

Employment Tool Kit

Employment Resources for
Local Churches, Schools and
Other Conference Ministries



Central California Conference
of Seventh-day Adventists
Human Resources Department
PO Box 770
Clovis, CA 93613
Telephone: 559-347-3042
Facsimile: 559-347-3062
E-mail: hr@cccsda.org

TABLE OF CONTENTS

	Tab
Hiring Procedure for New Employees	1
Factors to Consider in Determining Employment Status	2
Screening and Hiring Guidelines for Denominational Organizations	3
Statements to Avoid During the Employment Screening Process	4
Hiring Checklist	5
Termination Checklist	6
EEOC Opinion Letter Regarding Religious Affiliated Inquiries During the Hiring Process	7
Employment Documentation Retention Chart	8

An Overview of the Employment Process for Local Churches & Schools in the Central California Conference

The Central California Conference has developed hiring packets for the churches and schools to aid them in filling their local staffing needs. The packets contain a hiring checklist and the documents needed to complete the hiring process. Churches and schools are strongly cautioned against giving “stipends” or other payments to workers directly unless they have thoroughly reviewed the materials in this tool kit concerning hiring independent contractors and have sought the review of the Conference Human Resources Department. Misclassifying a worker as a contractor can have very severe financial consequences on a local church or school.

To request a hiring packet, call the Conference Human Resources Department at 559-347-3042 or email us at hr@cccsda.org. The employment checklists and forms are also on the Conference web site in the Human Resources Department pages under “new employee forms.” You can find the HR website at <http://ccchr.adventistfaith.org>.

1. All persons seeking employment at a Central California Conference church or school, other than Conference pastors or contract teachers, should first complete an CCC employment application form (pastors and teachers may contact the Conference Office for an application form). This form is included in the hiring packet referred to above.
2. For each position to be filled, someone at the local church or school should be designated with the responsibility for reviewing the application, checking references, etc. If, from reviewing the application and references, it appears that the individual may be a good candidate for the position, an interview may be scheduled. The interviewer should be aware of permissible, as well as impermissible types of questions to ask at an interview. Included in this Tool Kit is a guide to assist the interviewer in this process.
3. Once an individual has been selected to fill a position, there are a number of forms that must be completed and signed before the employee may start work, including a back ground check. These forms are included in the hiring packet referred to in the introductory paragraph above.
4. Forward the completed documents for review and processing to the Conference Human Resources Department at the Conference Headquarters. They may be faxed to that department at 559-347-3062. The Human Resources Department will forward a “Welcome Packet” to the new employee with an employee handbook and other important employee information.
5. Hourly employees-fax a completed “hourly Time Report” to the Conference Payroll office.
6. Payroll costs to the local organization will be billed semi-monthly and will include the following:

Employee's wages;

Social Security (FICA); Employer's share is 7.65% of the employee's gross wages.

Workers' Compensation; Percentage charged varies by position.

Adventist Retirement Plan; For eligible employees only. Eligible employees are generally those who are 20 or older and who are hired to fill a position that requires half-time or more work and is an ongoing position or one scheduled to last more than one year.

Additional benefits provided to employees and charged to the local organization may apply to some positions based on North-American Division policy and include:

Basic Group Life Insurance – Full-time employees (38 hours a week +) only.

Retirement Allowance – For eligible employees only, will be paid to employees who go directly from employment into retirement. This allowance is prorated according to years of service. Maximum at 40 years service is five months wages. Must be budgeted for in the year in which it will be due.

Long-Term Disability - Full-time employees only.

Health Care Assistance Plan - Full-time regular employees only.

Vacation, paid holidays, sick leave and any other benefits are determined by NAD and Conference policy.

7. Church and school employees are not eligible for either State Unemployment or State Disability Insurance because their employer is a religious not-for-profit organization. Therefore, no premiums for these programs are charged to the employee or the local church or school and the employees are not eligible to receive benefits under either of these state insurance programs.

8. Payroll checks and direct deposit reports are sent directly to each employee, as well as the yearly W-2 form. Federal, State and Social Security (FICA) taxes will be deducted from the employee's check unless a valid exemption is filed on the W-4 form.

Please direct all payroll questions to: Central California Conference Office
Payroll Department
PO Box 770
Clovis, CA 93613
559-347-3118
smeyers@cccsda.org

Please direct all new employee processing and employee benefits questions to:
Central California Conference Office
Human Resources Department
PO Box 770
Clovis, CA 93613
559-347-3042
lbarron@cccsda.org

FACTORS TO BE CONSIDERED IN DETERMINING EMPLOYMENT STATUS

Distinguishing between employee and independent contractor status may be an issue of critical importance. This outline will provide an overview of the requirements an individual must meet in order to be considered an independent contractor and will explore other aspects of the legal issues involved with independent contractor status.

a. The Common-Law "Ten-Point" Test

At common law, a "servant" or employee is "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Restatement (Second) of Agency*, § 200. There are ten factors to consider in determining whether a worker is an independent contract or employee:

- (1) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (2) whether or not the one employed is engaged in a distinct occupation or business;
- (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (4) the skill required in the particular occupation;
- (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (6) the length of time for which the person is employed;
- (7) the method of payment, whether by the time or by the job;
- (8) whether or not the work is a part of the regular business of the employer;
- (9) whether or not the parties believe they are creating the relation of master and servant; and
- (10) whether the principal is or is not in business.

