



## Avoid Legal Pitfalls When Hiring

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The hiring process can be fraught with legal pitfalls at every stage. 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.

### Position Description

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Hiring starts with a complete and up-to-date position description. Among its many uses, a position description:

- Serves as a recruiting tool
- Sets forth the minimum training and experience, as well as the knowledge, skills and abilities, required for the job
- Documents the essential functions of the position and defines the employer's expectations of the position for the potential employee
- 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. Also review which skills and attributes make an employee more or less successful in the position. 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 (Generally, 29 C.F.R. § 1630.2(n)(1)).

Federal regulations<sup>1</sup> offer guidance on when a function could be considered essential, including:

- The job exists to perform the function.

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<sup>1</sup> 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 are the:

- 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 perform the essential functions of the job successfully. 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.

# Postings, Advertisements, 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 (e.g., *Thomas v. Washington Cnty. Sch. Bd.*, 915 F.2d 922 (4<sup>th</sup> 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:

- Brief description of the position
- Essential functions of the job
- Minimum qualifications required
- Salary range (see below)
- State where individuals can obtain a complete position description and application for employment
- 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
- Statement that the employer is an equal opportunity employer.
- 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

When posting a job advertisement for a position in which the applicant will be required to complete drug or alcohol testing or cannabis testing, when allowed, the employer may want to include that information in the advertisement. For example, the advertisement could include language indicating that any job offer for

## 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
- Gender identity
- Age
- Local human rights commission activity
- Pregnancy
- Genetic information

\*Minn. Stat. § 363A.08, subd. 4(a)

the advertised position will be contingent on the successful completion of drug and alcohol testing or cannabis testing. (See below for further discussion of drug and alcohol testing and cannabis testing).

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.

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. When in doubt, if the term in question is not related to an essential function of the position, do not use it in the posting.

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

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.

## Salary Range Requirement

As of Jan. 1, 2025, employers with 30 or more employees in Minnesota, including counties and other governmental subdivisions, are required to disclose the starting salary range and a general description of the benefits and other compensation that will be offered to the hired applicant in postings for job openings.

The salary range is the minimum and maximum annual salary or hourly range of compensation, based on the employer’s good faith estimate. The salary range may not be open ended. If the employer does not plan to offer a salary range, a fixed rate of pay must be listed.

The information must be included in all job postings for specific positions, including recruitment done through a third party and any posting made electronically or in printed hard copy.

## Application

Requiring applicants to complete a standardized application form serves a number of purposes:

- Allows public employer to gather the same information pertinent to the position from all applicants
- 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
- Serves as an authorization for release of information and a waiver of liability against the employer

### Minnesota Government Data Practices Act (MGDPA)

The MGDPA requires a government entity to give a Tennesen 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.

The names of "certified applicants" and "finalists" are public data. 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).

To collect, store and use the private data, the government entity must give the applicant a Tennesen Warning at the time of or prior to collection.

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

- Purpose and intended use of the data requested
- Whether the individual may refuse to supply or is legally obligated to supply the requested data
- Any known consequences of supplying or not supplying the data

### Sample Tennesen 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.

- Identity of other persons authorized to receive the data

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.

## 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, specialized training 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.

## Information *Not* to Collect

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, which includes traits associated with race, including hair texture and hair styles
  - Color
  - Creed or religion
  - National origin, including birthplace or native language
  - Sex/gender
  - Marital status
  - Familial status, which includes residing with and caring for another individual who lacks the ability to meet essential requirements for physical health, safety or self-care because the individual is unable to receive and evaluate information or make or communicate decisions
  - Disability, including current or past health conditions, episodic disabilities 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
  - Gender identity
  - Local human rights commission activity
  - Pregnancy/children, including current or future family plans
  - Genetic information, including family medical history
- Social Security number
- Maiden name
  - 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
- Pay history (see below)
- Criminal record or criminal history (see below)
- An applicant's participation in a strike (Minn. Stat. §§ 181.52 & 181.53)
- Membership status in the National Guard or reserve component of the United States Armed Forces, if asked with the intent to discriminate (Minn. Stat. § 181.535)

## Pay History

Minnesota Statutes, Section 363A.08, subdivision 8, prohibits employers from asking about, considering or requiring disclosure of a job applicant's pay history for the purpose of determining wages, salary, earnings, benefits or other compensation for that applicant. Pay history includes information about any prior or current wage, salary, earnings, benefits, or other compensation.

