



Avoid Legal Pitfalls When Hiring

Date: April 2017

When hiring new employees, an employer's underlying goal is to find a candidate with the best skills, knowledge and abilities for the job. To make this decision, employers collect and evaluate information about potential candidates through a multistep hiring process.

The hiring process can be fraught with legal pitfalls at every stage. It is important for individuals involved in the hiring process to recognize and avoid these legal pitfalls when hiring where possible. Breaking down the hiring process into key areas can help in identifying the pitfalls and ways to avoid them.

Position Description

Hiring starts with a complete and up-to-date position description. Among its many uses, a position description serves as a recruiting tool. It sets forth the minimum training and experience, as well as the knowledge, skills and abilities, required for the job. Additionally, a position description documents the essential functions of the position and defines the employer's expectations of the position for the potential employee. It also allows an applicant the opportunity to evaluate whether the position is a good match for him- or herself.

The employer should review the existing position description prior to posting or advertising the open position. The position description should reflect the current and actual job duties of the position. If possible, it may be helpful to review the position description with the employee leaving the position to ensure it is current.

An effective position description is factual, objective, direct, specific and concise. Position descriptions typically include several components. One of the most important is a list of the essential functions of the job.

Essential Functions

The Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 and the Minnesota Human Rights Act (MHRA) prohibit employers from discriminating against qualified individuals with disabilities with regard to any employment practices, terms, conditions and privileges of employment, including hiring. Within the context of hiring, this means that an employer cannot refuse to hire an individual with a disability based upon that disability if the individual is able to perform the essential functions of the job.

Essential functions are the fundamental job duties of a position that the individual who holds the position must be able to perform unaided or with a reasonable accommodation. See generally, 29 C.F.R. § 1630.2(n)(1). Federal regulations¹ offer guidance on when a function could be considered essential, including:

- The job exists to perform the function.

¹ 29 C.F.R. § 1630.2(n)(2); 29 C.F.R. § 1630.2(n)(3)

- There are a limited number of employees available to perform the function, or there are only a few workers among whom the function can be distributed.
- The function is highly specialized, and the individual in the position is hired for his or her expertise or ability to perform the particular function.

Additional factors that may be considered when determining whether a particular function is essential include the following:

- employer’s judgment as to which functions are essential
- contents of a written job description prepared before advertising or interviewing applicants for the job
- amount of time spent on the job performing the function
- consequences of not requiring the incumbent to perform the function
- terms of a collective bargaining agreement
- work experience of past individuals in the job
- current work experience of individuals in similar jobs

Essential functions should reflect the actual requirements imposed upon applicants and employees. If there is an allegation that the employer intentionally selected a particular essential function to exclude individuals with disabilities, the employer may have to offer a legitimate business reason for its selection and proof that the essential function is actually necessary and required.

Minimum Training and Experience

Another important part of the position description is the minimum training and experience section. The position description should state the minimum experience, training and/or education that the individual holding the position must possess to competently perform or learn to perform the essential functions of the position.

These minimum qualifications are used to assess job applicants. They can be a classification (e.g., licensure or educational degree) or a specific measurable attribute (e.g., typing 50 words per minute). In reviewing the minimum training and experience section, the hiring manager should ask, “If the person holding the position resigned tomorrow, how much experience and education would his or her replacement need to meet expectations after a reasonable orientation period?”

Note that nondiscrimination laws generally prohibit employers from using qualification standards that screen out individuals with disabilities unless those standards are job-related and reasonably necessary for business operations.

Knowledge, Skills and Abilities

This section of the position description is used to list important knowledge, skills and abilities (a.k.a mental and physical skills) required to successfully perform the essential functions of the job. The knowledge, skills and abilities section may also denote the attributes that an employee will need to possess or acquire to be successful in the job.

It is important to determine the essential functions of the position and other hiring criteria prior to posting or advertising the position. Employers that set forth or modify these criteria after applications are received risk the argument that the modified criteria were established to illegally exclude an individual from employment.

See MCIT Resource [Performance Management: Making the Most of Your Human Resources](#) for more information.

Postings, Advertisements and Recruiting Materials

No legal requirement obligates an entity to advertise or post an open job position. However, employers may have such a requirement in a collective bargaining agreement or in their internal policies or practices.

Employers should review their collective bargaining agreements and policies when looking to fill a vacant position. Some agreements require the employer to give preference to internal candidates prior to opening the position to the general public.

From a risk management standpoint, government entities may want to advertise or post open positions to avoid claims of discrimination. Reliance upon word-of-mouth recruitment or referrals could have a disparate impact on a protected class because word-of-mouth campaigns are more likely to bring in applicants who reflect the present workforce. *See e.g., Thomas v. Washington County Sch. Bd.*, 915 F.2d 922 (4th Cir. 1990). This could create the argument that the employer's hiring practices have the effect of closing opportunities to protected classes.

