

Hiring Employees

“When can you start?” While those words may be music to a job applicant’s ears, the road used by the employing agency to get to the point to say them may be long and challenging. This paper explores a municipality’s ability to hire employees, who has the authority to hire, and the processes that should be followed to protect the municipality’s and the applicant’s interests.

Who Can Hire?

The authority to hire is controlled, for the most part, by state statute. In a code city, for example, hiring is either by the mayor,¹ if the city operates under the mayor-council plan of government, or by the city manager,² if the city operates under the council-manager plan.³ While the board of county commissioners establishes all positions and sets the compensation for each, the elected officials (auditor, treasurer, prosecuting attorney, etc.) actually make the appointments in their respective departments.⁴ Although state law sets the basic hiring parameters, local regulations and customs may change the process by delegating the actual hiring authority to department heads or other management employees.⁵

Starting the Process: You Can’t Fill a Position If There is None to Fill

Before the process can even be started, there must be an authorized and vacant position available into which an applicant may be appointed or hired. In a county, the *need* for a deputy or an employee likely is first noted by a department head or one of the county’s independently-elected officials. The actual *authorization* for the position, however, is made by (“with the consent of”) the board of county commissioners.⁶ The commissioners also establish the salary and other compensation for each position.

The process is similar in a city. The city or town council creates each position and determines its salary and benefits.⁷ While each position could be created separately, it is also possible to authorize positions and establish salaries by listing each in the annual or biennial budget.⁸

Before You Start, Have a Job Description

Just as it wouldn’t make sense to put two AAA batteries in a flashlight that requires two D batteries, it also would not make sense for an employer to hire someone into a position, if it didn’t know what qualifications that position requires. The first step of the process of matching candidate qualifications to job requirements is the development of a realistic job description.

The job description should set out the purpose of the job and can include its educational, experience, skill, and knowledge requirements.⁹ It lists any licenses or endorsements that may be required (such as a commercial driver’s license). The description

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should set out information regarding expected contacts (e.g., meets regularly with public; routinely interacts with elected officials) and list organizational relationships (e.g., reports to city manager). If there are technical or physical requirements, such as the ability to use certain equipment or to routinely lift up to a certain weight, they should be listed, as should workplace hazards or safety concerns. The essential functions of the position should be set out in the description (and identified as such), as well as other functions that may be marginally required.

Should the Position be Posted?

An employer may want to first open a position to its current employees; in such an instance, it may choose to internally post the job on appropriate employment bulletin boards. Some collective bargaining agreements require that new or vacant positions be first made available to union membership before they are advertised. Obviously, if a labor contract (or other policy) calls for posting, that should be done before the position is advertised to the general population.

Shouldn't a Job Opening be Advertised?

Although, from a policy and practical standpoint, it may be a good idea to advertise an open position to help ensure the hiring of the most qualified individual, neither federal nor state law requires advertising. (In fact, other than by *prohibiting* certain conduct or procedures (employer may not discriminate based on age or disability, for example), state and federal laws are virtually silent about the hiring process.) If the person authorized to fill a position wanted to, he or she could hire the first person coming through the door, without any advertising. Local government regulations, though, as well as generally accepted hiring practices, may require that open positions are advertised, and such requirements, if they exist, must be followed.

Is Recruiting Allowed?

In addition to advertising an open position, a somewhat static process, a local government may choose to actively solicit or recruit candidates. Recruitment may encourage applications from more qualified and experienced candidates who might not otherwise be aware of the position. The cost of recruitment is specifically recognized as an expense that may be paid through an emergency expenditure.¹⁰ Recruitment may be handled in-house or through a job placement, “head hunter” firm. State law allows the direct payment of lodging and transportation costs of candidates who are sought to be interviewed.¹¹

Balancing the Workforce

May a government employer actively seek to have its workforce reflect the racial and sexual makeup of the community? The answer, which once was “yes,” is no longer certain. Initiative 200, approved by the state’s voters in 1998, prohibits “preferential treatment” based on race, sex, color, ethnicity, or national origin in public employment.¹² What is “preferential treatment”? Would it be preferential treatment to also announce a job opening in newspaper directed at and widely distributed among the black population of an area? Could an employer recruit candidates exclusively from women’s organizations? Could the employer hire only qualified women or minorities until the workforce makeup

was evenly split between men and women, minorities and non-minorities? While there have been no state appellate court decisions on point, the attorney general has informally opined that efforts to increase the size of a pool of applicants by encouraging woman and minority applicants is not “preferential treatment,” whereas efforts to limit the pool to women and minorities or to equalize the race or sex of the pool members would be preferential.¹³ Until the initiative’s language is construed by the courts, there may be a threat of litigation when a city, town, or county seeks to make its workforce more closely reflect the makeup of the community.

