

# THE HIRING PROCESS

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## THE EMPLOYMENT RELATIONSHIP

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This book is designed to be an employment law resource for Minnesota business owners. Before delving into the law surrounding the employment relationship, however, the business owner must determine whether the individuals it has retained to perform services are employees or independent contractors. Business owners who use independent contractors may think they do not have employees and, therefore, that employment laws do not apply to them. An individual's status as an independent contractor, however, is not determined by agreement or by what he or she is called. Rather, the individual's status is determined by what he or she actually does. If an individual performing services for a business is being treated as an independent contractor, but is performing the work of an employee, and an agency such as the Internal Revenue Service or the Minnesota Department of Revenue discovers this error, the results can be expensive to the business.

Before designating an individual as an employee or an independent contractor, the business owner should consider the following factors:

- **Instructions.** A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee.
- **Training.** Training a worker by requiring an experienced employee to work with him or her, corresponding with the worker, or requiring the worker to attend meetings, weighs in favor of employee status because the employer for whom the services are performed wants the services performed in a particular method or manner.
- **Integration.** A worker is subject to direction and control if his or her services are integrated into the company's business operations. Thus, this factor weighs in favor of an employment relationship.
- **Services Rendered Personally.** If the worker must perform the agreed upon services personally, this factor weighs in favor of employee status because presumably the employer is interested in the method used to accomplish the work as well as the results.

- Hiring, Supervising and Paying Assistants. If the business owner hires, supervises and pays a worker's assistant, this factor generally shows control over the workers on the job. If, however, one worker hires, supervises, and pays assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, independent contractor status is indicated.
- Continuing Relationship. A continuing relationship between the employer and the worker weighs in favor of an employment relationship.
- Set Hours of Work. This is a factor indicating control and, therefore, an employment relationship.
- Full Time Required. If the worker must devote substantially full time to the business, an employment relationship is indicated because the employer has control over the amount of time the worker spends working and therefore can restrict the worker from doing other gainful work. An independent contractor would be free to work when and for whom he or she chooses.
- Doing Work on the Employer's Premises. Work performed on the employer's premises suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises indicates some freedom from control. This fact alone, however, does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require employees to perform such services on the employer's premises.
- Order or Sequence of Work. Requiring a worker to perform services in an order or sequence set by the employer shows that the worker is not free to follow the worker's own pattern but must follow established routines and schedules of the employer. Thus, this factor weighs in favor of an employment relationship.
- Oral or Written Reports. Requiring oral or written reports indicates a degree of control by the employer and, thus, an employment relationship.
- Payment by Hour, Week, Month. Payment by the hour, week, or month generally points to an employer-employee relationship. Payment by fee generally indicates an independent contractor relationship.
- Payment of Business and/or Traveling Expenses. If the employer pays the worker's business and/or traveling expenses, this factor weighs heavily in favor of an employer-employee relationship.
- Benefits. The provision of benefits such as insurance, a pension plan, PTO vacation pay, and sick pay indicate an employer-employee relationship.

- **Furnishing of Tools and Materials.** If the employer furnishes significant tools, materials, and other equipment, this tends to show the existence of an employment relationship.
- **Significant Investment.** If the worker invests in facilities that are used by the worker in performing services and the facilities are of the kind that are not typically maintained by employees, that factor tends to indicate independent contractor status. Lack of investment in facilities indicates dependence on the employer and, therefore, the existence of an employment relationship.
- **Realization of Profit or Loss.** The worker's ability to realize a profit or suffer a loss is indicative of independent contractor status. In other words, if the worker is subject to real risk of economic loss due to significant investments or bona fide liabilities for expenses, this factor indicates that the worker is an independent contractor. The risk that the worker may not be paid for his or her services is not a sufficient economic risk to support independent contractor status.
- **Working for More Than One Company at a Time.** If a worker performs services for a variety of unrelated persons or companies at the same time, he or she is most likely an independent contractor. It is possible, however, that an individual who performs services for more than one person or company may be an employee of each of those persons or companies.
- **Making Services Available to the General Public.** If a worker's services are available to the general public on a regular and consistent basis, this factor weighs in favor of independent contractor status.
- **Right to Discharge.** If the employer has the right to discharge the worker in question, this factor indicates that the worker is an employee. A person is an independent contractor if he or she cannot be fired if he or she produces results that meet contract specifications.
- **Right to Terminate.** If the worker has the right to end his or her relationship with the employer for whom the services are performed at any time without incurring liability, this factor indicates an employer-employee relationship.

The above factors are common-law rules that the Internal Revenue Service looks at in determining whether an individual is an employee or an independent contractor.<sup>1</sup> None of the factors discussed above, standing alone, will determine independent contractor or employee status. Each situation is considered on a case-by-case basis,<sup>2</sup> and the IRS, the Minnesota Department of Revenue, and the Minnesota Department of Employment and Economic Development each assign different weights to each factor. The most significant factor with all agencies, however, is the business owner's right to control the individual's method or manner of performance.<sup>3</sup> If the business owner has the right to control the method or manner of performance, then the individual is most likely an employee. If the business owner has the right

to control the results of the work, but does not have the right to control the manner and means of accomplishing the result, the individual is most likely an independent contractor. In addition, there are statutory employees<sup>4</sup> for FICA tax purposes (e.g., commission drivers, full-time life insurance sales persons, home-workers and traveling sales persons) and statutory non-employees<sup>5</sup> for FICA, unemployment and income tax purposes (e.g., qualified real estate agents and direct sellers). Business owners are urged to consult their legal counsel before classifying an individual as an independent contractor instead of an employee.

