LEGAL GUIDELINES FOR HIRING EMPLOYEES

I. THE EMPLOYMENT APPLICATION

The application form is generally the first real contact between an employer and a prospective employee. The application form offers an employer the opportunity to obtain standardized information concerning applicants that can be used to screen unqualified applicants and to compare objectively the responses of a number of applicants. The Equal Employment Opportunity Commission ("EEOC") requires employers to keep applications for a minimum of one year, although the application need not be kept open for consideration during that entire period.

In drafting an employment application, an employer should attempt to eliminate all information requests that are not essential to determining the qualifications of applicants, and which can be found to be discriminatory. Even seemingly innocuous questions such as the selection of "Mr., Mrs. or Ms." and requests for information concerning applicants' hobbies and organizational memberships can be used by overzealous claimants to support a discrimination claim against the employer.

Employers subject to Title VII should also use the employment application to seek information required by the Uniform Guidelines on Employee Selection Procedures (the "Guidelines") concerning the race, ethnicity and gender of each applicant and to analyze the data that they collect to determine whether the selection process has an adverse impact based on race, sex or ethnic group. 29 C.F.R. § 1607. An employer can satisfy its collection obligations by attaching an "applicant flow questionnaire" to the employment application. The questionnaire should advise applicants that the information sought is required by federal regulations, will be maintained separately from the application and will have no impact on the employment decision.

Venable has designed a sample Employment Application form that can be used by employers as a guide in preparing an application incorporating these considerations.

II. THE EMPLOYMENT INTERVIEW

The interview process is fraught with legal land mines. Title VII, the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and other federal, state and local anti-discrimination provisions limit questions concerning the applicant's race, gender, disability, national origin, sexual orientation, marital status, pregnancies and age. Similar restrictions apply to "help wanted" ads. The NLRA precludes questions concerning applicants' union affiliations and those designed to prevent union "salting."

The best way to avoid potential exposure to liability is to prepare a list of objective questions concerning the applicant's qualifications prior to the interview and stick to it. Inquiries concerning the applicant's age, race, national origin, marital status, family plans, and other personal issues, and the applicant's union affiliations or sympathies should be avoided. All employees who interview applicants should be trained to conduct objective interviews and to avoid certain issues during interviews.

Venable has prepared a checklist of preemployment inquiries, which provides general guidance on the types of questions that should and should not be asked during employment interviews.

III. ACQUIRING INFORMATION CONCERNING EMPLOYEES

A. References/Negligent Hiring

In December 1997, a mail handler in Milwaukee opened fire in a mail-sorting area, killing a coworker that he disliked and injuring two other employees. The mail handler, who was reportedly angry that his request to be transferred to the day shift was denied, then killed himself. In a crowded cafeteria in a Florida office building, a former employee shot five of his former supervisors; three were killed. As he pulled the trigger, the employee reportedly said, "This is what you get for firing me."

The foregoing high-profile examples of violence in the workplace raise the question: is the employer of these violent employees liable for their conduct? If the employer knew, or should have known, of their propensity for violence, the answer to this question may be "yes."

One of the hottest topics in employment law today is the doctrine of negligent hiring. This theory imposes liability on an employer for the injurious acts of its employees if the employer knew, or should have known, of the employee's propensity for such behavior. For instance, under this theory, an employer may be held liable if an employee assaults someone in the workplace and an inquiry into the employee's prior work history would have revealed a history of similar misconduct. Although the doctrine itself is by no means novel, it has gained increased attention in recent years as concerns over workplace violence have intensified.[1]

[1] The related tort of negligent retention is based on the same principles that underlie the tort of negligent hiring, that is, that an employer is careless in retaining an employee when it is aware that the employee is unfit. As with the tort of negligent hiring, the plaintiff must establish that the employer knew or should have known the employee's violent tendencies before the act that produced the injury. The sort of knowledge likely to be used by a plaintiff to buttress a claim of negligent retention could arise as a result of reports by other employees of improper or abusive behavior, complaints of sexual harassment, and the like.

1. General Principles

An employer's obligation to its employees and third parties for negligent hiring hinges on whether the employer acted as a reasonably prudent employer would have acted in hiring such employees. If the employer has not taken reasonable care in selecting the person for the business at hand, liability will be imposed. In order for a customer, employee, or other third party to prevail in a negligent hiring suit against an employer, the following must generally be shown:

- the existence of an employment relationship between the employer and the worker;
- the employee's unfitness;
- the employer's actual or constructive knowledge of the employee's unfitness (failure to investigate can lead to a finding of constructive knowledge);
- the employee's act or omission causing the third party's injuries; and
- the employer's negligence in hiring the employee as the most likely cause of the plaintiff's injuries.

It is important to note that, unlike the doctrine of *respondeat superior*, liability for negligent hiring extends to acts beyond the scope of the employee's employment. While liability under a *respondeat superior* theory is based on the principle that an employee is the agent of the employer, liability under a negligent hiring theory arises from the direct responsibility of the employer in exposing others to a potentially dangerous employee.

