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Andrew A. Esposito is a Shareholder and Account Manager. Drew advises clients in human resource management, labor relations, contract negotiations, regulatory compliance, discipline, and policy development. He regularly conducts training on a variety of human resource and labor relations issues such as social media and technology in the workplace, supervisory principles and practices, performance evaluations, FLSA, FMLA, and discriminatory harassment.

Drew joined Clemans Nelson in 2011 after working for two of the most preeminent law firms in Cleveland. He received his J.D. from Cleveland-Marshall College of Law and his B.S. from Ohio University in Political Science and Biology.

HOUSE BILL 56

- What is House Bill 56?
  - House Bill 56 is Ohio’s “ban the box”
  - Prohibits Public Employers from inquiring about criminal convictions on the job application
- So now I can’t ask applicants about criminal convictions?
  - WRONG. The inquiry is only banned from the job application itself
  - Prohibits Public Employers from inquiring about criminal convictions on the job application
**HOUSE BILL 56**

- Can my application notify applicants if State or Federal law disqualifies persons with certain convictions from employment?
  - Yes.

- Can I refuse to hire persons with convictions if there is no express State or Federal law disqualifying persons with convictions from employment in a position?
  - Maybe. The EEOC does not have the authority to prohibit employers from obtaining or using arrest or conviction records. The EEOC simply seeks to ensure that such information is not used in a discriminatory way. See EEOC 2012 Enforcement Guidelines.

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**EEOC’s 2012 Enforcement Guidelines**

- Issued April 25, 2015
- Excluding individuals from jobs based on criminal records were shown to have a disparate impact on race.
- Result: Employers must show that the excluding an applicant from employment based on a conviction or arrest is "job related and consistent with business necessity."
  - Green v. Missouri Pacific Railroad
    - To show a business necessity, the screening process must consider three factors: 1) The nature/gravity of the crime, 2) The time elapsed, and 3) The nature of the position sought.
  - Employers must also provide an opportunity for "individualized assessment."

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**EEOC’s 2012 Enforcement Guidelines**

- The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including "have you ever been convicted of a crime?" If the applicant answers "yes," the online application process automatically terminates, and the applicant sees a screen that simply says "Thank you for your interest. We cannot continue to process your application at this time." The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work to delivery to management positions.
Leo, an African-American man, has worked successfully at PR Agency as an account executive for three (3) years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The new owners, who are highly respected in the industry, pride themselves on employing only the “best of the best” for every position. The owners assert that a quality workforce is a key driver of profitability. Twenty (20) years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. At PR Agency, all of Leo’s supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, once the new ownership of PR Agency learns about Leo’s conviction record through a background check, it terminates his employment.


INTERVIEWING

1. Name
   - Name Inquiry into any title which indicates race, color, religion, sex, national origin, handicap, age, military status, or ancestry.

2. Address
   - Inquire into place and length of current address.

3. Age
   - Any inquiry limited to establishing that applicants meet any minimum requirements that may be established by law.
     - A. Requiring birth certificates or baptismal record before hiring.
     - B. Any other inquiry which may reveal whether the applicant is at least 40 years of age.

4. Birthplace or National Origin
   - A. Any inquiry into place of birth.
   - B. Any inquiry into place of birth of parents, grandparents, or spouse.

5. Race or Color
   - For applicant flow data.

6. Sex
   - For applicant flow data.
## INTERVIEWING

### INQUIRIES BEFORE HIRING

<table>
<thead>
<tr>
<th>Lawful</th>
<th>Unlawful</th>
</tr>
</thead>
</table>
| **7. Religion** | A. Any inquiry which would indicate or identify religious denomination or custom.  
B. Applicant may not be asked any religious identity or preference of the employee.  
C. Request pastor’s recommendation or reference. |
| **8. Disability** | Any inquiry concerning need for accommodation (before conditional selection).  
Any inquiry regarding disability or medical conditions, workers compensation filings, etc. |
| **9. Citizenship** | A. Any inquiry which would reveal the nationality or religious affiliation of a school.  
B. Inquiry as to what mother tongue is or how foreign language ability was acquired. |
| **10. Photographs** | May be required after hiring for identification purposes.  
Required photographs before hiring. |
| **11. Arrests and Convictions** | Any inquiry which would reveal arrests without convictions. |
| **13. Relatives** | Inquiry into name, relationships, and address of person to be notified in case of emergency.  
Any inquiry about a relative which would be unlawful if made about the applicant. |
| **14. Organizations** | Inquiry into organization memberships and officers held, including any organization, the name or character of which indicates the race, color, religion, sex, national origin, disability, age, or ancestry of its members. |
| **15. Military Status** | For applicant flow data.  
In Ohio, any inquiry into military service past or present is prohibited.  
Military status is now a protected class similar to race, sex, and age. |
INTERVIEWING

**INQUIRIES BEFORE HIRING**

<table>
<thead>
<tr>
<th>CAPITAL</th>
<th>UNLAWFUL</th>
</tr>
</thead>
<tbody>
<tr>
<td>16. Work Schedule</td>
<td>Inquiry into willingness to work required work schedule.</td>
</tr>
<tr>
<td>17. Other</td>
<td>Any question required to reveal qualifications for the job applied for.</td>
</tr>
<tr>
<td>18. References</td>
<td>General personal and work references not relating to race, color, religion, sex, national origin, handicap, age, military status, or ancestry.</td>
</tr>
</tbody>
</table>