There are also special rules regarding the classification of construction workers. Minnesota law requires individuals (not corporations, LLCs, or partnerships) who work as independent contractors in the building construction industry to obtain from the Department of Labor and Industry an Independent Contractor Exemption Certificate (ICEC). For purposes of the state's workers' compensation, unemployment insurance, wage and hour, and occupational safety and health laws, individuals doing building construction work without an ICEC will be employees of the contractor for whom they are working.<sup>6</sup>

## **HIRING IN GENERAL**

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When an employee is hired in Minnesota, unless the employer and the employee enter into an oral or written employment agreement or a collective bargaining agreement specifying otherwise, that employee is employed "at-will," which means the employer can discharge the employee at any time for any lawful reason and the employee can quit at any time for any reason. (Restrictions on an employer's ability to terminate an at-will employee are discussed later in this Guide.) During the hiring process, however, if employers are not cautious, inadvertent contracts can be formed with new employees, and unnecessary information may be elicited from applicants which could later form the basis of a discrimination charge if the applicant is not hired. By keeping these two areas (contracts and discrimination) in mind during the hiring process, employers may avoid a great deal of liability after the hiring process is complete.

During the hiring process, employers also should keep in mind the federal Americans with Disabilities Act ("ADA"), which prohibits disability discrimination during hiring. For example, an employer may not reject a job applicant due to the possible risk of future injury to that applicant or due to the risk that the employer may incur higher insurance costs if the applicant is hired. The ADA applies to employers with 15 or more employees and will be discussed in detail in the Disability Discrimination section of this Guide.

## **ADVERTISING**

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If the employer needs to advertise for a position, it should choose the wording it uses in an advertisement carefully. Employers should avoid ambiguous or misleading language which

may imply an illegal bias toward any particular group of applicants. It is a violation of the Minnesota Human Rights Act to disclose a preference in an employment advertisement regarding sex, age, race, color, creed, religion, national origin, marital status, status with regard to public assistance, disability, or sexual orientation.<sup>7</sup> If the employer is a federal contractor or subcontractor, the employer may have obligations to advertise the position with the local job service and use the words “equal employment opportunity employer” in an employment advertisement.

## **THE EMPLOYMENT APPLICATION**

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The employer must review the employment application carefully. In order to determine whether all the questions asked are appropriate, consider whether the information requested is reasonably related to the job for which the applicant is applying. For example, does the employer really need to know whether an applicant for a custodian position has a driver’s license and the number and the state in which it was issued? Also, determine whether any of the questions on the application ask information which might impermissibly reveal the applicant’s status as a member of a protected class. For example, inquiries into club memberships or civic organizations should be followed by a disclaimer which states that the applicant need not disclose any activities which might reveal him or her as a member of a protected class.

Employers should not automatically assume that standard, preprinted employment applications only ask legally permissible questions. First, a preprinted form may ask questions which are not reasonably related to the job for which the applicant is applying. Second, preprinted employment applications may not be tailored to comply with individual state laws and may ask impermissible questions as discussed in the Interviewing section later in this Guide.

Employers who are federal, state or local government contractors or who must compile equal employment opportunity (EEO) data on applicants (as may be defined by statute or regulation),<sup>8</sup> may ask certain questions relating to race/ethnicity and gender so long as those questions are asked on a form which is kept completely separate from the employment application and which is not used in the hiring process. Completion of this form by applicants is voluntary.

## **THE APPLICATION PROCESS**

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Under the federal Americans with Disabilities Act (discussed in the Disability Discrimination section of this Guide), employers must provide an equal opportunity for individuals with disabilities to participate in the job application process. Therefore, employers subject to the ADA must make reasonable accommodations to enable disabled applicants to apply for

available jobs. Employers are not required to make reasonable accommodations in advance; they are simply required to make such accommodations on request.<sup>9</sup> This might include providing job information in an accessible location or providing written job information in various formats (e.g., in large print or on CD).

## **DISCLAIMERS**

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Employers should consider including disclaimers on employment applications, in any employee handbook maintained by the employer, and, if there is a handbook, in a separate acknowledgment regarding the handbook. The disclaimer must be clear and conspicuous and should include the following:

- That the employer retains the right to terminate its employees at any time for any reason not prohibited by law, that an employee has the right to resign employment at any time for any reason (subject to the employer's notice request or requirement, if any), and that these mutual rights constitute the employer's at-will employment policy;
- That any understandings and agreements between the employer and any employee to the contrary must be in writing and signed by the proper officer of the company;
- That the employee handbook, if there is one, does not constitute an employment contract for a term of employment and may be revised or discarded at the employer's discretion; and
- That the employee handbook, if it is being newly issued, supersedes all prior handbooks and previously issued policies.

## **INTERVIEWING**

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When interviewing a prospective job applicant, the employer should only ask questions which reasonably relate to the job in question. The employer should not request information that is not job-related and must not ask questions that might reveal an applicant's protected status. If discriminatory questions are asked or discussed during an interview, the employer may have to later show that the information obtained was not used to discriminate. With that in mind, it is prudent to avoid certain inquiries completely. For example, employers should not inquire into the following areas:

- Age or date of birth;<sup>10</sup>

- Marital status (this includes whether an applicant is married, divorced, separated, widowed or in the process of having a marriage annulled or dissolved, or the identity of one's current or former spouse, including whether the spouse is an employee of the employer);
- Sex, race, creed, color, religion, national origin, or sexual orientation;
- Disabilities;
- National Guard or Reserve status;<sup>11</sup> and
- Date of military discharge.<sup>12</sup>

Employers should train interviewers and recruiters to ask appropriate questions. Interviewers also should be well informed about the Americans with Disabilities Act (discussed further in the Disability Discrimination section of this Guide) if that Act is applicable. Inappropriate questions include:

- Do you have any children? Do you intend to have any?
- How many children do you have? How old are they? Who will care for them while you are at work?
- If you become pregnant, will you quit your job?
- Do you use birth control?
- Are you married? What does your husband/wife think of all this?
- Whom can we contact in case of an emergency?<sup>13</sup>
- Have you ever tested HIV positive?
- What does your husband/wife do? Is your husband/wife a union member? How likely is it that your husband/wife will accept a job in another city?
- How does your husband/wife feel about you making more money than he/she does?
- How old are you?
- What year(s) did you graduate from (attend) high school? College?
- How would you feel about taking orders from someone younger than you?
- Have you ever been arrested?<sup>14</sup>

- Have you ever been treated for any of the following diseases or conditions?
- What languages are spoken in your home?
- Do you have a good credit rating? Have your wages ever been garnished?
- Do you have any physical impairments which would prevent you from performing the job for which you are applying?
- Are you now receiving or have you ever received workers' compensation benefits?
- How much do you weigh? How tall are you?
- What is the lowest salary you will accept?
- Do you smoke?