At a minimum, job postings and advertisements should include a brief description of the position, the essential functions of the job and the minimum qualifications required. The posting or advertisement should state where individuals can obtain a complete position description and application for employment. The job posting or advertisement should explain how to apply for the job (written application, résumé, etc.), to whom the application materials should be sent, who to contact for more information about the position and the deadline for submitting an application.

A job posting or advertisement should include a statement that the employer is an equal opportunity employer. The posting or advertisement should also include information about whom an applicant may contact if he or she needs a reasonable accommodation for a disability to complete the application or attend an interview.

Job postings and advertisements should not include any statements regarding job security, career opportunities or permanent employment. Including statements such as these could lead to an argument that a specific contractual relationship exists between the individual hired and the public employee that may limit the employer's ability to terminate the employee.

Protected Classes and Discrimination Claims

Several state and federal anti-discrimination laws prohibit requesting protected class information in the hiring context. For example, with limited exceptions, the Minnesota Human Rights Act states that it is an illegal, discriminatory practice for an employer to require or request a job applicant to furnish information that pertains to the protected class categories of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, disability, sexual orientation or age prior to hiring.

It is also an illegal, discriminatory practice, subject to certain exceptions, for an employer to seek and obtain information about these protected classes from any source prior to hiring for purposes of making a job decision.*

Protected class categories:

- race
- color
- creed
- religion
- national origin
- sex
- marital status
- public assistance
- disability
- familial status
- sexual orientation
- age
- local human rights commission activity
- pregnancy
- genetic information

*Minn. Stat. § 363A.08, subd. 4(a)

Job postings or advertisements should not include any preference or exclusion based on protected class status. For example, a job posting for “recent college graduates” may be discriminatory on the basis of age because most recent college graduates are in their early 20s. Other terms to avoid are noted in the following table.

Avoid	Reason	Alternative
<ul style="list-style-type: none"> • “Only U.S. Citizens” • “Must be U.S. citizen or have green card” • “Must have green card” • “English must be your first language” • “Spanish must be your first language” 	<p>Could be national origin discrimination</p>	<ul style="list-style-type: none"> • “Successful applicants must show proof that they can legally work in the U.S.” • “Ability to communicate effectively in written and spoken [language].”
<ul style="list-style-type: none"> • “Young” or “youthful” • “No more than [X] years of experience” • “Supplement your retirement income” • “Great opportunity for student” • “Mature adult wanted” 	<p>Could be age discrimination</p>	<p>Focus on desired quality versus the anticipated age of the applicant.</p>
<ul style="list-style-type: none"> • “Great opportunity for stay-at-home mom” • Gender specific titles 	<p>Could be gender discrimination</p>	<ul style="list-style-type: none"> • Avoid mention of gender, even if intention is to encourage underrepresented group to apply. • Consider using gender-neutral position titles where possible.
<ul style="list-style-type: none"> • “Seeking able-bodied individual ...” • “In good health” 	<p>Could be disability discrimination</p>	<p>Instead focus on the essential job function that the person will have to perform. For example:</p> <ul style="list-style-type: none"> • “Routinely moves equipment weighing up to 50 pounds” • “Requires frequent movement between job sites”

Gender-specific or physical ability-related terms may be used only in very limited circumstances where a bona fide occupational qualification exists. For example, gender may be a bona fide occupational qualification for certain correctional officer positions. Employers are urged to consult with their legal counsel when determining whether a bona fide occupational qualification exists.

Application

Requiring applicants to complete a standardized application form serves a number of purposes. First, it allows the public employer to gather the same information pertinent to the position from all applicants. A standardized application also serves as the platform for informing the applicant about his or her rights under state and federal laws, including the Minnesota Government Data Practices Act (MGDPA) and the Veterans Preference Act, as well as an authorization for release of information and a waiver of liability against the employer.

Tennessee Warning

The MGDPA requires a government entity to give a Tennessee Warning to an individual any time it collects private or confidential data as defined by the MGDPA. Minn. Stat. § 13.05, subd. 4.

Under the Minnesota Government Data Practices Act, there is a presumption that all data collected on employment applicants is private, unless it is specifically classified in the statute as public. Minn. Stat. § 13.43, subd. 3. For job applicants, only the following information is public:

- veteran status
- relevant test scores
- rank on eligibility list
- job history
- education and training
- work availability

All other information requested from applicants, including the applicant's name at the time he or she is applying for the job, is considered to be private personnel data on the individual.² Thus, to collect, store and use this data, the government entity must give the applicant a Tennessee Warning at the time of or prior to collection.