Courts generally agree that although no one factor is determinative, the most important factor is the right of control. It is the *right* to control, not the actual exercise of that right, that is paramount. Similarly, the existence of an agreement providing that the worker is an independent contractor is not determinative and usually is accorded little weight.

b. **Internal Revenue Service "Twenty-Point" Test**

For purposes of withholding and payment of Social Security, Medicare, and federal unemployment insurance taxes, the IRS uses an expanded form of the common-law test which considers twenty factors:

- (1) Instructions. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the *right* to require compliance with instructions.
- (2) Training. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.
- (3) Integration. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.
- (4) Services Rendered Personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.
- (5) Hiring, Supervising, and Paying Assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other 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, this factor indicates an independent contractor status.
- (6) Continuing Relationship. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an

employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

- (7) Set Hours of Work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.
- (8) Full Time Required. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.
- (9) Doing Work on Employer's Premises. If the work is performed on the premises, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises, such as at the office of the worker, indicates some freedom from control. However, this fact by itself 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 that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time or to work at specific places as required.
- (10) Set Order or Sequence. If a worker must perform services in the order or sequence set by the person for whom the services are performed, that factor shows that the worker is not free to follow his own pattern of work but must follow the established routines and schedules of the person for whom the services are performed. Often because of the nature of an occupation, the person for whom the services are performed does not set the order of the services, or sets the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.
- (11) Oral or Written Reports. A requirement that the worker submit regular or written reports to the person for whom the services are performed indicates a degree of control.

- (12) Payment by Hour, Week, Month. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.
- (13) Payment of Business and/or Traveling Expenses. If the person for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.
- (14) Furnishing of Tools and Materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.
- (15) Significant Investment. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.
- (16) Realization of Profit or Loss. A worker who can realize a profit or suffer a loss as a result of his services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.
- (17) Working for More than One Organization at a Time. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the

persons, especially where such persons are part of the same service arrangement.

- (18) Making Services Available to General Public. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
- (19) Right to Discharge. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.
- (20) Right to Terminate. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-99.

c. Employment Discrimination Test

A majority of the federal appeals courts settled on a test which is a hybrid of the "right to control" and "economic realities" tests. For example, one federal appeals noted that the proper test to be used under Title VII and ADEA is the "hybrid economic realities/common-law control test," explaining the test as follows:

The right to control an employee's conduct is the most important component of this test. When examining the control component, we have focused on whether the alleged employer has the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee's work schedule. The economic realities component of our test focused on whether the alleged employer paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment.

In general, the hybrid test is broader than the common-law test and will result in more workers being considered as employees.

d. FLSA Test

The definition of "employee," "employer," and "employ" in the FLSA are comprehensive in scope and are to be interpreted broadly. To determine whether an individual is an employee under the FLSA, courts focus on the "economic realities of the

relationship." *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *see also Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 332 (5th Cir. 1993); *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 327 (5th Cir. 1993). According to the Fifth Circuit:

To determine employee status under the FLSA, we focus on whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services. Stated in other words, our focal inquiry in determining employee status is whether the individual is, as a matter of economic reality, in business for itself. To gauge the degree of the worker's dependency, we consider five factors:

- (1) the degree of control exercised by the alleged employer;
- (2) the extent of relative investments of the worker and the alleged employer;
- (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
- (4) the skill and initiative required in performing the job; and
- (5) the permanency of the relationship.

These factors are merely aids in determining the underlying question of dependency, and no single factor is determinative. The economic realities test will result in more workers being considered employees than would the common-law or hybrid tests.

Denominational organizations must use caution in classifying workers as independent contractors or employees. If the classification is in doubt, denominational organizations should seek advice of legal counsel.

SCREENING AND HIRING GUIDELINES FOR DENOMINATIONAL ORGANIZATIONS

This guideline is a resource for individuals serving on church or school boards who are involved in interviewing and selecting candidates for positions with denominational organizations of the Seventh-day Adventists Church. These screening and hiring guidelines are intended to educate participants on their legal responsibilities as representatives of the denominational organizations, to ensure that participants meet their legal, ethical, moral, and spiritual responsibilities, and to promote accountability, trust and equal employment opportunities in the workplace.

- Denominational organizations are equal opportunity employers.

Equal Employment Opportunities

- Denominational organizations have the right, under state and federal laws, to restrict employment to Seventh-day Adventists.
- Denominational organizations are subject to other federal and state laws which prohibit discrimination in recruiting, selection and hiring based on race, color, sex, age, ethnicity or disability.
- As a volunteer serving on a committee or Board for a church or school and participating in screening and selection of denominational organizations or locally hired employees, you are also subject to these non-discrimination laws.
- Your failure to screen and recommend applicants in compliance with legal requirements and the denominational organization's equal employment opportunity policy can result in significant liability and expense.

