

MCLANE MIDDLETON

Employment Interviews, Background Checks and Drug Screening

Presented By:

John D. Colucci, Esq., CPA

Adam M. Hamel, Esq.

Interview Questions

Some questions are prohibited:

- ❑ Religion
- ❑ Sexual Orientation
- ❑ Lie Detector Test
- ❑ Salary & Related Questions (Effective 7/1/18)
 - If voluntarily disclosed, employer may confirm
 - May seek or confirm prior wages after offer of employment made and communicated to candidate

Interview Questions, cont'd

Permitted Interview Questions:

□ Age

- Are you under age 18?
- If necessary to satisfy state or federal law.

□ Education

- School, College or Vocational Program
- Did the candidate graduate?

Interview Questions, cont'd

□ **Work Experience**

- Work Experience (but not questions designed to determine age)
- References
- Cannot ask about organizations which the applicant is a member if it would disclose protected class status

Interview Questions, cont'd

□ **Military Experience**

- Veteran Status
- U.S. Military Service History
 - Cannot ask about foreign military service or nature of U.S. Military discharge

Interview Questions, cont'd

□ Gender

- If legitimate requirement for a particular position
- May not ask:
 - maiden name
 - plans to have children
 - questions only asked of one gender

Interview Questions, cont'd

❑ Race

- Only questions for affirmative action purpose

❑ National Origin

- Legal to work in the United States

Interview Questions, cont'd

❑ Disability

- Related to performing specific job functions
- Ability to meet attendance requirements
- Record of attendance
 - Cannot ask questions related to:
 - specific illness
 - treatment
 - Workers Compensation Claims
 - Drugs or Alcohol addiction

Interview Questions, cont'd

□ Criminal History

- No questions on Application (except when state or federal law disqualifies the candidate because of the conviction)
- May not ask about
 - a first conviction for minor misdemeanors such as drunkenness or speeding violations, *or*
 - a conviction of a misdemeanor where the date of conviction or the end of incarceration, whichever is later, was five years or more from the date of the interview or request for information

If employer has CORI at time of interview, must give copy to candidate prior to asking questions

Why does employee screening matter?

- ❑ Workplace violence
- ❑ Safety and productivity
- ❑ Creating a workplace culture
- ❑ Affordable hiring tool
- ❑ Mitigates risk of “negligent hiring” lawsuits
- ❑ But . . . serious legal consequences if used improperly

Screenings we will cover today:

- ❑ Criminal Background Checks
- ❑ Drug Testing
- ❑ Credit, Reference and Education Checks

State Law

- Massachusetts Arrest Record Law (MARL)
 - “Ban the Box”
 - Applies to all employers
 - No questions on employment applications regarding arrest or conviction
 - Allowed when federal or state law or regulation disallows candidate because of the conviction

No federal bans, but a focus of EEOC

- ❑ Why the EEOC?
- ❑ Discrimination – Agency that enforces Title VII of the Civil Rights Act
- ❑ If used the wrong way, *could* discriminate against protected classes
 - 2012 Enforcement Guidance (not a statute – just “guidance”)

http://eeoc.gov/laws/guidance/upload/arrest_conviction.pdf

The Background Check Itself

- ❑ First question: do it yourself or use a third-party provider
- ❑ Use of third-party providers triggers additional requirements:
 - Subject to fair credit reporting act (FCRA)
 - Before asking for the report – employers need:
 - Applicant’s written permission to perform the check
 - Written notice – in separate doc from job application – that you may use results of check to make employment decisions
 - Certification to third-party company that you notified the applicant and got their permission to perform the check, will not use the report to discriminate, and will otherwise comply with the FCRA

Third-party providers and the FCRA, cont'd.

- ❑ After receiving results & deciding to reject applicant, there are additional steps:
 - Notify applicant in writing and provide copy of “summary of rights” form (available online)
 - Notify applicant they are not receiving job because of info. in the report
 - Provide applicant name, address, and tel. # of provider
 - Notify applicant that the third-party did not make the hiring decision (you did)
 - Notify applicant they have right to dispute accuracy or completeness of the report and can get a free copy of report within 60 days

DYI Checks – Using CORI

- Company can do or third-party.
- Company is responsible for: 1) showing that the individual signed an acknowledgement authorizing the CORI check; 2) showing that the company verified the individual's identity; and 3) certifying under oath that the reason for the request is to evaluate a current or potential employee.
- Information accessible for 10 years for most felony convictions and 5 years for most misdemeanor convictions
- Company will not be liable for discriminatory employment practices for failure to hire a person based on erroneous information.
- Company must provide a copy of the CORI to the individual prior to asking him/her about it.
- Companies conducting 5 or more checks required to maintain a written CORI policy.
- Violations includes fines up to \$50K for corporations.