The Tennessee Warning must inform the individual of all of the following:

- the purpose and intended use of the data requested
- whether the individual may refuse to supply or is legally obligated to supply the data
- any known consequences of supplying or not supplying the data
- the identity of other persons authorized to receive the data

² Applicant names are generally considered to be private data. Only the names of "certified applicants" and "finalists" are public. A "certified applicant" has been certified for appointment to a vacancy in the government. A "finalist" is selected to be interviewed by the appointing authority prior to selection. Minn. Stat. § 13.43, subd. 3.

Sample Tennessee Warning for Application

The information requested in this application process is intended to be used by [Public Entity Name] in determining suitability for employment for the position, which you are currently seeking or may seek in the future. If hired, the information may later be used for consideration for other positions, verification of employment history or disciplinary action in the event that the information provided is not truthful. You are not legally required to provide any of the information requested in this form at this time. However, failure to provide complete, accurate information may result in [Public Entity Name] being unable or unwilling to offer employment to you. With respect to any special accommodations necessary for completing your application or the interview process, [Public Entity Name] may be unable to provide the necessary accommodations if you do not provide this information. The information you provide in this application process that is classified as private data under the Minnesota Government Data Practices Act (MGDPA) will not be released outside [Public Entity Name] without your consent except as necessary for tax purposes or as otherwise required by state or federal law or court order. Information that is classified as public data will be released pursuant to the terms of the MGDPA.

Sample language courtesy of Ann Goering, Ratwik, Roszak & Maloney, P.A.

With limited exception, private or confidential data on an individual may not be collected, stored, used or disseminated by government entities for any purpose other than the ones stated within the Tennessee Warning.

See MCIT Resource [Tennessee Warnings: Requirements and Remedies](#) for more information.

Application Questions

Applications generally ask for information such as the applicant's name, address and contact information, as well as past education and employment history. An employer may also ask the applicant about skills, knowledge and abilities that the applicant believes will make him or her the best candidate for the position. Many applications also ask about licenses or certifications relevant to the position.

A public employer must notify veterans of the availability of preference points under the Minnesota Veterans Preference Act. Minn. Stat. § 197.455, subd. 9. This notification is generally found on the employment application, along with a space for the veteran to request veterans preference points. The notice should also indicate that proof of veteran or disabled veteran status may be required before preference will be granted. Some employers choose to use a separate form for this notification. The Veterans Preference Act is discussed in further detail later.

The employer may want to ask whether the applicant has ever been discharged or forced to resign from a position for reasons other than in conjunction with a human rights charge or lawsuit (discrimination, harassment or retaliation) in which the applicant was a claimant/plaintiff.

Although the primary function of the job application is to gather information from the applicant, public employers should not address a number of topics on the application, including the following list.

- Any information related to protected class status, including:
 - race
 - color
 - creed or religion
 - national origin, including birthplace or native language
 - sex/gender
 - marital status
 - disability, including current or past health conditions and inquiries into alcoholism, past drug use, or alcohol or drug treatment
 - status with regard to public assistance, past or current receipt
 - age, including date of birth or year of high school graduation (as could reasonably calculate age)
 - sexual orientation
 - local human rights commission activity
 - pregnancy/children, including current or future family plans
 - genetic information
- Social Security number
- Maiden name (but can ask *all* applicants if their records or references would know them by another name)
- Past workers' compensation claim: Requesting information about workers' compensation claims may violate the MHRA. *Huisenga v. Opus Corp.*, 494 N.W.2d 469 (Minn. 1992).
- Litigation or claims against any past or present employers involving a discrimination claim: It is a violation of the MHRA to refuse to hire an individual who opposed a discriminatory practice or filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the MHRA. Minn. Stat. § 363A.15.

- Prior sick leave use: Information regarding prior sick leave use could lead to a claim of disability discrimination or discrimination on the basis of exercising the individual’s rights under the Family and Medical Leave Act or other state or federal law. Employers may ask for information about unexcused absences unrelated to illness or the applicant’s ability to meet attendance requirements that are essential functions of the position.
- Need for reasonable accommodations to perform the job: Although the employer may ask if the individual needs a reasonable accommodation to complete the application or in the interview process, it is premature to ask whether the applicant would need a reasonable accommodation to perform the job itself.
- Criminal record or criminal history (see below).

Criminal Record or History

Minnesota Statutes, Section 364.021 prohibits employers from inquiring into or considering a criminal record or history of a job applicant until the applicant is selected for an interview by the employer. There are exceptions for positions for which employers have a statutory duty to consider criminal history or conduct a criminal background check when hiring, such as law enforcement.

The statute has the practical effect of precluding employers from asking about criminal history on an application for most positions. However, public employers may notify applicants if a particular criminal history will disqualify them from employment in particular positions.