The Employment Application

- An application form provided by your local denominational organization must be completed for all positions.
- Ensure that the applicant answers all questions on the employment application and does not omit any information requested on the form.
- Review the application to determine if the applicant's responses provide sufficient information on his/her background and qualifications.
- Review the applicant's work history to determine the existence of, and be prepared to request an explanation for, any "gaps" in employment.

Verification of Information Provided by the Applicant

- Confirm, if applicable, an applicant's current certification.

- Inquire regarding any complaints filed with the state agency or former employers against the applicant.
- Check references, especially those employers who employed the applicant in the same position which he is presently seeking.
- If the applicant is seeking a position of trust (e.g., with children or other vulnerable individuals or money), it should be made clear to the reference provider that the applicant is being considered for a position of trust.
- Review the results of the criminal background check, and the check of an applicant's driving record if the applicant is seeking employment in a position that involves driving responsibilities.
- Document in writing all information obtained regarding the applicant (especially verbal references) and include with the application.

Interview

- The focus of the interview should be the requirements of the position. The interviewer must understand the job, what it entails, its responsibilities, and the essential requirements for the job.
- If there are any gaps in employment history or inconsistencies on the application, question the applicant to confirm the validity of information.
- Take notes of all job-related information elicited during the interview (but not on the application form or resume).
- Limit your questions to those that are both relevant and legally permissible. Avoid asking questions about the applicant's national origin, sex, pregnancy status or future family plans, or age.
- Confirmation and consideration of an applicant's sex is only permissible where this characteristic is directly job-related (i.e., bona fide occupational qualification for residence hall staff).
- Examples of prohibited and permitted interview questions are attached for your review.

Uniform Hiring Criteria

- Use uniform and consistent criteria on which to base a hiring recommendation.

Confidentiality and Recordkeeping

- The information gathered for the purpose of screening a candidate should be discussed only with the candidate and those directly involved in the screening and hiring process.
- Information on candidates should not be discussed or shared with persons outside of the selection committee or Board, including spouses.

Reasonable Accommodation Obligations

- Denominational organizations are subject to the prohibitions against disability discrimination under federal and state laws.
- Denominational organizations also have a legal duty to "reasonably accommodate" persons with disabilities in the application and selection process, as well as for employment opportunities unless doing so would create any "undue hardship."
- Committees or Boards with questions about "reasonable accommodation" or "undue hardship" should contact the appropriate individual or department within their local denominational organization.

STATEMENTS TO AVOID DURING THE EMPLOYMENT SELECTION PROCESS

<i>Subject</i>	<i>Acceptable</i>	<i>Avoid</i>
NAME	<p>"State your name."</p> <p>"Have you ever worked for this company under another name?"</p> <p>"Is any additional information relative to change of name, use of an assumed name, or nickname necessary to enable a check on your work records?"</p>	<p>"State your maiden name"</p> <p>"Have you ever used another name?"</p> <p>Inquiries about the name that would indicate applicant's lineage, ancestry, national origin, or descent.</p> <p>"Do you prefer to be addressed as Mr., Mrs., Miss, or Ms.?"</p>
RESIDENCE	<p>Asking for applicant's place of residence.</p> <p>Inquiries about the length of residence at current and previous addresses.</p>	<p>Specific inquiries into foreign residence.</p>
AGE	<p>Statement that employment is subject to verification that applicant meets legal age requirements.</p>	<p>"State your age."</p> <p>"State your date of birth."</p> <p>"Would you have problems reporting to someone who is younger than you?"</p> <p>Requesting dates of attendance at or completion of elementary or high school. (However, may be needed for verification of academic credentials).</p>

<i>Subject</i>	<i>Acceptable</i>	<i>Avoid</i>
MARITAL AND FAMILY STATUS	<p>Can you meet the attendance requirements of this job?</p> <p>Can you work overtime and/or travel extensively? (only if applicable).</p>	<p>"Are you married, single, divorced, or separated?"</p> <p>"What are the names and ages of your children?"</p> <p>"What provisions will you make for child care?"</p> <p>Asking for name or other information about applicant's spouse (after hire, this is permissible, to obtain a contact in case of an emergency).</p>
RELATIVES	<p>Statement of company policy about work assignment of employees who are related.</p> <p>Asking for names of applicant's relatives already employed by the company.</p>	<p>Asking for name or address of any relative of applicant.</p>
SEX	<p>Inquiries based only on a bona fide occupational qualification.</p>	<p>"Are you expecting?" or "Are you pregnant?"</p> <p>Asking applicant about future childbearing plans.</p> <p>"How do you feel about working in a male-dominated industry?"</p> <p>"We typically don't hire male secretaries. Will it make you uncomfortable to be the only male secretary at this company?"</p> <p>Asking applicant out on a date or otherwise propositioning applicant.</p>