The general prohibition does not apply if the applicant's pay history is a matter of public record under federal or state law, unless access to the public record is sought with the intent of obtaining the applicant's pay history for the purpose of determining the salary or other compensation for that applicant.

However, an applicant may voluntarily, without being asked or prompted, disclose pay history for the purpose of negotiating wages, salary, benefits or other compensation. If an applicant voluntarily discloses pay history information, the employer may consider or act on the information to support a wage or salary *higher* than initially offered by the employer.

Employers may provide information to applicants about wages, benefits, compensation, or salary offered related to a position. Employers may also inquire or engage in discussions with an applicant about the applicant's expectations or requests related to wages or other compensation.

## 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 or, if there is no interview, a conditional offer of employment is made. 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.

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 or application. 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.

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 communication 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

Public employers must exercise caution in how they use criminal background information in their hiring decisions. (See further discussion about criminal background checks below).

Employers using a third-party to conduct a criminal background check must include a disclosure under Minnesota Statutes, Section 13C02 either in or accompanying the application. The disclosure must include a box that the person may check off and return to receive a copy of the report.

For more information about criminal background checks and consumer reports see below.

## 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: 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.

## 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. Please refer to the job description for this position to determine if such a check will be conducted. If the job description or other application material states that a criminal check will be conducted, no offer of employment shall become final until the results of the criminal background check are received, the contents are acceptable to [Public Entity Name], and formal approval by the appointing authority.

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

## 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.

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

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.

## 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<sup>2</sup> (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<sup>3</sup> (Minn. Stat. § 197.455, subd. 1). Local units of government are governed by a separate statute from the state.

<sup>2</sup> The Act also provides procedural safeguards for employee veterans from removal or wrongful termination by a public employer.

<sup>3</sup> The University of Minnesota is not a political subdivision under the Act. *Windberg v. Univ. of Minnesota*, 499 N.W.2d 799 (Minn. 1993)

The Veterans Preference Act applies to all competitive open positions in government *except* the positions of private secretary, superintendent of schools, head of a department<sup>4</sup>, one chief deputy of any elected official or head of a department, elected officials<sup>5</sup> or any person holding a strictly confidential relationship to the appointing officer<sup>6</sup> (Minn. Stat. § 197.46).

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

- 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?

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.<sup>7</sup>

## 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 502 (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.

## 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 at least one of the following:

- 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
- 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 military service and issue a discharge under honorable conditions.

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 Minnesota Statutes, Section 197.447.

<sup>4</sup> *Sprague v. Heise*, 67 N.W.2d 907, 910-911 (Minn. 1954)

<sup>5</sup> Op. Atty. Gen., 85 F, March 7, 1958

<sup>6</sup> 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.

<sup>7</sup> *Crnkovich v. Ind. Sch. Dist. No. 701, Hibbing*, 142 N.W.2d 284 (Minn. 1966)

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.

## Assigning Points

- 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.
- The number of points needed for a passing score (i.e., meets the minimum qualifications of the job) should also be determined in advance of screening or testing.
- A veteran who achieves a passing score is entitled to an additional 10 points.
- A disabled veteran who achieves a passing score is entitled to an additional 15 points added to a passing score.<sup>8</sup> (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. For example, 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 DD-215 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 received a passing score and a 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 veterans who meet the minimum qualifications of the job regardless of whether they were interviewed.

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<sup>8</sup> 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, and the disability is existing at the time the preference is claimed (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

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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 helps ensure consistency from candidate to candidate. It also aids in making sure that the desired job-related information about candidates is gathered, while avoiding questions that could produce illegal information.

Each question should be limited to requesting information that is necessary for determining whether the applicant is qualified for the job.

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

- Describe the experience or course work you have 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. Interviewers should be careful not to ask questions that might elicit protected class information.