However, in order to prevail on a negligent hiring claim, the plaintiff must establish that his or her injuries were proximately caused by the particular characteristics of the employee of which the employer was aware or should have been aware. For instance, if a reasonable inquiry by the employer would have revealed that an employee had been convicted for driving while intoxicated, this information will likely be insufficient to establish the employer's responsibility for a theft committed by the employee. Similarly, an employer's failure to investigate an employee's background alone is not a proper basis for liability; if there is nothing in the employee's background that would indicate a propensity to commit the type of harm at issue, the employer's failure to conduct such an investigation is irrelevant.

Courts in Maryland, Virginia and the District of Columbia have recognized negligent hiring as a viable cause of action. For instance, in Cramer v. Housing Opportunities Comm'n, 304 Md. 705, 501 A.2d 35 (1985), a tenant of a housing project who was raped by a Montgomery County housing inspector brought an action for negligent hiring against the Montgomery County Housing Opportunities Commission ("HOC"). The evidence showed that the HOC did not contact any of the employment or personal references provided by the inspector. In addition, the HOC did not attempt to verify any of the information provided by

the inspector on the application form. Moreover, although the inspector failed to complete portions of the application that asked whether he had ever been dismissed or asked to resign from any position, the HOC did not seek to obtain this information.

At trial, the plaintiff called the three individuals whom the inspector had listed as references on his employment application. Each testified that the HOC had made no attempt to contact them and that, in any event, they had no knowledge of the inspector's educational background or work experience. In addition, the plaintiff attempted to offer evidence that the inspector's criminal record was readily available to the HOC. An inquiry into the inspector's criminal background would have revealed that, at the time of his hire, he had convictions for robbery, burglary and assault and was under indictment for rape and related offenses. The trial refused to admit this evidence. On appeal, the Court of Appeal held that the trial court's ruling was in error and ordered a new trial. Thus, the Cramer case suggests that, in some circumstances, employers should go so far as obtaining a criminal background check on potential employees in order to satisfy the reasonable care standard.

In contrast to the Cramer case, the court in Southeast Apartments Management v. Jackman, 257 Va. 256, 513 S.E.2d 395 (1999), held that the employer had conducted a satisfactory pre-hire inquiry. In Jackman, a female tenant who was molested by the maintenance supervisor of the apartment building in which she resided brought an action for negligent hiring against the building owner. The jury returned a verdict for the tenant, and the building owner appealed. In determining whether the trial court erred in allowing the case to go forward, the Supreme Court examined the hiring process and information gathered therein. The evidence showed that the resident manager, on behalf of the owner, interviewed the employee and obtained favorable references from two individuals. In addition, the resident manager administered the employee a behavioral test, on which he received a favorable score. Moreover, on his application, the employee stated that he had only been convicted of traffic violations. In the Court's view, "none of this information gave a hint that [the employee] may have had a propensity to molest women." Jackman, 257 Va. at 261, 513 S.E.2d at 397. Consequently, the Court ruled that the trial court erred in refusing to find that the tenant failed to establish a prima facie case of negligent hiring and set aside the verdict in favor of the tenant. See also Majorana v. Crown Central Petroleum Corp., 260 Va. 521, 539 S.E.2d 426 (2000) (recognizing that, to establish liability for negligent hiring, the plaintiff must show that an employee's propensity to cause injury was either known to the employer or should have been discovered by reasonable investigation).

2. Avoiding Liability for Negligent Hiring

As noted above, the doctrine of negligent hiring imposes on employers the duty to exercise reasonable care in the hiring process. Employers seeking to reduce potential liability for negligent hiring should consider taking the following steps:

- Do Not Extend Employment Offers Without Checking References: Adopt and enforce a company policy that no employment offers will be extended until satisfactory reference checks are made; inform all applicants of that policy.

- Check Employment References:
  Call or write to each reference, and document all information that you receive. Keep notes of the name and title of the reference, the name of the person who contacted the reference, the method of communication, the date(s) of each communication, and the substance of the communication. If the former employer refuses to give you any information, document that you received no information indicating that you should not hire the applicant.

- Check Educational Records:
  Make sure that the applicant has the qualifications and background he has represented that he has by checking educational records.

- Check Driving Records:
  If the position will require the employee to drive a company vehicle, check the applicant's driving record.

- Check Credit History and/or Criminal Records:
  If the position will require the employee to have access to money, drugs or valuables or have contact with the public, particularly children, check the applicant's credit history and/or criminal record.[2]

B. Arrest Records

As noted above, under certain circumstances, it may also be advisable for the employer to conduct a background and criminal investigation concerning the applicant. However, several states, including Maryland, Virginia and the District of Columbia, have enacted statutes that prohibit employers from asking applicants and employees whether they have ever been arrested, except in limited circumstances. See Md. Code Ann., Art. 27, § 740; Va. Code Ann. § 19.2-392.4; D.C. Code Ann. § 2-1402.66 (2001). The EEOC also frowns on such inquiries, on the ground that they have a disparate impact against certain minority groups. As noted above, employers can ask about an applicant's criminal convictions. In addition, laws applicable to certain regulated industries may require more detailed background checks. See D.C. Code § 44-552 (2001) (health care providers required to perform criminal background checks on unlicensed professionals); Md. Health Occ. Code § 19-1901 (health care providers required to perform criminal background checks on licensed nurse applicants); Va. Code §§ 32.1-126.01, 32.1-162.9:1, 63.1-173.2, 63.189.1, 63.1-194.13 (licensed nursing homes, homes for adults and adult day care centers are required to obtain criminal background records of job applicants).