<i>Subject</i>	<i>Acceptable</i>	<i>Avoid</i>
RACE OR COLOR	Statement that photograph may be required after hire.	<p>Requiring applicant to submit a photograph at any time prior to hire, or requesting that applicant, at his or her option, submit a photograph.</p> <p>Asking the race or color of applicant.</p> <p>Inquiries about applicant's complexion or color of skin.</p>
BIRTHPLACE, NATIONAL ORIGIN, ANCESTRY	<p>"Are you authorized to work and remain in the United States?"</p> <p>Asking applicant about foreign languages applicant reads, speaks, or writes, if job related.</p>	<p>Asking for birthplace of applicant.</p> <p>Asking for birthplace of applicant's parents, spouse, or other close relatives.</p> <p>"What is your mother (or native) tongue?"</p> <p>Inquiries into how applicant acquired ability to read, write, or speak a foreign language.</p>
ORGANIZATIONS	Inquiries into membership in organizations that applicant considers relevant to his or her ability to perform the job for which applied.	"List all clubs, societies, and organizations to which you belong."
PERSONAL FINANCES	Asking whether applicant has use of a reliable car, if car travel is required by the job.	<p>Questions about personal bankruptcy.</p> <p>Questions about home or car ownership.</p>

<i>Subject</i>	<i>Acceptable</i>	<i>Avoid</i>
PHYSICAL CONDITION, HANDICAP, DISABILITY¹	<p>"Are you able to perform the duties of the position that you have applied for with or without a reasonable accommodations?"</p> <p>"Do you use illegal drugs?"</p> <p>"Can you meet the attendance requirements of this job?"</p> <p>"How well do you handle stress?"</p> <p>"Do you work better or worse under pressure?"</p>	<p>"Do you have any physical disabilities or handicaps?"</p> <p>"Do you have now, or have you ever had, a drug or alcohol problem?"</p> <p>"Have you ever sought treatment for your inability to handle stress?"</p> <p>"Have you ever been treated for mental health problems?"</p> <p>Questions regarding the applicant's general medical condition, state of health, or illnesses.</p>
WORKERS COMPENSATION	<p>"How many days were you absent last year?"</p> <p>"Can you perform the essential functions of the job with or without reasonable accommodation?"</p>	<p>Questions regarding receipt of workers' compensation.</p> <p>"Have you ever filed for workers' compensation?"</p> <p>"Have you ever been injured on the job?"</p>

¹Avoid inquiries that are likely to elicit information about whether an applicant has a disability.

<i>Subject</i>	<i>Acceptable</i>	<i>Avoid</i>
CITIZENSHIP	<p>"Do you have the legal right to work and remain in the United States?"</p> <p>"Are you currently authorized to work for all employers in the United States on a full-time basis or only for your current employer?"</p> <p>Statement that applicant will be required to submit proof regarding his or her identity and employment eligibility upon hire, in accordance with applicable immigration requirements.</p>	<p>"Of what country are you a citizen?"</p> <p>Asking whether applicant or applicant's spouse or parents are naturalized or native-born U.S. citizens.</p> <p>Asking for date when applicant, parents, or spouse acquired U.S. citizenship.</p>
ARREST, CRIMINAL RECORD	<p>"Have you ever been convicted of a crime?" (in most jurisdictions, this question must be accompanied by a statement on the employment application that a conviction will not necessarily disqualify applicant from the job applied for)</p>	<p>Asking about applicant's arrest record.</p> <p>"Have you ever been arrested?"</p>

HIRING CHECKLIST

1. Eliminate all questions from applications and interviews that could be construed as discriminatory or that could have a disparate impact.
2. Prepare for the interview.
3. Tie application and interview questions to the job description.
4. Have more than one person interview the applicant, if possible.
5. Use a "standardized" interview format.
6. Accept applications only when you have a job opening.
7. Keep applications "active" for a limited time (for example, 3 months) and advise an applicant that he/she can reapply after that.
8. Make sure that the application is fully completed and request cover letters and resumes when applicable.
9. Keep applications forms for at least 1 year.
10. Do not make notes on the application.
11. Investigate any gaps in employment shown on the application or as a result of a background investigation.
12. Investigate frequent changes in employment.
13. Verify former employment, including the reason for leaving.
14. Check background information (criminal, driving and credit) and references (employment and personal)
 - a. Make sure the type of background or reference check used is *appropriate* for the position (job-related and consistent with business necessity).
 - b. Disclose the use of *all* background and reference checks to the applicant.
 - c. Contact all references and former employers.
 - d. Comply with obligations of the Fair Credit Reporting Act.
 - e. Limit questions to areas pertaining to the position applied for. Do not conduct an investigation that is broader than reasonably necessary (for example, generally avoid investigating the applicant's private life).
 - f. Obtain written consent/release from the applicant for background and reference checks before conducting checks.