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"> <li>• “Do you belong to a labor union?”</li> <li>• “Have you been involved in labor union activities?”</li> </ul>	<p>Could be violation of labor relations law</p>	<p>It is best to avoid this type of question</p>
<ul style="list-style-type: none"> <li>• “Are you available to work Saturdays?”</li> <li>• “Are you available to work Sundays?”</li> </ul>	<p>Could be religious discrimination</p>	<ul style="list-style-type: none"> <li>• “What days or hours would you be unable or unwilling to work?”</li> <li>• “Will you be able to work the required schedule?”</li> </ul>
<ul style="list-style-type: none"> <li>• “What type of military discharge did you receive?”</li> </ul>	<p>Could elicit information about protected class status, for example if the discharge was for disability or medical reasons</p>	<ul style="list-style-type: none"> <li>• Questions about type of military discharge should be avoided unless there is a clear business necessity</li> <li>• Employers can ask about a candidate’s military service, such as type of training or work experience received, when job related*</li> </ul>
<ul style="list-style-type: none"> <li>• “Do you have a disability?”</li> <li>• “Are you in good health?”</li> <li>• “Have you ever filed a workers’ compensation claim?”</li> <li>• “Have you ever been injured on the job?”</li> </ul>	<p>Could be disability discrimination</p>	<ul style="list-style-type: none"> <li>• Avoid asking questions that may produce medical information or information about a disability.</li> <li>• Focus on the applicant’s ability to perform the essential functions of the job</li> </ul>
<ul style="list-style-type: none"> <li>• “How many children do you have?”</li> <li>• Are you pregnant?”</li> <li>• “Are you planning on starting a family/having more children?”</li> <li>• “What kind of childcare arrangements do you have?”</li> </ul>	<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"> <li>• “Do you have any responsibilities other than work that will prevent you from performing specific job requirements (such as travel)?”</li> <li>• “What hours and days can you work?”</li> <li>• “Are there specific times that you cannot work?”</li> </ul>
<ul style="list-style-type: none"> <li>• “Are you married? Single? Widowed? Divorced?”</li> <li>• “Who is your spouse?”</li> <li>• “What is your maiden name?”</li> </ul>	<p>Could be marital status discrimination</p>	<p>It is best to avoid this type of question</p>
<ul style="list-style-type: none"> <li>• “Are you currently in debt?”</li> <li>• “Do you own or rent your home?”</li> <li>• “Have you ever claimed bankruptcy?”</li> <li>• “Have you ever had your wages garnished?”</li> </ul>	<p>Could be discriminatory as some protected classes have been historically underpaid</p>	<ul style="list-style-type: none"> <li>• It is best to avoid this type of question in an interview situation unless the position requires significant financial responsibility</li> <li>• Consult with legal counsel prior to asking these questions in an interview</li> </ul>
<ul style="list-style-type: none"> <li>• “To which clubs or organizations do you belong?”</li> </ul>	<p>Could be discriminatory, as it could elicit information about religious affiliation, race,</p>	<p>Focus on professional or job-related organizations. For example:</p>

Avoid	Reason	Alternative
	creed, national origin or other protected classes	<ul style="list-style-type: none"> <li>“Do you belong to any professional or trade groups that you would consider relevant to the position for which you are interviewing?”</li> </ul>
<ul style="list-style-type: none"> <li>“What is your national origin?”</li> <li>“Where are your parents from?”</li> <li>“What is your native language?”</li> </ul>	Could be considered national origin discrimination	<ul style="list-style-type: none"> <li>“Are you legally eligible for employment in the United States?”</li> <li>“What languages do you speak and write fluently?” (If the job requires additional languages)</li> </ul>
<ul style="list-style-type: none"> <li>“When did you graduate from high school?”</li> <li>“When did you attend high school?”</li> </ul>	Could be age discrimination because it may be an indirect question about the applicant’s age	If relevant to the job requirements, a better alternative is “Do you have a high school diploma or equivalent?”
<ul style="list-style-type: none"> <li>“Do you wish to be addressed as Mr., Mrs., Miss or Ms.?”</li> </ul>	Could be considered gender discrimination	It is best to avoid this type of question
<ul style="list-style-type: none"> <li>“To which political party do you belong?”</li> <li>“For whom did you vote in the last election?”</li> </ul>	Could be discrimination based upon First Amendment rights	It is best to avoid this type of question
<p>*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).</p>		

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.

However, employers can document that information about a protected class was volunteered, the circumstances under which the information was volunteered and that the information was not considered. This may be done to ensure there is a record in the event the candidate later claims that he or she was asked an impermissible question.