HOW TO SUCCEED

- **Preparation.**
  - Create a written list of questions that you will ask ALL applicants.
  - Make sure that the job description is up-to-date and that all of the questions asked relate to the essential functions of the job.
  - Create a system for recording the results of the interviews.
  - Review resumes closely
    - Are there gaps in employment?
    - Are there jobs that ended within one year of hire?
    - Exaggerations

INTERVIEW FORMAT

- **Level 1 Questions:**
  - Questions asked to all applicants.
- **Level 2 Questions:**
  - “Behavioral” interview questions
- **Level 3 Questions:**
  - Questions specific to each applicant
THE ADA

- Medical Exams
  - Post offer, pre-employment
- Can you ask about the applicant’s ability to perform the essential functions of the job without violating ADA?
  - Yes. You can ask an applicant if they can perform the essential functions of the job with or without an accommodation.
- Provide job description

REFERENCE CHECKS

- Commandment 1: Employers SHALL require applicants sign a written release when seeking references from individuals.
- Commandment 2: Employers SHALL use caution when providing references to requesting parties.
  - Why?
  - Defamation of character. However O.R.C. 4113.71

SOCIAL MEDIA

- Can we use it?
  - Yes.
- What risks come with using social media for interviews?
  - Invasion of privacy.
  - Retaliation. Jarzynka v. Advantage Health Physician Network
  - Stored communications act. Piotrka v. Hollarus Restaurant Group
**Case Studies**

• **EEOC v. Abercrombie and Fitch, 135 S. Ct. 2028 (2015)**
  - **Hijab Discrimination.** Employer had a "look policy" prohibiting any type of headware. The case stemmed from the company’s decision to reject a job applicant whose headscarf, which she wore in observance of her Muslim religious beliefs, was deemed to violate the company’s dress code.
  - The Supreme Court found that "an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed." 135 S. Ct. 2033. The Court then declared that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions." 135 S. Ct. 2033. In an 8-1 vote, the Supreme Court reversed the Appellate Court decision and remanded the case back to the 10th Circuit for further proceedings. The parties subsequently settled out of court.

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• **Barbano v. Madison County, 922 F.2d 139**
  - **Can panel interviews protect against discrimination claims?**
  - **Discriminatory questions by one member can taint the entire process!**
  - Plaintiff alleged she was rejected from employment due to her sex. Plaintiff was interviewed by a six member panel. Prior to entering the interview room, plaintiff heard someone say "here are copies of the next resume," followed by "oh, another woman." One member asked plaintiff her plans for having a family and whether her husband would object to her transporting men. The same member stated that he did not want to hire a woman who would get pregnant and quit.

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• **EEOC v. Service Temps, Inc. d/b/a Smith Personnel Solutions**
  - The EEOC alleged that Service Temps refused to hire Jacquelyn Moncada for a stock clerk position, despite her qualifications and experience, upon learning that Moncada is deaf. Through a sign language interpreter, Moncada attempted to explain to the company that she was fully capable of performing the job and that she had several years of stock clerk experience. The company refused to conduct an interview or consider Moncada for the position. A Service Temps manager explicitly told Moncada that she would not be hired because she could not hear.
Case Studies

- EEOC v. High Speed Enterprise, Inc. d/b/a Subway (D.Ariz. 2011)
- “You’re pregnant. We can’t hire you.”

Exit Interviews

- Do you conduct Exit Interviews?
- Has your agency improved because of Exit Interviews?
- A survey of 6900 HR Executives answered this question:
  - Thirteen (13) said “Yes” exit interviews helped their organization.

Exit Interviews

- Why do Exit Surveys Fail?
  - Too long
  - No Truth
  - We accept “better opportunity”
  - No accountability
  - Autopsies but not as effective
EXIT INTERVIEWS

• What is the purpose?
  • To learn where the employer can improve itself;
  • To make sure employees leave feeling good about their service; and
  • In some cases, to encourage the employee to stay under new circumstances

EXIT INTERVIEWS

• Exit Interview Practices
  • The Employer should have a formal policy regarding exit interviewing
  • Exit interview should be reserved for voluntary separations, because issues raised by layoffs and terminations will require a special approach
  • Exit interviews should be extended to all departing employees – not just key performers or long-timers

EXIT INTERVIEWS

• Voluntary or Mandatory?
  • Exit interviews should be required as a formal part of the out-processing.
• Who Should Interview?
  • A neutral manager or third party who has good interviewing skills
  • Third party cost vs. confidentiality benefit
**Exit Interviews**

- Formal v. Informal?
  - Exit interviews must have a mechanism or structure to capture the information that is gathered.
  - The formality isn’t as important as capturing the information

- Sharing the Findings
  - It should be included in the employer’s annual review, strategic planning, recruiting strategies, training plans, management development program and any tool employers use to evaluate themselves

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**Stay Interviews**

- What is a Stay Interview?
  - A structured discussion a leader conducts with each individual employee to learn the specific actions needed to strengthen that employee’s engagement and retention with the organization.

- Bring information that can be used today?
- Focus on individual employees including top performers
- Put managers in the solution seat
- Separate from Performance Review
- Create individual stay action plans
**STAY INTERVIEWS**

- Top 5 Stay Interview Questions:
  1. **What do you look forward to each day when you come to work?**
  2. **What are you learning here? Want to learn?**
     - Assign mentor, offer CLE, etc.
  3. **Why do you stay here?**
  4. **What could cause you to leave us?**
  5. **What can I do to make your job better for you?**

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**QUESTIONS???


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