Arrest Records

- ❑ Inherently unreliable
 - No proof of criminal conduct
 - Incomplete side of the story
 - Risks of mistaken identity
 - Expungement may not show up on report
- ❑ Use them at your own risk

Job Postings or Advertisements

- ❑ Some do's and don'ts:
 - Don't include the following in your posting:
 - “no criminal records”
 - “must have clean criminal history”
 - “no felonies or misdemeanors”
 - “no arrest records” “no felons”
 - If including language about searches in job posting, DO inform applicants:
 - That they may be subject to a criminal background check, but criminal records will not automatically eliminate them from consideration

Background Checks and Discrimination

- ❑ 2 Types – Disparate (i.e. different) “impact” and “treatment”
- ❑ Treatment
 - Under background check policy, members of one protected status are treated differently, i.e. worse, than another (e.g. they are passed over for a job)
- ❑ Impact
 - Background check policy has adverse impact on a particular protected class

Discrimination, cont'd.

- ❑ How does a background check policy violate anti-discrimination laws (Title VII (15+ employees) and state laws)?
 - If you reject a black applicant because of their criminal record, but hire a white applicant with a similar criminal record and qualifications, that's Disparate Treatment (DT) discrimination
 - If you reject a black applicant because of a racial or ethnic stereotype about criminality, that's clearly DT discrimination
 - If you allow white applicants to explain their criminal histories, but prohibit black applicants from doing the same, that's DT discrimination

Background Screening Policies

- ❑ Must be: (i) related to job in question; and (ii) consistent with business necessity
- ❑ How do you accomplish this:
 - Develop targeted screen; and
 - Analyze results under an “individualized assessment” process

Targeted Screens

- ❑ Targeted screens are policies or practices that consider (and limit hits to):
 - Nature and gravity of the offense (not a blanket – “no misdemeanors”)
 - Time elapsed since offense and/or completion of the sentence/punishment
 - Position held or sought

Targeted Screens – Nature & Gravity of Offense

- ❑ Consider the type of record – indictment, charge, arrest, conviction, plea deal
- ❑ Consider the type of offense – violent crime, drug crime, crimes of dishonesty (theft, embezzlement, check fraud)
- ❑ Consider severity of the offense – misdemeanor v. felony, probation v. fine v. prison time

Targeted Screens - Time Elapsed

- ❑ No bright-line number of years
 - Common sense: more recent the events, more likely to occur again
 - More serious crimes (5, 7 years)
 - Less serious (2-3 years)
- ❑ Before implementation, understand recidivism statistics for certain types of offenses
- ❑ Don't simply exclude individuals with *any* record, regardless of how long ago events occurred

Targeted Screens – Nature of Job

- ❑ Tailor exclusions based on jobs in question
- ❑ Policies could differ for categories of jobs or departments within the company
- ❑ Risks not the same in all jobs, i.e.:
 - Safety;
 - Access to company funds, confidential information;
 - Interaction with customers, children
 - Publicity of position

Individualized Assessment

- ❑ You receive a report with “hits” – what do you do next?
- ❑ 3 Recommended Steps:
 - Notify applicant
 - Give them opportunity to demonstrate that exclusion should not apply due to particular facts
 - Consider additional info provided by applicant

Individualized Assessment

- Factors to consider:
 - Number of offenses
 - Facts of particular offense
 - Confirming correctness of report
 - Time elapsed since convictions
 - Jobs before and after last conviction
 - Specific rehabilitation efforts
 - Whether they have worked in similar jobs
 - Character or employment references

Before taking an adverse action . . .

- ❑ Anti-discrimination laws require that employer again consider these factors *prior* to making a decision:
 - nature and gravity of the offense or conduct
 - how much time has passed since the offense or completion of the sentence
 - nature of the job

- ❑ FCRA – notice requirements, *prior* to making a decision: provide a copy of the report, rights under FCRA, & give the applicant a reasonable opportunity to explain that the applicant believes is inaccurate.