- g. Keep the results of background checks confidential and disclose them only to those who are participating in the selection process and who have a legitimate need to know.
 - h. Documents the results of background checks.
15. The application form and job advertisement should state that the denominational entity complies with equal employment opportunity laws.
 16. The application form and job advertisement should invite applicants to request reasonable accommodations for participation in the application and interview process.
 21. The application should contain language affirming employment at will status.
-

Termination Checklist

Before terminating an employee, whether for a single incident or following progressive counseling, managers and supervisors should carefully consider the following questions:

1. Is the reason for discharge or discipline job-related?
2. Is the reason for discharge consistent with the Employer's policies and past practices?
3. Other than cases of serious misconduct warranting immediate termination, does the record show the employee was given fair notice of what was expected of him/her, and an adequate opportunity to correct the perceived problem in performance or conduct? If not, there may be good reason to give a final warning and another chance to the employee.
4. Have all the requisite preliminary steps for progressive discipline to discharge been met?
5. Are you certain of the facts behind the proposed discharge, and are they supported by hard evidence rather than hearsay and speculation?
6. Have you been procedurally fair, *i.e.*, have you confronted the employee with the reason you are considering discharge or discipline, afforded the employee fair opportunity to respond or explain, and to give his/her side of the story, before you make and announce your decision? Is this step accurately and adequately documented?
7. Has the employee made any claim of wrongdoing by the Employer? If so, don't ignore the claim. Get the employee's story and investigate the claim. The employee may be obligated to cooperate with a reasonable investigation.
8. Is documentation proper and adequate? Will it support this termination?
9. Has the proposed decision been reviewed objectively by someone within the Employer other than the immediate supervisor to assure adequacy of the basis for discharge, consistency of approach, and sufficiency of documentation (*i.e.*, does the employee's file support the action)?
10. Is this termination retaliatory? Is there any indication that it might be considered a termination in retaliation for an employee's whistle blowing, workplace injury claim, complaining about a manager's actions, or complaints about employee safety? Even if the termination is not so motivated, are there any facts or circumstances surrounding the termination that makes it appear retaliatory?
11. Invasion of employee's privacy? To accomplish the termination, is it necessary to invade the employee's privacy?
12. Is there a pending governmental investigation or complaint? Has the employee recently filed a complaint with a federal or state agency?

13. Is there any argument that the discharge was because the employee refused to participate in an illegal act or an act which may be considered against public policy?
14. Long-term employee? Terminating long-term employees should automatically raise a red flag. Courts and juries are more likely to ask why the Employer didn't take action to terminate a long-term employee sooner if it claims that the employee was not performing adequately. The mere fact that an employee has longevity does not mean he can never be discharged-but it does mean you should have substantial documentation to support the discharge.
15. Has the Employer followed its own policies?
16. Eggshell employee? Is this employee particularly sensitive in some area so that the supervisor's or Employer's conduct is likely to upset the employee more than it would another person?
17. Bad timing? What is the timing of the termination? Is it near in time to suspicious events, for example, shortly after the employee's recovery of workers' compensation benefits?
18. Is the Employer being honest about the reasons for termination? Are you prepared to tell the employee the real reason for termination? This is no time for face-saving for the employee. He must be told the real reason, a reason which can be substantiated with documentation and other evidence.
19. Anything else? Is there any indication of extreme or outrageous circumstances? This is specially problematic where there was an altercation between the employee and his supervisor.

**EEOC OPINION LETTER REGARDING RELIGIOUS
AFFILIATED INQUIRIES DURING THE HIRING PROCESS**

March 10, 2005

Dear:

This responds to your February 3, 2005, letter inquiring whether various questions on an employment application for the _____ School in, violate any of the laws enforced by the Equal Employment Opportunity Commission (EEOC). Specifically, the application questions you have asked about include inquiries regarding:

- nationality
- height and weight
- physical disabilities
- treatment for any physical, mental, or emotional disorder
- whether married, divorced, number of children, and plans to marry within the next year (and if so name and employer of spouse)
- “testimony of [applicant’s] personal salvation experience, home church, how frequently church attended, applicant’s “attitude” and “practice” toward “soul-winning,” applicant’s practice and belief regarding tithing, ministries of interest, past involvement in local church, and “position on the modern tongues movement”
- whether “anyone [can] justifiably bring an accusation against [the applicant]” (or, if married, applicant’s spouse)
- financial debts
- musical abilities, and hobbies

The statutes enforced by EEOC include Title VII of the Civil Rights Act of 1964 (Title VII) and Titles I and V of the Americans with Disabilities Act of 1990 (ADA). Title VII prohibits employment discrimination by private and state or local government employers with fifteen or more employees based on race, color, religion, sex, or national origin. Titles I and V of the ADA prohibit the same employers from discriminating against qualified individuals with disabilities.

The EEOC provides technical assistance concerning these laws. While we cannot make any representations regarding what position the Commission would take if a given matter were to come before it in a future discrimination charge, we can provide some guidance regarding general principles that might apply to the application form about which you have inquired.⁵

Questions regarding religious background, beliefs, and practices

While Title VII prohibits most employers from making hiring, firing and other employment decisions based on an applicant or employee's religious beliefs or practices (or lack thereof), it is not *per se* illegal to ask applicants questions regarding their religious background, beliefs, and practices. Rather, such questions would be potential evidence of the employer's discriminatory intent if a religious discrimination claim was filed by an applicant alleging he or she was not hired based on religion, except in the case of "religious" organizations, which are allowed to employ people of their own religion.