[2] Maryland, Virginia and the District of Columbia all have enacted statutes that prohibit employers from asking applicants and employees whether they have been *arrested*, except in limited circumstances. See Md. Code Ann., Art. 27, § 740; Va. Code Ann. § 19.2-392.4; D.C. Code Ann. § 1-2530.

C. Credit Reports

In requesting background checks on prospective employees, it is important to keep in mind the requirements of the Fair Credit Reporting Act ("FCRA"). The FCRA imposes various disclosure and notification obligations on employers who procure consumer reports from consumer reporting agencies for employment purposes. Because the notification requirements are rather complex, employers who wish to obtain credit and criminal background checks on applicants should seek the assistance of counsel in developing the necessary notice and disclosure forms.

Generally, however, before requesting a consumer report from a consumer reporting agency, an employer must first make a clear, conspicuous disclosure that a consumer report may be obtained for employment purposes.[3] The disclosure must be in a document consisting solely of the disclosure. In addition, the individual must authorize the procurement of the report in writing. See 15 U.S.C. § 1681b(b)(2). The employer may then request a consumer report for employment purposes by certifying to the credit reporting agency that it has made the required disclosure and secured the required authorization, and that it will not use the report in violation of any state or federal equal employment opportunity law or regulation. See 15 U.S.C. § 1681b(b)(1)(A).

If an employer chooses to base an adverse employment action,[4] even in part upon information contained in a consumer report, the employer must, ***before*** actually taking the action: (1) provide the individual with a copy of the report; and (2) a description in writing of the individual's rights under the FCRA. See 15 U.S.C. § 1681b(b)(3). The credit agency that furnishes the report is required to provide employers with a description of these rights that can be passed on to the individual. The employee's rights include an opportunity to correct inaccurate or erroneous information contained in the credit report by reporting inaccuracies to the credit reporting agency that produced the report.[5]

After an employer takes the adverse action, it must give the individual notice – orally, electronically or in writing – that the action has been taken. The adverse action notice must include: (1) the name, address and phone number of the credit bureau that supplied the credit report; (2) a statement that the credit bureau did not make and does not know the reasons for the adverse action; and (3) a notice of the individual's right to dispute the accuracy or completeness of any information the bureau furnished and right to an additional free credit report from the bureau upon request within sixty days. See 15 U.S.C. § 1681m(a).

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[3] Under the FCRA, the term "employment purposes" means a "report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee." See U.S.C. § 1681a(h) (emphasis added).

[4] An "adverse action" is defined as ". . . a denial of employment or any other decision for purposes that adversely affects any current or prospective employee . . .." See 15 U.S.C. § 1681a(k)(1)(B)(ii).

[5] The Federal Trade Commission, the agency in charge of enforcing the FCRA, has suggested that the amount of time that an employer should wait before taking adverse action will vary depending upon the circumstances, such as the nature of the job involved and the way that the employer does business. It is counseled that employers wait at least seven (7) days prior to taking action.

IV. EMPLOYEE/APPLICANT TESTING

A. Lie Detector Tests

Many states have enacted laws that prohibit employers from requiring applicants or employees to take lie detector tests in order to obtain or continue employment. Maryland, Virginia and the District of Columbia either prohibit lie detector tests of applicants and employees or restrict the use of such tests. See Md. Code Ann. Art. 100, § 95; Va. Code Ann. § 40.1-51.4:3; D.C. Code Ann. § 36-802. Federal law also prohibits or severely restricts the use of lie detector tests in employment. 29 U.S.C. § 2001.

B. Drug Testing

A significant number of employers screen employees and/or job applicants for the use of illegal drugs and alcohol consumption. A number of large corporations require their contractors and vendors to adopt substance abuse testing programs. Some state and federal agencies also require contractors and subcontractors to perform substance abuse testing. Moreover, under regulations issued under the Omnibus Transportation Employee Testing Act of 1988, companies that employ drivers of commercial motor vehicles and other transportation workers in safety-sensitive positions in interstate commerce must subject employees to drug testing on a pre-employment, for cause, post-accident and random periodic basis.

While drug testing of employee applicants has generally been found to be legally permissible, there are some limitations. In addition to the limitations imposed by the Americans with Disabilities Act, discussed below, state law may impose limitations on applicant and employee testing. In Maryland, for instance, employers that test employees must perform the tests at a laboratory certified by the state and provide the applicant or employee with notice of a confirmed positive test result within thirty days of the test date. The notice must include a copy of the test results, the employer's policy on substance abuse, an explanation of the employer's intention, if any, to take disciplinary action, and a statement notifying the employee that he or she has the right to have an independent test performed. Maryland does allow applicants for employment to be screened for drug use using a "single use test device." However, if the single use test device results in a positive result, the applicant must be given a follow up test using a laboratory certified by the state following the procedure mentioned above.

Notwithstanding the general legal acceptance of drug testing, court challenges continue to be filed by applicants and employees, particularly where no business or safety-related need for the test can be shown, or where the test is unduly intrusive or fails to follow state of the art procedures. See Luck v. Southern Pacific Transp. Co., 218 Cal. App. 3d 1 (1st Dist) (upholding a jury finding that employer breached the implied covenant of good faith and faith dealing by discharging a computer programmer for refusing to submit to a mandatory, random drug test), cert. denied, 498 U.S. 939 (1990); Kelley v. Schlumberger

Tech. Corp., 849 F.2d 41 (1st Cir. 1989) (upholding jury finding that testing procedures that required the direct observation of urination inflicted emotional distress on employee).