The Technical Assistance Manual on Title I of the Americans with Disabilities Act lists a number of additional prohibited questions,<sup>15</sup> including:

- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
- Have you ever been treated for any mental condition?
- Is there any health-related reason you may not be able to perform the job for which you are applying?
- How many days were you absent from work because of illness last year?
- Are you taking any prescribed drugs?
- Have you ever been treated for drug addiction or alcoholism?

Interviewers and recruiters also should be trained to avoid making any notations on application forms. Codes, numbers or cryptic shorthand notes on the application could be misinterpreted. Such promises may impair the employer's right to terminate an individual. Interviewers should take detailed notes on a notepad separate from the application form and discard their notes after an applicant has been hired. Interviewers also should be trained to avoid making any oral or written representations to prospective candidates, such as "you'll have this job until you retire."

## OUT OF TOWN AND RECRUITED CANDIDATES

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Employers should be especially careful in their representations when recruiting someone who must move or is not actively seeking a change of employment. Detrimental reliance on such representations by an applicant who moves or quits an existing job can form the basis of an implied contract. In addition, it is unlawful for an employer to induce an individual to move within Minnesota, or from another state to Minnesota, based upon knowingly false representations concerning the kind or character of the work or the compensation paid. An employer who does so is guilty of a misdemeanor, and the employee is entitled to an action for damages.<sup>16</sup> Finally, legal counsel should be consulted regarding the existence of any industry specific statutory requirements. For example, Minnesota law requires employers in the food processing industry to provide written disclosure of the terms and conditions of employment to persons recruited to relocate. The statute allows civil actions and fines.<sup>17</sup>

## AFFIRMATIVE ACTION

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Before an individual is actually hired, a company that contracts with the government should consider what effect the hiring will have on its affirmative action obligations to recruit and advance qualified minorities, women, persons with disabilities and covered veterans. Federal, state and local laws each have different criteria for compliance with their respective affirmative action or equal employment opportunity requirements. Covered employers and federal, state and local criteria include:

- **Federal.** Each prime contractor or subcontractor that has 50 or more employees and a federal contract of \$50,000 or more; or government bills of lading totaling \$50,000 or more; or a depository of government funds; or issues U.S. savings bonds/notes, must develop a written affirmative action plan that covers minorities, women, persons with disabilities and covered veterans. Employers must implement the written affirmative action program, keep it on file and update it annually. The employer is also required to prepare the standard Form 100 (EEO-1), and a VETS-100 Reporting Form, as well as satisfy other record-keeping obligations.<sup>18</sup> The EEO-1 and VETS-100 Forms must be filed annually by September 30<sup>th</sup> each year. The Department of Labor's Employment Standards Administrator's Office of Federal Contract Compliance Programs ("OFCCP") oversees federal affirmative action plans.
- **State.** In Minnesota, if an employer employed more than 40 full-time employees on a single working day during the previous 12 months and it holds or submits a bid or proposal for a state contract for goods or services in excess of \$100,000, the employer is required to have a written affirmative action plan for the employment of qualified minority, female and disabled individuals.<sup>19</sup> The plan

must be approved by the Commissioner of Human Rights, who then issues a Certificate of Compliance. This Certificate, which is a requirement for bidding on state contracts, is valid for two years. Covered employers must also submit an annual compliance report. The Department of Human Rights is responsible for enforcing compliance with this statute.

- **Local.** Minneapolis and St. Paul have city ordinances governing affirmative action requirements for contractors with the city.<sup>20</sup> Minneapolis requires contractors and subcontractors that do more than \$50,000 of work with the city in a fiscal year to have a written affirmative action plan.<sup>21</sup> The Minneapolis Department of Civil Rights and the St. Paul Department of Human Rights enforce the respective city ordinances. Other cities may have similar ordinances.

Employers doing business with government entities or acting as subcontractors to businesses who contract with government entities should check with the entities involved and legal counsel concerning their affirmative action obligations.

## **BACKGROUND CHECKS**

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Employers hiring certain types of employees are required by law to perform background checks. For example, employers hiring security guards are required to check their background with the Bureau of Criminal Apprehension,<sup>22</sup> and employers hiring certain counselors are required to check their references for evidence of sexual contact with patients or former patients.<sup>23</sup> Public and private schools are required to check the criminal history on all individuals who are offered employment in the school.<sup>24</sup> Rental property owners must request background information from the Bureau of Criminal Apprehension before hiring property managers.<sup>25</sup> Finally, employees, contractors and volunteers of a home health care provider or hospice are subject to background checks.<sup>26</sup>

In addition to the background checks required by statute, employers should perform background checks appropriate to the job for which the applicant is applying. For example, an employer hiring a convenience store clerk may want to conduct a background check because the clerk works primarily alone and handles cash.

The negligent hiring, retention and supervision doctrines also impose a duty on employers to use reasonable care in the selection, retention and supervision of employees. If an employer hires, retains or fails to supervise employees whom it knows or should know may cause harm, that duty has been breached and liability may result. In an effort to encourage employers to share important information about an employee's work history (when requested), Minnesota has a reference law designed to protect an employer from civil liability. A more complete discussion of Minnesota's reference law is discussed in the chapter on Terminations.

