

# School District of Hortonville

Title: Employment & Recruitment of Professional Personnel      Date Adopted: 2/11/85      Policy No. 4003  
Date Revised: 6/23/97      Page 1 of 7

## POLICY STATEMENT:

It is the policy of the School District of Hortonville to employ individuals for Board approved positions whose qualifications best match the job opening requirements, are willing to continually improve their teaching skills and rapport with students and whose employment would fall within the financial ability of the School District of Hortonville without consideration as to age, sex, race, national origin, political or religious beliefs.

Applications may be sought through current substitute lists, state colleges and universities that train teachers, local newspapers, teacher placement agencies, teacher recruiting fairs and the Department of Public Instruction.

No otherwise qualified person shall be excluded from employment, be denied the benefits of employment or otherwise be subject to discrimination in employment in any manner on the basis of age, race, creed, pregnancy, religion, color, sex, national origin or ancestry, handicap, physical condition, development disability, arrest or conviction record, sexual orientation, marital status or military participation. All employees are expected to support our goals and programmatic activities relating to nondiscrimination in employment.

## RATIONALE:

SCOPE: District-wide

RESPONSIBILITY: The District Administrator

## IMPLEMENTATION:

1. Candidates desiring employment within the school district must provide a written application for employment per Board approved form. Such application shall include placement credentials if available, letters of reference and any information appropriate to make an employment decision.  
Each candidate will be required to have filled in the personal statement on the last page of the application form in long-hand. This is to determine penmanship, spelling and knowledge of sentence structure. Applications will be kept on file for a period of at least one year.
2. When a certified vacancy occurs, candidates to be considered will be screened and interviewed by at least one member of the administrative staff. Whenever possible, at least three candidates shall be interviewed.
3. Two or more references of the candidate and the current or previous employer will be contacted about the personal characteristics and other information about the candidate.
4. All persons proposed to the Board of Education for employment shall have the recommendation of the District Administrator.

President

*Willard Griesbach*

Date *Aug 25, 1997*

Clerk

*Marilee Stroskin*

Date *Aug 25, 1997*

5. The Board of Education recognizes that emergency situations will arise wherein it is imperative that personnel be hired prior to being able to obtain final approval of the Board of Education. In such instances, when the interviewing member of the administrative staff, the District Administrator and the Board President concur with their recommendation, the Board will allow the District Administrator to offer a contract to the potential candidate with the understanding that the District Administrator will justify the action at the first opportunity to the Board to obtain its approval.
6. A written contract shall be on file for any certified person who has worked for the school district for at least one (1) semester. All contracts shall be official when approved by the Board of Education.
7. The following guidelines for interviewing candidates shall be considered before interviewing candidates:

#### **WHAT YOU CAN AND CANNOT ASK DURING THE HIRING PROCESS**

Employers have become increasingly aware of the legal implications of employment decisions.

The threshold issues originate with recruitment and hiring procedures. Like all other employment decisions, the recruitment and hiring procedures used by employers can result in numerous legal claims. Both state and federal laws prohibit discrimination in the hiring process. In order to protect job applicants, numerous restrictions have been placed on the areas into which employers can inquire. The most recent set of prohibitions arise out of the Americans with Disabilities Act (ADA) which forbids certain inquiries regarding an individual's disability. The advent of these new restrictions provides a good opportunity for employers to review their employment applications and hiring practices to ensure that they are not opening the door for potential discrimination claims in the future.

#### **Employment Applications**

##### **(a) General Considerations**

The employment application is one of the most heavily regulated employment documents.

In the interest of deterring unlawful discrimination during the hiring process, state and federal regulations prohibit a wide variety of employer inquiries. Employers must be cautious if using preprinted application forms. These forms are often outdated, do not comply with the current legal requirements and solicit inadequate or improper information. Such application forms may expose the employer to liability and are probably not adequate to meet the employer's needs.

A well-designed employment application provides a good balance between the employer's desire to make adequate inquiries to screen out undesirable applicants and the employers need to minimize the risk of discrimination claims. Employers should draft application forms which focus on the relevant educational and employment experiences needed for the position. The application should seek information which will help identify the most desirable and qualified applicant. Applications should contain only questions which are job-related. If other questions are asked, there is a presumption that you are going to use this information. Such questions can provide evidence in proving charges of discrimination and may also be found to have the unlawful effect of discouraging minority groups from applying. Thus, if the answer to a question could be used unlawfully and the information to be obtained is not relevant to the qualifications of the position being filled, in almost all circumstances, the question should not be asked.