Employers that want to inquire about criminal history once the applicants are selected for interviews can include a questionnaire about the criminal background in the letter to applicants advising of the interview. Alternatively, employers may ask interviewees to arrive early for the interview to complete a criminal background questionnaire.

The questionnaire may include the following questions or topics:

- whether the applicant has ever been convicted of a crime
- name under which the person was convicted, date and jurisdiction
- time, nature and number of convictions
- facts surrounding each offense
- employment history before and after the conviction, if not already provided on the application

If a public employer is hiring for a position that mandates a criminal background check, the employer may also want to put this information in the job advertisement and/or position description. The advertisement could include language indicating, for example that criminal background checks will be completed for all interviewees or that criminal background checks will be completed for all finalists.

Sample Application Language

[Public Entity Name] may request information regarding criminal history in the event that you become a finalist for the position for which you are applying. For certain positions, criminal background information may be requested during the application stage. Further, [Public Entity Name] may conduct a criminal background check on individuals upon making a contingent job offer. If a criminal check will be conducted, no offer of employment shall become final until the results of the criminal background check from the Minnesota Bureau of Criminal Apprehension (BCA) or other agency are received, the contents of the criminal background check are acceptable to [Public Entity Name], and formal approval is given by the appointing authority. You may request a copy of the results of any criminal background check obtained and may have the right to request additional information about the nature of the report.

Sample language courtesy of Ann Goering, Ratwik, Roszak & Maloney P.A. and MCIT

Public employers must exercise caution in how they use criminal background information in their hiring decisions. The Criminal Rehabilitation Act, Minnesota Statutes, Chapter 364, prohibits public employers from disqualifying applicants from consideration for a position on the basis of a past conviction unless the crime(s) is directly related to the position for which the applicant is applying. Minn. Stat. § 364.03, subd. 1. This prohibition does not apply to all positions, however, so it is advisable to check with legal counsel to determine whether the position being filled is exempt from this Act. See Minn. Stat. § 364.09.

Additionally, public employers should be aware of the federal Equal Employment Opportunity Commission's (EEOC) Guidelines that state that a criminal conviction may not be an absolute bar to employment unless the employment policy is justified by a business necessity. These guidelines can be found on the EEOC's website at www.eeoc.gov/laws/guidance/arrest_conviction.cfm. Employers should consider how any conviction(s) would affect the applicant's ability to perform the duties of the job.

Criminal background checks conducted by an outside third-party company are subject to the federal Fair Credit Reporting Act (FCRA). See 15 U.S.C. § 1681, et seq. The FCRA has specific notice requirements that must be met by the employer, including the applicant's written authorization and written notification to the applicant that a consumer report (as defined by the FCRA) may be used for employment purposes. The public employer may also need to give the applicant an additional Tennessee Warning if collecting private data, such as date of birth, for background check purposes.

See MCIT Resource [Criminal Background Checks in Hiring](#) for additional information.

Certification, Authorization and Release

In most standard employment applications, the final section includes a declaration by the applicant attesting to the accuracy and completeness of the information provided and an acknowledgment that any false or misleading statements or information provided in the application process may be grounds for future termination should the applicant be hired.

The employment application should also include a section authorizing the employer to contact the applicant's former employers, references, etc. and granting these individuals the authority to release information regarding the applicant's job performance and their fitness and qualifications. The application may also contain a release of liability for the former employer providing this information and the prospective employer receiving this information. Note that under the Minnesota Government Data Practices Act, government employers are generally not able to release employment information about the applicant without a signed release.

Some former employers may be reluctant to provide information about an applicant's performance for fear of a defamation lawsuit. The authorization and release of liability may assist the prospective employer in obtaining the information requested.

Finally, if applicable, the public employer may want to include a section that confirms that no offer of employment is valid or binding until the appointing authority, which may be the board, formally approves the employment. A similar statement should be placed in any offer of employment. If this statement is not included and the offer of employment is later withdrawn, the prospective employee may have a cause of action against the public entity based upon detrimental reliance if he or she took actions in anticipation of the new employment, such as quitting his or her current job.

Certification, Authorization and Release Sample

I certify that the answers I have given on this application are true and correct to the best of my knowledge. I understand that any false or misleading information provided, or any omission or concealment of facts will disqualify me from consideration for employment, and constitutes grounds for my immediate dismissal should I be employed by the [Public Entity Name].

I understand, acknowledge and agree that no offer of employment is valid or binding until formal approval by the [Public Entity Name] Board or the appointing authority referenced in the job description and that until such approval that the [Public Entity Name] shall not be liable for any reliance on any oral or written offers of employment made to me.

In connection with this application, I hereby authorize any and all current and former employers, organizations where I have volunteered (“volunteer organizations”) and references named in this application, or any agent of such a former employer or volunteer organizations, to release to the [Public Entity Name] and its agents any and all information regarding my job performance and fitness/qualifications to perform the position I am presently seeking and any other employment or related information, both public and private, in their possession. I understand that the [Public Entity Name] will use this information to determine my fitness/qualifications for the position I am seeking. This authorization expires one year from the date of my signature, below.

