

The Employment Application

Almost everyone has completed an employment application at some point in his or her work life. Distracted by the need to accurately recall the information to complete the questionnaire, few people stop to think about the purpose and design of the form. As an employer, it is extremely important that you keep in mind the purpose of an employment application and choose the questions to ask accordingly. An employment application is an information-gathering tool that will assist you in your hiring decisions and should contain language that will reduce employment-related liability exposures.

The purpose of an employment application is to provide your firm the opportunity to make specific inquiries into an applicant's work and educational background. The applicant's responses to these inquiries will assist you in developing a profile of the applicant's qualifications and capabilities to determine if they meet the position requirements. Many accounting firms rely on

resumes when hiring professional staff, and use employment applications only when filling non-professional positions. This is not the best employment practice, as an applicant's resume will only provide information the applicant wants to reveal. Since the job requirements for professional and non-professional employees differ, your firm's needs may be better met by designing two different employment applications.

An employment application can also be an important tool to reduce employment-related exposures. In fact, many employment practices liability insurance underwriters consider the application to be a vital part of the hiring process and require their use by insureds. Your employee selection process must be free from discrimination under all applicable federal, state, and local fair employment practice laws. You want to be sure to keep employment inquiries lawful, asking only about areas that will provide information as to the applicant's ability to perform the job. A well-crafted employment application contains language that limits exposure, and omits questions that could lead to allegations of discrimination.

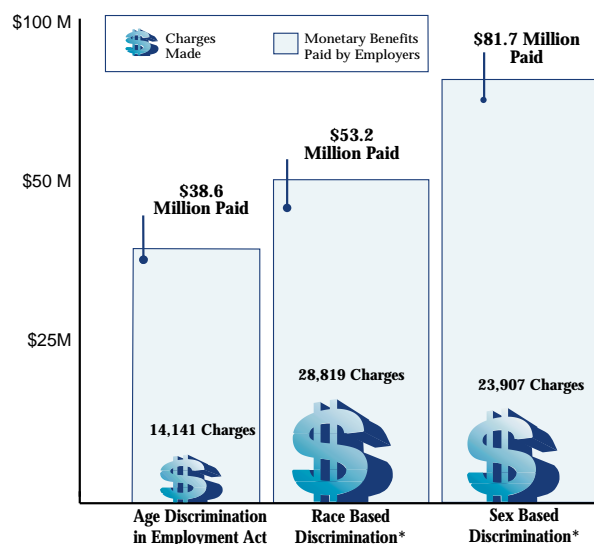
Avoid questions that could lead to actual or perceived discrimination

Discrimination based upon an applicant's race, color, religion, sex and national origin is illegal under Title VII of the Civil Rights Act of 1964 (Title VII), a federal law. There are no acceptable application questions regarding race or color. It is also unlawful to use a different standard when evaluating a female applicant versus a male applicant. Therefore, questions that reveal the applicant's sex, marital status, number or ages of children or dependents, or provisions for childcare, as well as questions regarding pregnancy, child bearing or birth control are also unacceptable under Title VII.

If your firm has concerns with absenteeism or an employee's ability to travel, it is acceptable to make statements of policy within the application. The following questions would be acceptable: "The position requires travel, would you be able to travel approximately 6 days per month?" or "This position requires dependable attendance and frequent overtime. Can you meet these requirements?"

Title VII also requires an employer to accommodate an employee's religious beliefs and practices. An employer may be

Charges received from the Equal Employment Opportunity Commission in 1999



*Title VII of the Civil Rights Act of 1964

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exempt from compliance if it can demonstrate that it is unable to reasonably accommodate an employee's religious observance or practice without undue hardship. There is no acceptable application question regarding a person's religion. However, a general statement on the application about the firm's regular work hours would be acceptable. If a prospective employee asks a question about Saturday or Sunday work, the firm should indicate that a reasonable effort is made to accommodate the religious needs of employees.