To avoid discrimination claims, an employer who performs background checks should be able to justify the inquiry. A hotel may want to conduct background checks on all of its employees who have access to guest rooms, as may a manufacturing company who hires employees to drive forklifts in the warehouse. Employers should not ask anything during a background check that cannot be asked of the applicant directly. Employers also need to be aware that outside firms used to conduct background checks must comply with these rules as well. Background checks should be done for all persons considered for the particular position as part of the hiring process. An employer or prospective employer may not generally require an employee or prospective employee to pay for expenses incurred in criminal or background checks, credit checks, or orientation.<sup>27</sup>

Under the Americans with Disabilities Act, employers may ask an applicant's previous employers about job functions and tasks performed by the applicant, the quantity and quality of work performed, how job functions were done, the applicant's attendance record (not how many days the applicant was absent from work because of an illness or injury), and other job-related issues that do not relate to disability.<sup>28</sup>

Because the Minnesota Human Rights Act generally prohibits employers from seeking and obtaining information from any source that pertains to an individual's protected class (age, marital status, etc.) for the purpose of making a job decision, employers should exercise great caution and consult with counsel before obtaining background information.

Under the federal Fair Credit Reporting Act<sup>29</sup> and its Minnesota counterpart, the Access to Consumer Reports law,<sup>30</sup> Minnesota employers are subject to specific notification and disclosure requirements regarding their use of consumer credit reports to learn background information about applicants and employees.<sup>31</sup> Credit history checks may reveal marital status, date of birth or public assistance status. Employers are advised to consult legal counsel for a discussion of the rules and potential liabilities before they use these reports to assist them in their hiring and employment decisions.

## **PRE-EMPLOYMENT TESTING**

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This section discusses all pre-employment tests other than physical examinations and drug and alcohol tests. Under current law, a Minnesota employer may require an applicant to take a non-medical pre-employment test before the applicant receives a job offer. Such a pre-employment test must not be given for the purpose of discriminating against any protected class, and it also must meet the following criteria:

- The test must measure only essential job-related abilities.
- The test must be required of all applicants for the same position regardless of disability (except for tests authorized under workers' compensation law).

- The test must accurately measure the applicant's aptitude, achievement level or other relevant factors and may not reflect the applicant's impaired sensory, manual or speaking skills except when those skills are what is being tested.<sup>32</sup>

The above criteria also apply to employers subject to the Americans with Disabilities Act. If a pre-employment test tends to screen out individuals with disabilities on the basis of those disabilities, the ADA requires that the test be job-related and consistent with a business necessity.

Employers testing applicants with impaired sensory, manual or speaking skills (when those skills are not what is being tested) must reasonably accommodate those applicants in the testing process. Such reasonable accommodation may mean, for example, giving an oral test to an individual with dyslexia or providing extra time to take a test to a person with a visual impairment or learning disability.

Employers who employ at least 15 employees during each of 20 or more calendar weeks in the current or preceding calendar year must also comply with the federal Equal Employment Opportunity Commission (EEOC) Guidelines for tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include, but are not limited to, hiring, promotion, demotion, membership (for example, in a labor organization) referral and retention.<sup>33</sup> Under the EEOC Guidelines, an employer may be called upon to prove that its test does not discriminate on grounds of race, color, religion, sex or national origin. A selection rate for any race, sex, or ethnic group which is less than 80 percent of the selection rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact. The EEOC published an Enforcement Guidance on Employment Tests and Selection Procedures in December 2007 that provides technical assistance on some common issues relating to federal anti-discrimination laws and the use of tests and other selection procedures in the employment process.

If the employer cannot show that its test has no adverse impact on protected groups, then it will be required to prove that its test is job-related and does not in fact discriminate. The methods of proof required at this point are beyond the scope of this Guide.

Any employer conducting a pre-employment test should be able to demonstrate that the test truly measures essential job-related abilities and individual characteristics. Unless the test is obviously job-related (i.e. to a layperson), such as a word processing test for an applicant applying for an administrative position, an employer may want to consult an expert familiar with the particular test under consideration to make sure that these standards are met. Reliance on expert advice may demonstrate an employer's good faith effort to comply with the requirements of the law.

Employers should not rely solely on pre-employment tests in making hiring decisions. Other hiring criteria should include the interview, relevant experience, education, availability, employment history and references.

An employer who conducts pre-employment tests should keep detailed records with regard to all testing and should monitor its hiring decisions based on the data which it accumulates. All test results should be kept strictly confidential.

All tests should be administered and scored in a nondiscriminatory manner. Tests should be given in the same environment for all applicants, and all applicants should be given the same equipment to perform the tests.

Timing an applicant's performance of a job-related task (e.g., typing) would be a non-medical test; however, measuring an applicant's physiological state—such as blood pressure or heart rate—following performance of the test, would likely constitute a medical or physical examination. Written tests which purport to test the honesty of the applicant and which do not measure physiological changes in the applicant are permitted under Minnesota law,<sup>34</sup> although courts in some other jurisdictions are showing disfavor toward “integrity” tests. Employers are generally prohibited from using lie detector (polygraph) tests on applicants or employees.<sup>35</sup>

## **PRE-EMPLOYMENT PHYSICAL EXAMINATIONS**

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### **MINNESOTA LAW**

A Minnesota employer may require an applicant, as a condition of hire, to submit to a pre-employment physical exam, which may include a medical history, if:

- The applicant (except for certain peace officer applicants) has first received an offer of employment contingent only upon passing the physical;
- The physical examination tests only for essential job-related abilities;<sup>36</sup> and
- The physical is required of all persons conditionally offered employment for the same position, regardless of disability (except for examinations authorized under Minnesota's workers' compensation law).<sup>37</sup>

The physical may include a drug or alcohol test if the requirements of the Minnesota drug testing statute (discussed below) are followed.

An employer may not refuse to employ an applicant due to physical inability to perform the job unless the applicant is unable to perform the essential functions of the job. Certain employers also have an obligation to explore whether they can “reasonably accommodate” the applicant to enable him or her to perform the essential functions of the job. “Reasonable accommodation” is required of any employer who employs 15 or more permanent full-time employees unless the employer can demonstrate that accommodation would impose an undue hardship on the

company.<sup>38</sup> “Reasonable accommodation” means steps which must be taken to accommodate the known physical or mental limitations of a qualified disabled person.