I hereby release the [Public Entity Name] and all former employers, volunteer organizations and references listed herein and any and all agents acting on behalf of said [Public Entity Name], former employers, volunteer organizations or references, for any and all liability of whatever nature by reason of requesting or providing such information.

Screening Process

Applying the Veterans Preference Act

Under the Minnesota Veterans Preference Act, a veteran applicant for hire or promotion may invoke special points for consideration during the hiring or promotion process.³ Minn. Stat. § 197.447, *et seq.*

The Veterans Preference Act applies to all public employers, including counties, cities, towns, school districts, other municipalities, or political subdivisions of the State of Minnesota that recruit or employ veterans.⁴ Minn. Stat. § 197.455, subd. 1. Local units of government are governed by a separate statute from the state.

The Veterans Preference Act applies to all competitive open positions in government *except* the positions of private secretary, superintendent of schools, head of a department⁵, one chief deputy of any elected official or head of a department, elected officials⁶ or any person holding a strictly confidential relationship to the appointing officer.⁷ Minn. Stat. § 197.46.

³ The Act also provides procedural safeguards for employee veterans from removal or wrongful termination by a public employer.

⁴ The University of Minnesota is not a political subdivision under the Act. *Windberg v. Univ. of Minnesota*, 499 N.W.2d 799 (Minn. 1993)

⁵ *Sprague v. Heise*, 67 N.W.2d 907, 910-911 (Minn. 1954)

⁶ Op. Atty. Gen., 85 F, March 7, 1958

⁷ Teachers are not covered by the removal provisions of Minn. Stat. § 197.46. Minn. Stat. § 197.455, subd. 5a of the Veterans Preference Act applies to teacher hiring.

Note: The term “head of a department” has been defined by the courts. To be a department head, all of the following questions must be affirmatively answered:

- Does the alleged department head have charge of the work of the department?
- Does his or her work require technical, professional training?
- Is he or she the highest authority at that level of government as to his or her official duties?
- Does he or she supervise all of the work in the department?
- Does the success of the department depend on his or her technique?
- Are the employees in the department under his or her direction?
- Are his or her duties more than merely different from other employees?
- Does he or she have the power to hire and fire subordinates?

Holmes v. Bd. of Com’rs of Wabasha County, 402 N.W.2d 642 (Minn. Ct. App. 1987)

Caution should be exercised when deciding whether a position is a department head under the Veterans Preference Act. Public employers should consult with legal counsel when making this case-by-case determination.

The Veterans Preference Act also does not apply to “occasional or temporary” employment situations.⁸

Testing/Reviewing Applications

A public employer must apply the veterans preference laws during the hiring process for those open competitive positions covered by the Veterans Preference Act.

When identifying applicants to interview, a public employer must set up its process on a 100-point basis to enable allocation of veterans preference points. *Hall v. City of Champlin*, 463 N.W.2d 520 (Minn. 1990). The appointing authority has broad discretion to determine which criteria will be considered in awarding the 100 points. The evaluation process may be based on the job application, a written test, an oral examination, a skills test or any combination of factors. The public employer may administer any type of evaluation so long as it is based on criteria capable of being reduced to a 100-point rating scale.

The public employer should articulate the objective criteria establishing the 100 point rating scale prior to accepting or reviewing applications. The criteria must be based upon the actual job duties. Therefore an up-to-date position description is critical in determining the criteria that are utilized.

⁸ *Crnkovich v. Ind. Sch. Dist. No. 701, Hibbing*, 142 N.W.2d 284 (Minn. 1966)

Who Is a Veteran?

The Veterans Preference Act (Minn. Stat. § 197.447) defines “veteran” as a citizen or resident alien of the United States who has separated under honorable conditions from any branch of the armed forces of the United States if he or she has:

- either served on active duty for 181 consecutive days;
- been disabled while serving on active duty;
- completed the minimum active duty requirements under federal law, as defined by 38 C.F.R. § 3.12a; or
- been service certified by the United States Secretary of Defense as active military service under Public Law 95-202.

The U.S. Secretary of Defense must certify the active service and discharge under honorable conditions of the veteran.

Retired military veterans have the same preference rights as other veterans in state and local government hiring. Veterans should submit a DD 214 or DD 215 form that verifies their status as veterans from the military. From this form, it can be determined whether the individual meets the requirements of a “veteran” under Minn. Stat. § 197.447.

The number of possible points assigned to each objective criteria *must be determined in advance of the screening or testing*. The total number of points for all categories before the addition of veterans preference points must equal 100. Points must be awarded to applicants in a uniform manner.

A veteran who achieves a passing score (i.e., meets the minimum qualifications of the job), is entitled to an additional 10 points. A disabled veteran is entitled to have 15 more points added to a passing score.⁹ Minn. Stat. § 197.455, subd. 4 & subd. 5. Veterans preference points may be used by the surviving spouse of a deceased veteran and by the spouse of a disabled veteran who, because of the disability, is unable to qualify. Minn. Stat. § 197.455, subd. 7.

Veterans preference points are added *only* if the applicant receives a passing score. Preference points cannot be used to increase a failing score to a passing score. If the test requires a score of 70 points to pass and the veteran scores a 68, no preference points are added. If the veteran scores a 70, the score is increased to 80 (or 85 in the case of a disabled veteran).

Public employers must notify veterans of the availability of preference points. Minn. Stat. § 197.455, subd. 9. However, the applicant *must* request the preference. Therefore, the public employer should have a place on the employment application or related form for the veteran to request veterans preference. The notice should also indicate that proof of veteran or disabled veteran status may be required before preference will be granted. An employer should request and review a copy of applicants' DD 214 or DD215 forms to determine eligibility before granting veterans preference rights to them.

Ranking Applicants

The Veterans Preference Act does not provide an absolute preference for veterans. Rather, the awarding of veterans preference points increases the chance that a veteran will receive an interview.

A veteran applicant, even with preference points, may fall short of points determined necessary for an interview. When this occurs, the public employer is not obligated to interview the veteran. For example, if there are five applicants who achieve a score of 95, a veteran with a score of 75 will not likely receive an interview for the position. The additional points will move the veteran up on the eligibility list but do not guarantee that the veteran will be at or near the top score.

In the event of a tie, the law requires that a candidate who receives veterans preference points be entered on an eligibility list ahead of a nonveteran with the same rating. Minn. Stat. § 197.455, subd. 8

Notification

Whenever a public employer fails to hire a veteran who has received veterans preference, the employer is required to notify the veteran in writing of the reasons for rejection and file the notice with the appropriate local personnel officer. Minn. Stat. § 197.455, subd. 10. This applies to all veteran applicants regardless of whether they were interviewed.

See MCIT Resource [Veterans Preference Act and USERRA Compliance in Employment](#) for more information, including hiring for promotional positions.

⁹ A disabled veteran is defined as a person who has a compensable service-connected disability as adjudicated by the United States Veterans Administration or by the retirement board of one of the several branches of the armed forces. Minn. Stat. § 197.455, subd. 6. A determination as to the veteran's disability status should be made and verified before awarding additional disability points.

Positions Not Covered by the Veterans Preference Act

For positions not covered by the Veterans Preference Act, the employer is not strictly required to implement a 100-point scale. However, employers may want to use a similar format to protect the organization better from claims of discrimination or unfair treatment.

As in the veterans preference process, the public employer should consider establishing objective criteria for ranking the applicants prior to reviewing any applications received. Optimally, these criteria should be determined when or even before the position is advertised. The criteria should be based upon the job description and set forth in writing. The employer should also consider determining the number of individuals who will be interviewed prior to reviewing or ranking applications.

Setting these parameters early in the process may help the employer to avoid the argument that the reviewer set the criteria purposely to screen certain individuals out of the process after reviewing their applications.

Interviewing

The employment interview is a conversation between employer and applicant designed to exchange sufficient, job-related information about the applicant, the employer and the position. While the employer is gathering information about the applicant to help make a selection decision, the applicant is equally interviewing the employer to determine if the employer and position will suit his or her needs.

As with the application and selection process, the interview process should be planned and systematic. To that end, a good practice is to draft interview questions in advance of the interview. Having written interview questions will help ensure consistency from candidate to candidate. It will also aid in making sure that the desired job-related information about the candidates is gathered, while avoiding questions that could produce illegal information.

Effective questions are open-ended, job-related and based upon past behavior or experience. For example:

- Describe the experience or course work you have had in [X] field.
- What is your experience supervising people including volunteers?
- How would you describe your work style?
- What did you like best and least about your last/current job?
- What is your strongest job-related skill or ability? Weakest?
- What are your reasons for wanting to make an employment change at this time?
- What are you looking for in an employer?
- What elements are most important to you in a work situation?
- What about this position interests you?
- What do you expect out of this position?

Interviewers can ask specific questions to follow up after each opening question, if further information or explanation is needed. These follow-up questions should also be focused upon job-related criteria or the candidate's experience or training. A question is likely job related if the answer is needed to judge the employee's qualifications or ability to perform the essential functions of the job.

As a general rule, if the employer cannot ask a question on the job application or consider a subject during the screening process, the employer cannot ask or consider the same during the interview process.

Interview questions to avoid include, but are not limited to those indicated in the following table.

Avoid	Reason	Alternative
<ul style="list-style-type: none"> • “How many children do you have?” • “Are you pregnant?” • “Are you planning on starting a family/having more children?” • “What kind of childcare arrangements do you have?” 	<p>Could be pregnancy, gender or marital status discrimination</p>	<p>Focus on availability to work if this is the concern behind the question. For example:</p> <ul style="list-style-type: none"> • “Do you have any responsibilities other than work that will prevent you from performing specific job requirements (such as travel)?” • “What hours and days can you work?” • “Are there specific times that you cannot work?”
<ul style="list-style-type: none"> • “Are you married? Single? Widowed? Divorced?” • “Who is your spouse?” • “What is your maiden name?” 	<p>Could be marital status discrimination</p>	<p>It is best to avoid this type of question.</p>
<ul style="list-style-type: none"> • “Are you currently in debt?” • “Do you own or rent your house?” • “Have you ever claimed bankruptcy?” • “Have you ever had your wages garnished?” 	<p>Could be discriminatory as some protected classes have been historically underpaid</p>	<ul style="list-style-type: none"> • It is best to avoid this type of question in an interview situation unless the position requires significant financial responsibility. • Consult with legal counsel prior to asking these questions in an interview.
<ul style="list-style-type: none"> • “To which clubs or organizations do you belong?” 	<p>Could be discriminatory as it could elicit information about religious affiliation, race, creed, national origin or other protected classes</p>	<p>Focus on professional or job-related organizations. For example, “Do you belong to any professional or trade groups that you would consider relevant to the position for which you are interviewing?”</p>
<ul style="list-style-type: none"> • “When did you graduate from high school?” • “When did you attend high school?” 	<p>Could be age discrimination because it may be an indirect question about the applicant’s age</p>	<p>If relevant to the job requirements, a better alternative is “Do you have a high school diploma or equivalent?”</p>
<ul style="list-style-type: none"> • “To which political party do you belong?” • “For whom did you vote in the last election?” 	<p>Could be discrimination based upon First Amendment rights</p>	<p>It is best to avoid this type of question.</p>

Avoid	Reason	Alternative
<ul style="list-style-type: none"> • “Do you belong to a labor union?” • “Have you been involved in labor union activities?” 	Could be violation of labor relations law	It is best to avoid this type of question.
<ul style="list-style-type: none"> • “Are you available to work Saturdays?” • “Are you available to work Sundays?” 	Could be religious discrimination	<ul style="list-style-type: none"> • “What days or hours would you be unable or unwilling to work?” • “Will you be able to work the required schedule?”
<ul style="list-style-type: none"> • “What type of military discharge did you receive?” 	Could elicit information about protected class status, for example if the discharge was for disability or medical reasons	Questions about type of military discharge should be avoided unless there is a clear business necessity. Employers can ask about a candidate’s military service, such as type of training or work experience received, when job-related. ¹⁰
<ul style="list-style-type: none"> • “Do you have a disability?” • “Are you in good health?” 	Could be disability discrimination	Avoid asking questions that may produce medical information or information about a disability. Focus on the applicant’s ability to perform the essential functions of the job.

Despite the carefully worded interview questions, some candidates will inevitably volunteer information that is impermissible for the employer to ask or consider in the hiring process, such as age or marital status. If this occurs, interviewers should not ask any follow-up questions or write down the prohibited information.

Interviewers should be cautious about engaging in social conversation with the candidate before or after the interview. The same subjects to be avoided in interview questions should also be avoided in pre- or post-interview conversations.

As a best practice, interviewers should not interview candidates alone. A second (or third) person in the interview can act as a witness should the candidate later claim that he or she was asked an impermissible question. Moreover, having more than one person in the interview provides additional perspectives on the candidate and provides for additional note takers during the interviews.

¹⁰ The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits an employer from denying initial employment based on a person’s military status, including to an individual who is a past or present member, has applied for membership or is obligated to service in the uniformed services. 38 U.S.C. §4311(a). Under Minnesota law, employers may not ask or require people seeking employment to make a written or oral statement whether they are members of the National Guard or a Reserve unit if the employers intend to use that information in a discriminatory manner. Minn. Stat. § 181.535. For more information about USERRA and Minnesota laws affecting veterans, see MCIT Resource “Veterans Preference Act and USERRA Compliance in Employment.”

Interviewers should take complete interview notes, including the candidate's answers (unless they include unlawful information) and any follow-up questions and responses. As discussed later, these materials should be retained for at least 18 months.