Finally, Title VII prohibits discrimination based on a person's national origin. Questions about a person's citizenship may have the effect of discrimination based upon their national origin. Further, citizens of other countries are legally able to work in this country under certain conditions and circumstances. Therefore, you should not ask whether an applicant is a U.S. citizen. It is better to ask whether the person is legally authorized to work in the U.S.

The federal Age Discrimination Act of 1967 (ADEA) prohibits age discrimination against people aged 40 through 70. Employment application questions which request a person's age, date of birth, or date of high school graduation could be considered illegal and should be avoided. However, asking whether a person is at least 18 years old, or if underage, has the necessary work permit would be acceptable.

The Americans with Disabilities Act of 1990 (ADA), another federal fair employment practices statute, prohibits discrimination against persons with disabilities. You should avoid asking an applicant questions about disabilities, medical treatment, medications, addictions, or the amount of sick leave taken in his or her last position. Questions regarding an applicant's height or weight could be perceived as discriminatory and should also be avoided. If a position has specific physical requirements, consult with an employment law attorney for the appropriate way to address this subject on the application.

Include exposure-limiting language

An employment application provides an opportunity to employ devices that may afford a defense in the event of a wrongful termination allegation against the firm. You should include a verification statement that the applicant signs and attests to the truthfulness and completeness of the information provided. This statement should include language that the firm can terminate the applicant's employment at any time in the future should any of the information prove to be false or misleading. Additionally, include an authorization that allows the firm to perform a background check on the applicant.

Another important device that should be included in the application is a statement above the signature line that either the firm or the employee can terminate the employment relationship at any time, without notice, and for any lawful reason. This is known as an 'at-will' employment relationship. This may help with a defense against future claims of breach of an express or implied contract to discharge only for good cause. Note, however, that some states do not ascribe to the 'at-will' employment doctrine and permit employers to terminate employees only for good cause.

Lastly, be sure to include a statement that the firm is an equal opportunity employer – also known as an 'EEO statement.' The firm could use this statement to help defend a discrimination claim brought by an applicant that was not hired.

The above suggestions only touch upon some of the exposure reduction mechanisms that can be included on an employment application. Whether you choose to use a commercially prepared employment application, or design your own form, always consult with a competent attorney whose practice focuses on employment-related matters. Employment laws change often, and a legal review is necessary to insure compliance with all applicable federal, state, and local employment laws.



Since most federal employment discrimination laws apply only to firms with 15 or more employees, why do smaller firms need employment practices liability insurance (EPLI)?

It is true that many federal employment discrimination statutes apply only to firms with 15 or more employees. Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Pregnancy Discrimination Act apply to employers with 15 or more employees and the Age Discrimination in Employment Act applies to firms with 20 or more employees. But an employee can also bring a claim against a firm under state and local discrimination statutes.

Some states and cities have laws that reflect federal discrimination laws. In addition, they often apply to all employers regardless of staff size. Additionally, these state and local laws may prohibit discrimination based on other factors not addressed by federal laws such as marital status, sexual orientation, smoking habits, political activities, volunteer activities and other off-duty conduct, to name a few.

Claims that allege discrimination, sexual harassment or wrongful discharge often have a variety of common-law tort, quasi

contract, or other state law claims attached. All employers are subject to common-law actions by employees. For example, a common wrongful termination claim brought by employees against smaller firms is breach of an implied or oral contract for continued or permanent employment. In this type of case the employer intends to establish an at-will employment relationship, but the terminated employee argues that due to certain actions by the employer he or she was guaranteed employment indefinitely.

All employers are also subject to common-law tort claims for assault, battery, and false imprisonment. These claims are often included in sexual harassment lawsuits. Other common-law tort claims that may accompany wrongful termination lawsuits are libel, slander, defamation, invasion of privacy, intentional infliction of emotional distress, fraud and negligent misrepresentation.

The bottom line is that although smaller CPA firms may be exempt from some federal employment discrimination statutes, they still have a considerable amount of employment liability exposure via state statutes, local ordinances and state common-law. Remember, even frivolous suits require a vigorous defense where defense costs alone could cause major financial trouble for a smaller sized firm. Self-insuring for employment practices liability exposure could prove to be a critical mistake for smaller firms.

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