenge you have been faced with and what you did about it.
16. Have you had public speaking experience? If so, who was the audience, and what was the purpose: selling, informing?
17. Give an example of a potentially volatile situation or individual that you successfully calmed down and how you went about it.
18. Describe a time when you went well “beyond the call of duty” to accomplish a task.
19. Describe the most difficult person you have ever worked with and how you handled him or her.
20. Describe a situation in which it was necessary for you to mediate or negotiate a solution or compromise.
21. What kinds of work pressures do you find the most difficult to deal with?
22. Describe what you mean by “on-the-job stress.”
23. Describe a time when you felt you “lost your cool” on the job and the result.
24. Describe the best boss you ever had.
25. Describe the worst boss you ever had.
26. Tell me about a failure in your working life and why it occurred.
27. What could your last employer have done to keep you?

RELEVANT EDUCATION AND TRAINING

1. Why did you choose the particular college you attended?
2. What determined your choice of major?
3. How do you think college contributed to your overall development?
4. In what way do you believe your education and training has prepared you for this position?
5. What special training do you have that is relevant to this position?
6. What licenses or certifications do you have that are relevant to this position?
7. What professional affiliations do you have that are relevant to this position?

THE VACANT POSITION

1. In what way does this position meet your career goals and objectives?
2. If you were hired for this job, in what areas could you contribute immediately, and in what areas would you need additional training?
3. What changes and developments do you anticipate in your particular field that might be relevant to this position?
4. What are your salary expectations if offered this position?
5. Can you perform all the essential functions of this job with or without reasonable accommodation?
6. Are you able to travel as required by this position?
7. Are you able to relocate, if necessary?

ATTENDANCE AND PUNCTUALITY

1. How many days of work did you miss, other than for medical reasons, in the last year you worked?
2. How many times were you tardy for work in the last year you worked?
3. What do you consider to be good attendance?
4. What do you consider a legitimate reason for missing work?
5. Do you know of any reason why you would not be able to get to work on time on a regular basis?
6. Are you able to work overtime?

CLERICAL/SECRETARIAL WORK

1. What word processing systems have you worked with, and what are the advantages and disadvantages of each?
2. Describe the kinds of telephone and receptionist duties you have had, being specific about the number of calls and walk-ins you received in a typical day.
3. Describe your past experiences with scheduling of appointments.
4. Give me an example of a task you performed that required attention to detail, and what you did to ensure accuracy.
5. What are some of the more unusual assignments you have been given?
6. What kinds of filing systems have you used and/or created?
7. Which decisions could you make on your own, and which did you refer to your boss?
8. What kinds of reports did you develop, create or produce?
9. What volume of mail did you typically process in a day?
10. What kinds of correspondence have you written on your own initiative?

SUPERVISION

1. Describe the positions in which you have had supervisory responsibility. How many people have you supervised and in what kinds of positions? Did you have hiring/firing authority?
2. Give an example of a time when you were disappointed by an employee's lack of accomplishment and what you did about it.
3. What are the generally accepted steps in progressive discipline?
4. In your experience, what kinds of things motivate an employee?
5. Describe what is meant by "problem employee."
6. Describe a sticky situation with an employee and how you dealt with it.
7. Describe an innovative way you handled a conflict involving two or more of your subordinates.
8. What kinds of things can a supervisor do to create a positive working environment?
9. What training and experience do you have in listening skills?
10. Approximately how many people have you personally hired in your career?
11. Describe an effective performance planning and review process.
12. What methods of communicating with subordinates have you found most successful?
13. What recognition and reward systems for subordinates have you found most effective?
14. What is the role of a supervisor, in your opinion?
15. What are the major responsibilities of a supervisor, in your opinion?
16. What is an effective training and orientation program for a new employee?
17. Describe the most serious complaint an employee brought to your attention and what you did about it.
18. Give an example of the most novel idea an employee presented to you and how you responded.
19. What is meant by the term "protected class" under civil rights laws?
20. Under federal wage and hour laws, describe "exempt" and "nonexempt" employees.