**(b) Problematic Inquiries**

The employment application, as a general rule, should not seek information regarding protected characteristics. The Wisconsin Fair Employment Act (WFEA) prohibits unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, membership in the national guard, state defense force or any other reserve component of the military forces of the United States or this state or use or nonuse of lawful products off the employer's premises during nonworking hours. Similarly, discrimination against teachers and administrative personnel on the basis of sex, race, nationality, handicap or religious or political affiliation is prohibited. In order to avoid potential liability, inquiries should not be made in the following areas:

**Age** A person forty years of age or older is considered a member of a protected class. You should not ask for an applicant's birth date on the employment application or during an interview. In addition, it would not be advisable to seek dates of school attendance and graduation since such information is not relevant to the job qualifications and arguably could be used to determine a person's age.

**Sex** Discrimination in employment on the basis of sex is prohibited unless sex is a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business. Since there are virtually no jobs which can only be performed by one sex or the other, any reference to sex should be eliminated.

**Marital Status** Marital status is defined as the state of being married, single, divorced, separated or widowed. Applications should delete any reference to Mr., Mrs. or Miss. This information is not relevant, and is simply another way of asking an applicant's sex or marital status. An employer should not inquire as to the name of a spouse or spouse's work since such a question simply asks for marital status. It is also improper to ask for a woman's maiden name. Such an inquiry provides no useful information as to an individual's job qualifications and can be used as an indication of marital status, religion or national origin. In order to check references, an employer may ask if a person has used a different name in prior employment but caution should be taken so that no assumptions are made by interviewers concerning the reason for the name change.

**Disability** Employers should eliminate all questions on application forms concerning past medical and accident history, physical abilities or limitations, and history of worker's compensation claims. You should also not inquire about lifestyle issues such as smoking habits since such inquiries may lead to an inference of concern for higher insurance costs. While the employer can ask about previous work attendance records, no reference can be made to illness or disability. An employer may ask about an applicant's ability to perform the essential functions of the job with or without reasonable accommodation. However, if this question is asked, it must be asked of all applicants. An employer cannot request or require a pre-offer medical examination. A job offer may be conditioned on the results of a medical examination or inquiry, but only if the examination or inquiry is required for all applicants. Further, if the medical examinations or inquiries are used to screen out an employee with a disability, the exclusionary criteria must be job-related and consistent with the employer's business needs. Except in first class cities, as a condition of employment, a physical examination including a chest X-ray or tuberculin test is required of every school district employee who has contact with children or prepares food for children. An exception may be allowed in those instances where the employee files an affidavit setting forth that he or she depends exclusively upon prayer or spiritual means for healing.

**Arrest Records** In almost all circumstances, the consideration of arrest records is unlawful, because an arrest is no indication of guilt and, historically, minorities have suffered proportionately more arrests. An employer may and should, however, inquire as to any pending charges. An employer can consider a pending charge, but only if it is related to the job. The employer should not reject the applicant outright because of a pending arrest, but rather should delay any decision while the arrest is still pending if the charges relate to the circumstances of the job, or request that the applicant reapply after the matter has been resolved.

**Citizenship** By asking an individual in which country he or she is a citizen, it is possible to discriminate on the basis of a particular national origin and, thus, this type of question should be eliminated. It is appropriate, however, to inquire if the applicant is legally able to be employed in the United States.'

**Physical Characteristics** Unless height or weight is directly related to the job, employers should not ask questions regarding these matters since such questions may adversely affect women and certain nationalities. Similarly, an employer should not ask questions regarding eye color or hair color since it is not related to job performance and may serve to indicate a person's race, religion or national origin.

**Educational Background** Any inquiry into an applicant's educational background should be clearly job related. Consideration of formal education in making hiring decisions can be unlawful where there is a disparate impact on some groups such as minorities and the employer is unable to show that the particular degree or education is necessary for the performance of the job.

**Family Status** Employers should also avoid any question regarding an employee's children or arrangements to be made for younger children as a way to explore what the employer believes is a common source of absenteeism and tardiness. Such questions tend to adversely impact upon women. Moreover, to ask an applicant if she is pregnant or planning on having children greatly increases the likelihood of a discrimination charge even if a decision not to hire was made on some other basis. The Pregnancy Discrimination Act prohibits the refusal to hire an individual based upon pregnancy, childbirth or related medical conditions and unequal treatment in compensation, terms, conditions or privileges of employment.