Employers also may *not* ask about a candidate’s pay history, but an employer may consider or act on information about a candidate’s pay history if the candidate voluntarily discloses the information without being asked or prompted, and the employer uses the information to support a higher wage or salary than initially offered by the employer (Minn. Stat. § 363A.08, subd. 8).

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.

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.

## Pre-employment Tests

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### Medical Information or Examinations

Generally, employers may not request or require a physical examination prior to making an offer of employment (Minn. Stat. § 363A.08, subd. 4). But employers may ask whether the applicant has the ability to perform specific job functions or how an applicant would perform a specific job task.

An employer may make an offer of employment on the condition that the person meets the physical or mental requirements of the job. Once a conditional offer is made, the employer can require a medical examination, which may include a medical history, if all of the following apply (Minn. Stat. § 363A.20, subd. 8):

- Examination tests only for essential job-related abilities,
- Examination is required of all people conditionally offered employment for the same position regardless of disability
- Information obtained is treated as a confidential medical record. However, supervisors and managers may be informed regarding necessary restrictions on the employee's work or duties and necessary accommodations

If any medical records or information adversely affects any hiring, firing or promotional decision, the employer must notify the employee of that information within 10 days of the final decision (Minn. Stat. § 363A.20, subd. 8).

Law enforcement agencies may require an applicant for a peace officer position to undergo a psychological evaluation before a job offer is made if the evaluation tests only for job-related abilities set forth by the Board of Peace Officer Standards and Training and is otherwise lawful. See Minn. Stat. § 363A.20, subd. 8.

### Other Physical Tests

Other types of physical tests must (Minn. Stat. § 363A.20, subd. 8(a)(3)):

- Measure only essential job-related abilities
- Be required of all applicants for the same position regardless of disability
- Accurately measure the applicant's aptitude, achievement level or whatever factors they purport to measure rather than reflecting on the applicant's impaired sensory, manual or speaking skills except when those skills are the facts that the test purports to measure

### Drug and Alcohol Testing and Cannabis Testing

Employers may request a job applicant complete drug and alcohol testing or cannabis testing under certain circumstances. Note: References to drug and alcohol testing generally does *not* include cannabis or cannabis testing.

Employers may request or require a job applicant who has received a contingent offer to undergo drug and alcohol testing if the same test is required of all job applicants conditionally offered employment for that position (Minn. Stat. § 181.951, subd. 2). Applicants can be tested for drugs and alcohol only according to a written policy that complies with the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA), Minnesota Statutes, Sections 181.950-181.957.

Recreational cannabis use by individuals 21 years of age and older is legal in Minnesota. (Minn. Stat. § 342.09). Employers may not request or require an applicant to undergo cannabis testing as a condition of employment unless required by state or federal law (Minn. Stat. § 181.951, subd. 8). Employers also may not refuse to hire an applicant if the applicant submits to a cannabis test or a drug and alcohol test and the results indicate the presence of cannabis, unless otherwise required by state or federal law.

This means employers generally may not require or request pre-employment cannabis testing or refuse to hire an applicant solely because the applicant tested positive for cannabis on a pre-employment test.

### **Pre-employment Cannabis Testing for 7 Positions**

Employers may require pre-employment cannabis testing for certain positions. For the following positions, cannabis is considered a drug and subject to drug and alcohol testing requirements, including pre-employment testing (Minn. Stat. § 181.951, subd. 9):

1. Safety-sensitive positions, which are jobs, including any supervisory or management position, in which an impairment caused by drug, alcohol, or cannabis usage would threaten the health or safety of any person
2. Peace officer positions
3. Firefighter positions
4. Positions requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to:
  - Children;
  - Vulnerable adults; or
  - Patients who receive health care services from a provider for the treatment, examination, or emergency care of a medical, psychiatric, or mental condition
5. Positions requiring a commercial driver's license or requiring an employee to operate a motor vehicle for which state or federal law requires drug or alcohol testing
6. Positions funded by a federal grant
7. Any other position for which federal law requires testing of a job applicant or employee for cannabis

This means that for these seven types of positions, employers can request or require pre-employment cannabis testing if all of the following apply:

- The applicant has been given a job offer contingent on testing
- The same test is required for all applicants conditionally offered employment for that position
- The testing is according to the employer's written policy

### **Notice Requirements**

Before an employer can request an applicant undergo drug or alcohol testing or cannabis testing, the employer must provide the applicant with written notice of the employer's testing policy and provide the applicant time to review the policy before testing. The applicant must also be provided with a form to acknowledge the applicant has reviewed the employer's drug and alcohol testing or cannabis testing policy (Minn. Stat. § 181.953).