The interest of public sector employers in testing applicants and employees for drugs is, unlike the interest of private employers, subject to important federal and state constitutional restraints – including the prohibition against illegal searches and seizures – that generally do not apply to many private employers. For example, the Maryland Attorney General issued an opinion stating that mandatory drug testing of all Maryland State employees would violate the Fourth Amendment's prohibition against unreasonable searches and seizures. The Attorney General wrote that "a war on drugs is a good idea, but not if its first casualty is the Bill of Rights." The Attorney General did not, however, conclude that all drug testing by public employers was illegal. He opined that drug testing of a public employee would not violate the constitution if based on particularized probable cause to believe that the employee was a drug abuser. He further stated that testing of applicants for public jobs which drug abusers could not perform or which would present a danger to the public or property would be permitted. The Attorney General further concluded that even when drug testing is permitted, the public employer's drug testing program must include reasonable steps to confirm that a positive result is accurate, that the specimens were not tampered with or switched, and that test results were secured against unauthorized disclosures.

The Maryland Attorney General's opinion is consistent with Supreme Court precedent. For example, in a 1989 opinion, the Court found the testing of candidates for all promotions in (1) those positions involving drug intradiction or seizure; and (2) those jobs requiring the incumbent to carry a firearm to be constitutionally acceptable. Agents involved in drug intradiction and seizure could be tested, the Supreme Court held, to prevent foxes from being promoted into the hen house. Workers carrying firearms could also be tested to ensure the safety of the public by preventing the promotion of unfit individuals into jobs with access to deadly force.

Finally, a number of state constitutions explicitly recognize an individual's right of privacy, which could form the basis for a challenge to a drug testing program. While most courts have held that such provisions apply only to state actions, courts in New Jersey and California have held such provisions applicable to private employers.

C. Personality and Skills Tests

Employers who ask applicants to take personality and/or skills tests prior to employment should be aware of any possible adverse impact of such tests on minority groups and should be sure the tests are properly "validated." The EEOC has established guidelines for the validation of employment tests, in order to establish that the tests are truly related to job performance. 29 C.F.R. § 1607.14. Moreover, if the tests are reviewed by medical professionals, they may be deemed "medical examinations" subject to the restrictions discussed below imposed by the ADA.

V. AMERICANS WITH DISABILITIES ACT HIRING CONSIDERATIONS

A. Pre-Offer

1. Inquiries and Medical Examinations

Guidelines adopted by the EEOC address the permissible inquiries and examinations at each stage of the recruiting process. According to the guidelines, an employer may not ask disability-related questions or conduct medical examinations until after it makes a conditional job offer to the applicant. A question is "disability-related" if it is likely to elicit information concerning a disability. The EEOC instructs that disability-related inquiries may include the following:

- asking an applicant whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability;
- asking an applicant to provide medical documentation regarding his/her disability;
- asking an applicant's co-worker, family member, doctor, or another person about an employee's disability;
- asking about an applicant's genetic information;
- asking about an applicant's prior workers' compensation history;
- asking an applicant whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications; and
- asking an applicant a **broad** question about his/her impairments that is likely to elicit information about a disability (e.g., What impairments do you have?).

Questions that are permitted include the following:

- asking generally about an applicant's **well being** (e.g., How are you?), asking an employee who looks tired or ill if s/he is feeling okay, asking an employee who is sneezing or coughing whether s/he has a cold or allergies;
- asking an applicant about nondisability-related impairments (e.g., How did you break your leg?)
- asking an applicant whether s/he can perform job functions;

- asking an applicant to describe or demonstrate how s/he will perform certain job tasks;

- asking an applicant whether s/he has been drinking;

- asking an applicant about his/her **current illegal use of drugs**;

- asking a pregnant applicant how she is feeling or when her baby is due; and

- asking an applicant to provide the name and telephone number of a person to contact in case of a medical emergency.

With respect to all of these pre-offer inquiries, the employer must ask all applicants in the same job category the same questions.

If an applicant's disability is obvious or if the applicant volunteers that he or she has a disability, an employer can ask a particular applicant to describe or demonstrate how he or she would perform the job functions and ask whether he or she needs reasonable accommodation to perform those functions.

2. Drug Testing

a. Illegal Drug Use

The ADA does not protect an individual who is currently engaged in illegal drug use. Thus, the ADA does not restrict an employer's right to conduct tests to detect current drug use, either at the pre- or post-offer stage.

b. Alcohol Use

A person who is an alcoholic is considered an "individual with a disability" under the ADA. Because tests of alcohol use are considered medical examinations, an employer cannot perform the test until the post-offer stage and must maintain the results of the tests in confidence.

B. Post-Offer Inquiries and Examinations

After the employer has made a conditional job offer, the employer may ask disability-related questions and require medical examinations, as long as this is done for all individuals in the job category. If the question or exam screens out an individual because of his or her disability, the employer must establish that the reason for the screening was "job related and consistent with business necessity." If the individual is screened out for safety reasons, the employer must show that the individual posed a "direct threat" -- a significant risk of substantial harm to himself or herself or others that cannot be reduced through reasonable accommodation.