Title VII's exception for "religious organizations" states that the law will not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a). A similar exemption exists for certain religiously-affiliated schools if they are, in whole or in part, owned, supported, controlled, or managed by a particular religion or religious group, or if the curriculum is directed toward the propagation of a particular religion. 42 U.S.C. § 2000e-2(e)(2)

The "religious" organization exception applies only to those institutions whose "purpose and character are primarily religious." Although no one factor is dispositive, significant factors include whether its articles of incorporation state a religious purpose, whether its day to day operations are religious, and whether it is for profit. That determination must be based on "[a]ll significant religious and secular characteristics." The determination of whether a particular employer falls within the "religious" organization exception permitting religious preference in hiring is made on a case-by-case basis.

⁵ Your letter does not specify what laws you believe the questions highlighted on the application form violate. In most instances, we assumed you believed the questions violated Title VII or the ADA. The questions about an applicant's financial debts and musical abilities and talents, however, do not appear to implicate any of the laws we enforce.

If an organization or school is exempt from Title VII's religious discrimination provisions, then it can likely ask applicants about religious background, beliefs, and practices and make employment decisions based on the answers to those questions without violating Title VII. The "religious" organization exception, however, is limited to discrimination based on religion, so even

"religious" organizations are generally not permitted to discriminate on other protected bases, such as race, national origin, or sex.⁶

Questions About Nationality

Like questions about an applicant's religion or religious practices, questions about an applicant's nationality are not per se illegal. They may, however, be evidence of an employer's discriminatory intent in an action alleging failure to hire an applicant because of national origin. This is true even if the entity asking the questions qualifies as a religious organization, because, as noted above, Title VII's exemption for religious organizations only allows the organization to prefer members of its own religion, not to discriminate on other protected bases.

Disability-Related Inquiries

Under Title I of the ADA, an employer may not make any disability-related inquiries or require a medical examination of applicants at the pre-offer stage. This prohibition applies to inquiries made directly to an applicant, as well as to indirect inquiries made to an applicant's doctor. However, after making a job offer, an employer may ask disability-related questions and perform medical examinations, and the job offer may be conditioned on the results of these post-offer questions and examinations. All entering employees in the same job category must be subjected to the examination/inquiry, regardless of disability, and medical information obtained must be kept confidential. Post-offer, pre-employment disability-related questions and medical examinations do not have to be related to the job, but job offers may only be withdrawn on the basis of disability where the medical information shows that the individual cannot perform the essential functions of the position without posing a direct threat to safety, even with a reasonable accommodation. See *EEOC ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (October 10, 1995) (available at <http://www.eeoc.gov/docs/preemp.html>).

⁶ However, there is a broader "ministerial exemption" in Title VII permitting great latitude in various employment decisions involving clergy.

A disability-related inquiry is a question or a series of questions that is likely to elicit information about a disability. If there are many possible answers to a question and only some of them would reveal a disability, the question is not disability-related. Therefore, disability-related inquiries generally include questions that ask an applicant to divulge whether or not he or she has any physical or mental disabilities, questions about present or past physical or mental health treatment, and questions about present or past use of medication.

Several of the questions on the application, such as questions about whether an applicant has certain physical conditions and the question regarding whether an applicant has had treatment for

any physical, mental, or emotional disorder, appear to fall squarely within this definition. Questions about height and weight are not disability-related. Even if these questions may sometimes reveal that an applicant has a condition such as dwarfism or morbid obesity, both of which may be disabilities, they will usually reveal no more than normal deviations in height or weight, which are not disabilities.

This has been an informal discussion of the issues you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. Further, our silence on other statements or analyses that may have been presented in your letter should not be construed as agreement with those matters.

Sincerely,

Peggy R. Mastroianni
Associate Legal Counsel

FEDERAL RECORDKEEPING REQUIREMENTS

RECORDKEEPING REQUIREMENTS		
STATUTE	RETENTION PERIOD	DOCUMENTS
Age Discrimination in Employment Act (ADEA)	3 years	Payroll documents
	1 year	Hiring, firing, promotion, employment test results, job ads and training records
	1 year	Benefit plans, written seniority and merit plan systems
	90 days	Temporary jobs
	Until the end of time	Lawsuit documents, notes, supervisor's files, <i>etc.</i>
Americans with Disabilities Act (ADA)	1 year	Personnel records, resumes, applications, records on promotions, demotions, transfers, layoffs and compensation
	Until resolved	EEOC charges, records of the persons making the charge, records of all similarly situated employees
Davis-Bacon Act[applies to employers who work on federally financed construction in excess of \$2,000]	3 years after completion of the contract	Payroll records
Equal Pay Act	3 years	Workweek definition, hours worked, pay rates and deductions, total wages
	3 years	Collective bargaining agreements
	2 years	Time cards, time sheets, wage rate tables, seniority system records
Employee Retirement Income Security Act (ERISA)	6 years after the filing date of the documents	Supporting documents of the plan or reports
	Duration of the plan participation	Employee and beneficiary records relevant to benefits
Executive Order 11246 (Affirmative Action)	2 years	Test records and results, job group analysis, affirmative action program evaluation
	2 years	Written affirmative action program