MANAGEMENT

1. What was the level of your decision-making authority in past positions?
2. Describe a decision you made that had a negative result.
3. Give an example of a decision you made that backfired and what you did about it.
4. Give an example of a decision you made that turned out better than you believed possible.
5. Describe a time when you made a decision in the absence of a clear policy regarding the issue.
6. Have you experienced political pressure that interfered with your getting the job done?
7. Describe your experience with setting goals and objectives.
8. Describe your experience in developing and monitoring budgets.
9. What fiscal authority have you had in past positions?
10. Give an example of a situation in which a budget overrun was necessary to accomplish a goal.
11. What is the most effective method for setting priorities, in your opinion?
12. What would your current/past employer tell us about your ability to organize your work?

13. Describe a time when your goals conflicted with the goals of the organization and what you did about it.
14. What is your most innovative accomplishment?
15. What is your most creative idea that was turned down?
16. What experience do you have with writing?
17. What have you done in the past five years to improve your writing skills?
18. What have others said about your writing ability?
19. What experience have you had with public presentations? What was their purpose, and what visual aids and kinds of notes did you use?

PROBLEM-SOLVING

Briefly describe a difficult situation pertinent to the vacant position, doing so in a way that protects the privacy of individuals involved. Ask an open-ended question — one that does not require knowledge of institutional or departmental policies and procedures — about how the applicant would deal with this situation. Encourage the applicant to think out loud and explain the kinds of solutions he or she might try.

An example:

You are working at the front desk of a very busy office. You are answering a 10-line phone bank and have on average 15 walk-ins per hour to direct to appropriate offices and people. At 4 p.m. on a particularly busy day, an outside salesperson approaches your desk at the same time one of the clerks, who is a friend of yours, comes around the corner crying and headed toward your desk. Two outside lines light up at the same time, and the display on your phone tells you the third call coming in is the president's office. What are you going to do?

Another example:

The supervisor of a small work unit that provides service to students is on vacation and, as a result, you are temporarily in charge of the department. One afternoon you overhear two unit members talking about an incident that occurred one week earlier. They are discussing a new employee in the department. Someone you hired, and describe this employee's losing his temper with a student. You suspected that the employee in question had a nasty temper but had nothing concrete on which to base the suspicion. This is the first occasion on which you have heard of this incident. What would you do about it?

QUESTIONS NOT TO ASK

1. What kind of child-care arrangements do you have?
 2. Does your spouse expect you to be home to cook dinner?
 3. What will you do if your children get sick?
 4. How do you get to work?
 5. How many children do you have?
 6. Does your spouse live with you or contribute to your support?
 7. Do you own a home?
 8. Do you own a car?
 9. Do you have any debts?
 10. Do you have any loans?
 11. Do you plan to get married?
 12. Do you plan to have children?
 13. What sort of birth control do you use?
 14. Are you likely to quit if you get married or have children?
 15. Is your spouse likely to be transferred?
 16. Is your spouse from this area?
 17. Would a white (or black) supervisor create any difficulties for you?
 18. How do you feel about having to work with members of a different race?
 19. Are you a militant?
 20. Do you get along well with other women (or men)?
 21. Will it bother you if the others swear?
 22. What language does your mother/father speak?
 23. Were you born in this country?
 24. Do you have people in the "old country?"
 25. That's an unusual name — what nationality are you?
 26. Can you provide a photograph of yourself?
 27. How old are you?
-

Topics to Avoid During the Interview Process

- arrest records
- less-than-honorable military discharges
- gender and marital status
- maiden name
- number of children
- ages of children
- number of preschool children
- spouse's name
- spouse's education
- spouse's income
- form of birth control
- family plans
- childcare arrangements
- conviction record
- car accidents
- lawsuits or legal complaints
- ownership of home or rental status
- length of residence
- ownership of car
- form of transportation to work
- loans
- wage assignments or garnishments
- bankruptcy
- credit cards
- insurance claims
- judgments
- citizenship or national origin
- mother's maiden name
- place of birth
- other languages spoken
- proficiency in speaking, reading and writing English (unless job-related)
- disabilities
- handicap
- prior illnesses or accidents
- hospitalizations
- current or prior medication or treatment
- workers' compensation claims
- weight
- age
- date of high school graduation
- religion
- church affiliation
- social organizations

APPENDIX D

SAMPLE QUESTIONS TO DETERMINE WHETHER THE APPLICANT CAN PERFORM ESSENTIAL JOB FUNCTIONS

The following questions can be asked about the performance of job functions without referring to a disability.