An employer may use either oral fluid testing or laboratory testing when drug, alcohol or cannabis testing of a job applicant is authorized. Oral fluid testing was added in mid-2024 as a method for drug and alcohol and cannabis testing. The procedures are different for the two testing methods. Employers need to make sure their written testing policies are updated before using oral fluid testing.

Oral fluid testing uses a saliva sample to detect the presence of drugs, alcohol or cannabis or their metabolites and does not require the services of a testing laboratory. The applicant must be informed of the test results at the time of the oral fluid test. If the test is positive, inconclusive or invalid, the applicant may request additional drug or alcohol testing or cannabis testing within 48 hours of receiving the test result.

This additional testing must use the services of a testing laboratory and is at no cost to the applicant. The statutory rights, notice and limitations on laboratory testing apply to this additional laboratory testing.

If the employer uses laboratory testing, a licensed, accredited or certified laboratory must conduct the testing. Within three working days after the employer receives the test results, the employer is required to inform the applicant in writing of the result and of the right to receive a copy of the test report.

Note: Test results and other information acquired in the testing process (either oral fluid testing or laboratory testing) are considered private data on individuals under the Minnesota Government Data Practices Act (Minn. Stat. § 181.954).

If the applicant receives a positive test result, the employer must give the applicant written notice of the right to explain the positive test and may request the applicant indicate any over-the-counter or prescription medication the individual is taking and any other information relevant to the reliability of or explanation for a positive test result (Minn. Stat. § 181.953).

### **Positive Test and Job Offer**

Unless otherwise required by state or federal law, an employer may not refuse to hire an applicant solely because the applicant submits to a cannabis test or a drug and alcohol test and the results indicate the presence of cannabis. (Minn. Stat. § 181.951, subd. 8(b)).

The medical use of cannabis is also legal in Minnesota. The law allows registered individuals with a qualifying medical condition to use and possess cannabis (Minn. Stat. §§ 152.22 to 152.37 and Minn. Stat. §§ 342.52, 342.57 (effective March 1, 2025)). Except when the failure to do so would violate federal or state law, an employer may not discriminate against a person in hiring based on the person's status as a patient enrolled in the medical cannabis registry program or the patient's positive drug test for cannabis unless the patient used, possessed or was impaired by medical cannabis on the employer's premises or during work hours (Minn. Stat. § 152.32, subd. 3 and Minn. Stat. § 342.57, subd. 5 (effective March 1, 2025)).

Note: Employers may want to be careful in allowing an applicant with a job offer contingent on the results of a drug or alcohol test or a cannabis test to start working before the employer receives the test results. When an employee tests positive for the first time, the employee may not be terminated until the employee is allowed an opportunity to participate in and complete a counseling or rehabilitation program (Minn. Stat. § 181.953, subd. 10).

### **Personality, Emotional Intelligence, Leadership Tests**

Employers often use non-medical, pre-employment tests, including personality or emotional intelligence or leadership tests, to gain more insight into applicants either in hiring or internal promotion decisions.

Employers should be aware of potential discrimination risks. This includes asking potentially discriminatory questions or an adverse impact on applicants of a protected class. Personality is not a protected class, however it may implicate a protected class under certain circumstances. For example, if an employer associates a certain personality trait with a specific protected class and makes a decision on that basis.

Employers should review the test for potentially problematic questions. Employers should also be careful not to use a test that may be deemed a medical examination, such as tests designed to identify mental disorders.

Employers may not adjust the scores of, use different cutoff scores for, or otherwise alter the results of employment-related tests on the basis of a protected class. See 42 U.S.C. § 2000e-2(l) (regarding unlawful employment practices under Title VII of the Civil Rights Act of 1964).

The employer must also make reasonable accommodations for a qualified applicant with a disability to take the test unless it would impose an undue hardship.