An employer in Minnesota may ask an applicant whether he or she has a physical condition which could prevent the applicant from performing the job for which he or she is applying only as part of a pre-employment physical, after a conditional job offer has been made, and as part of the medical history which is part of that pre-employment physical. Note that all medical information must be collected and maintained on separate medical forms and in separate medical files, to be treated as confidential medical records, not as part of the employee’s personnel file.

If the applicant undergoes a pre-employment physical and a physician determines that the applicant is unable to perform the job in question even with reasonable accommodation (if required), the employer must notify the applicant of that information within ten days of the final decision not to hire.<sup>39</sup>

Note that in addition to protecting applicants who actually have physical, mental or sensory impairments, Minnesota law also protects applicants who have a record of having such impairment or who are perceived as having such an impairment against discrimination based on disability.

## **FEDERAL LAW**

Under the Americans with Disabilities Act (“ADA”), consistent with Minnesota law, employers may not make any medical inquiries or submit applicants to any medical examinations before a conditional offer of employment is made, and the medical examination must be required of all persons conditionally offered employment for the same position. Unlike Minnesota law, under the ADA employers may perform medical examinations that are not job-related and may make unrestricted medical inquiries as long as the responses to those inquiries are not used to reject an applicant for reasons that are not job-related or consistent with business necessity. This approach, even though acceptable under the ADA, is not allowed under Minnesota law. Therefore, Minnesota employers should only perform medical examinations that test for job-related abilities.

## **DRUG AND ALCOHOL TESTING OF APPLICANTS**

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Minnesota employers may require a job applicant to undergo a drug and alcohol test if a job offer has been made to the applicant and the same test is required of all applicants conditionally offered employment for the same position.<sup>40</sup> The employer must have a written drug and alcohol testing policy which contains certain information required under Minnesota law. Each applicant should be given a copy of the policy, and notice of the existence and availability of the policy should be posted in appropriate and conspicuous workplace locations.

An applicant, before being tested, should first sign an acknowledgment that he or she has read the policy and understands that passing the drug and alcohol test is a requirement of the job. The applicant also has an opportunity, both before and after the testing, to list any prescription medications or any other explanation for a positive drug test. The applicant has other specific rights and the employer has specific responsibilities during the testing process. Testing must be done by a laboratory qualified by law to conduct testing, and there must be both an initial and confirmatory (second) drug test. If the confirmatory test is positive, the applicant may request a third test, to be conducted on the same sample at his or her own expense.

The employer must assure compliance with regulations published by the Minnesota Department of Health with respect to chain of custody and laboratory procedures, and it must assure that all drug testing information is kept strictly confidential.

An employer may withdraw a job offer if the applicant does not successfully pass the drug and alcohol screen. The employer must inform the applicant of the reason for the withdrawal within ten days of the decision not to hire.<sup>41</sup>

Note that different rules promulgated by the federal Department of Transportation (“DOT”) apply to testing of job applicants who, for example, if hired, would operate a commercial motor vehicle or would possess a commercial driver’s license in the course of their employment.<sup>42</sup> These rules may preempt state law. Discussion of the DOT drug and alcohol testing requirements for employees appears in the Drug Free Workplace Act and other Federal Requirements section of this Guide. Because these rules are complex, any employer in this situation is advised to consult with counsel on how to properly implement a testing program.

## **OFFER OF EMPLOYMENT**

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When offering employment to any individual, whether orally or by offer letter, the employer should be sure to avoid making statements such as “we look forward to a long and rewarding experience with you on our team.” If the employer uses an offer letter, the terms and conditions of employment should be fully described as the company understands them, and the offer letter should indicate that it supersedes any oral promises. In addition, if the employer wants the employment relationship to be “at-will,” that is, terminable by either party at any time, the letter should not include an annual salary; it should include a payroll period amount (weekly or semi-monthly) that is annualized at a rate of “X.” This will insure that the offer is not construed to be for a one-year term. To insure that the offer letter will not be interpreted as a binding employment contract, the employer is advised to have the letter reviewed by legal counsel before it is sent.

## NOTICE OF RIGHTS REGARDING PERSONNEL FILES

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Although all Minnesota employers are required to provide employees with access to their personnel files,<sup>43</sup> employers with at least 20 employees should note that they must provide written notice to a job applicant upon hire of the new employee's rights and remedies regarding personnel records.<sup>44</sup> Employers are encouraged to secure a signed acknowledgment of the notice from each employee. Further discussion of personnel files appears in the Employee Access to Personnel Files section of this Guide.

## FORM I-9 AND IMMIGRATION LAW COMPLIANCE

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Once an individual has been offered employment, the employer is required to review documents indicating that the individual is legally authorized to work in the United States.<sup>45</sup> The requirement to review and record documents extends to all employees, including lifetime U.S. citizens. Employers cannot review documents just for individuals they perceive to be aliens. The law applies to all employers, regardless of the number of employees they have, and to all individuals hired after November 6, 1986. An employer is not required to complete Form I-9 for independent contractors, but should be careful in determining whether an independent contractor could be considered an employee, regardless of label.

The employer must attest on Form I-9, Employment Eligibility Verification, that it has examined documents establishing the following:

- The employee's authorization to work in this country ("work authorization"); and
- The employee's identity.

The employer does this by examining original documents that are provided by the employee and are specified on the List of Acceptable Documents attached to Form I-9. Specifically, the employer is required to examine either: (a) one document from those specified in "List A," or (b) one document from those specified in "List B" and one document from "List C." The employer may not specify or recommend which documents the employee provides. The employee can choose which document(s) the employee wants to present from the list of acceptable documents.

A new version of Form I-9 was issued in 2009. Employers now are prohibited from accepting expired documents to verify employment authorization. Previously, certain expired documents such as a U.S. passport were acceptable. In addition, the 2009 I-9 form reduces the number of acceptable documents that employers may accept to prove identity and employment authorization. The following documents no longer are valid as a "List A" document: Form I-688, Temporary Resident Card; Form I-688A, Employment Authorization Card; and Form I-

688B, Employment Authorization Card. List A, however, now includes foreign passports containing certain machine-readable immigrant visas and passports from the Federated States of Micronesia and the Republic of the Marshall Islands if presented with an I-94 or I-94A arrival/departure record.