- ❑ Base decision on applicant's response and factors above. Supply post-adverse action letter.

Background Checks - Other Best Practices

- ❑ Rely on convictions when full name and one other identifier matches
- ❑ Obtain current disposition information when possible
- ❑ Train your HR and managerial staff on how to implement the targeted screen and individualized assessment
- ❑ Vet the criminal record reporting provider carefully – research their procedures, databases used (preferably official sources of data), etc.

Drug Testing - Why important?

- ❑ Drug use, particularly marijuana, is more accepted than ever
- ❑ More states are legalizing medical marijuana use, and some are legalizing marijuana for general use
- ❑ The opioid crisis
- ❑ More than 70% of substance abusers hold some kind of job (American Council of Drug Education)
- ❑ Workplace Drug Use Impacts:
 - Safety
 - Productivity
 - Morale
 - Turnover
 - Theft

Drug Testing, cont'd.

- ❑ It is estimated that 98 percent of Fortune 200 companies have implemented some form of drug testing
- ❑ About 60% of new hires today are required to take a pre-employment drug test

Drug Testing – State Law

- ❑ ADA, Massachusetts:
 - Allows for questioning of illegal drug use; ability to comply with policy
- ❑ Post-Offer, Pre-Employment
 - Knowledge, consent
 - Reliable method, respectful of privacy
- ❑ Medical Marijuana
 - Schedule I Drug under Federal Law
 - Medical prescription, ID card, accommodations

Types of Drug Testing

- ❑ Discretionary:
 - Pre-Employment
 - Post-incident or accident
 - Reasonable Suspicion
 - Random

- ❑ Required in some industries, with specifications for testing policies:
 - Commercial drivers (US DOT 49 CFR Part 40)
 - Healthcare providers (NH RSA 151:41)

Assessing the Risks

- ❑ Discrimination Claims
 - Disparate Impact
 - Not so random
- ❑ Supervisors not trained to assess drug and alcohol use

Pre-Employment Testing

- ❑ Medical marijuana laws on the books do not give employees a right to employment
- ❑ Marijuana is still illegal under federal law
- ❑ Timing: after conditional offer made
- ❑ ADA prohibits use of pre-employment testing for alcohol use

Drug Testing – Some Recommendations

- ❑ Employer pays for the test
- ❑ Urine most common test for drugs / breath for alcohol
- ❑ Chain of custody forms
- ❑ Initial screens and confirmatory screens
- ❑ Substance Abuse and Mental Health Services Administration (SAMHSA) Guidelines are the gold standard - <http://www.samhsa.gov/workplace>

Credit Check - 3 Factors: Credit Worthiness, Standing, or Capacity

- ❑ Less-frequently used
- ❑ If finances of business related to position, then consider it
- ❑ TransUnion, Experian, Equifax
- ❑ FCRA – must follow
- ❑ EEOC – possibility of disparate impact (less likely than background checks)

Other Screens: Reference Checks

- ❑ Not consistently checked
- ❑ When hiring
 - Application – misrepresentation cause to terminate
 - List references & written consent to contact
 - contact former employer in writing with release
 - Validate dates, titles, duties & would hire again.
- ❑ Former employer
 - Verify caller's identity and get release
 - Avoid unfounded impressions or opinions
 - Rely on statements in file known to former employee
 - Respond in writing or keep record of conversation

Other Screens: Education Checks

- ❑ Not consistently checked, but should to protect against misrepresentations by applicants
- ❑ FERP – federally funded institution
 - release
- ❑ Private
 - internal policies – release
 - could contact individual
- ❑ Certified copies of transcripts
- ❑ Third Party Educational Verification Service

Polygraphs

- ❑ Federal law prohibits the practice, while Massachusetts goes one step further:
 - ❑ *“It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability.”*
- ❑ Does it test for:
 - detection of deception
 - verification of truthfulness
 - diagnostic opinion regarding personal honesty

Social Media

- ❑ Presents Obvious Advantages ...
- ❑ ... With Potential Liabilities
 - Unverifiable Information
 - Unintentional Information
- ❑ How To Safely Screen
 - Set the parameters
 - Select a neutral party
 - Stay Public
 - Proceed with Caution



Any other questions?

John D. Colucci, Esq., CPA

(781) 904-2691

john.colucci@mclane.com

Adam M. Hamel, Esq.

(781) 904-2710

adam.hamel@mclane.com