



## Labor & Employment Law Update

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### PRE-EMPLOYMENT INQUIRIES

SLS receives occasional inquiries from clients regarding the hiring process. These inquiries fall into two general categories. First, what information can a district request from an applicant? Second, what background information can a district obtain from sources on the internet about applicants?

The most simple answer is that an employer should only obtain information about an applicant that is job related and consistent with the business necessity. If an employer obtains information that it should not have prior to making a job offer to an applicant, such as information about the applicant's medical condition, the employer runs the risk of having to defend a discrimination lawsuit based upon an improper hiring practice. The administrative agencies charged with investigating complaints of hiring discrimination may assume that the employer used the improper information in making its hiring decision. Therefore, employers should have formal policies regarding who may obtain information about applicants and what information they may obtain. The following is a list of the types of information that an employer may not obtain from an applicant prior to making an offer of employment to the applicant:

1. The applicant's age
2. The place of birth or citizenship
3. National origin
4. Religion
5. Sex
6. Marital status
7. Family
8. Race
9. Color
10. sexual orientation
11. A physical description
12. Photographs
13. Fingerprints
14. Information regarding mental or physical disability or mental condition of the applicant
15. Information involving arrests or criminal records

16. Information about military service, including foreign military service or questions regarding the type of discharge or dates of service
17. Questions regarding organizations and activities which might indicate a protected classification, such as a religious or national origin-based society

(DFEH - 161, Pre-Employment Inquiry Guidelines (8/1/2001).)

Please note that some of this information may be permissible to obtain from someone after an offer of employment has been made. For example, information about citizenship is required for the Federal I-9 form. However, information for the I-9 form may only be requested after an offer of employment has been made. The same would hold true for information about criminal convictions that would disqualify someone from employment under the Education Code. Other information such as religion or sexual orientation may never be appropriate for an employer to obtain.

Employers must be careful when checking references to refrain from obtaining any information which is not job related and is not permissible for the employer to have. An employer should also use caution when checking any references on the internet. Information about an applicant, even if displayed on a MySpace site or some similar location, may still be improper for the employer to consider in making its employment decision. An employer should proceed with caution if it intends to do a background check that goes beyond contacting an applicant's previous employers to obtain job-related reference information. If an employer conducts its own investigation of an applicant using public records, it must comply with the Investigative Consumer Reporting Agencies Act. (Civ. Code § 1786.53.) The definition of "public records" is "records documenting an arrest, indictment, conviction, civil judgment action, tax lien or outstanding judgment." (Civ. Code § 1786.53(a).) If a district is planning to conduct an investigation using public records, we recommend that you contact Schools Legal Service or your counsel for guidance on compliance with the Investigative Consumer Reporting Agencies Act. If an outside provider is used to obtain background information on an applicant, the district and the provider may have to comply with the Fair Credit Reporting Act (15 U.S.C. §§ 1681 - 1681u), as well as the California Consumer Credit Reporting Agencies Act (Civ. Code §§ 1785.1 - 1785.35). We recommend contacting Schools Legal Service for guidance if a district is planning on utilizing an outside agency to conduct background checks.

Based upon the above discussion, we recommend that employers take the following steps to reduce or minimize potential liability in the hiring process:

1. It is clear that all pre-employment inquiries must be focused on information that is job related and consistent with business necessity. Therefore, it is crucial that an employer have accurate, up-to-date and properly validated job descriptions. The job

descriptions should describe the essential functions of the job, as well as any credentials, licenses or experience which is mandated by law.

2. It is recommended that the person who does the background check not be a person who is a decision maker in the hiring process. The person doing the background check should utilize a pre-printed form or some other form of written memoranda to provide only relevant job-related information to the decision makers. This will help to ensure that any non-job-related information which is inadvertently obtained during the background check process is not passed on to the decision maker.
3. Employment applications should be reviewed annually to ensure that no prohibited information is required by the form.
4. The written board policy and administrative regulations for the hiring process should be reviewed annually to ensure compliance with applicable federal and state law, as well as board policies. In addition, all personnel involved in the hiring process should be trained annually on the district's hiring process and made aware of any changes in that process as they occur.

If you need further information on this topic, do not hesitate to contact our office.

— *Christopher W. Hine*

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