The Application Form

If a good job description has been prepared, it should be a relatively easy task to develop an application form that will draw out relevant information from applicants. Some of the entries will be obvious: the employing agency needs to know the name, address, and telephone or contact numbers of those applying. As to the age of applicants, both federal¹⁴ and state¹⁵ law prohibit employers from discriminating against workers aged 40 years or older; however, there is nothing prohibiting an employer from requiring information about the applicant’s age.¹⁶ For education background information, the application should include a section for listing the person’s high school, business or technical school training, undergraduate and graduate studies, and any “other courses” taken that may be relevant to the position sought. Similarly, as to experience, the application needs a section for listing the applicants’ past employment history, which might include space for listing the applicant’s past employers, supervisors, job titles, starting and ending salary, duties, reasons for leaving, and whether the applicant’s previous supervisors may be contacted for reference purposes.

The application form may ask the applicant what special skills he or she possesses (e.g., ability to operate a 10-key adding machine, his or her typing speed, or familiarity with particular word processing software). The form also may ask if the person is licensed to drive, or if he or she is a member of a professional organization.

It is *not* recommended that the application include a request for the applicant’s social security number. Before an employer can require such information, it must advise applicants “whether disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.”¹⁷ In most instances, there will be no authority for such a request.

Although both the federal Americans with Disabilities Act (ADA) and the Washington Law against Discrimination (WLAD) prohibit employers from discriminating against qualified individuals with disabilities,¹⁸ the hiring employer may nevertheless inquire whether an applicant, after reviewing the essential job functions set out in the job description, would be able to perform them, with or without accommodation.

While state regulations prohibit inquiries about applicants’ citizenship,¹⁹ the federal Immigration Reform and Control Act of 1986 prohibits the hiring of an alien who is not authorized to work in the United States.²⁰ So, what’s an employer to do? State Human Rights Commission regulations offer a question that could be asked: “If offered a position, would

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your visa or immigration status prevent you from being lawfully employed?”²¹

Often an application form will request a list of references who can be contacted for additional information (this would be a list *in addition to* past supervisors). Since this list will have been hand-chosen by the applicant, the references’ comments, assuming the candidate has previously contacted them, will tend to be consistently positive. Nevertheless, what the relationship was between the applicant and the listed references and what the references may have to say could be useful in making a final hiring decision.

Winnowing Down

Depending upon the number of applications received, it may be a good idea to reduce the number of persons who will be considered and interviewed. Interviews, background checks, reference reviews, and testing are time-consuming and can be expensive; limiting the number of applicants under consideration can help reduce the time and expense required. Some employers will create a committee to review resumes and applications, and this committee will then develop a list of candidates for further consideration. This paper does not recommend any particular way to reduce the number of applications under consideration; whatever approach is used, it should result in a pool of candidates who, presumably, will satisfy the requirements and abilities listed in the job description.

The Interview²²

There are different aspects to the interview process: asking the right questions to assist in the selection of the most qualified applicant, and not asking questions that will get you in trouble. How best to ask questions, such as by using open-ended questions instead of closed-ended ones, is covered in articles, books, and other information available from the MRSC Library. This paper will concentrate on some of the questions one should *not* ask.

As stated above, one must be cautious when asking about a person’s age. While questions about a person’s date of birth or proof of true age are permitted, one must be careful not to ask a question suggesting a preference for younger employees, those under 40 years of age.²³

Questions about *arrests* are seldom allowed, except where the person being hired would have responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, and other vulnerable adults.²⁴ They are also allowed if the nature of the crime for which the arrest was made involved “behavior that would adversely affect job performance” and occurred within the last ten years.²⁵ If questions about a person’s arrests are allowed, they *must* also delve into whether the charges are still pending, have been dismissed, or have led to a conviction. Similar rules apply to questions involving an applicant’s *convictions*.²⁶

Very little may be asked about an applicant’s marital status and/or family. Questions may be posed whether the person will be able to meet certain work schedules and whether there are responsibilities that would prevent him or her from meeting attendance requirements; a candidate may not be asked about his or her marital status, children, spouse, or dependents.²⁷

The interview should not include questions about a person's height and weight, unless the inquiry is based upon an actual job requirement and is consistent with business necessity.²⁸ Questions are not allowed about the applicant's race, color, sex, lineage, ancestry, national origin, birthplace, or native tongue.²⁹

Inquiries regarding disabilities are limited. The applicant may be asked whether he or she is able to perform the essential functions of the job sought, with or without accommodation. Inquiries regarding the nature, severity, or extent of a disability are not allowed, nor are inquiries that are not job-related or consistent with business necessity.³⁰