**Availability for Saturday and Sunday Work** This question may serve to discourage applications from persons of certain religious groups which prohibit their adherents from working on Saturday or Sunday. In situations where it may be necessary to know whether an applicant can work on these days, an employer should indicate that a reasonable effort will be made to accommodate the religious needs of employees.

**Friends or Relatives Working for Us** This question may reflect a preference for friends or relatives of present employees which would be unlawful if it had the effect of reducing employment opportunities for women or minorities. In addition, such a question may also suggest that the employer prefers not to employ a married couple. Current interpretations of marital status discrimination prohibit the refusal to hire someone because that person's spouse works for the same employer. It is proper, however, to refuse to employ an individual if he/she would directly supervise or be directly supervised by his/her spouse.

**Miscellaneous** Other areas in which an employer should not inquire include the applicant's credit record and any garnishment record. Because minorities are poorer on average than whites, consideration of an applicant's credit record has an adverse effect on minorities and is unlawful unless such an inquiry is required by considerations of business necessity.

Similarly, due to findings that minorities suffer wage garnishments substantially more often than do whites and that wage garnishments do not affect a worker's ability to perform his or her work effectively, inquiry should not be made into this matter. In fact, employers are prohibited from discharging employees due to garnishment actions. Therefore, prior garnishment actions should not form the basis for refusal to hire. While an employer may inquire if a fidelity bond was ever refused to an applicant, such a question should only be asked when the position being filled requires bonding. Even in such situations, refusal to hire based on this factor alone is not advisable since a fidelity bond may be denied for totally arbitrary and discriminatory reasons which the individual does not have an adequate opportunity to know of or challenge. Rather, the employer should look at the applicant's current bondability.

It should be noted that this list of prohibited areas of inquiry is concerned only with the potential unlawful use of information. Different considerations are involved when the purpose of seeking information is to carry out an affirmative action program. In addition, if some of the information is needed for post-employment purposes, it can be obtained after an individual has been selected for employment.

**(c) Recommended Inquiries**

The application must solicit appropriate information which will enable the employer to select the most qualified applicant. The application should also seek sufficient information about an applicant to reduce the possibility of liability for negligent hiring. In order to properly defend against such claims, it is necessary that the employer have obtained or attempted to obtain, the proper information at the time of the employee's application. Inquiries should be made in the following areas:

**Conviction Record** It is permissible and in fact advisable to make an inquiry regarding convictions. WFEA prohibits employment decisions based on conviction records unless the conviction substantially relates to the circumstances of a job. For example, the Court of Appeals held it was not discriminatory to refuse to hire an individual with a conviction for shoplifting because the offense of shoplifting was substantially related to the position of a customer service representative for a power company which involved going on customers' premises at times when customers were not there presenting temptations and opportunities similar to those present in his shoplifting conviction. A job application should specifically state that a criminal record does not constitute an automatic bar from employment but only will be considered as it relates to the job.

**Pending Charges** As noted previously, an employer may inquire as to pending criminal charges. If any pending criminal charges relate to the position to be filled, the employer should put on hold any decision with respect to hiring such an employee until such charges have been resolved, or conduct its own investigation into the conduct of which the applicant is accused. A refusal to hire an applicant with a pending charge for false representation on medical assistance claims was found to be nondiscriminatory in *McVicker v. Milwaukee County*. It was held that the charges were substantially related to the children's probation officer position sought by the applicant because those circumstances suggested that she would not convey to youthful offenders the necessity of reforming their conduct.

**Prior Employment** An employer should always request the reasons that the employee left his or her previous jobs. The employer should discover whether the employee was discharged or forced to resign. It would be advisable to ask prior employers if the applicant would be rehired.

**Qualifications** An applicant should be questioned about his/her skills, abilities and work habits, and why he/she is well-suited for the position. An employer should also ask why the individual is interested in the position.

**References** An employer should ask for the name of an individual the applicant has worked for recently. Workplace references rather than personal references are more important in obtaining job related information.

**Declaration** A statement should appear above the applicant's signature attesting to the truth and completeness of the information along with an acknowledgment that false or misleading statements are grounds for discharge. Misrepresentations made on a job application can preclude any relief to an employee who makes a claim of improper discharge against the employer. Courts have held that employers can use after-acquired evidence of an employee's misconduct, such as misrepresentations on a job application even though the employer neither knew of or relied upon the misrepresentation in making an employment decision, to limit the employee's right to relief. All that must be shown by the employer is that it would have fired or not hired the employee had it known of such evidence at the time the adverse employment decision was made.

