

MINNESOTA FAMILY SUPPORT & RECOVERY COUNCIL

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## Avoiding Legal Pitfalls When Hiring in the Public Sector

St. Cloud, MN  
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The information contained in this document is intended for general information purposes only and does not constitute legal or coverage advice on any specific matter.

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The Basics of Public Sector Hiring

- Position Description
- Advertising
- Employment Application
- Screening
- Interviewing
- Reference Checks
- Documentation



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# Position Descriptions

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## Position Description



- Defines expectations of the position for the employee and employer
- Provides baseline objective criteria for performance evaluation
- Defines essential functions and minimum qualifications of the position
- Provides basis for determining categories for VPA 100-point competitive scale

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## Position Description



- Essential functions
  - The fundamental duties of a position that the individual who holds the position must be able to perform unaided or with reasonable accommodation
- Reasons a function may be considered essential
  - Job exists to perform the function
  - Limited number of employees who can perform the function
  - Function is highly specialized and the person is hired for his or her expertise or ability to perform the function(s)

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**Position Description**



- Knowledge, skills and abilities
  - Understanding of specific subject areas
  - Competence to perform a learned activity
  - Competence to perform an observable behavior
- Education, experience and credentials
  - Minimum required and preferred

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**Position Description**



- Other sections
  - Federal Labor Standards Act (FLSA) classification
  - Reporting structure/supervisory responsibility
  - Working conditions
  - Physical demands of the job
  - Travel

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**Pitfalls with Position Descriptions**



- No current and accurate position description
- Determining essential functions and standards after advertising the position
  - Could infer intentional discrimination
- Best practice: Create (or revise) the position description prior to advertising the position

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# Postings, Advertisements and Recruiting Materials

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## Pitfall: Relying Solely on Word-of-mouth Recruitment or Referrals



- Could have a disparate impact on a protected class
- Best practice: Advertise or post open positions
  - No legal requirement that the position must be advertised; however, the employer may have a contractual obligation to do so

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## Protected Class Categories



• Race	• Disability
• Color	• Public assistance
• Creed	• Age
• Religion	• Sexual orientation
• National origin	• Local human rights commission activity
• Sex	• Pregnancy
• Marital status	• Genetic information
• Familial status	

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### Pitfall: References to Protected Class Status in Advertisement

- Could be discriminatory
- Best practice: Advertisement should not include any preference or exclusion based upon protected class status

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Avoid	Reason/Alternative
<ul style="list-style-type: none"> <li>• "Must be U.S. citizen"</li> <li>• "English must be your first language"</li> <li>• "Spanish must be your first language"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be national origin discrimination</li> <li>• "Successful applicant must show proof he or she can legally work in the U.S."</li> <li>• "Ability to effectively communicate in written/spoken [language]"</li> </ul>
<ul style="list-style-type: none"> <li>• "Young" or "Youthful"</li> <li>• "Supplement your retirement income"</li> <li>• "Mature adult wanted"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be age discrimination</li> <li>• Focus on desired quality rather than the anticipated age of the applicant</li> </ul>

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Avoid	Reason/Alternative
<ul style="list-style-type: none"> <li>• "Great opportunity for stay-at-home mom"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be gender discrimination</li> <li>• Avoid mention of gender</li> <li>• Consider using gender-neutral position titles where possible</li> </ul>
<ul style="list-style-type: none"> <li>• "Able-bodied individual ..."</li> <li>• "In good health"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be disability discrimination</li> <li>• Focus on the essential job functions</li> <li>• "Routinely moves equipment weighing up to 50 pounds"</li> <li>• "Requires frequent movement"</li> </ul>

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# Employment Application

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## Pitfall: Failing to Inform Applicant of Legal Rights and Obtain Release



**Best Practice: Use a standardized application**

- Collects same information pertinent to the position from all applicants
- Platform for informing the applicant of his or her rights under state and federal laws, including the Minnesota Government Data Practices Act and the Veterans Preference Act (VPA)
- Contains authorization for release of information and a waiver of liability against the employer

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## Tennessee Notice (MGDPA)



- Must provide whenever asking an individual to provide private data under the MGDPA
- Must include:
  - The purpose and intended use of the data;
  - Whether the individual is legally required to provide the data;
  - Known consequences from either providing or refusing to provide the information; and
  - The identity of other persons and/or entities with statutorily authorized access to the data  
(Minn. Stat. § 13.04, subd. 2.)

