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Preventing Employment Liability Claims – Start at the Beginning!

by Robert Bambino, CPCU,
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Proper interviewing is a learned skill – and a critical part of the hiring process. An interview gives both parties an opportunity to gather information and ask questions that will help them either offer or accept a position. However, if not conducted properly, an interview can increase the likelihood of employment-related complaints or litigation against the employer.

Refusal to Hire

Education risk management files can point to cases where job applicants, denied positions for bona fide reasons, have initiated lawsuits against schools, claiming that they were denied a position because of a personal characteristic, such as race, gender, religion, marital



status, age, disability, arrest record, political affiliation, national origin or sexual orientation, and not for legitimate or bona fide reasons. These cases typically claim that elements of the hiring process (such as interview questions, or requests for information on the application), are evidence of the school's discriminatory intents.

Litigation claiming a refusal to hire is usually filed in federal or state court claiming monetary damages, such as emotional distress, back or

front pay and lost benefits, or injunctive relief – typically an appointment to a position or promotion. In some cases, punitive damages are sought as well.

The Interview

Experienced interviewers usually ask questions that are fair and job-related to determine if the applicant has the skills, talents, and experience to perform the job in a professional and competent manner. However in some cases, perhaps in an attempt to learn more about the applicant, interviewers pose questions that may be discriminatory in nature. Interviewers could also ask questions that could be problematic if the inquiries indirectly steer the interview into a discussion about a taboo subject. Looking at this from a different perspective, any question with discriminatory implica-

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tions is an inappropriate question which may leave the applicant with the perception that he or she wasn't hired because of discrimination, whether or not that is the case. In these situations, there is the likelihood of a complaint to the Equal Employment Opportunity Commission or a state human rights office, or the filing of a claim alleging failure to hire because of the applicant's race, gender, religion, age marital status or other characteristic. It is prudent to avoid these types of questions and to be mindful of small talk during the interview.

Risk Management Controls

Federal and state laws require employers to conduct interviews in a fashion that is fair and nondiscriminatory. As a general rule, interview questions and inquiries on employment applications should be job-related, consistent, objective, and verifiable. School attorneys should review employment applications, tests and standard interview questions. See chart on page 3 for questions to ask and not to ask.

The following additional questions may be asked of job applicants during an interview:

- What did you like/dislike most about your previous jobs?
- Reasons for termination of previous employment?
- Who were your supervisors at your previous jobs?
- How did they rate your work performance?

- When are you available for work?
- What skills do you have in terms of the job requirements? (subsequent to your providing a thorough explanation of the job)
- Can you demonstrate, with or without reasonable accommodation, how you would perform job-related functions? This question must be asked of all applicants in the same job category, regardless of disability.
- Did you have a problem following the rules of any of the companies you worked for?

Employment Applications

Employment applications can create problems if they contain inappropriate questions. We recommend reviewing your employment application to determine if there are inappropriate questions or requests for any of the following:

- Graduation date from high school or college.
- Request for a photograph with the employment application.
- Questions about physical characteristics (hair/eye/skin color), height and weight.

A job offer may be conditioned on the results of a medical examination, provided that the examination is required for all entering employees in the same job category regardless of disability, and that information obtained is handled according to confidentiality requirements specified in the Americans with Disabilities Act

(ADA). After an employee starts work, all medical examinations and inquiries must be job-related and necessary for the conduct of the employer's business.

A carefully prepared application can help reduce the likelihood of employment-related claims by including language that may afford a defense in the event of litigation. The following requests are allowable:

- Verification Statements - that are signed by the applicant and attest to the truthfulness and accuracy of the information provided on the application. This statement should also indicate that the applicant can be fired (subject to the restrictions of federal and state laws and collective bargaining agreements, if applicable) if the information is false or misleading.
- Authorizations for Reference Checks - that allow the school to perform a background check on the applicant.
- Equal Opportunity Employer - language that the organization is an equal opportunity employer. For example: The school is committed to a policy of equal employment in all areas of hiring, recruitment and all personnel practices.
- Not a Contract of Employment - language that the applicant understands that the application is just that and not a contract of employment.

