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CHARLES A. KRUGEL

*Charles A. Krugel*

Labor & Employment Law & Human Resources Counseling on Behalf of Business

### **HOW TO HIRE AN EMPLOYEE – 6/6/14**

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## Employment Agreements—Use or Not Use?

These agreements are used to protect employers from a variety of problems:

- Discourage some sort of employee conduct (e.g., noncompete or nonsolicitation) or to identify conditions & terms of employment;
- During pre-hire to define wages, hours, benefits, confidentiality, protection of business secrets & other similar information;
- Upon separation from employment; as a sort of insurance to obtain an employee's waiver of any legal or statutory claims; or to give unearned severance or separation benefits; &
- During employment for promotions, demotions, garnishments, & waiver of any legal rights.

When considering whether to use such an agreement, a business should determine the following (this isn't an exhaustive list because each business needs to decide what's best on a case-by-case basis):

- Do I have to pay or somehow compensate an employee for signing this?
- What conduct is being encouraged or discouraged?
- What's being protected? What's the value of the protected information or items?
- What will it cost to enforce the agreement in case of violation? What are the actual & foreseeable damages due to violation?
- How much is lost vs. saved or gained by using these agreements? It's all about the money.
- Should the language & format of the agreement reflect the business' branding, or is it a completely isolated document?

Since 2013, Illinois law has significantly changed on whether or not an employer should compensate an employee for their agreement. Today, many companies may be required to somehow compensate employees for their agreement. Such compensation may be cash, benefits or other perks.

No hard & fast rules exist for when & how to use employment agreements, & for the most part, they're not legally required unless certain circumstances exist such as to waive any legal or statutory claims, or to legally bind the other party to some sort of obligation.

Special attention must be paid to every aspect of wording, organization/layout & legal compliance. Conciseness, plain language & thoroughness cannot be stressed enough. This is especially true if you intend to enforce the agreement.

All agreements should permit the employer to recover damages, costs & expenses from the employee or other party, like the competing business. This won't absolutely prevent a breach from occurring, but it's a great preventive measure.

Enforceability of agreements is often an issue because if a violation occurs, the employer still needs to take action. This doesn't mean that the employer has to sue. The employer can issue some type of warning (letter, phone call, etc.), or the employer can contact the opposing party or business. The latter action poses its own risks due to ethical concerns & issues concerning antitrust, defamation, libel & slander.

The most extreme action an employer can legally take is to sue an ex-employee for violating the agreement. But, a lawsuit costs a lot of time & money, even if you could recover your costs (does the opposition have \$ ?).

A lawsuit or some other sort of complaint filed by an ex-employee might be easier to deal with than enforcement. As long as the terms of the agreement's prohibitions are legally compliant, no court or third party tribunal should rule against the employer. Furthermore, costs, expenses & damages may be awarded to the employer (again, assuming the other side has \$ ).

Clients typically ask whether entering into an employment agreement creates a legal precedent within their company, or if they'll instill a feeling of entitlement to money among employees. In short, it's not likely that the company will be legally obligated to offer the same benefit. However, if others learn about such agreements, there's a greater degree of possibility that complications like a sense of entitlement will result. So, when deciding whether to use employment agreements, a business should consider the greater impact on employee morale & should question the legal ramifications of using such an agreement.

The concerns regarding employee morale & feelings of entitlement can be combated by using these agreements infrequently or in extreme circumstances (e.g., in order to protect company confidentiality, capital, etc.), & making it clear to employees that they are at-will employees (if applicable).

In other words, it's relatively easy in an article like this to state in a generic & sterile manner what should or shouldn't be done. It's a completely different matter to actually draft & execute an agreement in a way that sufficiently communicates that this is an isolated & unique circumstance, & a serious & binding agreement with provisions that must be honored.

In short, how employment agreements are implemented is crucial. Issues with execution are what lead to misunderstandings & disputes. But, many of these issues are avoidable & resolvable via a professionally drafted & executed agreements & hopefully, the advice of competent legal counsel.

## What's Appropriate to Ask Candidates?

There are many inquiries which might imply that an employer is *illegally* discriminating against an employee or a job candidate. Always focus on the essential (necessary) functions of the job. Essential job functions may be defined by a *valid* job description.