Other changes include the legal status that the employee chooses in Section 1. For the first time, the 2009 I-9 form distinguishes between U.S. citizenship and permanent resident status. The 2009 version retains the option to identify oneself as an alien authorized to work (those with limited work authorization), and adds the option of “noncitizen national of the United States.” Noncitizen nationals include persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizens born abroad. U.S. Citizenship and Immigration Services also clarified with the release of the 2009 I-9 form that employees are not required to provide their Social Security number in Section 1 unless the employer participates in the “E-Verify” program.

Section 1 of Form I-9 must be completed by the employee at the time of hire.<sup>46</sup> For employees hired for more than three business days, Section 2 of Form I-9 must be completed by the employer within three business days of the date the employee was hired. For employees hired for fewer than three business days, the form must be completed on the first day of employment.

If the employee is unable to provide the required documentation within three days of hire because a document is lost, stolen or damaged, the employee may present a receipt for the application for the document by the third day of employment.<sup>47</sup> The employee must present the actual document within 90 days of beginning employment.<sup>48</sup> Form I-9 should be completed initially to reflect that a receipt was presented and again when the actual document is presented.

If the employee is an alien authorized to work until a specific date, the employer must re-verify the employee’s employment eligibility on or before the date that the employee’s work authorization expires.<sup>49</sup> The employee must present a document that shows either an extension of the employee’s initial employment authorization or new work authorization. Upon receiving the documentation, the employer must either complete Section 3 of the Form I-9 and record the new expiration date, or complete a new Form I-9. Either option is acceptable, as long as the employer uses the same option for all employees.

An employer may terminate an employee who:

- (1) fails to produce the required documentation, or a receipt for a document, within three business days of the date employment begins;
- (2) fails to produce the actual document within 90 days of the date that employment begins, if the employee presented a receipt for a document within the first three business days of employment and fails to produce other work authorization; or

- (3) fails to produce proof of current work authorization to continue to work when an employee's work authorization expires.

More information on completing Form I-9, is available in "Handbook for Employers Instructions for Completing the Form I-9" (Immigration Form M-274), which can be obtained online from U.S. Citizenship and Immigration Services at [www.uscis.gov/files/form/m-274.pdf](http://www.uscis.gov/files/form/m-274.pdf).

Employers are required to retain all completed I-9 forms for either three years from the date of hire or one year from the date that the individual's employment is terminated, whichever is later.<sup>50</sup> Employers are permitted, but are not required, to copy the documents presented by the employee. If copies of those documents are retained, they must be retained for all employees and kept together with each employee's I-9 form. Employers should keep I-9 forms separate from the employee's personnel record. The forms may be inspected by U.S. Immigration and Customs Enforcement, Special Counsel for Immigration-Related Unfair Employment Practices or the U.S. Department of Labor.<sup>51</sup>

Unless an employer establishes a good faith defense, an employer that knowingly hires an unauthorized alien is liable for civil penalties of not less than \$275 and not more than \$2,200 for each unauthorized alien for the first violation occurring before March 27, 2008 and not less than \$375 and not exceeding \$3,200 for a first offense occurring after March 27, 2008; not less than \$2,200 and not more than \$5,500 for each unauthorized alien for the second violation occurring before March 27, 2008 and not less than \$3,200 and not exceeding \$6,500 for a second offense occurring after March 27, 2008; and not less than \$3,300 and not more than \$11,000 for each unauthorized alien for more than two violations occurring before March 27, 2008 and not less than \$4,300 and not exceeding \$16,000 for more than two offenses occurring after March 27, 2008.<sup>52</sup> Persons or employers convicted of engaging in a "pattern or practice" of hiring unauthorized aliens are subject to a fine of up to \$3,000 and/or imprisonment of up to six months for the entire pattern or practice.<sup>53</sup> "Pattern or practice" involves regular, repeated and intentional activities. Employers who fail to properly complete, retain and/or make available for inspection Forms I-9 as required by law may face civil money penalties of not less than \$110 and not more than \$1,100 for each employee for whom such violation occurred. Recent worksite enforcement efforts by U.S. Immigration and Customs Enforcement also have resulted in criminal fines and prison sentences for employers considerably out of compliance.

A Minnesota executive order was implemented in 2008 requiring employers that are awarded state contracts in excess of \$50,000 to certify their compliance with federal immigration laws and that they do not knowingly employ persons in violation of immigration laws.<sup>54</sup> Under the order, vendors and subcontractors must also certify that, as of the date state services will be performed, they have implemented or are in the process of implementing the federal government's "E-Verify" program (an electronic employment verification system) for all newly hired employees in the United States. Employers that knowingly employ individuals who are ineligible to work risk having their contracts terminated and possibly being banned from doing business with the state.

The state order also requires recipients of business subsidies to certify their compliance with federal immigration laws in relation to employees performing work in the United States.<sup>55</sup> The Commissioner of the Department of Employment and Economic Development is to establish the certification compliance procedures for these businesses.

In addition, federal Executive Order 13465 was amended, effective September 8, 2009, requiring all companies with federal prime contracts that are in excess of \$100,000 to enroll certain employees in E-Verify. This includes all new hires, as well as existing employees who will perform work covered by the contract. The contracts must last for at least 120 days to be subject to the amended executive order. Subcontracts of \$3,000 or more also are subject to the amended executive order. Contracts for commercially available off-the-shelf items and for work performed outside the United States are not subject to the amended executive order.

An employer wishing to employ a foreign worker should be aware that a number of visa categories allow an alien to work in the United States. For work authorization purposes, there are two types of aliens: immigrants and non-immigrants.

An immigrant has permanent residency status, typically reflected by a Permanent Resident or Resident Alien card, more commonly known as a "Green Card." Generally, permanent residents may be employed by any U.S. employer for an indefinite period of time.