Best Practices for pre-employment testing:

- If a pre-employment test is used, the employer must administer the test to all applicants for the same position.
- The test must be job-related and its results appropriate for the employer's purpose.

- If the test or the selection procedure adversely impacts a protected class, the employer should determine whether there is an equally effective alternative selection procedure or test that has less adverse impact.
- Employers should keep up to date on changes in the job requirements to ensure that a test or selection procedure continues to be predictive of success in the position.

## Background Checks

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Background checks are a part of the due diligence needed in hiring. Not only can background checks give an employer further insight into the potential employee, they may also guard against a claim of negligent hiring.

Negligent hiring is “the negligence of an employer in placing a person with known propensities or propensities which should have been discovered by reasonable investigation in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.” (*Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983))

In a negligent hiring claim, an employer will be liable for an employee’s conduct if all of the following are met:

- It is reasonably foreseeable that an employee was unfit for employment
- It is reasonably foreseeable that physical injury would occur
- 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 contains private data under the MGDPA.

Employers may wish to have the candidate sign a physical copy of the authorization and release on a separate document. This separate document could be provided to individuals whom the employer contacts in the background check.

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?
- 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?

As with the applicant interviews, employers should document this process, including what references were contacted, the date of contact, what questions were asked and the responses that were given. This information should be kept permanently in the applicant's personnel file if the applicant is hired. The information may be needed if the employer is ever sued for negligent hiring.

## 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, TikTok) 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.

## Other Background Checks

For some positions, more detailed background checks may be appropriate. For example, a credit history check or a criminal background check may be appropriate for a position that handles money or other financial transactions. These additional background checks should only be done if the information is essential to the position.

There are specific legal requirements that must be met when undertaking and using more extensive background checks. Public employers are encouraged to work with their legal counsel and human resources professionals prior to conducting either of these checks.

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.

Members should be cautious when an employment decision is based on information obtained from a background check if the type of background problem is more common among people of a certain protected class. For example, employers should not use a practice that excludes people with certain criminal records if the practice significantly disadvantages individuals of a particular race and does not accurately predict who will be a responsible, reliable or safe employee.

Employers should apply the same standard to all applicants. For example, if a female applicant is rejected because of certain information on her credit report, male applicants with similar credit histories should also be rejected.

## Consumer Reports

If an employer obtains background information from a company in the business of compiling background information, like a credit history or a criminal background report, the employer must comply with the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, et seq.

To comply with the FCRA, the employer must give the applicant written notice on a stand-alone format that the information may be used in the decision about his or her employment. Additional information may need to be provided if the company is providing an “investigative report,” based on personal interviews concerning a person’s character, general reputation, personal characteristics and lifestyle.

Employers must receive written permission from the applicant to conduct the background check.

If the employer decides not to hire an applicant based on information obtained through the consumer report, the employer must give the applicant notice that it intends not to hire the applicant based on some information in the report.

The notice must include a copy of the consumer report used to make the decision and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.” The candidate should have an opportunity to review the report and explain any negative information.

If the employer makes a final decision not to hire the applicant based on the credit report, the employer must send the applicant an “adverse action notice.” The employer must tell the applicant all of the following:

- He or she was rejected because of information in the report
- Name, address and phone number of the company that sold the report
- The company selling the report did not make the employment decision
- The applicant has the right to dispute the accuracy or completeness of the report and may obtain an additional free report from the reporting company within 60 days

There are also requirements under state law for the use of consumer reports for employment purposes (Minn. Stat. § 13C.02). The employer is required to provide a disclosure that the employer will obtain the consumer report and include certain information pursuant to the statute. If a written application is provided for employment purposes by an employer or prospective employer, the disclosure must be included in or accompany the application.

The disclosure must include a box that the applicant may check to indicate that he or she would like a copy of the report. The employer must notify the consumer reporting agency to send a copy of the report directly to the applicant for free if the applicant requests a copy.

## **Criminal History**

As explained above, an employer generally may not inquire into or consider an applicant’s criminal history until the applicant is selected for an interview or, if there is no interview, when a conditional offer of employment is made. There are exceptions for positions in which employers have a statutory duty to consider criminal history or conduct a criminal background check when hiring, such as law enforcement.

Public employers must exercise caution in how they use criminal background information in their hiring decisions. The Minnesota 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).