If you make any inquiries or assessments of candidates, then:

- Ask them all of the same questions;
- Use the same background checking processes;
- Use the same tests/assessments; &
- Score/assess the same way; i.e., don't adjust scoring/assessment system unless for a valid &/ or legal purpose.

Concerning questions, it's generally okay to:

- Focus on questions related to the *essential job functions*. Put another way, are the questions asked or intended to solicit information connected to the applicant's ability & willingness to perform the essential job functions or are they more indicative of illegal bias?
  - It's usually not an essential function to be of a certain race, age, sex, sexual orientation, etc. *Exceptions are extremely limited.*
- Ask questions to determine reliability. Such questions include asking what hours & days the person can work, or specific days or times they can't work.
- Ask if the applicant is legally eligible to work in the U.S. or if they have ever worked under another name.
- Ask if they've ever been convicted of a crime only if criminal conviction relates to the essential job functions. If they've been convicted, then you could also ask what, when & how the case was resolved. Moreover, the date of conviction may be relevant depending on the magnitude of the crime.
  - You must get written permission to do a 3rd party criminal background check.
- Ask behavior oriented questions. Again, ask all candidates the same questions.
- Ask what kind of education or degrees a candidate has & what schools they attended.
- Ask if an applicant meets the minimum age requirement to work (but don't ask specific age).
- Relative to languages spoken, if the job requires language fluency, other than English, then you can ask if the applicant has that ability.

- Ask if applicant has a problem with joining organizations, clubs, networking groups, that directly relate to ability to perform essential job functions; e.g., chambers of commerce or business groups.

Don't ask:

- About anything related to a "protected class" such as age, gender, race, national origin, sexual orientation, military status, arrest record, religion, pregnancy, family status, or socioeconomic status.
- About children, dependents, pregnancy or plans to start a family. If the candidate indicates that they're pregnant, then congratulate them, but don't relate pregnancy to the job unless some sort of accommodation is requested or somehow indicated by the applicant. This is very tricky territory.
- If the applicant owns or rents a car, unless the job requires having own transportation (e.g., sales or site visits).
- Questions to determine where the candidate is from; i.e., national origin. Don't ask what their native language is.
- If the applicant has ever been arrested.
- If a candidate has any physical or mental disabilities. Also, don't ask if the applicant has any medical or behavioral problems, or if they're being treated for the same.
- If the applicant owns or rents a home.
- If the candidate ever had wages garnished or if they've ever declared bankruptcy.
- About discharge from military service.
  - Can ask about the applicant's education, training & experience while in the military.
- What clubs, organizations, or societies they belong to, including fraternities or sororities.
- If they've filed for disability, worker's compensation, unemployment compensation or if they've ever sued or filed a complaint against an employer.
- About religious & ideological beliefs, associations or affiliations. *Possible exception:* if employer is a religious organization (be careful with this).
- Don't ask about gender or sexuality, including bisexuality, homosexuality or transgenderism.
- Don't ask about titles such as Mr., Mrs. & Ms.
- Previous residential addresses.
- DOB or when graduated college or high school; anything that has any bearing on age, ethnicity or socioeconomic class.

## Job Candidate Application & Selection Summary

Focus on the essential (necessary) functions of the job. Essential job functions are usually defined by a valid job description. A valid job description is an accurate & simple description of the key & necessary functions of the job.

For all candidates:

- Ask the same questions,
- Use the same background checking processes, use the same tests; &
- Score/assess the same way; i.e., don't adjust scoring/assessment system unless for a valid &/or legal purpose.
- Don't discriminate in the hiring process on the basis of any protected class (see below), unless:
  - mandated pursuant to a legally binding order or agreement, or
  - you're doing so based on a "bona fide occupational qualification."
- Can ask if candidate can perform the essential job functions with or without a reasonable accommodation.
- Reasonableness is generally contingent upon why needed, cost & feasibility.

Don't ask questions intended to elicit, or which unintentionally elicit, information regarding:

- race
- gender
- religious beliefs
- age
- sexual orientation
- disability
- military status
- socioeconomic status—own home, rent home, how will pay for home, etc.
- national origin.

Currently, it's popular to ask behavioral questions. These questions might be useful as they're generally nondiscriminatory, & they elicit performance & conduct related information. Examples of such questions include:

- Describe a situation in which you & another coworker conflicted. What happened? How did you deal with the situation? How was the situation resolved?
- Describe a situation where your employer asked you to do something which you

believe may have been unethical or unprofitable for the business? How did you handle this? What was the outcome?

- Background Checking—Compliance with federal laws like the Fair Credit Reporting Act, Consumer Credit Protection Act & state law like the Illinois Uniform Conviction Information Act is contingent upon:
  - disclosure of the background check;
  - disclosure of the reason for background check; procurement of candidate or employee's written release(s)—could be more than 1 release depending on the checks conducted.

Also:

- subsequent to the selection process, if a candidate or employee is rejected as a result of the screening, then provide that person with the relevant part of the report & summary of rights/ recourse options.
- Per the Illinois Criminal Identification Act you can't ask job applicants to disclose criminal convictions which have been expunged or sealed, & you can't ask if applicant has any expunged or sealed convictions & records.

Employment Testing:

- Make sure that the test is valid, reliable & used for the purpose(s) intended.
- Don't randomly select tests or use on basis of word-of-mouth.

## Employee Screening & Risk Assessment

Co-Authored by Tony Ramos & Charles Krugel

Headlines about workplace violence always raise serious questions about employee screening programs. These questions include:

- What is negligent hiring?
- Should companies have a screening policy?
- Does every employee need to be screened?
- What's an acceptable screening program?
- How much should a company expect to pay for screening?
- What can it cost a company should they chose not to have a screening program?
- Are all screening companies alike?

Negligent hiring & negligent retention lawsuits are increasing, & so are employer expense & liability as a result of these suits. "According to a 2001 report by Public Personnel Management, employers have lost more than 79% of negligent hiring cases." Moreover, "average settlement of a negligent hiring lawsuit is nearly \$1 million." (Human Resources Management study; both above stats cited from ISO Review, Negligent Hiring: Employer Risk.

Underlying the idea of negligent hiring & retention is an employer's legal responsibility to provide employees, customers & the public with a reasonably safe environment, & the liability imputed to employers when they fail to maintain safety. It's when this failure occurs that as an employer, your business, could be held liable for negligent hiring or retention.

Consequently, due to cost containment & legal liability, if you're going to do criminal background screening, conduct such checks in a careful & deliberate manner & take reasonable & measured actions as a result of these inquiries. This means that if an employer undertakes criminal background checking, in order to avoid legal liability, it should carefully choose who does the screening as well as what's searched.

Although, Illinois doesn't require many businesses to screen job candidates (most education & social service organizations are required to screen candidates), & the IL Human Rights Act mandates that an employer can't use a candidate's "arrest record" to deny employment (narrow exceptions exist), the possible liability resulting from a business' failure to screen can be costly. A 2001 report by the Society of Human Resources Management & American Background Information Services, Inc., found the average settlement for negligent hiring lawsuits exceeded \$1.6 million.

Obviously, much of the burden falls on employers, with the guidance of competent legal counsel & screening professionals, to determine what constitutes a competent background search. Generally, this search is based upon the essential requirements of the position & the industry's particular circumstances.

Usually, courts don't examine why screening is done. The courts look at why the essential duties of the job, & the particulars of the business' industry, necessitate the need to screen out convicted criminals, & which types of crimes prevent a candidate from being hired. Therefore, just knowing that a job candidate has been convicted of a crime may not be enough to insulate a business from liability. You'll need to know the exact nature of the conviction & connect it to the job.

In short, if you undertake criminal record checking, then choose a competent screener & screening method, check all candidates & employees, conduct the search in a good faith & reasonable manner, & use the results appropriately. As with all human resources related matters, in order to minimize expense & legal exposure, focus on prevention & proaction –

research your screener & work with them to best determine what you need & why you need it.

### Vendor Selection - by Tony Ramos

Selecting the wrong screening vendor can be equal to or more devastating than hiring the wrong employee. The wrong vendor can provide you with nothing more than a false sense of security.

Select a knowledgeable vendor who can clearly explain your screening options & their limitations. Typical choices include state, county court, national criminal databases & fingerprint searches. There are also choices of supplemental screening options which include driving record, credit reports, workers compensation, employment history, educational history & civil records as well. Your vendor can assist you in developing the right plan to match your needs.

### Basic Program

#### Vendor Selection

Select a vendor who can demonstrate a *national* hit rate of at least 10%. Hit rate is the *most* effective way to determine the quality of the service. In short, for every 100 applicants screened, the vendor should be finding at least 10 with a criminal record. Don't be surprised if a vendor is hesitant or actually refuses to provide this information. Many operate with only a 6% or less hit rate.

#### Social Security Trace

Should validate the number & provide up to 10 years of past residential history & names or aliases used.

#### County-court Record Search

Counties to be searched should be selected based on the results of the trace & never from the job application. This will also provide you with the most accurate & current information available.

#### National Criminal Database Search

For a more comprehensive program, include a national criminal database search. Important note, database findings must be verified by court records before acting upon them. Also, database searches should only be used to supplement an actual court record search & not be in place of it.

#### FCRA (Fair Credit Reporting Act) Compliant

Ensure your vendor is fully FCRA compliant, this will provide you with additional protective immunity against some civil lawsuits.

#### Cost

While there are many factors such as volume & types of screening options selected which determine the actual cost, one can expect to pay \$20 to \$50 per person.

Co-Author: Tony Ramos, [tramos@integrasecurity.org](mailto:tramos@integrasecurity.org), has also authored "*The Guide to Background Checks*" which he developed for the Illinois Association of Chiefs of Police & is available for download from his web-site at [www.integrasecurity.org](http://www.integrasecurity.org)

## **Independent Contractor vs. Employee & Hourly vs. Salaried: Summary of Classification Issues**

Advantage of the independent contractor classification:

- Avoid processing & paying federal & state withholding taxes.
- Avoid most employment-related liabilities & insurance.

Disadvantage:

- If improperly classified (intent is irrelevant), then penalty may include payment of taxes by employer & 5%–25% penalty for each month.

How to Distinguish Between the Two:

- Degree of control & independence is one key.
- Independent contractors have a great deal of control over their working conditions, environment, & freedom to work for anyone.
  - Such control might include control over work schedule, when paid, work for other businesses, location of work, able to maintain separate/distinct identity.
  - Commission pay might not matter.
  - They use own their work methods; not trained by the principal; outside principal's scope of expertise.
  - They use own tools, materials, etc.
  - Closed ended contract/agreement with a start & finish date.
- Employees have little control over the above-mentioned factors.
  - Employees are subject to using the employer's materials, tools, processes, property, etc.
  - Employees generally work within scope of principal's core services.

See the [irs.gov](http://irs.gov) for additional information.

Overtime—Exempt vs. Nonexempt Classifications

Overtime at a minimum of 1 1/2 times the regular rate of pay is required after 40 hours of work in a workweek.

Don't arbitrarily classify. This will probably lead to an illegal classification.

Most businesses are covered by the Fair Labor Standards Act. This is the federal law governing minimum wage & overtime.

Exclusions exists for businesses earning less than \$500k in annual revenue & not engaged in interstate commerce or hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally, or physically disabled or gifted; preschools, elementary, & secondary schools &

institutions of higher education; & federal, state, & local government agencies. Other exceptions exist too.

The following are examples of employees exempt from both the minimum wage & overtime pay requirements:

- Executive, administrative, & professional employees (including teachers & academic administrative personnel in elementary & secondary schools), outside sales employees, & certain skilled computer professionals;
- Employees of certain seasonal amusement or recreational establishments;
- Employees of certain small newspapers & switchboard operators of small telephone companies;
- Employees in newspaper delivery; &
- Casual babysitters & persons employed as companions to the elderly or infirm.

The following are examples of workers exempt from overtime pay requirements:

- Certain commissioned employees of retail or service businesses;
- Auto, truck, trailer, farm implement, boat, or aircraft salespersons, clerks & mechanics employed by nonmanufacturing establishments primarily engaged in selling these items to ultimate purchasers (consumers, businesses);
- Railroad & airline employees, cab drivers, some employees of motor carriers, & local delivery employees paid via rate plans;
- Announcers, news editors, & chief engineers of certain nonmetropolitan broadcasting stations;
- Domestic service workers who reside in their employers' residences; &
- Employees of motion picture theaters.
- Certain employees may be partially exempt from the overtime pay requirements. These include:
  - Employees engaged in certain operations on agricultural commodities & employees of certain bulk petroleum distributors;
  - Employees of hospitals & residential care establishments that have agreements with the employees that they will work 14 day periods in lieu of 7 day workweeks (if the employees are paid overtime premium pay within the requirements of the Act for all hours worked over eight in a day or 80 in the 14 day work period, whichever is the greater number of overtime hours); &
  - Employees who lack a high school diploma, or who have not completed the eighth grade, who spend part of their workweeks in remedial reading or training in other basic skills that are not job specific.

For additional information see: [www.dol.gov](http://www.dol.gov).

## A PERSONAL STATEMENT FROM CHARLES KRUGEL

Practice & Background Summary); [www.charlesakrugel.com](http://www.charlesakrugel.com)

As a management side labor & employment attorney & human resources (HR) counselor, I have more than 18 years of experience in the field & have been running my own practice for 13-plus years; [www.charlesakrugel.com](http://www.charlesakrugel.com).

My clients are small to medium sized companies in a variety of industries. Besides providing traditional



labor & employment law services, I represent companies desiring to institute preventive & proactive HR functions. These functions include policies & procedures, which help to efficiently & discreetly resolve issues in-house & prevent lawsuits & complaints; they also help to reduce costs & act as catalysts for increasing productivity & profits.

Regarding my results, I have negotiated more than 100 labor & employment agreements & contracts, including noncompete & severance/separation agreements, collective bargaining & related labor agreements. Also, I have argued more than 11 arbitrations, 13 mediations & 39 agency cases/complaints & have resolved 100-plus labor grievances & similar in-house complaints & completed over 100 in-house investigations.

My career choice is the result of a long running fascination with workplace behavior, management styles, & how & why people pursue particular vocations. While in college, I advanced my interest by majoring in psychology. After college, I pursued graduate study in industrial/organizational (I/O) psychology with the thought of being an I/O consultant. During my first year of graduate school, I realized that the practice of I/O psychology was too "touchy feely" for me. Consequently, I decided that once I earned my masters degree in I/O psychology, I would attend law school.

I earned my law degree (Juris Doctorate) from Ohio Northern University. My MA degree in I/O psychology is from the University of North Carolina at Charlotte. My BS degree in psychology is from Bradley University. During law & graduate schools, I was a graduate student representative for each school's university senate. During college, I was a rush chairman & executive board member for my fraternity.

Regarding civic & association involvement, I'm on the following boards of directors:

- Member of the Young Professionals Board of the Chicago Bar Foundation, the charitable arm of the Chicago Bar Association;
- 2014 Chair for the Board of Directors for the GOA Regional Business Association;
- Board member for the Kelly Hall YMCA, in West Humboldt Park, & the Steering Committee of the Black & Latino Achievers, both are part of the YMCA's of Metropolitan Chicago;
- Member of the Board of Directors for ChildServ ([www.childserv.org](http://www.childserv.org)), a 100-plus year old child & family advocacy, housing & adoption organization.
- Member of the Board of Directors for The Lakeside Community Committee, a 45 year old child & family advocacy, housing & adoption agency; &
- Member of the Board of Directors for Youth Outreach Services, a 50+ year old teen advocacy, housing & direct service organization in Chicago.

Finally, some personal background information. I'm a native Chicagoan. Born & raised in West Rogers Park. I graduated from Rogers Public School. For high school, I graduated from Nilas North in Skokie. It was during childhood that I was indoctrinated into the ways of business, self-employment & entrepreneurship. My father owned & ran his own chain of pharmacies in Chicago for 35 years. My grandfather was an immigrant businessman who owned his own grocery stores in Chicago. Family taught me the value of hard work & how to compete & succeed in business.