CLERICAL POSITION

- Here is a job description for this position. Are you capable of performing each of the job duties on it?
- Our regular work hours are 8:30 to 5:00, but there may be requirements to work overtime during evenings and weekends, sometimes without much advance notice. Are you able to meet these requirements?
- New employees get one week of vacation and seven days of sick leave and may take no more than five days of unpaid leave per year. Can you meet the requirement of taking no more than five days of unpaid leave per year?
- One of the managers you may be working for does a lot of dictation using a dictaphone. Are you able to understand and transcribe dictation?
- Our minimum standard for all clerical personnel who will be doing word processing is 65 words a minute. Can you operate a word processor at that rate of speed?
- This position requires the answering of phone calls. There may be times when you are the only person available to answer incoming calls and take messages. Are you able to perform this function? Will you be able to respond to inquiries called into the office?
- This position frequently involves the review of incoming correspondence to determine its importance and/or destination. Are you able to perform this function?

SHIPPING AND RECEIVING CLERK/WAREHOUSE WORKER

- The following is a job description listing the job duties for this position. Are you capable of performing each of these job duties?
- Our warehouse workers are required to load and unload and deliver supplies for eight hours a day with one half-hour off for lunch and two 15-minute breaks. Are you capable of doing that?
- Warehouse workers are required to lift and maneuver items weighing more than 50 pounds using fork lifts, hand trucks and stack bed trucks. Are you capable of performing this function?
- Attendance is very important because of the way we staff warehouse workers. Warehouse workers are given up to 10 days of sick leave and no unpaid leave during the first year, and 12 paid vacation days. Can you meet the requirement of taking no unpaid leave during the first year?
- During the past two years at your last job, how many work days did you miss that were not covered by your employer's leave policies?
- Did your previous employer ever criticize your attendance?
- Our warehouse workers may be required to perform some of the duties of a laborer during slow periods. Here is a job description listing the normal duties of a laborer. Are you able to perform most duties for a full eight-hour shift on an occasional basis?

FACULTY MEMBERS

- Class schedules are set to meet university needs. This will typically require that you teach four courses per semester during the fall semester and four additional courses during the spring semester. Class schedules will be M-F with at least one hour per day for office hours during which you are accessible to students. Do you anticipate any problems meeting these schedule requirements?
- Faculty members are also expected to facilitate online blog discussion groups for students. Do you anticipate any problems using the technology we have in place for this?

ADMINISTRATIVE DEPARTMENT HEAD

- The department head must periodically work evening and weekend hours. Do you anticipate any problems meeting this requirement?
- The incumbent of this position must schedule overnight travel at least once each month. Are you able to do this?
- The incumbent of this position frequently presents training workshops for university employees to outline the procedures necessary to use the campus's online administrative process. Tell me about your experience presenting workshops to groups of employees.

INFORMATION TECHNOLOGY PROFESSIONAL

- This position will work remotely four days per week. The remote workstation must have high-speed access to connect to campus systems. Do you have a regular location that meets this requirement that can be designated as your primary work location?
- This position is responsible for supporting all administrative department needs associated with the campus enterprise resource planning system. What experience do you have supporting similar needs at your current or previous employer?
- This position requires that the incumbent be available for IT emergencies 24/7 one weekend each month. Do you anticipate any difficulty meeting this requirement?

APPENDIX E

SAMPLE LETTER OF CONFIRMATION

Date _____

Name and address _____

Dear _____,

On behalf of _____ [name of college or university], I am pleased to offer you the regular full-time [part-time: include number of hours] position of _____ with the _____ Department. Your annualized base salary is _____ and your starting date is _____. Please report to _____ at _____ a.m./p.m.

_____ has a comprehensive benefits package offering a variety of choices to meet individual needs. _____ will review all benefits and terms and conditions of employment with you when you arrive on campus. If you would like information in advance, please feel free to call _____ or e-mail us at _____.

[Insert a paragraph indicating the amount and conditions of a moving allowance or other special provisions, if applicable.]

[Insert a paragraph personally welcoming the employee to your institution and indicating that you look forward to your professional association.]

If you have any questions, please feel free to contact me at _____. Please indicate your acceptance of this offer by signing one copy of this letter and returning it to my office no later than _____. A copy has been included for your records.

Sincerely,

(hiring supervisor)
(title)

I accept the terms of this appointment and understand that this letter is not a contract.

Signature _____ Date _____

cc: Human Resources

Employment Practices Pre-Employ

Defining the Job Job analysis | Job



**College and University Professional
Association for Human Resources**

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