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Interview Questions to Ask and Avoid

Category	Questions to Avoid	What You May Ask
Age	What is your age? How old are you? What is your date of birth?	Do you meet the minimum age requirement for this position? Are you over 18?
Affiliations and Clubs	What organizations or groups are you a member of?	Are there professional or trade organizations that you belong to that you consider relevant to this position?
Credit History	Do you have a credit record? Have you ever been bankrupt?	No questions
Criminal Convictions	Have you ever been arrested? If so, what was the charge? Have you ever been convicted of a crime?	If a conviction record is volunteered by the applicant, convictions must be evaluated in terms of the nature, severity and date of the offense and how it relates to the position.
Citizenship	Where were you born?	Are you legally authorized to work in the US?
Disabilities	Do you have any health problems? Do you have a disability? Do you take prescription drugs?	Will you be able to perform in a safe manner the essential functions of this job? Can you demonstrate how you would perform the following job-related functions?
Family Size	Do you have children? What are your family plans? Are you pregnant?	No questions
Marital Status	Are you married? Have you ever been divorced?	After, not before hiring, it is appropriate to ask about marital status for tax and benefit purposes.
National Origin	You have an unusual name. Where are you from? What is your ethnic background?	No questions
Physical Appearance	What is your hair/skin color? What is your height and weight?	Questions about height and weight cannot be asked unless they are job-related.
Religion	Where do you worship? What religion are you?	No questions
Schedules	Questions concerning work availability regarding weekends are allowed if they are relevant to the position.	This is your likely work schedule, can you work these hours? Is there any reason why you could not travel if it is work related?
Sex/Gender	No questions	No questions
Workers' Compensation	Have you ever filed a workers' compensation claim? If so, what was the nature of the claim?	No questions

Private school administrators should be familiar with the provisions of the Health Insurance Portability and Accountability Act (HIPAA). Information is available at the U.S. Department of Health and Human Services web site at <http://www.hhs.gov/ocr/hipaa/>

Unequal Pay for Equal Work?

Hon. Lawrence J. Brennan
Associate General Counsel,
Wright Risk Management Company
Acting Justice, N.Y.S.
Supreme Court (ret.)

On May 29, 2007, the United States Supreme Court, by a 5 - 4 majority, ruled in *Ledbetter v. Goodyear Tire & Rubber company Co.* that the plaintiff's lawsuit for damages for unequal pay, brought under the 1964 Civil Rights Act (CRA), must be dismissed due to her failure to file her claim with the federal Equal Employment Opportunity Commission (EEOC) within the required 180 day period.

The plaintiff, Lilly Ledbetter, had worked as a manager for Goodyear Tire & Rubber from 1979 to 1998. She was initially hired at an equivalent starting salary as her male co-workers, but over the years her compensation was 15 to 40% less than men with the same duties.

Goodyear's defense was that the pay disparities were based on her poor performance, and that she had not qualified under its merit compensation system.

She first filed her unequal pay complaint in May 1998, only six months before retiring. The plaintiff prevailed before the EEOC, and at a subsequent federal jury trial in Alabama she was awarded \$200,000 in back pay and \$3.3 million in punitive damages. Thereafter, the trial judge reduced the jury's award to \$360,000.

On appeal, her case was dismissed for failure to comply with the federal 180 day period within which to bring her claim. The Supreme Court affirmed the appeals court.

There is another legal remedy available for aggrieved employees under the federal Equal Pay Act of 1963 (EPA).

Initially, Ms. Ledbetter had also sued under this statute, but had withdrawn that claim prior to the trial. Thus, there was no definitive ruling about the EPA's applicability to her case. The EPA is also administered by the EEOC and equal pay claims also have the same claim commencement deadline.

Justice Alito, writing for the majority, noted that "...such a filing deadline protects employers from the burden of defending claims arising from employment decisions long past."

Justice Ginsberg, in summarizing her dissent, stated from the bench that the majority "does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination."

School administrators, as employers, should be mindful of the legal pitfalls they may encounter in not applying the principle of "equal pay for equal work" in compensating their employees.

There is no legal justification for unequal compensation for essentially identical work. Generally, the only exceptions may be for seniority or production.

Essentially, the Ledbetter decision was premised upon a narrow legal principle, that the plaintiff had failed to comply with the EEOC's abbreviated claim commencement period.

Ironically, the Supreme Court's decision in Ledbetter may encourage more lawsuits, as attorneys for employees speedily initiate equal pay claims to avoid dismissal for failure to comply with the short filing deadline.

Minimizing the Risks of Equal Pay Claims

School administrators must be mindful that equal pay and civil rights cases will often be litigated over a number of years. They can often result in a continual stream of negative media coverage and publicity until final resolution.

The legal expenses incurred in defending EEOC claims and federal civil rights and equal pay lawsuits can be quite substantial. Significantly, depending on the nature of the litigation, coverage for these types of claims may be problematic.