Non-immigrants have limited authorization to work in the United States. Work authorization typically is restricted in its duration and often is restricted to a specific employer. Some of the more common visa categories available to non-immigrants are the H-1B; E-1 and E-2; L-1A and L-1B; and TN. A number of other less common visa categories and situations allow an alien to work in the United States.

The H-1B category is available for specialty occupations that require a minimum of a bachelor's degree or its equivalent. The employer must demonstrate that it is offering at least the prevailing wage for the position and obtain an approved Labor Condition Application from the U.S. Department of Labor prior to petitioning U.S. Citizenship and Immigration Services to hire the alien. There is an annual "cap" on the number of H-1B petitions that U.S. Citizenship and Immigration Services will approve each fiscal year (October 1 to September 30).

The E-1 and E-2 categories are available to individuals who will commit a substantial investment in a U.S. enterprise. The investor must be a national of a country with a qualifying treaty with the United States, as listed in the Department of State Foreign Affairs Manual. These categories also are available to certain executive, managerial, supervisory, or essential employees of the investor. Such employees must also have the nationality of the treaty country.

The L-1A and L-1B categories are available to intracompany transferees who are coming to the United States to work for a U.S. employer. The U.S. employer must have a qualifying business relationship with a foreign business entity, such as that of a parent company, subsidiary, joint venture, or branch office. The proposed employment must be in an executive or managerial capacity (L-1A) or for an employee with specialized knowledge of the business (L-1B).

The TN or Trade NAFTA category, which was created as part of the North American Free Trade Agreement of 1994 (NAFTA), is available to employers that wish to employ Canadian or Mexican business professionals in one of the professions listed in NAFTA Appendix 1603.D.1.<sup>56</sup>

Employers should consult with legal counsel with knowledge of immigration law to ensure compliance with Form I-9 and immigration requirements, including the hiring of immigrant or non-immigrant workers.

## **COURT-ORDERED OBLIGATIONS**

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### **INCOME WITHHOLDING FOR CHILD SUPPORT OR SPOUSAL MAINTENANCE**

With respect to the payment of child support, medical support, maintenance and related payments, Minnesota employers are required to report certain information to the Minnesota Department of Human Services on new employees and independent contractors, and on rehires, within twenty days of hiring the employee or engaging the independent contractor.<sup>57</sup>

Under this reporting system, employers must provide the Department of Human Services with the employee or independent contractor's name, address, social security number, and if available, date of birth. In addition, employers must provide their own name, address and federal employer identification number. The Department of Human Services has given employers different options for reporting such information, including mailing or faxing the person's W-4 form, or providing the information on a printed list, on magnetic tape, diskette, or via telephone (note that certain formatting requirements must be followed in some instances). For further information, contact the Department of Human Services at (651) 431-2000.

When the employee or independent contractor is required under order to pay child support, maintenance or related payments, the employer is required to begin withholding according to the terms of the order.<sup>58</sup> This obligation applies to wages or other lump sum payments made by the employer to the employee or independent contractor.

When the employer receives notice of court-ordered support, it must begin withholding no later than the first pay period that occurs after 14 days following the date of the notice.<sup>59</sup> The maximum amount which may be withheld for spousal maintenance or child support is 50 percent of the employee's disposable earnings if the employee is supporting a new spouse or another dependent child, and 60 percent if the employee is not supporting a spouse or other dependent child (55 and 65 percent respectively in certain cases where the employee is in arrears on court-ordered support or maintenance payments).<sup>60</sup> An employer may deduct \$1 from the employee's remaining salary for each payment made pursuant to a withholding order in order to cover its expenses.<sup>61</sup>

## **DEPENDENT MEDICAL SUPPORT OBLIGATIONS**

At the time of hire, an individual (whether an employee or independent contractor) is required to disclose whether medical support is required to be withheld from his or her pay.<sup>62</sup> If so, employers are required to withhold such amounts in the same manner as amounts for child support, maintenance or related payments. Employers must request that new employees disclose whether they have been ordered by a court to provide health and dental dependent insurance coverage. If a new employee discloses an obligation to obtain health and dental dependent insurance coverage and coverage is available through the employer, the employer is required to make all application processes known to the employee upon hiring, and to enroll the new employee and dependent in the plan. An employer or union that willfully fails to comply with the court order is liable for any health or dental expenses incurred by the dependents during the period of time the dependents were eligible to be enrolled in the insurance program, and for any other premium costs incurred because the employer or the union willfully failed to follow the court order. The employer can also be required to pay a fine of \$500, and can be held in contempt of court.