In summary, applications should elicit the information necessary to determine an individual's qualifications for the position while avoiding unlawful inquiries. All applications should contain a declaration which provides that the employee certifies that the answers are true and complete, and that any misrepresentation or omission of material facts can result in termination of employment. Such a declaration provides the employer some protection in the event that inaccuracies are discovered in the future.

#### **Interviews**

The interviewing process may also create potential discrimination charges. The same restrictions that apply for employment applications hold true for interviewer statements, performance evaluations, written recommendations about candidates for positions, offer and rejection communications. All interviewers should be trained to avoid discriminatory questions and remarks. The interview should remain focused on job related information, and any employment recommendations and decisions should be based on such qualifications as education, academic and personal achievement, job related skills, work experience, attitudes toward work and co-workers, and generally accepted job related personal habits such as timeliness, courtesy, responsibility, discipline, etc. A standard set of questions should be asked of each candidate. This minimizes the chance of discriminatory questions or comments and it provides valuable comparative data because each applicant responds to the same basic questions. The documentation of the interview and its results should be fact-oriented. The personal opinions of the interviewer should not be placed in written form because this type of documentation would be available in discovery to a plaintiff who has made a claim of discriminatory refusal to hire.

#### **Follow-up on the Applicant**

Asking the applicant the necessary information is not alone sufficient. The employer should take steps to confirm the information provided. Employers should contact previous employers and attempt to verify the trustworthiness and honesty of the applicant as well as to determine if the applicant has any criminal or improper propensities. Employers should inquire as to any gaps in employment. It may also be advisable for the employer to do a criminal background check. Such a check can confirm the information which the applicant acknowledged on the application as well as determine if the applicant has been truthful. All references should be checked. When discussing an applicant with former employers, it is

beneficial to have developed a set of questions relating to skills, abilities and work habits of the applicant. The problem arising out of employer references, however, is that fewer employers are willing to give any subjective information about former employees due to the fear of defamation claims. The employer may want to obtain an authorization from the applicant for background checks such as records pertaining to criminal convictions, former employers and education, and a release of liability for the same. Finally, employers may also want to adopt and implement pre-employment drug testing procedures. Such testing should be done pursuant to a written policy. The written policy should articulate the need for such testing and should indicate that the information obtained will be kept confidential and only released with the express consent of the applicant. The testing requirement should be disclosed to applicants at the time of application and should be required of all applicants for a position. In addition, to avoid any possibility of discrimination claims, drug testing should be instituted on a post-offer basis.

#### Conclusion

The increasing regulations on pre-employment practices are a source for potential liability on the part of employers. Due to the numerous restrictions on application and interview inquiries, all employers should carefully review their current employment applications and hiring processes to ensure they do not violate either federal or state law. Those individuals involved in the interviewing of applicants must be properly trained with regard to those matters which may subject the employer to liability. Employers should also make sure that an applicant's history has been properly investigated in order to provide a defense to any negligent hire claim. (Copied from Legal Notes, March, 1994)

#### **LEGAL REFERENCES:**

1. Wis. Stat. 111.321
2. Wis. Stat. 118.195, 118.20
3. 29 U.S.C. 631(a); Wis. Stat. 111.33, 118.20.
4. Wis. Stat. I 11.36(2).
5. Wis. Stat. 111.32(12).
6. 42 U.S.C. 12112(c)(23)(A); 29 C.F.R. 1630.13(a); Appendix 1630.13(a).
7. 29 C.F.R. 1630.14(a); Appendix 1630.14(a).
8. 42 U.S.C. 12112(c)(3); 29 C.F.R. 1630.14(b).
9. 29 C.F.R. 1630.14(b)(3).
10. Wis. tStat. 118.25.
11. Wis. Stat. 111.335(1)(a).
12. Wis. Stat. 111.335(1)(b).
13. 8 U.S.C. 1324A.
14. Wis. Stat. 111.36(1)(c).
15. 42 U.S.C. 2000c.
16. Wis. Stat. I I I.337(1).
17. Wis. Stat. 111.345.
18. Wis. Stat. 812.235.
19. Wis. Stat. 11.335(1)(c)2.
20. Wis. Stat. 111.3355(1)(c).
21. Halverson v. LIRC and Northern States Power Comnanv, (Ct. App. Dist. III, unpublished, 8-9-88).
22. LIRC (6-28-83).
23. Washington v. Lake Countv. Illinois, 969 F.2d 250 (7th Cir. 1992).