The Supreme Court recently had occasion to examine and validate the "direct threat" defense in Chevron v. U.S.A. Inc. v. Echazabal, No. 00-1406 (S. Ct. June 10, 2002). The plaintiff in this case had been employed by various maintenance contractors in the oil refinery of Chevron for 20 years and applied directly with Chevron jobs in 1992 and 1995. In both 1992 and 1995, the plaintiff was offered a job with Chevron, contingent on passing a medical examination. Each examination showed liver abnormality or damage, which Chevron's doctors opined would be "aggravated by continued exposure to toxins in Chevron's refinery." As a result, the plaintiff's job offers were rescinded. Moreover, in 1995, Chevron requested that the contractor employing the plaintiff remove him from the refinery.

The plaintiff field suit alleging that Chevron's failure to hire him constituted a violation of the ADA. Chevron defended its decision not to hire the plaintiff based on the EEOC regulation that permits an employer to refuse to hire an individual with a disability that would pose a threat to his own health in the work place. Specifically, Chevron argued that its decision not to hire the plaintiff was justified because the job would have exposed him to liver-toxic chemicals that would have aggravated his liver condition and endangered his health. Recognizing the "threat-to-self" defense, the District Court granted summary judgment for Chevron. On appeal, the Ninth Circuit reversed the District Court decision, explaining that the EEOC regulation recognizing a "threat-to-self" defense exceeded the scope of the agency's rulemaking authority. The Ninth Circuit reasoned that, although the text of the ADA itself explicitly recognizes a employer's "right to adopt an employment qualification barring anyone whose disability would place others in the workplace at risk," it "say[s] nothing about threats to the disabled employee himself." Furthermore, the Ninth Circuit held that a contrary ruling would lead to an increase in the adoption of paternalistic attitudes by employers.

In reversing the Ninth Circuit, the Supreme Court held that the EEOC regulation allowing employers to assert a "threat-to-self" defense is a reasonable interpretation of the ADA because the "harm-to-others provision" was merely an example of a "legitimate qualification that are job related and consistent with business necessity" and was not intended to be exhaustive. Furthermore, the Supreme Court stated that the EEOC regulation does not allow the kind of impermissible workplace paternalism that the ADA was meant to preclude. The Supreme Court recognized that the Ninth Circuit's concern over "sham protection" offered by employers to avoid hiring disabled persons on the pretense of protecting them from harm is precluded by the EEOC's regulation that requires that the direct threat defense be based on a "reasonable medical judgement that relies on the most current medical knowledge and/or the best available objective evidence" and on an "individualized assessment of the individual's present ability to safely perform the essential functions of the job."

C. Confidentiality

An employer must keep all medical information concerning employees and applicants confidential. The guidelines recognize several limited exceptions:

-- Supervisors may be told about restrictions and necessary accommodations;

-- If the disability might require emergency treatment, first aid and safety personnel may be told;

-- Information may be given to state workers' compensation offices, injury funds or workers' compensation insurance carriers in accordance with state law; and

-- Information may be used for insurance purposes.

VI. OFFER LETTERS AND LIABILITY FOR REPRESENTATIONS IN THE HIRING PROCESS

A. Misrepresentations

It is well-established that an employer can be held liable for misrepresentations to applicants concerning the terms of the employment relationship. Maryland courts have specifically recognized that an employer may also be liable for what it does ***not*** disclose to applicants. See Lubore v. RPM Assoc., Inc., 674 A.2d 547 (Md. Ct. App. 1996) (employer found potentially liable for failing to notify an applicant for an executive-level position that he would be required to sign a fifteen-page employment agreement containing a covenant not to compete and other restrictions until his second day on his new job). To avoid liability for false representations and the "non-disclosure" of key terms, employers must be careful not to cause an employee to change her employment based on information that could be considered misleading. Offer letters should clearly indicate that they do not encompass every term of employment.

B. Statements Modifying the At-Will Relationship

The District, Maryland, and Virginia all continue to recognize that employment for an indefinite term remains an "at will" relationship, but a number of exceptions have been engrafted onto this general rule. See Sorrells v. Garfinckel's, Brooks Brothers, Miller & Rhoads, Inc., 565 A.2d 285 (D.C. 1989); Wholly v. Sears, Roebuck & Co., 803 A.2d 482 (Md. 2002); Adler v. American Standard Corp., 432 A.2d 464 (Md. 1981). Courts have recognized that statements during the interviewing and recruiting process and documents, such as the offer letter and employee manuals, provided to prospective and new employees can create implied contract rights that modify the at-will relationship and impose limitations on an employer's right to terminate an employee. See Dantley v. Howard University, 801 A.2d 962 (D.C. 2002) (recognizing that language in an employee handbook may create an implied contract); Nickens v. Labor Agency of Metropolitan Washington, 600 A.2d 813 (D.C. 1991) (employee handbook that required employees to accept "the position and the Personnel Policies governing his/her employment" in writing formed an employment contract); Washington Welfare Ass'n, Inc. v. Wheeler, 496 A.2d 613 (D.C. 1985) ("the Manual evidences intent of the parties that specific preconditions had to be met before employment could be terminated; the contract was therefore distinguishable from a pure 'at will' contract"); Progress Printing Co. v. Nichols, 244 Va. 337 (Va. 1992) (recognizing that

an employment manual could constitute an implied contract where it contained a termination for cause provision); see also Bradley v. Colonial Mental Health & Retardation Board, 856 F.2d 703 (4th Cir. 1988); Staggs v. Blue Cross, Inc., 486 A.2d 798 (Md. Ct. App.), cert. denied, 493 A.2d 349 (Md. 1985).