RECORDKEEPING REQUIREMENTS		
STATUTE	RETENTION PERIOD	DOCUMENTS
Fair Labor Standards Act (FLSA)	3 years	Name, address, payroll information, wages, overtime, daily and weekly hours worked, pay rates, total daily and weekly rates, deductions, timecards collective bargaining agreements and employment contracts
Family and Medical Leave Act (FMLA)	3 years	Name, address, payroll information, hours worked, wages, overtime, etc. Dates FMLA leave taken-- (hours taken if less than 1 full day), leave notices, premium payments, records of any disputes
Immigration Reform and Control Act (IRCA)	3 years from the date of hire OR 1 year after termination whichever is later	I-9 Forms and supporting documents
Occupational Safety and Health Act (OSHA)	5 years	OSHA Injury and Reporting Forms
	Duration of employment + 30 years	Legally required medical exam records
	30 years	Records to monitor exposures to hazardous materials
Rehabilitation Act of 1973	1 year minimum	Personnel records of disabled applicants and employees
	1 year upon resolution of action	Lawsuits
Title VII of the Civil Rights Act of 1964 (Title VII)	1 year	Personnel records, resumes, applications, records on promotions, demotions, transfers, layoffs and compensation
	Until resolved	EEOC charges, records of the persons making the charge, records of all similarly situated employees
Executive Order 11246 (Federal Subcontractors & Contracts)	2 years	All personnel records, including applications

FEDERAL POSTING REQUIREMENTS

STATUTE	COVERAGE	STATUTORY REQUIREMENTS	POSTING REQUIREMENT	OFFICIAL FORM
<p>Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, 29 C.F.R. § 1601.30</p>	<p>Employers engaged in commerce with 15 or more employees, employment agencies, labor unions with 15 or more members</p>	<p>No job discrimination based on race, color, religion, sex, or national origin</p>	<p>Post notice describing the applicable provisions of Title VII and the ADA in conspicuous places where notices to employees and job applicants are customarily posted (42 U.S.C. § 2000e-10(a); <i>see also</i> 29 C.F.R. § 1601.30(a)). Although there are no minimum size requirements per se, the EEOC states that any reduction of the consolidated EEO poster would not comply with the statute's posting requirements. Notices should be posted in English and any other language predominant in the workforce. Department of Labor permits the notices may be reduced in size so long as they may be read from a distance. The notices should be posted in English and any other language predominant in the workplace.</p>	<p>Consolidated EEO Poster (EEOC-P/E-1)</p>

STATUTE	COVERAGE	STATUTORY REQUIREMENTS	POSTING REQUIREMENT	OFFICIAL FORM
Americans With Disabilities Act, ("ADA"), 42 U.S.C. § 12101, <i>et seq.</i> , 29 C.F.R. § 1601.30	Employers engaged in interstate commerce with 15 or more employees	No job discrimination against qualified persons with disabilities	Post notice describing the applicable provisions of Title VII and the ADA in conspicuous places where notices to employees and job applicants are customarily posted (42 U.S.C. § 12115) (42U.S.C. § 2000e-10).	Consolidated EEO Poster (EEOC-P/E-1)
Age Discrimination in Employment Act (as amended), ("ADEA"), 29 U.S.C. § 621, <i>et seq.</i> , 29 C.F.R. § 1627.10	Employers engaged in interstate commerce with 20 or more employees	No job discrimination against persons age 40 and older	Post notice pertaining to the applicability of the Act in conspicuous places where readily observable by employees, job applicants, and union members (29 U.S.C. § 627).	Consolidated EEO Poster (EEOC-P/E-1)
Employee Polygraph Protection Act, 29 U.S.C. § 2001, <i>et seq.</i> , 29 C.F.R. § 801.6	Employers engaged in interstate commerce	Polygraph testing of employees is prohibited unless part of an ongoing investigation involving the economic loss or injury to the employer's business.	Post notice explaining the act in a prominent and conspicuous place in every establishment of the employer where it can be readily observed by employees and applicants where notices to employees and job applicants are customarily posted (29 U.S.C. § 2003).	Employee Polygraph Protection Act Notice (WH 1462, 9/88)
Equal Pay Act, 29 U.S.C. § 206(d), 29 C.F.R. § 1620.32 (see 29 C.F.R. § 516.4--same posting requirements as FLSA)	Employers engaged in commerce	No discrimination based on sex in payment of wages for equal work	Post notice explaining the Act in conspicuous places to permit employees to readily observe a copy.	Consolidated EEO Poster (EEOC-P/E-1)

STATUTE	COVERAGE	STATUTORY REQUIREMENTS	POSTING REQUIREMENT	OFFICIAL FORM
Fair Labor Standards Act, as amended ("FLSA"), 29 U.S.C. § 201, <i>et seq.</i> , 29 C.F.R. § 516.4	Employers engaged in commerce or in the production of goods for commerce	Minimum wage paid must be \$5.15 per hour (effective 09/01/97); hours over 40 per week must be paid at one and one-half regular rate of pay	Post notice explaining the Act in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy (29 C.F.R. § 516.4).	Federal Minimum Wage Notice (WH 1088, 10/96)
Family & Medical Leave Act, ("FMLA"), 29 U.S.C. § 2601, <i>et seq.</i> ; 29 C.F.R. 825.300-301.	Employers or public agencies with 50 or more employees engaged in commerce or any industry or activity affecting commerce	Employers required to provide to qualified employees 12 weeks of unpaid, job-protected leave for birth of a child, placement of a child for adoption, serious health condition of a child, parent, or spouse, or employee's own serious health condition	Post notice explaining the Act's provisions and providing information concerning the procedures for filing complaints in violation of the Act with the Wage & Hour Division in conspicuous places where notices customarily are posted (29 U.S.C. § 2619).	Family and Medical Leave Act Notice (WH 1420, 6/93)