While an employer may not discriminate in employment, either during the hiring process or thereafter, the rules governing what may or may not be asked do change after the employment of someone; actually, the rules vanish. The rules outlined above "do not apply after a person is hired," although the information obtained may not be used for a discriminatory purpose.³¹

Follow-Up Procedures: Reference and Background Checks

Reference Checks

An employer, before hiring someone, can probably find out a great deal of information about the candidate's knowledge, experience, and work habits by asking for information from present and former employers and from others who are familiar with the applicant. Unfortunately, the applicant's employers and other references may feel uncomfortable providing information without some assurance that they will not be sued, should the reference information they give be unfavorable and result in candidate not being hired. The best way to proceed, unless the only information being sought involves the dates of the applicant's former employment, his or her job title, and salary, is to obtain a signed release from the applicant, permitting the hiring employer to seek information and permitting past employers and references to give it without the threat of legal action.³²

Background Checks

•Credit checks

While a background check might include a reference check, discussed above, it might also involve a check of an applicant's credit and/or criminal record. If a "consumer reporting agency" is hired to prepare a consumer report³³ or an investigative consumer report³⁴ about an applicant, certain disclosure requirements are imposed under the federal Fair Credit Reporting Act.³⁵ Before the hiring agency can seek a report, it must notify the candidate of its intent and obtain a written consent; the consent must be a "stand alone" document, not just an authorization included as part of the job application form itself. The hiring agency must also notify the consumer reporting agency that consent has been obtained and that its report won't be used illegally. There are additional notice requirements if the employer seeks an investigative consumer report.³⁶ If the employing agency uses the consumer report in a negative way, such as by denying a person employment, in whole or in part, because of the report, it must provide the applicant notice of its deci-

"obtain a signed release from the applicant, permitting the hiring employer to seek information and permitting past employers and references to give it without the threat of legal action."

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sion and of the name, address, and telephone number of the consumer reporting agency, and notify the person of the right to obtain a copy of the report and dispute its accuracy and completeness.³⁷

- Criminal record checks

There are specific statutes allowing or requiring criminal records checks of persons seeking employment involving unsupervised access to children, or developmentally disabled persons, or other vulnerable adults.³⁸ An employing agency may also obtain criminal record information if it will be securing a bond for an employee or if the employee will have access to proprietary business information, money, or other items of value.³⁹ Such record checks are performed by the Washington State Patrol. The employing agency has 30 days following the receipt of any conviction record to notify the applicant of the record, and the record is to be made available to the applicant.⁴⁰

The employing agency may review an applicant’s driving record, provided the applicant authorizes the release of the record, and the information sought is necessary to determine whether the applicant should be employed to operate a commercial vehicle or school bus.⁴¹

Polygraph Tests

Both federal⁴² and state⁴³ law limit the use of polygraph tests in the employment context; the federal law, however, does not apply to public employers, whereas the state law does. State law makes it unlawful for the state or a political subdivision of the state “to require, directly or indirectly, that any employee or prospective employee take or be subjected to any lie detector or similar test as a condition of employment or continued employment.”⁴⁴ There are three exceptions to the prohibition: persons taking the initial application for employment with a law enforcement agency; the employment of persons who manufacture, distribute, or dispense controlled substances; and persons in sensitive positions directly involving national security.⁴⁵

Medical Testing

Under the ADA, pre-employment medical examinations may not be given,⁴⁶ with one important exception: an examination can be required *after* a conditional offer of employment has been made, provided everyone in the same job category is required to take an exam, not just those who may be disabled.⁴⁷ Drug testing is not a medical examination under the ADA, and thus may be required at the time of application, assuming there is a public safety or other compelling justification for the test.⁴⁸ Similarly, other non-medical tests, such as for physical fitness, may be allowed, provided they are to measure an attribute of the applicants that is job-related.⁴⁹

It’s Time to Hire Someone

Having developed a job description, established the position in the budget, reviewed the job application, interviewed the candidates, required credit and criminal checks, gone over writing samples and references, it’s time to make your choice. Good luck.

Endnotes

¹ RCW 35A.12.090.

² RCW 35A.13.080(2).

³ The mayor is also given the power to hire in second class cities (RCW 35.23.021) and in towns (RCW 35.27.070). The city manager is authorized to hire in a second class city or a town operating under the council-manager plan of government (RCW 35.18.060(2)). In a commission city - and now there is only one such city - it is the commission that appoints officers and employees. RCW 35.17.080. Hiring decisions in chartered cities and counties are made according to their individual charters.

⁴ RCW 36.16.070; see, also, *Osborn v. Grant County*, 130 Wn.2d 615 (1996).

