Employment Law Advisor

Employment Applications in Massachusetts

July 01, 2012

What may be asked in an employment application is heavily regulated.

- *Do you want to learn about how to comply with these laws?*
- *Do you want to learn how employers can use employment applications to establish and protect their legal rights?*

If so, read on…

Some employers view employment applications as simple, standard forms used to obtain only basic background information from job candidates. Others see them as a tool to obtain more extensive information used to evaluate and potentially screen out prospective employees. Massachusetts employers need to know that there are some very specific requirements regarding both what must be contained in application forms and what is prohibited. Further, we believe employers also should use employment applications to establish and protect employer rights.

What's Required?

Statements Concerning Volunteer Work and Lie Detectors

Applications normally contain a section in which applicants are asked to provide specific information concerning their prior work history. Massachusetts law requires that employers include a statement advising applicants that they may include in their work history "any verified work performed on a volunteer basis."

It is unlawful to require that applicants take a lie detector test as a condition of employment. Though perhaps relatively few employers would impose such a condition, Massachusetts law requires that all applications contain the following: "It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability."

What's Prohibited?

Inquiries Regarding Criminal History

In its 2010 overhaul of the Criminal Offender Record Information ("CORI") law, Massachusetts made it unlawful for employers to request on an "initial written application form" **any information about an applicant's criminal history.** As a result, employers no longer can include questions on job application forms requiring applicants to disclose whether they have ever been convicted of a felony or have been convicted of a misdemeanor within the last five years, or to provide specific information concerning such convictions.

Note that the 2010 CORI reform law does **not** prohibit employers from asking appropriate criminal history questions **during an interview after an initial application form is submitted**.

Still, Massachusetts law prohibits employers from asking interviewees information concerning:

- an arrest, detention, or disposition regarding any violation of law in which no conviction resulted;
- a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace; or
- any conviction of a misdemeanor where the date of such conviction or the completion of any jail time, whichever is later, occurred more than five years prior to the date of application for employment (unless the person has been convicted of another offense within five years prior to the application).

Inquiries Revealing a Protected Status
Massachusetts law prohibits discrimination in hiring based upon an applicant's age, race, color, religious creed, national origin, sex, sexual orientation, gender identity, genetic information, ancestry, or disability. According to the Massachusetts Commission Against Discrimination (MCAD), employers may not make any inquiry, directly or indirectly, regarding any such "protected class status," including pre-employment inquiries "the response to which would likely disclose the applicant's protected class status." Thus, the MCAD takes the position that employers should not ask questions such as: "Where were you born? What is your primary language? Are you married? What is your maiden name? What is your date of birth?" As to age, the MCAD states that employers should not include questions about education or work experience designed to determine an applicant's age, such as requesting dates of graduation from high school or college.

PRACTICAL TIP: Before including a question in an application, an employer should ask itself: Could this question have a disproportionate effect in screening out minorities, females or older applicants? Is this information necessary to judge applicants' qualifications or competence for the jobs to be filled? Are there alternate non-discriminatory ways to obtain the necessary information?

Health and Disability-related Questions
Both federal law and Massachusetts law prohibit employers from seeking information concerning whether an applicant is disabled or was disabled in the past, or about the nature or severity of any disability. The MCAD maintains that questions concerning an applicant's history of absenteeism or illnesses are unlawful because they are likely to elicit information about a potential disability. Massachusetts law also expressly prohibits employers from including in applications any questions regarding admission of an applicant to a mental health institution.

Inquiries Regarding Workers' Compensation History
The Massachusetts workers' compensation statute, M.G.L. c. 152, prohibits employers from refusing to hire someone because he/she has filed a worker's compensation claim or testified or cooperated in any workers' compensation proceeding. The MCAD explicitly states that employers cannot ask questions regarding applicants' workers' compensation history because the MCAD views such inquiries as designed to obtain information concerning whether the applicant is or was disabled. (Of course, questioning an applicant about any workers' compensation history may also be viewed as evidence of the employer's intent to discriminate on that basis in violation of M.G.L. c. 152.)

What's Recommended
EOE Statements
Most employers call themselves "equal opportunity employers." We recommend that employers include in their application forms the following statement: "We are an equal opportunity employer and do not unlawfully discriminate against any applicant on the basis of race, color,

religion, sex, national origin, age, disability, sexual orientation, gender identity, genetic information, or any other class protected by federal or state law." We suggest that employers place this statement prominently (e.g., at the top) in the application under the heading "An Equal Opportunity Employer." Although the statement is really no more than an affirmation that the employer does not violate the discrimination laws, its prominent placement in an employment application sends the message that the employer takes its obligations seriously.

Releases for Contacting References
Employers often (and should) perform reference checks on applicants before hiring. We recommend that employers include language in applications that expressly authorizes the employer to contact the references provided and, further, that releases the employer from any liability arising from such contacts. Employers should include a separate line for the applicant to sign, indicating the applicant's agreement and understanding that the release prevents him/her from instituting any legal claim based on information provided by the reference.

"At Will" Statements
We recommend that employers use applications to have applicants acknowledge their understanding and agreement that, if hired, they will be employed "at will," meaning that employment is for no definite period and may be terminated at any time with or without notice or cause. The "at will" statement should state that nothing in the employer's other prior written or oral communications shall constitute an express or implied contract of continued employment, and that no future statements may change the "at will" nature of the person's employment unless in writing and signed by the president of the company (or other designated employer representative). Consider placing the statement in prominent type near the end of the application form and above where the applicant is asked to sign and date the application.

Properly prepared "at will" statements make it difficult for an employee to later claim that he or she was promised employment for a definite period or could only be discharged "for cause."

Certifications Concerning the Truthfulness of the Information Supplied
We recommend that employers also include a certification by the applicant that the facts contained in the application are true and complete to the best of the applicant's knowledge and that the applicant understands that, if hired, any falsified, omitted, or misrepresented statements on the application may lead to discharge. Such certifications are usually placed at the end of the application form and above where the applicant is asked to sign and date the application. Many employee lawsuits are significantly weakened when it is discovered that employees provided false or misleading information despite certifying to the contrary in their employment applications.

Require Employees to Complete and Sign the Application Forms
Many applicants are hired based on resumes submitted, not applications completed. Often applications are not completed at all, or are partially completed after the person has been hired, sometimes with the person's resume attached. We recommend that all applicants be required to complete and sign the employer's application form. Information supplied through a resume submitted by the applicant (such as the applicant's employment history) can be incorporated into the application by reference, but the submission of a resume is not a substitute for the completion and signing of an application.

As evident from the above discussion, a good employment application will establish (and have applicants acknowledge) legal rights and obligations that may become very important later in the employment relationship.

For more information, please contact a member of our Employment Law Group.