## ENDNOTES

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- <sup>1</sup> For more information about employee or independent contractor status, consult Internal Revenue Service IRS Publ'n. 15-A "Employer's Supplemental Tax Guide," 2010 WL 151789 (January 2010).
- <sup>2</sup> *St. Croix Sensory, Inc. v. Dep't of Employment and Econ. Dev.*, 785 N.W.2d 796 (Minn. Ct. App. 2010).
- <sup>3</sup> See also, Minn. R. 3315.0555 (2011). The Minnesota Rules provide criteria for determining whether the employer has control over the method or performance of services, but the rules also state that control is determined by the totality of the circumstances. Minn. R. 3315.0555, subp. 3 (2011). The criteria include: (A) whether the employer has authority over assistants; (B) whether the individual is required to comply with detailed instructions or the employer has the right to instruct or direct the method of doing work; (C) whether regular reports relating to how the services are performed must be submitted to the employer; (D) whether the work is done on the employer's premises; (E) whether services must be personally rendered to the employer; (F) whether a continuing relationship exists between the \*801 parties; (G) whether the employer can terminate the individual without incurring liability; (H) whether set work hours are established; (I) whether training is given; (J) whether the employment is full-time; (K) whether the employer furnishes tools, supplies, and materials; (L) whether expenses are paid; and (M) whether the employer is required to enforce standards imposed by regulatory agencies. *Id.*
- <sup>4</sup> 26 U.S.C. § 3121(d)(3)(A) - (D) (2011).
- <sup>5</sup> 26 U.S.C. § 3508 (2011).
- <sup>6</sup> Minn. Stat. § 181.723 (2011).
- <sup>7</sup> Minn. Stat. § 363A.08 subd. 4(3) (2011).
- <sup>8</sup> 41 C.F.R. § 60-1.3 (2011) (The "Internet Applicant Rule").
- <sup>9</sup> U.S. Department of Justice, The Americans with Disabilities Act: Title I Technical Assistance Manual § 3.1, 3.6 (1992).
- <sup>10</sup> It is recommended that employers do not inquire into employment history further back than the previous five years to avoid an indirect inquiry into age, although it is not legally prohibited. The Age Discrimination in Employment Act (ADEA) only prohibits employment discrimination based on old age (at least 40) and, therefore, does not prohibit employers from favoring relatively older individuals. See Federal Register, July 6, 2007 Volume 72, Number 129; *General Dynamics Land Systems, Inc. v. Chine*, 540 U.S. 581 (2004). But the Minnesota Human Rights Act (MHRA) protects individuals over the age of majority. Minn. Stat. § 363A.03. Covered employers must comply with both state and federal law.
- <sup>11</sup> 38 U.S.C. § 4311 (2011).
- <sup>12</sup> The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits all employers from discriminating against any veteran, reservists, or National Guard members because of his or her past, present, or future military obligation. The law also requires that employers provide reemployment rights after a period of active duty or training.
- <sup>13</sup> This question is acceptable after the applicant becomes an employee.
- <sup>14</sup> Questions about criminal convictions are permissible if reasonably related to the job for which the applicant is applying. Further, for certain jobs, background checks are required. See discussion under the heading "Background Checks."
- <sup>15</sup> U.S. Department of Justice, The American with Disabilities Act: Title I Technical Assistance Manual § 5.5(b) (1992).
- <sup>16</sup> Minn. Stat. §§ 181.64, 181.65 (2011).
- <sup>17</sup> Minn. Stat. § 181.635 subd. 2-4 (2011).
- <sup>18</sup> 41 C.F.R. § 60-1.12 (2011).
- <sup>19</sup> Minn. Rules § 5000.3420 subp. 1 (2011); Minn. Rules § 5000.3410 subp. 2 (2011); Minn. Stat. § 363A.36 subd. 1(a) (2011).
- <sup>20</sup> *St. Paul, Minnesota, Code of Ordinances, Part II – Legislative Code, Title XVIII Human Rights Chapter 183.04* (2011).

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- 21 Minneapolis, Minnesota, Code of Ordinances, Title 7 – Civil Rights, Chapter 139.50(d) (2011).
- 22 Minn. Stat. § 326.336, subd. 1 (2011).
- 23 Minn. Stat. § 604.202 (a)(2) (2011).
- 24 Minn. Stat. § 123B.03 (2011).
- 25 Minn. Stat. §§ 299C.67 et seq. (2011).
- 26 Minn. Stat. § 144A.46, subd. 5(b) (2011).
- 27 Minn. Stat. § 181.645 (2011).
- 28 U.S. Department of Justice, The Americans with Disabilities Act: Title I Technical Assistance Manual § 5.5(g) (1992).
- 29 15 U.S.C. §§ 1681 et. seq. (2011).
- 30 Minn. Stat. § 13C.001 et. seq. (2011).
- 31 15 U.S.C. §§ 1681b, 1681k (2011); Minn. Stat. § 13C.02 (2011).
- 32 Minn. Stat. § 363A.20, subd. 8(a)(3) (2011).
- 33 42 U.S.C. § 2000e-2 (2011); 29 C.F.R. §§ 1607.1 et. seq. (2011).
- 34 State by Spannaus v. Century Camera, Inc., 309 N.W.2d 735 (Minn. 1981).
- 35 29 U.S.C. § 2002 (2011); Minn. Stat. § 181.75 (2011).
- 36 Huisenga v. Opus Corp., 494 N.W.2d 469 (Minn. 1992).
- 37 Minn. Stat. § 363A.20, subd. 8(a)(1) (2011).
- 38 Minn. Stat § 363A.08, subd. 6 (2011).
- 39 Minn. Stat § 363A.20, subd. 8(c) (2011).
- 40 Minn. Stat § 181.951, subd. 2 (2011).
- 41 Minn. Stat §§ 181.951, subd. 2; 363A.20, subd. 8(c) (2011).
- 42 49 C.F.R. §§ 382.101 et. seq. (2011).
- 43 Minn. Stat. §§ 181.960-966 (2011).
- 44 Minn. Stat. § 181.9631 (2011).
- 45 8 U.S.C. § 1324a (2011).
- 46 8 C.F.R. § 274a.2(b)(1)(i)(A) (2011).
- 47 8 C.F.R. § 274a.2(b)(1)(vi)(A) (2011).
- 48 8 C.F.R. § 274a.2(b)(1)(vi)(A)(3) (2011).
- 49 8 C.F.R. § 274a.2(b)(1)(vii) (2011).
- 50 8 U.S.C. § 1324a (b)(3) (2011).
- 51 Id.
- 52 8 C.F.R. § 274a.10(b)(1)(ii)(A-C) (2011).
- 53 8 U.S.C. § 1324a(f)(1) (2011).
- 54 Minn. Exec. Order No. 08-01 (Jan. 7, 2008).
- 55 Minn. Exec. Order No. 08-01, 3 (Jan. 7, 2008).
- 56 8 C.F.R. § 214.6(c) (2011).
- 57 Minn. Stat. § 256.998, subd. 3, 5 (2011)
- 58 Minn. Stat. § 518A.53, subd. 3 (2011).
- 59 Minn. Stat. § 518A.53, subd. 5(a) (2011).
- 60 Minn. Stat. § 518A.53, subd. 9(a) (2011) (citing 15 U.S.C. § 1673 (b)(2) (2011)).
- 61 Minn. Stat. § 518A.53, subd. 5(f) (2011).
- 62 Minn. Stat. § 518A.41, subd. 6 (2011)