Some courts have also recognized that oral representations and implied promises concerning the duration or terms of employment can create an implied contract. See Sea-Land Service, Inc. v. O'Neal, 297 S.E.2d 647 (Va. 1982) (implied contract precluded termination of employee who resigned position with employer with the express understanding that she would be transferred to another position); Hodge v. Evans Financial Corp., 823 F.2d 559 (D.C. Cir. 1987) (oral promise to keep employee on a permanent basis until retirement, coupled with employee's agreement to relocate to the Washington, D.C. area, created an enforceable contract that was terminable only for cause). But see Choate v. TRW, Inc, 14 F.3d 74 (D.C. Cir. 1994) ("at will" status found despite initial promises); Hartman v. C.W. Travel, Inc., 792 F.2d 1179 (D.C. Cir. 1986) (inclusion of annual salary in an employment contract does not alone make the contract one for a fixed term, but special factors could affect outcome).

To reduce the possibility of a court finding that its statements or documents modify the "at will" relationship, employers should incorporate "at will" affirmation statements in their employment applications, policy manuals and similar documents. These statements make employment at-will an express part of the employment conditions and limit the methods by which the at-will relationship can be modified. To be effective, the affirmation must (1) be written in plain language; (2) be prominently presented to the applicant or employee; (3) clearly state the employer's right to fire the employee with or without cause; (4) clearly state that no employee, other than designated officers, can alter the employer's right to terminate; and (5) be dated and signed by the applicant or employee.

Courts have upheld at-will affirmations that satisfy these prerequisites. In Novosel v. Sears Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980), for instance, the employment application contained in the following affirmation language:

> In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co. and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice-president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make an agreement contrary to the foregoing.

The court concluded that, based on this language, the employee was an at-will employee and could have no reasonable expectation that dismissal would only be for just cause. See also Goos v. National Ass'n of Realtors, 715 F. Supp. 2 (D.D.C. 1989); Smith v. Union Labor Life Ins. Co., 620 A.2d 265 (D.C. 1993).

C. Covenants Not to Compete

Employers that are concerned about protecting their business interest upon the future departure of key employees are often best served by obtaining an agreement from new hires, at the outset of employment, to restrictive covenants, such as covenants not to compete. Securing such a covenant is often crucial because it enables employers to protect their intellectual property, trade secrets and corporate information.

Covenants not to compete are typically obtained by businesses that employ individuals: (1) who have access to trade secrets, intellectual property, or other confidential information; or (2) who have close personal contact with the employer's customers and suppliers. Through covenants not to compete, employers may guarantee some level of protection over confidential matters and information central to their business operations. Such covenants have generally been held to be enforceable, provided that they are restricted as to time, place and manner of competition.

Employers should make certain that a covenant not to compete includes a disclaimer stating that the covenant does not modify the employee's status as an at-will employee.

VII. COMPLIANCE WITH IMMIGRATION REFORM ACT

Employers may not hire or recruit anyone who is not authorized to work in the United States and must verify on Form I-9 the employment authorization and identity of all employees hired, within three days of the individual's acceptance of an offer of employment, or at the time employment actually commences. The employer must maintain the I-9 form for three years after the hire or one year after termination, whichever is later.

LEGAL CHECKLIST OF PREEMPLOYMENT INQUIRIES

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THE FOLLOWING QUESTIONS SHOULD BE AVOIDED IN PRE-OFFER INTERVIEWS:

Disabilities:

Is there any health-related reason you may not be able to perform this job?

Have you or a family member ever had any of the following medical conditions .?

Have you ever filed a claim for workers' compensation?

Do you have AIDS or HIV infection?

Age:

When were you born?

When did you graduate from high school?

National Origin:

Where were you born? Are you a naturalized citizen?

Criminal Record:

Have you ever been arrested?

Marital/Family Status:

Are you married? Are you pregnant?

Do you have any children? Do you plan to have any children?

Union Affiliation/Salting:

Are you a member of a union?

THE FOLLOWING PRE-OFFER QUESTIONS ARE GENERALLY PERMISSIBLE:

Can you perform the essential functions of this job?

Here is the job description and a list of the company's performance standards -- can you satisfy them?

Will you comply with the company's drug abuse (smoking, attendance, etc.) policies?

Do you have the necessary licenses (skills, educational requirements, experience, or other qualifications) necessary to do the job?

Describe your prior work experiences? Why did you leave each of your prior employers?

Have you been convicted of a felony? Describe the circumstances.

Will you take a test for the use of illegal drugs?

Do you have the necessary documents for our I-9 forms?

These lists are not exhaustive. In some instances, legal issues may vary on a state by state basis and by type of industry. In addition, there are categories of information that applicants may be asked to voluntarily disclose pursuant to affirmative action requirements of state or federal law.

APPLICATION FOR EMPLOYMENT

(NAME OF COMPANY)

An Equal Opportunity Employer

(NAME OF COMPANY) is an Equal Opportunity Employer and does not discriminate on the basis of race, color, creed, religion, sex, age, marital status, national origin, or status as a veteran or qualified disabled person, or on any other basis prohibited by applicable laws.

1. NAME: _____
   Last First Middle

2. ADDRESS: _____
   Number & Street City State Zip Code

3. SOCIAL SECURITY NUMBER: ___ - ___ - ___

4. TELEPHONE NUMBER WITH AREA CODE:

   Day (__) _____ Evening (__) _____

5. Are you legally authorized to work in the United States without limitation or restriction?

   (NAME OF COMPANY) complies fully with the provisions of the Immigration Reform and Control Act of 1986 with respect to the employment eligibility of all employees to work legally in the United States. If you accept employment with (NAME OF COMPANY), you will be required to demonstrate employment eligibility by completing Form I-9 and presenting acceptable documents from those listed on the back of that form within three (3) days of hire. (NAME OF COMPANY) does not discriminate in hiring or firing based upon an individual's national origin or citizenship.

6. Position applied for: _____ Full time____ Part time_____

7. Salary Expected: $_____ Date Available:_____

8. Have you worked for (NAME OF COMPANY) before?

Yes__ No___

If yes, list dates, location, and position: _____

_____

9. Have you applied for employment with (NAME OF COMPANY) before?

Yes___ (Dates and position_____) No___

10. EDUCATION: (Only Job-related Education Will be Considered)

	Name and Location of School	Circle Last Year Completed	Did You Graduate?	Major Course Degree Received
Elementary	_____	1 2 3 4 5 6 7 8		
High School	_____	1 2 3 4		
College	_____	1 2 3 4		
Trade/ Business	_____	1 2 3 4		
Other	_____	1 2 3 4		

11. Subjects of study or research work: _____

_____

12. LIST ANY SPECIAL EXPERIENCES, QUALIFICATIONS OR SKILLS YOU HAVE THAT YOU BELIEVE WOULD HELP YOU DO THE JOB APPLIED FOR:

13. LIST ANY SPECIAL LICENSES OR CERTIFICATIONS YOU HAVE THAT YOU BELIEVE WOULD HELP YOU DO THE JOB APPLIED FOR: (List Licensing Authority, License Number, and Date of License for each)

_____

_____

14. IF REQUIRED FOR THE JOB YOU ARE SEEKING, DO YOU TYPE OR TAKE SHORTHAND?

Approximate Speed: TYPING ____ wpm; SHORTHAND ___ wpm.

15. PRIOR EMPLOYMENT: (Give the following information for all present and previous employers, beginning with the most recent.)

Employer Name, Address, and Phone Number	Dates of Employment	Job Title	Pay Rate	Were you ever disciplined? (Warnings, Suspension, Discharge)	Reason for Leaving
				Yes___ No___	
				Yes___ No___	
				Yes___ No___	

16. If you have had disciplinary problems with any previous employer, please describe the circumstances:

_____

_____

17. PROFESSIONAL REFERENCES: Give below the names of three persons with whom you have worked or studied under.

Name	Address	Position	Phone Number

18. PERSONAL REFERENCES: Give below the names of two persons, not related to you, whom you have known at least two years.

Name	Address	Phone Number	Relationship To You	Years Acquainted

19. Have you ever been convicted of a crime or received a verdict of anything other than not guilty in any criminal investigation or proceeding?

Yes ____ No ____

If yes, describe when the conviction occurred, the facts and circumstances, and any facts pertaining to rehabilitation. (Do not list any criminal charges for which the records have been sealed or expunged. A criminal offense will not necessarily bar employment.)

_____

_____

20. Do you have a contractual agreement, such as a non-competition agreement, that could potentially limit your employment with us?

_____ _____

Date Signature of Applicant

UNDER MARYLAND LAW, AN EMPLOYER MAY NOT REQUIRE OR DEMAND ANY APPLICANT FOR EMPLOYMENT OR PROSPECTIVE EMPLOYMENT OR ANY EMPLOYEE TO SUBMIT TO OR TAKE A POLYGRAPH, LIE DETECTOR OR SIMILAR TEST OR EXAMINATION AS A CONDITION OF EMPLOYMENT OR CONTINUED EMPLOYMENT. ANY EMPLOYER WHO VIOLATES THIS PROVISION IS GUILTY OF A MISDEMEANOR AND SUBJECT TO A FINE NOT TO EXCEED $100.00.

_____ _____

Date Signature of Applicant

INFORMATION FOR APPLICANT

(Read Carefully Before Signing)

1. This application is valid for only thirty (30) days. If you have not been employed within thirty (30) days of your application, you must re-apply for a position.