⁵ Certain positions may be covered by civil service, such as sheriff deputies, police officers, and firefighters. If civil service does apply, the hiring authority must hire from the candidate or candidates certified to him or her by the civil service commission. For additional information regarding civil service, see the "Personnel" section of the Municipal Research and Services Center website, <http://www.mrsc.org/Subjects/Personnel/civilservice/civserv.aspx>.

⁶ *Id.* In charter counties, reference must be made to the charter to determine responsibilities and authority.

⁷ RCW 35.23.021 (second class cities); RCW 35.27.070 and RCW 35.27.130 (towns); RCW 35A.11.020, RCW 35A.12.020, and RCW 35A.13.090 (code cities); RCW 35.18.080 (non-code city, city manager cities); and RCW 35.17.130 (city organized under commission form of government).

⁸ RCW 35.33.051 and RCW 35.34.070; RCW 35A.33.050 and RCW 35A.34.070.

⁹ However, note that in a mayor-council code city, the city council may require confirmation of appointments, but only when the qualifications for the position have not been established by ordinance. RCW 35A.12.090. Presumably, then, where the qualifications for a position are set out in a job description not adopted by ordinance, the code city council may still require confirmation.

¹⁰ RCW 35.33.081, RCW 35.34.140, RCW 35A.33.080, and RCW 35A.34.140.

¹¹ See, generally, RCW 35.33.081 and RCW 35.34.140; RCW 35A.33.080 and RCW 35A.34.140; RCW 36.17.031 and RCW 42.24.090.

¹² RCW 49.60.400.

¹³ *Issue Paper on Initiative 2000*, Washington State Attorney General's Office (October 16, 1998)

¹⁴ 29 U.S.C. § 623 et seq.

¹⁵ RCW 49.44.090(1)

¹⁶ In fact, an employer may establish minimum or maximum age limits for its employees in certain circumstances. RCW 49.44.090(1) ("employers . . . may establish reasonable minimum and/or maximum age limits with respect to candidates for positions of employment, which positions are of such a nature to require extraordinary physical effort, endurance, condition or training, subject to the approval of the executive director of the Washington state human rights commission or the director of labor and industries through the division of industrial relations.")

¹⁷ 5 U.S.C. § 552a.

¹⁸ 42 U.S.C. §§ 12101, 12102, and 12111 et seq. The ADA does not apply to all employers, only those with 15 or more employees. The WLAD, set out at chapter 49.60 RCW, applies to employers with eight or more employees and prohibits discrimination on the basis of disability, if an applicant could perform the duties of the position with a reasonable accommodation.

¹⁹ WAC 162-12-140(3)(c).

²⁰ 8 U.S.C. § 1324a

²¹ See WAC 162-12-140(3)(c). The language offered in the text paraphrases the language used in the regulation.

²² This section sets out some basic rules as to what may or may not be asked during the course of an interview. The MRSC Library can also provide specific examples of acceptable and unacceptable questions in its library; persons requiring such specific information should either contact Municipal Research for such assistance and/or their own legal advisor.

²³ WAC 162-12-140(3)(a) and RCW 49.44.090.

²⁴ WAC 162-12-140(3)(b).

²⁵ *Id.*

²⁶ WAC 162-12-140(3)(d).

²⁷ WAC 162-12-140(3)(e), (h), and (j).

²⁸ WAC 162-12-140(3)(g).

²⁹ WAC 162-12-140(3)(k), (o), and (s).

³⁰ WAC 162-12-140(3)(f).

³¹ WAC 162-12-140(1) and WAC 162-12-180.

³² Legislation which would have limited liability associated with reference checking failed to be approved during the 2002 legislative session. See SSB 5969.

³³ A "consumer report" provides information about a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living. 15 U.S.C. § 1681a (a) (1) (c).

³⁴ An "investigative consumer report" is one that reports "on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information." 15 U.S.C. 1681a (a) (1) (e).

³⁵ 15 U.S.C. § 1681 et seq.

³⁶ 15 U.S.C. § 1681d.

³⁷ 15 U.S.C. § 1681m.

³⁸ RCW 43.43.832.

³⁹ RCW 43.43.815(1) (a) and (b).

⁴⁰ RCW 43.43.815(2).

⁴¹ RCW 46.52.130(14).

⁴² Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 et seq.

⁴³ RCW 49.44.120.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 29 C.F.R. 1630.13

⁴⁷ 29 C.F.R. 1630.14(b).

⁴⁸ See *Robinson v. Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000).

⁴⁹ If an applicant is required to take a competitive examination to determine his or her qualifications for employment, as may be the case for a civil service position, *and* if the applicant is a qualified veteran, the employer must add to the rating a percentage determined by the time of the applicant's service. See RCW 41.04.010. This "preference" must be used within 15 year's of the person's release from active military service.

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