Municipal Technical Advisory Service
INSTITUTE for PUBLIC SERVICE

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Pre-Employment Practices

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Pre-employment selection procedures, including tests and inquiries used to screen out prospective applicants, can be particularly vulnerable to adverse impact charges. Title VII allows the use of "professionally developed ability test" provided that such test, its administration or actions upon the results, is not designed, intended, or used to discriminate because of race, color, religion, gender or national origin." [3] The EEOC requires employers using selection tests to justify them with "data demonstrating that the test is predictive of, or significantly correlates with, important elements of work behavior which comprise or are relevant to the job or jobs which candidates are being evaluated." [4] The EEOC also has published very technical and complicated standards for validating such tests. [5] In most circumstances, if a city cannot statistically tie a pre-employment test to specific characteristics necessary for successful job performance and the city does not desire or cannot afford to perform a validity study, the test should be discontinued or changed immediately.

Pre-employment screening procedures such as job application forms, interviews, and background investigations should be reviewed for their job relatedness. Interviewers should limit their questions to matters relevant to determining an applicant's competence and ability to perform the essential functions of the job. Title VII does not prohibit questions regarding an applicant's race, color, religion, gender or national origin, but they may be used as evidence of discrimination if a city cannot explain their presence. In addition, these questions may be prohibited by state law. Questions about association or marriage with a particular group also may be used as evidence of discrimination. Employers should avoid questions about marital status, the age and number of children, plans for pregnancy or arrangements for child care. [6]

Pre-employment investigations for the purpose of examining an applicant's "fitness" or "character" or to verify statements made on the application should be reviewed carefully for job relatedness. The criteria used to qualify applicants through background investigations should be precise and well defined and should state clearly the information that will disqualify an applicant; if not, some courts refuse to find them job related. For example, a police department's investigations to seek disqualifying evidence of "bad character, dissolute habits, and immoral conduct" violated Title VII primarily because the criteria were so poorly defined. [7]

Cities also must conduct investigations using the same procedures and thoroughness, regardless of the applicant's gender, race, ethnic origin or religion. Proof that an employer compared the results of an in-depth investigation of a member of a protected class with a limited investigation of a non-minority will defeat an employer's claim that the procedure was public business related. When no proof of business necessity has been shown, courts have found that background investigations by police [8] and fire departments [9] into an applicant's financial history violate Title VII because they disqualify disproportionate numbers of blacks. In addition, using a less than honorable discharge from the military as a criterion for rejecting an applicant also may violate the act because statistics reveal a higher incidence of such discharges among minorities. [10]

Unless solid proof of public business necessity can be shown, cities also should not rely solely on arrest and conviction records to reject applicants. If a conviction would render an applicant unsuitable for a particular job, it might be a valid justification for rejecting the applicant. For example, a conviction for bank robbery would probably justify a city's refusal to hire an individual as a utility clerk or finance officer but perhaps not in another capacity not involving money. If a city questions an applicant about prior convictions, inquiries should be accompanied by a statement that a conviction record will not necessarily be a bar to employment and those factors such as age and time of the offense, seriousness and nature of the violation, and rehabilitation will be taken into account.

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) updated its enforcement guidance [1] 11 on the consideration of arrest and conviction records in employment decisions. The EEOC determined that compliance with federal laws or regulations is a defense to a charge of discrimination. However, compliance with a state or local law or regulation may not shield the employer from liability if the employer's policy is not job related and consistent with business necessity.

According to the guidance, the EEOC recommends that employers not ask about convictions on job applications. Employers can consistently demonstrate job relatedness and consistency with business necessity if they: validate the criminal conduct screen for the position in question based on the Uniform Guidelines on Employee Selection Procedures, or develop a targeted screening considering at least the nature of the crime, the time lapsed, and the nature of the job and then provide an opportunity for an individualized assessment for people excluded by the screening.[12]

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[3] 42 U.S.C.A. § 2000e-2(h). Note: other jurisdictions have overruled or treated this citation negatively: 42 U.S.C.A. § 2000e-2 Rweyemamu v. Cote, 520 F.3d 198, 198+, 1678+, 43141+, (2nd Cir.(Conn.) Mar 21, 2008) (NO. 06-1041-CV)(unconstitutional as applied); Miller v. Bay View United Methodist Church, Inc., 141 F.Supp.2d 1174, 1175, 1406 (E.D.Wis. Mar 31, 2001) (NO. 99-C-0676)(limited); Funai v. Brownlee, 369 F.Supp.2d 1222, 1223+ (D.Hawai'i Nov 23, 2004) (NO. CIV.03-00160 ACK/BMK)/

[4] Guidelines on Employee Selection Procedures 29 C.F.R. § 1607.4(c), 35 Federal Reg. 12333 (Aug. 1, 1970).

[5] 29 C.F.R. § 1607.5.

[6] Romine, 518 F.2d at 332.

[7] *United States v. Chicago*, 549 F.2d 415 (7th Cir. 1977) affirmed 567 F2d 730 (7th Cir. 1977).

[8] Id.

[9] *Dozier v. Chupka*, 395 F.Supp, 836 (S.D. Ohio, 1975).

[10] Id.

[11] U.S. Equal Employment Opportunity Commission, Enforcement Guidance, "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964' April 2012.

[12] Id.

Links:
[1] http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm