Employment applications—almost every employer in the country uses them. They can seem innocuous, but they contain a number of minefields of which employers should be aware. A general theme of federal and state laws, regulations, and guidance is that employers should avoid asking an applicant questions that elicit information that cannot be considered in making a hiring decision. Below is a list of the top 10 mistakes to avoid in application materials:

1. *Including any disability-related or medical questions.* Employers should steer clear of questions related to whether an employee is disabled or has a medical condition. Any such inquiry would violate guidance from the U.S. Equal Employment Opportunity Commission (EEOC) and possibly the Americans with Disabilities Act (ADA) and similar state laws. If an employer asks an applicant such a question, the EEOC or a court may presume prohibited information was a factor in hiring.

2. *Not including an at-will disclaimer.* Employers may want to inform applicants that the application is not intended to and does not create a contract or offer of employment and state that, if hired, employment with the company would be on an at-will basis and could be terminated at the will of either party. This disclaimer is helpful to avoid any claim that the application is an offer of guaranteed employment or to defend a claim of breach of contract if the employee is not hired or is later discharged.

3. *Not including a non-discrimination statement.* Employers may want to inform applicants that the company is an equal opportunity employer (i.e., through an EEO statement) and does not discriminate in hiring based on federally-protected classifications (i.e., race, color, national origin, ancestry, religion, sex, disability, veteran status, age (40 or over), or genetic information). Employers may want to add any additional protected classifications under state or local law (e.g., sexual orientations or marital status).

4. *Requesting graduation dates in the education section.* Asking applicants for graduation dates (usually in the education section of the employment application where it inquires about degrees obtained) may lead to a finding of discriminatory intent on the basis of age under the Age Discrimination in Employment Act (ADEA) or state law—particularly if the employee’s graduation date has no bearing on the qualifications for the position—as it enables the hiring manager to guess the age of the applicant. It is appropriate to ask questions regarding the experience of the applicant if it is relevant to a job qualification.

5. *Asking about arrests and convictions, without appropriate disclaimers.* A number of states and local jurisdictions expressly prohibit employers from asking about applicants’ criminal histories on employment applications (these are called “ban the box” laws). EEOC Guidance further recommends that employers not ask about convictions on job applications, but, if they do, to limit their inquiries to
convictions for which exclusion would be “job related for the position in question and consistent with business necessity.” The EEOC discourages employers from asking about arrests on applications at all, because it reasons that the fact that an individual was arrested is not proof that he or she engaged in criminal conduct. The EEOC also has taken the position that an arrest record, standing alone, may not be used to screen out an applicant, but an employer may make an employment decision based on the conduct underlying the arrest if the underlying “conduct makes the individual unfit for the position in question.” Employers may want to use caution in this area.

6. Putting a background check acknowledgement on the employment application. Under the Fair Credit Reporting Act (FCRA), the disclosure of an employer’s intent to obtain a background check and section must be in a “stand-alone” document separate from the application.

7. Not including language telling applicants how to request a reasonable accommodation to apply or participate in the interview process. The ADA imposes a duty on employers to provide reasonable accommodations to applicants during the application process to ensure equal access to available positions. In light of this obligation, employers may consider instructing applicants on how to initiate that process independent of the employer’s online application system and hiring manager.

8. Asking for a photograph. Guidance from the EEOC prohibits employers from asking applicants for photographs. If needed for identification purposes, an employer may obtain a photograph of an applicant after the applicant accepts an offer of employment.

9. Asking about marital or familial status. Asking questions about an applicant’s marital status, the number of kids he or she has, the ages of his or her children or dependents, or provisions for childcare could be construed as discrimination on the basis of sex. Furthermore, in many states, marital or familial status is a protected classification about which employers may not inquire during the application process—similar to the federally-protected classifications listed above.

10. Asking about citizenship. The anti-discrimination provision of the Immigration Reform and Control Act prohibits employers from discriminating against an applicant because he or she is not a U.S. citizen. The Form I-9, rather than an employment application, is the appropriate forum to determine an applicant’s citizenship status. Rather than asking about citizenship, employers may want to ask if an applicant is legally qualified to work in the United States.

Conclusion

Employment applications are not only one of a company’s first contacts with applicants and new employees, they are also written documents that can later be used as evidence in an adversarial proceeding. Avoiding these common blunders can help employers maintain best practices for employment application materials.

Fifty-state resources, ban-the-box information, and sample employment applications are provided in the OD Comply: Employment Applications subscription materials, which are updated and provided to OD Comply subscribers as the law changes.