The Act also prohibits public employers from considering records of arrest not followed by a valid conviction, convictions that have been annulled or expunged and misdemeanor convictions for which no jail sentence can be imposed (Minn. Stat. § 364.04). These prohibitions do 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 (Minn. Stat. §§ 364.08 & 364.09).

The Criminal Rehabilitation Act also requires public employers to consider evidence of rehabilitation before denying an individual employment on the basis of criminal history (Minn. Stat. § 364.03, subd. 3). A public employer cannot disqualify the individual from employment if the individual can show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the public employment sought.

Sufficient evidence of rehabilitation may be established by any of the following:

- Production of the person's most recent certified copy of a United States Department of Defense form DD-214 showing the person's honorable discharge, or separation under honorable conditions, from the United States armed forces for military service rendered following conviction for any crime that would otherwise disqualify the person from the public employment sought
- Copy of the local, state or federal release order; and evidence showing that at least one year has elapsed since release from any correctional institution without subsequent conviction of a crime; and evidence showing compliance with all terms and conditions of probation or parole
- Copy of the relevant Department of Corrections discharge order or other documents showing completion of probation or parole supervision

However, a certified copy of a person's United States Department of Defense form DD-214 showing the person's honorable discharge or separation under honorable conditions from the United States armed forces ceases to qualify as competent evidence of sufficient rehabilitation for purposes of this section upon the person's conviction for any gross misdemeanor or felony committed by the person subsequent to the effective date of that honorable discharge or separation from military service.

In addition to the above documentary evidence, the public employer must consider any evidence presented by the applicant regarding:

- Nature and seriousness of the crime(s) for which convicted
- All circumstances relative to the crime or crimes, including mitigating circumstances or social conditions surrounding the commission of the crime(s)
- Age of the person at the time the crime(s) was committed
- Length of time elapsed since the crime(s) was committed
- All other competent evidence of rehabilitation and present fitness presented, including but not limited to letters of reference from people who have been in contact with the applicant since the applicant's release from any correctional institution

Public employers who reject an applicant solely or in part because of the applicant's criminal history are required to provide written notification to the rejected applicant informing the applicant of all of the following:

- Grounds and reasons for the denial or disqualification
- Applicable complaint and grievance procedure as set forth in statute (i.e., the Minnesota Administrative Procedures Act, Minn. Stat. Ch. 14);
- Earliest date the person may reapply for a position of public employment
- All competent evidence of rehabilitation presented will be considered upon reapplication

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 ([EEOC.gov](http://EEOC.gov)). Employers should consider how any conviction(s) would affect the applicant's ability to perform the duties of the job.

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.<sup>9</sup>

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<sup>9</sup> Minn. Stat. § 13.87, subd. 3(f).

## Polygraph/Lie Detector Test

Employers may not give a polygraph, voice stress analysis or any test purporting to test honesty to an applicant or employee, except at an employee's request (Minn. Stat. § 181.75).

## Artificial Intelligence

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Employers should use caution if they use artificial intelligence (AI) in the hiring process. Artificial intelligence is a "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." (15 U.S.C.A. § 9401(3)).

In the hiring process, AI may include résumé scanners that rank applications using certain key words, software that scores applicants' résumés, testing software that provides "job fit" scores for applicants and AI-powered background checks.

Discrimination can inadvertently occur when using AI hiring tools. For example, AI hiring tools may be programmed and trained based on past hiring practices, which may reproduce human or societal biases, potentially resulting in discrimination against a protected class.

Steps employers should take to prevent discrimination when using AI:

- Know the factors the hiring tool considers. This allows the employer to determine whether the factors are job-related.
- Pre-test the hiring tool to see if it produces biased results.
- Consider auditing AI tools on a regular basis. A bias audit is an impartial evaluation that tests the tool's disparate impact on protected classes.

Note: Contracting with an outside vendor for services used in the hiring process does not eliminate the risk to the employer. The employer may still have liability if the vendor is using a tool that discriminates against a protected class.

## Documentation

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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 (Minn. Stat. § 363A.28, subd. 3). Retaining the materials for 18 months helps ensure that the employer has the documents to defend a claim or charge of discrimination should it be brought on the last possible day.

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, Minnesota Statutes Chapter 13.