

*While any specific employment decisions must consider applicable federal, state and local law and should be discussed with your practice's employment counsel, below is a general starting point of issues to consider as part of the hiring process.*

### **The Do's and Don'ts of Hiring**

- Start with an accurate job description with essential job functions and qualifications. If the employer is challenged for not hiring an applicant who is also a member of a protected group - racial minority, female, disabled, religious minority, 40 years of age or older - it is essential that the employer is able to tie the decision to the specific requirements of the job description, prepared prior to the hiring process. The qualifications should also include "preferred" qualifications, if these would be important, even if not determinative. Given the increasingly prevalence of remote work requests, if in-person attendance and collaboration is essential to the position in question, that should be clearly stated in the job description.
- Job applications should request only relevant qualifications, references, and a clear, signed consent to allow background investigations by the prospective employer.
- Certain states recognize a cause of action for negligent hiring if an employer fails to exercise reasonable care in selecting its employees.
- Contrary to popular belief, a former or current employer is legally permitted to make a candid communication about the qualifications or work performance of an applicant. In some states, in connection with these communications the former employer is presumed to have acted in good faith and is immune from liability in a civil suit by the applicant. In some states there are exceptions to such presumption, for example in cases where the applicant can prove his current or former employer deliberately provided false or materially misleading information with reckless disregard for the truth or revealed information specifically prohibited by law or contract.
- The information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job. Information regarding race, sex, age (40 or older), disability, national origin, and religion are irrelevant in such determinations. Employers should not ask about those characteristics during the hiring process or information that is calculated to reveal those characteristics. Hiring decisions cannot be based on stereotypes and assumptions about an applicant's race, color, religion, gender, national origin, age (40 or older), disability, or genetic information.
- Hiring guidelines should be reviewed with managers responsible for meeting, greeting, interviewing or interacting with the applicant in any way. An employer must take steps to avoid making a decision on illegal grounds and then having its efforts undermined by a stray comment from a supervisor or during a casual introduction.
- The American with Disabilities Act (ADA) allows only questions that relate directly to the applicant's current ability to perform essential job functions. As a general rule, there should be no "medical" related inquiries. A physical examination may be required only after a conditional offer of employment has been made and only under certain circumstances.
- At the interview / pre-offer stage, it's ok to ask applicants to describe and/or demonstrate how they would perform their job duties, *only if* all applicants in the same job category are asked.
- If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job or go through the interview process, the employer is required

to provide the accommodation, so long as the accommodation does not cause the employer “undue hardship,” i.e. significant difficulty or expense.

- The Genetic Information Nondiscrimination Act (GINA) prohibits employers from acquiring genetic information about applicants and defines “genetic information” to include information about a candidate’s family medical history.
- Certain states have medical marijuana laws or regulations that apply to job applicants. For example, in certain states, employers cannot refuse to hire an applicant solely because of their status as a medical marijuana user.
- Care is essential when asking about an applicant’s criminal history. Never ask about an applicant’s arrest record. By way of example, in certain states, felony and misdemeanor convictions may be considered only if they relate to the applicant’s suitability for the position in question. Employers should consider whether to provide, and in some states must provide, written notice to an applicant if a decision not to hire is based in whole or in part on an applicant’s criminal history record information. If a question about criminal convictions is asked, consider adding the clarifier that convictions will not necessarily disqualify the applicant from the job. These restrictions apply to written applications and the interview process.
- Do not ask for credit history unless directly relevant to essential job functions. Use of credit reports for hiring is strictly regulated by the Fair Credit Reporting Act (FCRA). The FCRA requires written notice to employees that a report will be obtained as part of the application process and background check. Employers must obtain the applicant’s specific signed, written consent. Advance notice must be provided to the applicant of any intended adverse employment consequence, along with a copy of the applicant’s rights under the FCRA.
- Existing non-competition agreements and other restrictive covenants and confidentiality agreements are generally permissible areas of inquiry.
- Employment laws are constantly changing at the federal, state, and local levels. If your business operates in several different states or locations, be on the lookout for state and local laws such as ban-the-box laws or other legislation restricting employers from asking about an applicant’s prior salary levels or seeking social media-related information.