

LEMONS INTO LEMONADE

How to Strategically Update Job Applications into
Effective Liability Shields

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INTRODUCTION

- Preliminary considerations
- Ban-the-box impact
- Proper salary inquiries
- Proper military service questions
- Abbreviated statute of limitations
- Avoiding non-compete issues
- Avoiding workplace drama
- Other common mistakes on applications

PRELIMINARY APPLICATION CONSIDERATIONS

- When is the application filled out within the hiring cycle?
- What do you really need to know?
- How many application versions do you need?
 - Uniform nationwide v. state specific
 - Job specific v. catch-all application
- Electronic or “paper” application?
 - Note: Uniform Electronic Transactions Act (UETA) applicable for electronically signed applications

BAN THE BOX IMPACT

- Network of varying state and local specific laws
 - **Recommended resource:** [NELP Publication Regularly Updated](#)
- Aspects to BTB:
 - When you can ask about criminal records
 - What criminal records you can rely on and how far back
 - Steps to take if not hiring
 - Explicit exceptions to the law
- **Always include an EEOC compliant disclaimer even if no BTB law applies:**
 - “Answering yes to the above questions will not automatically exclude an applicant from employment, but may be considered in relation to job requirements”

SALARY INQUIRIES

- Network of varying state and local specific laws:
 - Aim to narrow gender wage gap
 - Many passed in 2017 and many more likely in 2018
 - States: NY, PR, CA, DE, MA and OR
 - Cities: NYC, PHIL, SF and Albany County (NY)
- Typically cannot ask:
 - Current salary
 - Past salary
 - Expected salary
- Can use voluntarily disclosed salary info by an employee (except in OR)

SALARY INQUIRIES

- What can you ask?:
 - Sales history
 - Billable hours
 - Sales revenue generated
- NLRA Note: Employees have a right to discuss their wages
- Background Check Note: Request that any compensation history information be excluded from the report where prohibited

MILITARY SERVICE QUESTIONS

- Laws implicated by asking for military service and reason for discharge:
 - ADA
 - Title VII (race & national origin)
 - USERRA
- Fix #1: Add a disclaimer
 - “A less-than-honorable discharge is not an absolute bar to employment, depending on the nature of the job sought. Further, a medical discharge will have no impact on your employment chances unless you are unable to perform the essential functions of the job for which you have applied with or without a reasonable accommodation.”
- Fix #2: Only ask about U.S. Military service
 - “What **U.S.** Branch of Service?”

SHORTENING STATUTE OF LIMITATIONS FOR CLAIMS

- Generally: Clause in application that requires claims against the employer be brought within a certain amount of time or else they are waived
- Example:

I agree that, unless prohibited by state law, that any action, suit, claim or charge against COMPANY or any of its subsidiaries, affiliates, employees or agents arising out of or relating to the application process, employment, or separation from employment, including but not limited to, claims arising under state or federal civil rights statutes, must be brought within 180 days of the event giving rise to the claim or within the limitations period contained in the statute I am suing under, whichever is shorter. To the maximum extent permitted by law, I waive any limitations period to the contrary.

SHORTENING STATUTE OF LIMITATIONS FOR CLAIMS

- Some states do not allow: ID, MS, AL, and KS
- Length must be reasonable (1 year or 180 days)
- Applicability to anti-discrimination laws varies and a reference to the law is advisable
 - Generally yes: Title VII, ADEA
 - Inapplicable: FMLA, FLSA

AVOIDING NON-COMPETE LIABILITY

- ALWAYS ASK:
 - “Have you entered into a non-compete, non-solicit, confidentiality or other agreement that may restrict you in any way from performing duties for the company?”
- Include space for the employee to provide details and require the applicant provide a copy of any such agreements prior to hire
- Especially important for sales, STEM-based positions, and financial positions
- Use common sense in responding to a “no”
- State law impacts whether the applicant’s non-compete is enforceable or necessary
 - Ex: Ohio case law indicates an unsigned non-compete can be enforceable in certain circumstances

AVOIDING WORKPLACE DRAMA

- Two big sources of workplace drama employers can avoid with a job application question:
 - Romance in the workplace
 - Hiring of relatives to subordinate or supervisory positions
- Question:
 - *“Are any of your relatives, any persons living in your household, or persons you are involved in a romantic relationship with, employees or former employees of the company?”*
- Disclaimer needed in states with nepotism laws (e.g., Colorado):
 - *“Your answers to these questions are meant to identify any significant conflicts of interest to the extent permitted by law”*

OTHER COMMON MISTAKES

- Do not ask: “Are you a U.S. citizen?”
 - Instead: “Are you legally authorized to work in the U.S.?”
- Do not ask disability-related questions
 - Instead: “Are you able to perform the essential functions of the job(s) you are applying for with or without a reasonable accommodation?” (also *provide a job description*)
- Check proper EEO disclaimer with all applicable federal, state and local protected characteristics listed
- Check place the employment application acknowledgment on a separate standalone page (especially when you want to use it for background checking purposes)
- Asking for an applicant’s social security number when the number is not yet needed

OTHER COMMON MISTAKES

- Unnecessarily asking for an applicant's social security number
 - **Only ask for the SSN when you have a specifically defined need for it (i.e., checking on an applicant's licensure status)**
- Always include an "at-will" disclaimer to avoid the application ever being considered an employment contract
- Never ask for graduation dates!
- Never ask for a photograph!
- Never ask for someone's "familial" or "marital" status:
 - **NEVER** → "Are you married?"
 - **NEVER** → "Do you have any dependent children? If so, how many?"
 - **NEVER** → "Will you require making childcare arrangements if hired?"

QUESTIONS?



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THANK YOU

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