In summary, it is strongly recommended that human resource personnel work closely with headmasters and other administrators in drafting precise job descriptions and in ensuring that individuals who have identical or very similar responsibilities are equally compensated.

Pregnancy Discrimination Claims – An Emerging Exposure for Private Schools?

By Robert Bambino, CPCU, ARM
Vice President, Risk Management

In Fiscal Year 2006 the Equal Employment Opportunity Commission (EEOC) received 4,901 pregnancy discrimination claims – the largest number of pregnancy-related complaints received in the past ten years. Only fifty-five percent of these claims resulted in a “no reasonable cause” finding, leaving a substantial number of claims ruled to be justified. Additionally, there were \$10.4 million in benefits awarded by the EEOC; this figure does not include the many millions of dollars of payments arising from civil litigation, as well as time spent by employers investigating complaints and responding to litigation.

Federal Laws Provide Protection

Federal regulations, specifically Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972 (guaranteeing equal employment rights in general to men and women) and most importantly the Pregnancy Discrimination Act of 1978, provide protection to pregnant women in the workplace. Additionally, the Family and Medical Leave Act (FMLA) must

be considered in all instances of pregnancy leave requests (both pre and post-delivery) as well as leave requests by fathers and adoptive parents.

Headmasters and other administrators should understand the ramifications of federal and state laws that address pregnancy discrimination. More information on the FMLA can be read at the Department of Labor web site, <http://www.dol.gov/esa/regs/compliance/whd/printpage.asp?REF=whdfs28.htm>

- Regarding the interview process, inappropriate questions during the interview (such as: “You appear to be pregnant – are you?”) can lead to discrimination claims at a later date. When an employee announces a pregnancy, questions about leave and accommodations are in order. Do not ask about marital status, child care plans or any other personal or unrelated questions.
- A pregnant employee may need an accommodation in the same way that employees with other temporary medical conditions do. Accommodations may include, if possible: lifting limitations, a modification of work hours, light or lighter duty, or

other changes to the work assignment to accommodate any temporary limitations imposed by a pregnant woman’s physician.

- Whatever benefits you afford other employees on temporary medical leave, such as paid health insurance, coverage of various fringe benefits, accrual of leave time, and amount of time a position will be held open, must be applied to the pregnant employee.

Termination

Pregnancy does not prohibit termination for cause, but as with all employees, cause and attempts to remediate a problem or situation must be documented because problems can arise if the employee has a clean pre-pregnancy record and the first disciplinary action is recorded post-disclosure of pregnancy.

Careful, thoughtful interaction with your female employees will go a long way toward keeping the school from contributing to the statistics that show that pregnancy disability claims are rising. The more an employer treats a pregnant employee like any other employee, the less likely it is that

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the employer will get into trouble. As with all employment-related issues, headmasters and other school administrators should consult with their school attorney when questions,

protocol or potential pregnancy problems occur.

To read EEO statutes in their entirety, or to learn more about laws protecting against pregnancy

discrimination, visit the EEOC website at:

<http://www.eeoc.gov/>

Statistical information can be found at:

<http://www.eeoc.gov/stats/pregnanc.html> ■

Cold Weather Extremes

by Robert Bambino, CPCU, ARM
Vice President Risk Management

During the summer, school athletic directors focus on preventing illnesses from heat stress and other heat-related conditions. However, winter weather extremes, which are often overlooked, can be equally as devastating to the health of young athletes.

In many schools, track and field athletes practice during the winter months. Exertion in extremely cold temperatures – particularly with dangerous wind chills – can result in dehydration and hypothermia, a medical condition that results from a dangerously low body temperature, below 95°F. According to the Mayo Clinic, approximately 700 people in the United States die from

hypothermia each year. Exercising in wet or sweat-soaked clothing increases the likelihood of hypothermia.

The symptoms of hypothermia include:

- Fatigue
- Drowsiness
- Weakness
- Confusion
- Loss of coordination
- Pale and cold skin
- Shivering
- Decreased breathing
- Decreased heart rate

Athletes should avoid exercising in extremely cold weather; wear clothes in layers; wear mittens and water-resistant, wind-proof clothing; and a head covering to avoid heat loss.



Athletic directors and team coaches should also be aware that hypothermia can be a potential risk in milder weather as well. For example, getting soaked to the skin in a rain shower on a cool day can lower body temperature to dangerous levels.

To learn more about hypothermia, visit the Mayo Clinic website at: <http://www.mayoclinic.com/health/hypothermia/DS00333> ■

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