



## Avoiding Employment Litigation Through Effective Recruitment and Hiring

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In the simplest terms, all employment litigation involves an allegation that the employer did not make a responsible business decision: that it broke a promise, acted for a legally improper reason, or behaved in a manner intended to cause harm and wholly unrelated to business interests. In short, an employment decision is, simply, a business decision with potentially significant legal consequences that should be considered, made and implemented with the same degree of care which attends any other business decision. Thus, employers need to understand the steps they can take, starting with recruiting and hiring practices, to reduce the possibility of a plaintiff being

successful. While litigation is often unavoidable and success can never be guaranteed, practices and decisions which make sound, practical business sense are the most defensible in litigation.

A responsible employer should structure its recruitment and hiring program to accomplish three goals: (1) to obtain the best qualified employee and to set a positive tone for the employment relationship; (2) to establish clearly the terms of the employment relationship to avoid misunderstanding and/or express or implied contract claims; and, (3) to avoid statements, procedures or decisions that are open to legal challenge. The first goal is beyond the scope of this article; the discussion here will focus upon the second two areas.

### **Establishing the Terms of the Employment Relationship**

Assuming that it is the company's intent to preserve the "at-will" character of employment, the recruitment and hiring process should be scrutinized for any statement or suggestion that rebuts that presumption (*e.g.*, "probationary," "permanent"), while efforts should be made to strengthen that presumption through appropriate disclaimers of intent to contract. The

alternative is to enter into written employment contracts designed to negate the existence of additional "implied" terms and that protect the employer's right to terminate.

Whether an employer wants to preserve the "at-will" character of employment or not, several junctures in the recruiting and hiring process require scrutiny:

#### **1. Advertising and Direct Recruitment.**

While courts do not presently recognize vague promises concerning "long term employment" to be contractually enforceable, there is no reason to invite future courts to do so. Even though advertising carries with it an expectation of "puffery," such that reliance on the specific wording of an employment advertisement or recruiting speech is almost *per se* unreasonable, such advertising should be carefully thought out.

Of much greater importance, however, is recruitment directed to individuals, rather than to the public-at-large. Where the employer affirmatively solicits an individual applicant and, in a situation fraught with even greater danger, induces that individual to leave or forego other employment, the likelihood increases that promises made to

that individual will be contractually enforceable.

## 2. The Application Form.

While the “don’ts” of the application form are important and of immediate concern to most employers, they are too numerous to list in this article. However, it is important to note that inquiries, which are explicitly or implicitly prohibited on Equal Employment Opportunity (EEO) grounds, should not be contained in an application form.

The “do’s” are equally important. Unfortunately, most employers do not devote much attention to them. Not only can the application provide valuable information in a convenient format (e.g., the identity of the potential employee’s previous direct supervisor), it can also provide important protection from later claims. Therefore, it is important to utilize the application form at the outset of the interviewing/selection process and not simply as an administrative afterthought following a hiring decision or the start of employment.

The application form can offer protection in three areas: (a) an acknowledgment of the at-will nature of employment; (b) a disclaimer of the authority or intent to modify at-will employment; and (c) an understanding that the information supplied is accurate, will be investigated by the employer and may provide the basis for rejection of the application or discharge from employment if found to be false. Even in the face of predictable arguments that such application form acknowledgments are no more than “boilerplate,” seldom read or understood by applicants, their importance cannot be underestimated. There is no “magic language” for this purpose and it is generally best to tailor the acknowledgment

to the particular industry and employer and to ensure that it complements other employer documents and policies.

## 3. The Offer of Employment.

Depending upon the nature of the position at issue and company culture, the offer of employment can fulfill one of three broad purposes. It may: (a) do nothing but offer a job upon unspecified terms, subject to the “at-will” presumption; (b) offer the position, outline the general terms (such as, salary, medical benefits and vacation entitlement) and explicitly disclaim the existence of an employment contract; or (c) explicitly affirm the existence of a contract, the terms of which are limited to those set forth in the offer. In any case, future difficulty is avoided if the offer is made, or at least confirmed, in writing.

### Avoiding Troublesome Pre-Employment Inquiries

Good business practice dictates that the recruiting and hiring process focus upon the background and skills necessary to perform effectively in the job at issue. Conversely, there is no good business reason for asking a question if an employment decision cannot be based lawfully on the answer. Some categories of appropriate and inappropriate questions that arise in the application and interviewing context:

#### *Inappropriate Questions:*

- seek information concerning protected classifications – race, creed, color, sex, age, national origin, ancestry, religion, physical or mental handicap/disability, veteran’s status, marital status, affectional or sexual orientation or other classification protected by applicable law.

- seek information that is not job related.

- focus on areas that are presumed to be of interest to individuals in a protected classification.

#### *Appropriate Questions:*

- seek information concerning educational background required for the position.

- seek information concerning prior work experience that will assist evaluating the applicant’s job skills.

- seek information concerning the applicant’s work habits.

- challenge the applicant to be self-critical.

- seek to develop the career intentions of the applicant.

While I have attempted to provide a broad overview of some of the issues employers face in connection with recruiting and hiring, a full analysis of the recruiting and hiring process for a given organization is complex and requires detailed and thoughtful planning. You can find additional information, as well as practical pointers, including a sample application acknowledgment form, on the issues raised in this article at [http://www.foxrothschild.com/pdfs/recruitment\\_IM-011806.PDF](http://www.foxrothschild.com/pdfs/recruitment_IM-011806.PDF) ¶

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