Equal Employment Opportunity and the Hiring Process

For many dairy farmers the hiring process is infrequent and can be fraught with potential discriminatory practices for the employer. Consider the following example. A Michigan dairy farmer was looking for a herdsperson after the incumbent had left for a position in California. After sifting through a number of applications, he had narrowed the choice to two applicants. One applicant was Hispanic with 5 years of experience. The other applicant was Caucasian with 1 year of experience. Recently the Department of Homeland Security conducted farm audits in the farmer’s region; therefore, he wanted to avoid any potential problems and made a job offer to the Caucasian applicant. When asked by his daughter why he decided to hire the less experienced candidate, he explained that he wanted to be sure that the job candidate would be an American citizen and avoid future turnover in this important position.

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The United States as a country values fair and equal treatment of all individuals in their employment. Multiple legislation and regulations address discrimination in employment decisions. Although most legislation applies to all employment decision, including hiring, training, evaluation, promotion, compensation, discipline, and termination, questions on how to treat everybody fair and equally often come up during the selection process.

While many federal laws protecting equal employment opportunity exempt small businesses, Michigan laws do not. Michigan laws protect religion, race, color, national origin, age, sex, height, weight, and marital status (Section 206 of Public Act 435 of 1976). They also protect disability, if the specific disability is unrelated to the individual’s ability to perform the duties of a particular job or position with or without reasonable accommodation (Section 206 of Public Act 220 of 1976). Whether an applicant is a union member and an applicant’s veteran status also are questions that should have no place in employment decisions.

As a general rule, all questions during the selection process should be relevant to the job to be filled. In an application form such questions include the identification of the applicant (e.g., name, address, and phone number), interests of the applicant (e.g., the job the applicant is applying for), and a summary of the applicant’s background (e.g., education and training, work history, special qualifications and skills). Citizenship and ethnicity are not typically relevant to agricultural jobs and, therefore, need to be avoided on application forms and must not
be taken into consideration when deciding who will receive the job offer. An employer concerned about hiring applicants who will later fail to provide the required documentation for the I-9 form, may include a question in the application form, such as “Are you legally eligible to work in the United States?” It is important to remember that many questions, which must be asked after a job candidate is hired (e.g., marital status), need to be avoided before the job has been offered.

Application forms can be submitted to labor law attorneys for review and, therefore, it is much easier to avoid potentially discriminatory questions on such forms than it is during an interview process. All participants in interview processes must be familiar with the job to be filled and the essential duties of the job, as well as, the relevant qualifications, skills, and experience. By focusing interview questions on these matters and writing down relevant questions before the interview, discriminatory practices can be avoided. In addition, interviewers should take notes during the interview in a neutral language. The best practice is to also train all interviewers which questions not to ask of job applicants. If an applicant brings up any of these topics, such as family and children, disability, or religion, it is best to not dwell on such information and to not ask any follow-up questions. This information also does not need to be included in the interview notes. The author recommends following the general rule to only ask job related questions and avoid all others, even if they legally can be asked in Michigan (e.g., sexual orientation). Also, interview questions should be similar for all job applicants.

A Problematic Decision

The dairy farmer in the initial example made several assumptions, which can be grounds for a discrimination law suit.

1. He took applicants’ ethnicity as an indication of citizenship, respectively of non-citizenship. Foreign looking job applicants may be American citizens, even if they speak with an accent. Caucasian looking applicants may be citizens of another country, e.g., Canada, and need a work authorization.

2. He assumed that an employee has to be a citizen to be legally eligible to work in the United States. There are many work visa types that enable foreigners to legally work in the United States. In particular, permanent legal residents (so called Green Card holders) must be equally considered.

3. He assumed that turnover would be related to citizenship status and/or ethnicity. Even if the farmer had data that showed that certain ethnic groups are more likely to leave a job than others, race, ethnicity, and national origin are protected characteristics which cannot be used in employment decisions. In addition, the author is not familiar with research showing higher turnover based on these characteristics.