STATUTE	COVERAGE	STATUTORY REQUIREMENTS	POSTING REQUIREMENT	OFFICIAL FORM
<p>Occupational Safety and Health Act, 29 U.S.C. § 651, <i>et seq.</i>, 29 C.F.R. §§ 1903.2 and 1904.5 (employers in states operating OSHA-approved state plans should obtain and post the state's equivalent posters)</p>	<p>Employers engaged in business affecting commerce</p>	<p>To ensure employees a safe and healthy workplace</p>	<p>Post notice informing employees of the protection and obligations provided for in the Act, including copies of the Act and of specific safety and health standards, in a conspicuous place or places where notices to employees are customarily posted. Reproductions or facsimiles of federal and state posters constitute compliance with the posting requirements if the reproductions are at least 8½ inches by 14 inches, and the printing size is at least 10-point. The caption or heading must be no less than 36-point. (29 C.F.R. § 1903.2(3)).</p>	<p>Two notices: OSHA Poster (2203). OSHA has issued a new "Plain Language Poster" (publication 3165), which will replace Poster No. 2203. As supplies of OSHA 2203 diminish, the new workplace poster will be phased in to take its place. Employers do not need to replace current 2203 posters. The OSHA 2203 poster will continue to be in compliance with OSHA regulations.</p>
			<p>Company shall post an annual summary of occupational injuries and illnesses for each establishment. The Summary should be prepared by using the information recorded in OSHA Form 300 (Log of Work-related Injuries and Illnesses). Summary must be completed and posted, even if no work-related injuries or illnesses occurred. OSHA has expanded the required posting period and the Summary must now be posted from February 1 through April 30.</p>	<p>OSHA Form 300A (Summary of Work-related Injuries and Illnesses)</p>

STATUTE	COVERAGE	STATUTORY REQUIREMENTS	POSTING REQUIREMENT	OFFICIAL FORM
Rehabilitation Act of 1973 (as amended), 29 U.S.C. § 701, <i>et seq.</i> , 41 C.F.R. § 60-741.5(a)(4)	Federal government contractors and subcontractors (with a contract of \$10,000 or more)	Affirmative action to employ and advance in employment qualified individuals with disabilities	Post notice stating the rights of applicant and employees as well as the contractor, obligations under the law to take affirmative action to employ and advance in employment qualified employees and applicants with disabilities in conspicuous places, available to employees and job applicants (41 C.F.R. § 60-741.5(a)(4)).	Consolidated EEO Poster (EEOC-P/E-1)
Executive Order 11246 (as amended), 41 C.F.R. §§ 60-1.4 and 60-1.4(2)	Federal government contractors and subcontractors; contractors under federally assisted construction contracts	No job discrimination based on race, color, religion, sex, or national origin	Post notice in conspicuous places available to employees, job applicants, union representatives (§§ 202(1) and 202(3)).	Consolidated EEO Poster (EEOC-P/E-1)
Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301, <i>et seq.</i> (formerly, the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. § 2021, <i>et seq.</i>), 41 C.F.R. § 60-250.20(9)	USERRA applies to all employers regardless of size; however, notice-posting requirements limited to federal government contractors and subcontractors with a contract of \$10,000 or more	Employ and advance in employment qualified disabled and Vietnam era veterans	Post notice stating the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era for employment, are the rights of applicants and employees in conspicuous places, available to employees and job applicants (41 C.F.R. § 60-250.20(9))	Consolidated EEO Poster (EEOC-P/E-1)

STATUTE	COVERAGE	STATUTORY REQUIREMENTS	POSTING REQUIREMENT	OFFICIAL FORM
Executive Order 13201 ("Beck" poster)	federal contractors and subcontractors		Beginning 4/18/01, the Office of Federal Contract Compliance Programs (OFCCP) requires federal contractors to post notices advising employees that they have a legal right to withhold part of their union dues. The "Beck" poster informs non-union employees who pay uniform, periodic dues as part of company-union agreements that they can refuse to pay any dues which do not support collective bargaining, contract administration or grievance adjustment.	On January 2, 2002, the Federal district court for the District of Columbia issued a decision in <i>UAW-Labor Employment & Training Corp. v. Chao</i> , holding that Executive Order 13201 is invalid because it conflicts with the National Labor Relations Act. The court permanently enjoined the Department of Labor from implementing and enforcing Executive Order 13201. The Department is considering options for responding to the decision.
Notice to Workers with Disabilities/Special Minimum Wage Poster	Every employer of workers with disabilities under special minimum wages certificates authorized by the FLSA, the McNamara-O'Hara Service Contract Act, and/or the Walsh-Healey Public Contracts Act		Post notice describing conditions of commensurate wage rates in conspicuous places where employees and parents of and guardians of workers with disabilities can readily view.	