2. By my signature below, I agree to the following:

a. I consent to take any physical examinations, including but not limited to tests for alcohol or drugs, that may be requested by (NAME OF COMPANY): (1) following an offer of employment and prior to commencement of work; and (2) during the course of my employment, consistent with applicable law, including but not limited to the Americans With Disabilities Act. I further authorize any health care professional or testing facility who performs such an examination or who has other information concerning my physical, mental or other medical status to release such information to (NAME OF COMPANY). I understand that if my drug screen is positive for any illegal substance, that any offer of employment will be rescinded, or if I have already commenced work, I will be terminated.

b. I understand that any false statements or omissions made by me in connection with my application, or in responding to requests for information, can be sufficient grounds for my rejection as a candidate for employment or for my immediate discharge.

c. I understand that any employment I might be offered by (NAME OF COMPANY) is at-will, of indefinite duration and not a contract, and that either I or (NAME OF COMPANY) can terminate that employment at any time with or without notice or cause, for any or no reason, and that no agreement to the contrary will be recognized by (NAME OF COMPANY) unless made in writing and signed by the President of (NAME OF COMPANY). I further understand that satisfactory completion of my provisional period will not change my status as an at-will employee, and that (NAME OF COMPANY) reserves the right, at its sole discretion, to change any of the terms or conditions of my employment, written or unwritten, without prior notice and that none of such terms or conditions of my employment are contractual in nature or binding on (NAME OF COMPANY).

d. I understand that none of (NAME OF COMPANY) practices or policies are to be construed as imposing any binding obligations on the (NAME OF COMPANY), and that they are subject to change or deletion at any time in (NAME OF COMPANY) sole discretion.

e. I acknowledge and agree that if at any time I am subjected to any type of discrimination or harassment, I will contact (NAME OF COMPANY) 's Human Resources Manager or the President immediately to obtain assistance in the resolution of those matters.

I have read this Employment Application and its attachments and I fully understand its contents. By my signature below, I hereby certify that I have answered all questions fully, have provided truthful and accurate answers to all questions, and have not omitted any information called for in the application. I further agree that I am seeking employment with (NAME OF COMPANY) under the terms and conditions described in this Employment Application and its attachments.

_____ _____

Date Signature of Applicant

SEX, RACE AND ETHNIC GROUP IDENTIFICATION FORM

DETACH FROM APPLICATION AND HAND IN SEPARATELY DO NOT SIGN THIS FORM

The federal government requires that an employer maintain records on the race, sex and ethnic group of its applicants. In order to comply with these requirements, (NAME OF COMPANY) requests that you supply the information sought below. The information is for recordkeeping purposes only and will not in any way affect any employment decisions. This questionnaire will be kept separate from your application.

Position applied for: _____

Sex: _____

Race: _____

Ethnic Group (Check if you are a member of the Ethic Group)

American Indian (including Alaskan Natives):___

Asian (including Pacific Islanders): ___

Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture): ___

In conformity with applicable laws, (NAME OF COMPANY) is an Equal Opportunity Employer and does not discriminate on the basis of race, color, creed, religion, sex, age, marital status, national origin, or disability.

REFERENCE RELEASE FORM

I _____ having filed an application to work as an _____
(Position Sought)
at (Name of Employer) (the "Company") do hereby authorize the Company to seek from school officials, doctors, previous employers, and other persons, firms or institutions, and further authorize the persons, firms or institutions contacted by the Company to release to it, any and all information in their knowledge or possession pertaining to my employment history or my qualifications and ability to work at the above-named job, including but not limited to information and opinions pertaining to the nature of my former jobs and job duties, how I performed those duties, my salary history, my attendance record, my character, my academic record, my physical ability to work and any performance, behavior, attitude or other problems or good points perceived by them. Further, I authorize the Company to seek from any and all law enforcement agencies having information concerning me any information maintained by that agency, including but not limited to the results of and reports concerning any investigations, and any and all documents, test results, or information of any type obtained from any source during the course of such investigations, other than records relating solely to charges that have been sealed or expunged. I also authorize said law enforcement agencies to release this information to the Company. I release, promise to hold harmless and covenant not to sue the Company on the basis of its attempts to obtain any of the foregoing information, and I further release, promise to hold harmless and covenant not to sue any persons, firms, institutions or agencies providing such information to the Company on the basis of their disclosures, regardless of whether those disclosures adversely affect my opportunities for employment or otherwise cause me harm.

I have signed this release voluntarily and of my own free will.

_____ _____
Signature Date

_____ _____
Witness signature Date

CONSUMER REPORT DISCLOSURE AND AUTHORIZATION

Dear Applicant

As part of the application review process or at some point during your employment, _____(the Company) may request an investigation and report, including but not limited to a Consumer or Investigative Consumer Report on or involving you, conducted by a consumer reporting agency or other outside organization. The nature and scope of any such investigation and report may include information bearing on your credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, or workplace performance and conduct, and could include information obtained thorough personal interviews with your neighbors, friends or associates, co-workers or others with whom you are acquainted or who might have knowledge concerning any such items of information. Such reports could be used to determine or help determine your fitness for the position for which you have applied or for purposes of determining whether you should be subjected to disciplinary action, up to and including termination, during the course of your employment.. In the event that a Consumer Report or Investigative Consumer Report is requested, you would have the right to request information regarding the nature and scope of the investigation and any rights that you might have under the Federal Fair Credit Reporting Act.

Please sign below to indicate that you have read this disclosure and that you authorize the Company to obtain an investigation and report, including but not limited to a Consumer Report or Investigative Consumer Report.

I,_____, hereby voluntarily authorize the Company to obtain a Consumer Report or Investigative Consumer Report on me from a consumer reporting agency or other outside organization.

_____ _____

Date Signature