The farmer also deprived himself of an experienced employee who may have been able to introduce new technologies and procedures and take on more management responsibility than the individual he decided to hire. The goal of a selection procedure is to hire the best applicant for the job. An applicant’s fit with the farm mission and the existing team can be appropriate selection criteria in addition to skills, experience, and expertise. Discrimination is not only illegal but often times a bad business decision.

In the example, civil penalties for citizenship status or national origin discrimination range from $375 to $3,200 for the first violation and go up subsequently. In addition, “back wages” may have to be paid to the job candidate who was not hired. If a discrimination case goes to trial, the candidate may be awarded substantial damage payments. Lastly, there will be costs for the attorneys and the lost management time.

After hiring a new employee the dairy farm employer needs to make sure that all necessary paperwork is completed. Paperwork includes the new hire form and, in particular, the I-9 form. An agricultural employer checklist for employment related paperwork is available at [http://www.msu.edu/user/bitsch].

Additional Information

Additional information is available at the Michigan Department of Civil Rights at [http://www.michigan.gov/mdcr]. Specifically, a pre-employment inquiry guide with examples of lawful and unlawful inquiries is available at [http://www.michigan.gov/documents/pre-employment_inquiry_guide_13019_7.pdf].

This article serves educational purposes only and does not constitute legal advice.

Contact the author at bitsch@msu.edu or visit her website at [http://www.msu.edu/user/bitsch].
Specific Questions

In many interview situations, the interviewer wants to obtain job related information about a candidate, but is not sure how to avoid a potentially discriminatory wording. It is, therefore, helpful to think about interview questions in advance and make a list of topics to cover, and how to ask them. Here are some examples of legitimate topics, and how they may be asked if they are relevant for the job to fill, and what not to ask.

Ability to speak a foreign language

The interviewer can ask: Which languages do you speak, read or write fluently?

The interviewer should not ask: What is your native language? How did you acquire your language skills?

Ability to perform the essential job duties

The interviewer can ask: Will you be able to perform these duties with or without reasonable accommodation? Are you able to lift 50 lbs regularly? This job involves climbing ladders, how will you be able to perform this? Can you demonstrate how you will perform these duties? A physical can be required only after a job offer has been made.

The interviewer should not ask: Do you have a disability? How severe is your disability? What accommodation will you need to perform these duties? What is your height and weight? Have you ever been injured on your job? Did you ever file a worker’s compensation claim?

Education

The interviewer can ask about academic, vocational, and professional education and schools attended, duration of attendance.

The interviewer should not ask about dates when the education was attained or graduation dates.

Age

The interviewer can ask: Are you 18 years old or older? If you are less than 18 years of age can you provide an age certificate?

The interviewer should not ask: When were you born? When did you graduate from high school or college?

Work schedule and travel requirements

The interviewer can ask: Will you be able to work any day of the week as required? Tell me about your attendance record at your previous jobs. Will you be able to work overtime announced on short notice? Will you be able to work odd hours, e.g., 4:00 a.m. or night shifts? This job requires 50% travel; will you be able to meet this requirement? Will you be able to come to work on time?

The interviewer should not ask: What is your religion? Which religious holidays do you observe? Do you have a disability or illness? Do you have children? What are your childcare arrangements? Do you have a driver’s license (except if that is part of the essential job duties)? Do you own a car?

Membership in organizations

The interviewer can ask: Of which job related organizations are you a member (please exclude organizations which indicate race, color, religion, national origin, or ancestry through their name or character)? If an applicant mentions such organizations, inquire about the job related skills and experience acquired.

The interviewer should not ask: List all organizations, associations, and societies to which you belong.

Arrests

The interviewer can ask: Have you ever been convicted of a crime? Are any felony charges pending against you? Employers may choose to mention that a conviction in itself will not exclude the job applicant from consideration, but will be considered on a case by case basis.

The interviewer should not ask: Have you ever been arrested (except for certain jobs involving children or vulnerable adults; and for law enforcement agencies)?