Legal Corner

Hiring Employees: Getting the Process Right

By David C. Potter, Esq. and Peter L. Ebb, Esq.

You need to fill a position in your group practice or medical office. The occasion may arise from the creation of a brand new position (a technologist responsible for just-acquired equipment), the need to supplement existing staff (a nurse to cover expanded weekend hours), or simply the replacement of a staff member who has resigned. In any event, you want to hire the best person *and* you want to avoid unnecessary legal risk in doing so. Thankfully, there are some relatively simple steps at each phase of the hiring process that will bring you closer to both of these goals. This article will help guide you through each phase of the hiring process: (1) defining the position; (2) interviewing the candidates; (3) checking references; and (4) closing the deal.

Defining the Position

It is critical to know the essential functions of the position that you are seeking to fill. Clearly delineating the essential functions will help you focus on which applicant is best able to perform them, and will give the successful candidate a clear understanding of what your expectations will be. From a legal perspective, failing to articulate an essential function or describing it inaccurately, may expose you to risk if you reject an applicant who (because of religious commitments or disability, for example) cannot meet that requirement.

It is desirable to have a written job description for every position in your office. Job descriptions should be updated on a regular basis, as the essential functions of positions inevitably change. (If the numbers "6/75" appear in the lower right hand corner of a job description, it has probably not been reviewed since Gerald Ford was in the White House. Running a mimeograph machine is no longer an essential function of your office manager's job; ensuring HIPAA compliance is.) View a vacancy as an opportunity to ensure that the job description is up-to-date (have the government-mandated or industry-standard requirements for the position increased in recent years?) and to confirm that it accurately captures and identifies the essential functions of the job.

Once you have reviewed the job description and made sure that it is up-to-date and accurate, it is time to post or advertise the position, review the applications you receive, and decide who to interview. A note of caution: If the position is covered by a collective bargaining agreement, make sure that you follow the required job posting procedures contained in that agreement. And if the position is a new one, but is similar to one covered by a collective bargaining

agreement, seek legal counsel before assuming that the collective bargaining agreement does not apply.

Interviewing the Candidates

Before an interview, outline your questions (prepare for an interview as if you were preparing for an important business meeting, since that is exactly what you are doing!), but be willing to pursue interesting or important detours during the interview itself. You should ask the same core of questions of every applicant or be prepared to explain why you did not do so. The rejected female candidate who was asked about her ability to juggle work and home responsibilities may be skeptical that her lack of pediatric hematology/oncology experience was the decisive factor if the successful male applicant was not asked about his child care arrangements. You should keep the questions job related.

As a general rule, you may certainly seek information that is directly related to an applicant's ability to perform the job for which he or she is applying. You should generally not ask questions that are likely to elicit responses identifying a person as being within a protected category (such as race, color, religion, national origin, sex, sexual orientation, age, or mental or physical disability). This does not mean that you can never ask questions related to the various protected categories. For example, if an applicant presents with an obvious disability, or voluntarily discloses that he is disabled, and the disability on its face raises questions about the applicant's ability to do the job, you may lawfully ask how he has been able to perform relevant work tasks at prior places of employment. But it does mean that you need to proceed with caution and make sure that your questions are directly related to the applicant's ability to perform the essential functions of the job.

If you conclude that pre-hire medical testing is appropriate for a particular position, special rules apply. First, medical testing is permissible only if it is required for all successful applicants for the same job category. For example, for a custodial position you cannot test only the candidate who you suspect is suffering lumbar spinal stenosis, and the same applies to the office clerk applicant who appears to be in his 50s if other individuals have been hired into those positions without medical testing having been required. Second, medical testing cannot be required until a conditional offer of employment has been made (e.g., "we are pleased to offer you this position, subject only to successful completion of a medical exam"). Third, medical test results can be used to disqualify an applicant only where they show that the

applicant cannot safely or effectively perform the essential functions of the position, with or without reasonable accommodation.

Checking References

Once you complete your interviews, it is time to check references. You should contact as many former employers as time will allow. If time is of the essence, you may make an offer of employment contingent on satisfactory references obtained at a later date. Though obviously, breaking up is much more painful, and much more likely to spawn litigation, than never getting engaged at all. There is nothing wrong with contacting a personal reference not listed by the applicant, so long as the purpose or effect of the contact is not to invade unreasonably the applicant's privacy. Finally, a word about background checks: background checks performed by private companies must be disclosed to and authorized by the applicant on a separate form containing nothing else (not in the lengthy block of fine print of the last page of an employment application).

Closing the Deal

Once you have decided which applicant you would like to hire, prepare to make an offer and close the deal. What are the traps for the unwary here? First, do not make an offer

until you are sure that you have the authority to do so (or ensure that any offer you make is clearly contingent on any other steps or necessary approvals). Second, review any offer or appointment letters to make sure that they are not unintended contracts for employment for life, or for employment on specific terms (for example by "guaranteeing" on an ongoing basis the benefits that happen to be in effect today, or by promising a shift that may not exist tomorrow). Finally, if an appointment is to be for a limited duration, that should be made clear in writing.

While following these suggestions will not free you from legal risk entirely, it will greatly reduce the chances of a lawsuit being brought and position you to defend those which do occur. It will also help you focus the hiring process on getting the employees best able to meet the needs of your practice.

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