

Whether paper or electronic, make sure job applications are legal

The days of the paper job application may be fading away, but whatever takes the place of paper applications better measure up the same way. Specifically, employers have to understand that online applications can hold more legal land mines than hard copy applications ever did.

Because online applications are so convenient, you may be tempted to view them as informal and inexpensive ways to gather applicant information. (Some employers have even quit using applications altogether, instead relying solely on résumés. But that practice carries its own risks. Remember, employers write applications to get information from candidates. Candidates write résumés to impress employers.)

Employers need to know the truth about job applicants because so much is at stake. Employers may face negligent hiring lawsuits if they fail to unearth signs of a problem employee. Job applications, paper or virtual, allow employers

to spot gaps in employment histories, require candidates to explain their job histories and put applicants on record regarding past legal troubles.

Asking about criminal records

In New York, an employment application may not ask whether an applicant has ever been arrested. Employers *may* ask if an applicant has been *convicted* of a crime. The common application question is, "Have you ever been convicted of a crime? If yes, give details."

Similarly, employers may conduct investigations to determine what convictions, if any, lurk in an applicant's past. New York state law does not limit employer inquiries concerning convictions. Employers may ask about misdemeanors or felonies and go back indefinitely.

A past conviction does not necessarily disqualify an applicant. To disqualify an applicant, the conviction must be related to the required duties of the job or pose an unreasonable risk to people or property. So employers should not

hire embezzlers as bank tellers, or child molesters as nursery school teachers. In addition, New York's ex-offender law requires balancing various factors. For example, employers must show they considered the nature of the offense, the length of time since the conviction and the nature of the job.

If you find out an employee lied on an employment application, you may fire the employee.

Why applications are essential

Require all employees, regardless of position or executive status, to complete an employment application either before or right after being hired.

Applications make much more reliable evidence should you find yourself in court. It is far easier to prove that applicants misrepresented themselves on an application than that they did so on a résumé or during an interview. An application will require, for example, that an applicant disclose the reasons for leaving prior employment, require certification that all the information disclosed is true and state that falsification will result in termination.

Before terminating an employee for including falsehoods on an application, verify that the misrepresentation or falsification was material—that is, it concerned something such as educational degrees, prior work history or conviction records, for example. Note that the misrepresentation must have been in response to a lawful question.

You must document the entire process that led up to the termination decision, including the steps you took to verify the contradictory information, as well as the employee's explanation.

Be consistent in the way you treat applicants and employees when you find discrepancies on their applications. You are inviting a lawsuit if you treat one applicant differently from another. If the person getting the short end of the stick is a member of a protected class, the employer can expect to spend a lot of time in court over the next few years.

Job application do's and don'ts

What to include:

- 1. General personal data**, including the applicant's name, address, phone number and Social Security number.
- 2. Education and professional experience**, including schools attended and degrees earned, employment history and names of supervisors, military service and dates.
- 3. Professional references.**
- 4. An "administrative use only" section**, where you can record test scores or other interview-related information for internal use.
- 5. A statement for the applicant to sign** affirming your right to verify information received (including a release to perform a background check) and acknowledging your intent to fire employees who provide false information. It should state that the application is not a contract.

What to leave out:

- 1. Date of birth.** In most cases, age is not a bona fide occupational qualification (BFOQ).
- 2. Citizenship or national origin.** Immigration laws say you can ask for such information only after you've made a hiring decision. You may inform candidates that they'll need proof of identity and work eligibility if they're offered a job.
- 3. Applicants' height or weight.** Unless height or weight is a BFOQ for the job, those questions are illegal because they can show a disparate impact on women and minorities. Also, don't ask for a photo along with the application.
- 4. Church or social organization memberships.** Courts could see asking for this information as an attempt to cull information about an applicant's religion, race or marital status—none of which are job-related. It's OK to ask applicants to list job-related organizations.