Background Checks

Background checks are a part of the due diligence needed in hiring. Not only can background checks give an employer further insight into the new potential employee, they may also guard against a claim of negligent hiring. In a negligent hiring claim, an employer will be liable for an employee's negligent conduct if:

- it is reasonably foreseeable that an employee was unfit for employment;
- it is reasonably foreseeable that physical injury would occur; and
- that the employer's breach of the duty to make reasonable inquiry was the proximate cause of the injury.

Reference Checks

As with interview questions, employers should draft the questions for references prior to contacting the references. The same questions should be asked of all references contacted.

The questions should be job-related and consistent with business necessity. Questions should be drafted to solicit critical and legal information to make an informed decision.

Reference check questions should not solicit information regarding the candidate's protected class status or other protected information. If protected information is volunteered, the employer cannot consider such information when making a final decision. As a general rule, if the question cannot be asked of the candidate directly, it also cannot be asked of the candidate's references.

When contacting references, it may be helpful to give the reference a brief description of the job position and its essential functions for context. Be prepared to provide a copy of the authorization and release from the candidate's employment application to the reference. The entire application should not be provided to references as it may contain private data under the MGDPA.

A good practice when speaking to references is to begin by determining if the basic information provided by the candidate is accurate and complete. For example:

- I'd like to verify the dates of employment. According to the information provided, he or she was an employee of your company from [X] to [X].
- What type of work did he or she perform for your company? What was his or her title?
- What are his or her earnings at this time or at the time he or she left your company? Does that include bonuses, overtime or incentive pay?
- For whom did he or she work prior to joining your company?

Employers may then want to move to questions that are indicators of how well the candidate may function in the organization. For example:

- How did the candidate compare to the person who's now doing the job (assuming the applicant has left the previous employer)?
- What type of characteristics will you look for in replacing this person?
- Would you rehire this person?
- When there was a time sensitive or urgent project assigned to the person, did he or she meet the deadline? If yes, what steps did the person take to get the job done?

- Recognizing that no one is perfect at everything, can you describe some of the candidate's shortcomings?
- Having the ability to get along with people is essential. Please share any situations where the candidate used his or her people skills to resolve a difficult situation or where his or her lack of skills disappointed you?
- When you hired the candidate, did you check his or her references? Can you share what those references said?

Using Social Media and Internet Searches for Background Checks

The amount of information that can be easily retrieved through the Internet is staggering. It is tempting for employers to use the Web, including social media sites, to conduct background research on employment applicants.

Although an Internet search or review of social networking sites (e.g., Facebook, LinkedIn, Instagram, Twitter) may give helpful information about an applicant, public entities should consider whether the benefits of this information outweigh the risks posed prior to conducting any searches. There are several risks and concerns related to the use of social media or Internet searches in hiring, including potential discrimination or retaliation claims, privacy concerns, and the accuracy and context of information.

Accordingly, public employers should consult with legal counsel prior to conducting any searches and before making a hiring decision based upon information gathered from these sources.

See MCIT's Resource [Social Media and the Workplace](#) for more information, including risk management suggestions.

Other Background Checks

For some positions, more detailed background checks may be appropriate. For example, a credit history check may be appropriate for a position that handles money or other financial transactions. A pre-employment physical or mental examination may be appropriate for other positions, such as law enforcement.

There are specific legal requirements that must be met for both credit history checks and pre-employment physical and mental examinations. This is a specialized area outside the scope of this resource. Members are encouraged to work with their legal counsel and human resources professionals prior to conducting either of these checks.

Note that employers who intend to use the Minnesota Bureau of Criminal Apprehension's website containing public criminal history data for an employment background check must inform the individual of the search.¹¹

See MCIT Resource [Criminal Background Checks in Hiring](#) for additional information.

Documentation

Employers should retain all application materials, including interview notes and background check materials, for all applicants for at least 18 months. The statute of limitations or timeframe for bringing a discrimination claim is one year. Retaining the materials for 18 months will help ensure that the employer has the documents to defend a claim or charge of discrimination should it be brought on the last possible day.

¹¹ Minn. Stat. § 13.87, subd. 3(f).

For individuals hired, the application materials should be maintained in the employee's personnel file indefinitely or consistent with the entity's records retention schedule.

Access to applicant information and materials must be consistent with the Minnesota Government Data Practices Act (MGDPA), Minnesota Statutes Chapter 13.

See MCIT Resources [Minnesota Government Data Practices Act, An Introduction](#) and [Personnel Data Maintenance](#) for more information.

Keys to Success

The keys to avoiding pitfalls in the hiring process are advanced planning and forethought. A planned and systematic hiring process helps to avoid the unintentional errors that can lead to a lawsuit or complaint. In the long run, public employers benefit from investing the time in crafting up-to-date and comprehensive position descriptions; reviewing their job postings, advertisements and applications for discriminatory language; and drafting job-related, nondiscriminatory interview and reference questions.

Originally published as MCIT Resource Briefing, September 2013.