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**Pitfall: Requesting Illegal or Problematic Information**



- Best Practice: Do not collect the following
  - Any information related to protected class status
  - Social Security number
  - Maiden name
  - Past workers' compensation claims
  - Litigation or claims against any past or present employers involving a discrimination claim
  - Prior sick leave use
  - Need for reasonable accommodations to perform the job
  - Criminal record or criminal history

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**Criminal Record or History (Minn. Stat. § 364.021)**



- Prohibits employers from inquiring into or considering the criminal record or history of a job applicant until the applicant is selected for an interview by the employer
  - Except positions for which employers have a statutory duty to consider criminal history or conduct a criminal background check when hiring, such as law enforcement
- May only disqualify applicants from consideration for a position on the basis of a past conviction if the crime(s) are directly related to the position for which the applicant is applying

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**Screening applicants**

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**Pitfall: Failing to Apply the Veterans Preference Act (VPA)**



- Minnesota Statutes, Sections 197.447, 197.455 and 197.46
  - Hiring
  - Discipline/Termination
- Who is a Veteran?: Review the DD214 Form
- Note: Merit System may already apply VPA

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**Apply VPA When Required**



- Applicants must be evaluated on 100-point system
- Eligible veterans get extra points added to "passing score"
  - 10 additional points for veteran
  - 15 additional points for disabled veteran
  - In some circumstances, spouses may be eligible
- Applied to the screening process for interviews, not at the interview
- May hire any person interviewed

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**Ranking Applicants**



- Create eligibility list
- Determine in advance
  - Number of interviewees?
  - Interview at natural break?
- Must notify in writing all individuals claiming preference of reasons for rejection and file with local personnel officer

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**Pitfall: Screening Process Is Discriminatory**

- Best Practice: Establish criteria used for evaluation before applications are reviewed or applicants are tested
  - Criteria should be objective and based upon actual job qualifications and duties
  - Award criteria in a uniform manner

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**Interviewing**  
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**Interviews**

- Standard set of questions should be asked of each applicant
  - Drafted prior to the interview
  - Open-ended, job-related and based upon past behavior or experience
- Do not ask about protected class status
- Avoid questions that could infer discriminatory purpose

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Avoid	Reason/Alternative
<ul style="list-style-type: none"> <li>• "How many children do you have?"</li> <li>• "Are you planning on starting a family/having more children?"</li> <li>• "What kind of childcare arrangements do you have?"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be pregnancy, gender, familial status discrimination</li> <li>• Focus on availability to work, if this is the concern behind the question</li> </ul>
<ul style="list-style-type: none"> <li>• "Are you married? Single? Widowed? Divorced?"</li> <li>• "Who is your spouse?"</li> <li>• "What is your maiden name?"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be marital status discrimination</li> <li>• It is best to avoid this type of question</li> </ul>
<ul style="list-style-type: none"> <li>• "To which clubs or organizations do you belong?"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be discriminatory</li> <li>• "Do you belong to any professional groups that are relevant to this position?"</li> </ul>

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Avoid	Reason/Alternative
<ul style="list-style-type: none"> <li>• "Are you currently in debt?"</li> <li>• "Have you ever claimed bankruptcy?"</li> <li>• "Have you ever had your wages garnished?"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be discriminatory</li> <li>• Avoid this type of question in an interview unless the position requires significant financial responsibility</li> </ul>
<ul style="list-style-type: none"> <li>• "To which political party do you belong?"</li> <li>• "For whom did you vote in the last election?"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be discrimination based on First Amendment rights</li> <li>• It is best to avoid this type of question</li> </ul>
<ul style="list-style-type: none"> <li>• "Do you belong to a labor union?"</li> <li>• "Have you been involved in labor union activities?"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be a violation of labor relations law</li> <li>• It is best to avoid this type of question</li> </ul>

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Avoid	Reason/Alternative
<ul style="list-style-type: none"> <li>• "Are you available to work Saturdays?"</li> <li>• "Are you available to work Sundays?"</li> </ul>	<ul style="list-style-type: none"> <li>• Could be religious discrimination</li> <li>• "What days or hours would you be unable or unwilling to work?"</li> <li>• "Will you be able to work the required schedule?"</li> </ul>
<ul style="list-style-type: none"> <li>• "What type of military discharge did you receive?"</li> </ul>	<ul style="list-style-type: none"> <li>• Could get protected status information</li> <li>• Avoid questions about type of military discharge unless there is a clear business necessity</li> </ul>

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**Interviews**

- Take comprehensive notes
  - If protected class status is volunteered, do not document it
- Be careful of "casual conversations" that may bring up information related to protected classes
- If possible, do not interview alone

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**Reference Checks**

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**Pitfall: Failing to Do a Reference Check**

- Part of due diligence in the hiring process
- May yield additional insight on the top applicants

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## Pitfall: Reference Check Is Discriminatory or Incomplete



- Ask the same questions to all references
- Draft questions prior to contacting references
- Questions should be job related and consistent with business necessity
- Questions should solicit critical but legal information
- Do not ask about protected class status

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## Other Background Check Pitfalls



- Unlawful use of criminal background information
- Using social media and the Internet for background checks
- Improper credit history check or pre-employment physical or mental examinations

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## Documentation

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**Pitfall: Failing to Make or Retain Documentation of Hiring Process**

- Documentation is crucial in defending against a hiring-related lawsuit
- Best practices
  - Make record of the hiring process
  - Maintain records on applicants for at least 18 months
  - For the individual hired, maintain his or her application materials indefinitely

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**Questions?**

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