

# Lemons into Lemonade:

## How to Strategically Update Job Applications into Effective Liability Shields

By: Stephen R. Gee

Today's legal environment has transformed the seemingly innocuous job application into a polarizing document with significant liability exposure. "Ban-the-box," gender identity, and pay equity movements are just a few of the recent developments that have contributed to the large landmine field of liability employers face with their job applications. At the same time, employers are getting blindsided by costly anti-competition suits as a result of unknowingly hiring applicants subject to non-competes and confidentiality agreements. This article identifies how employers can strategically update their applications to minimize their liability exposure and turn the document into an effective liability shield against costly trade secret and non-compete litigation.

**Preliminary Considerations:** Employers should consider the business need/purpose for having a job application before drafting or reviewing their job application(s). For example, employers should evaluate:

- *When is the application filled out within the employer's hiring cycle (e.g., first point of contact or as formality after an interview)?* The timing of the application will determine whether the employer complies with states'/cities' ban-the-box laws and/or salary inquiry/usage restrictions.
- *What does the employer really need to know about the applicant at the point in time the applicant fills out the application?* As a general rule of thumb, only ask questions that have a business purpose behind them. For example, you should not include a question asking for job references unless you actually plan to follow up.
- *How many applications does the employer need? Nationwide or state specific? Job specific or a catch-all application?* These questions are most important for large companies and companies in highly-regulated industries. For example, an interstate trucking company will need to ask truck driver applicants certain Department of Transportation mandated questions, which could be illegal for a non-trucking employee. There is no one right answer. An employer can have numerous application versions or a basic application with job-specific addendum application pages.

**Identify and Avoid Ban-the-Box Liability:** Ban-the-box laws essentially cover an employer's ability to ask an applicant about prior criminal convictions. Each of these laws has four basic components that impact more than just the job application:

- When an employer can ask about criminal records (e.g., post-interview and after providing a conditional job offer).
- What criminal records an employer can rely on (e.g., felony) and how far back (e.g., less than 10 years).
- Steps to take if not hiring (e.g., pre-adverse action letter and copy of the criminal background check).
- Explicit exceptions to the law (e.g., law enforcement, nursing positions, and certain financial roles).

Private employers are subject to these laws to varying degrees currently in 10 states and 17 localities. This number is likely to grow over time. Fear not though, because the National Employment Law Project has a detailed guide to these laws that it updates on an almost monthly basis. For the purpose of updating your application, if the application is the initial step in the hiring cycle for a position in a covered jurisdiction, then the employer needs to delete the criminal record question (unless state and/or federal law specifically prohibits hiring an applicant who has been convicted of certain crimes).

**Criminal History Disclaimer to Always Include:** Regardless of whether a ban-the-box law applies, an employer should always include an EEOC-compliant disclaimer right under its criminal history question. For example: "Answering yes to the above questions will not automatically exclude an applicant from employment, but may be considered in relation to job requirements."

**Avoiding Salary Inquiry Issues:** A growing number of states and localities have enacted laws prohibiting/restricting an employer's ability to inquire about an applicant's current or desired salary. Many of these laws were passed in 2017 and states and municipalities will likely pass more in 2018. Employers should monitor for such laws being passed where they operate.

- *Where do these laws currently apply?* New York, Puerto Rico, California, Massachusetts, Oregon, New York City, Philadelphia, San Francisco, and Albany County (NY).



- *What can an employer typically not ask about on its application in one of these jurisdictions?* Current salary, past salary, expected salary.
- *What if an applicant voluntarily discloses their salary information on the application or in an interview?* Except for Oregon, employers typically can use any salary information voluntarily provided by an applicant to make employment decisions and/or salary offers.
- *What if an employer inadvertently learns about an applicant's salary information from another source?* Some jurisdictions prohibit employers from using the information for setting salary, hiring decisions, and/or screening out applicants.
- *What can you ask about on the application or in an interview in one of these jurisdictions?* Employers can still typically ask other questions related to an applicant's production, such as about the applicant's past sales history, billable hours worked, and sales revenue generated.
- *Employers should ensure their background check vendor omits salary information for applicants in these jurisdictions.*

**Two Quick Fixes to the Military Service Section:** Employers expose themselves to liability under the Americans with Disabilities Act, USERRA, and Title VII by asking "do you have any military service" and "what was the reason for your discharge from the military." Employers can make two quick fixes to reduce their exposure to liability under these laws:

- *Add a disclaimer to the military service section.* The following disclaimer accounts for disability, race, and military discrimination concerns.

"A less-than-honorable discharge is not an absolute bar to employment, depending on the nature of the job sought. Further, a medical discharge will have no impact on your employment chances unless you are unable to perform the essential functions of the job for which you have applied with or without a reasonable accommodation."

- *Only ask about U.S. Military service:* National origin discrimination is reduced by simply asking "do you have any US military service?"

**Turn Your Application into a Liability Shield:** Michigan employers can use their application to reduce their liability exposure to employee lawsuits, non-compete violations, and liability caused by nepotism and coworker romances by adding the following questions/provisions:

- *Abbreviated time period for claims provision in the application's acknowledgment section.* An example provision would generally state (and include a place for the applicant to initial they read it):

"I agree that, unless prohibited by state law, that any action, suit, claim or charge against COMPANY or any of its subsidiaries, affiliates, employees or agents arising out of or relating to the application process, employment, or separation from employment, including but not limited to, claims arising under state or federal civil rights statutes, must be brought within 180 days of the event giving rise to the claim or within the limitations period contained in the statute I am suing under, whichever is shorter. To the maximum extent permitted by law, I waive any limitations period to the contrary."

**Note:** This provision will not apply to FMLA, FLSA, and workers compensation claims.

- *Non-Compete disclosure provision.* Employers should always ask an applicant "Have you entered into a non-compete, non-solicit, confidentiality or other agreement that may restrict you in any way from performing duties for the company?" For applicants who answer "yes," employers should also ensure they provide space under this question to (a) ask the applicant to provide details, and (b) state the applicant is required to provide a copy of the agreement prior to hire.
- *Romantic and familial relationship disclosure provision.* Employers who have experienced issues with workplace discrimination and harassment

claims due to coworker relationships (romantic or nepotism) can use their job application to help curb these issues. In addition to a romance/nepotism in the workplace policy, an employer can add an application question asking:

"Are any of your relatives, any persons living in your household, or persons you are involved in a romantic relationship with, employees or former employees of the company?"

**Workplace Policy Note:** The employer should define what relatives or job positions are at issue. For example, "Employees may not work in the same department where their father, mother, brother or sister works as a supervisor."

**Note:** Further, employers should have local counsel review any of the above provisions for applications used outside Michigan for job applications.

**Other Common Application Mistakes/Omissions:** In closing, here are some other common mistakes/omissions employers make on applications and how they can fix them.

- *Do not ask:* "Are you a U.S. citizen?" Instead ask "Are you legally authorized to work in the U.S.?"
- *Do not ask disability-related questions* (e.g., current prescriptions, prior worker's compensation claims, and any physical work restrictions). Instead, supply the applicant with a job description listing the job's essential functions and ask the applicant "Are you able to perform the essential functions of the job(s) you are applying for with or without a reasonable accommodation?"
- Forgetting to include or check that a proper equal employment disclaimer is on the top of the first page of the application with all applicable federal, state and local protected characteristics listed.
- Forgetting to place the employment application acknowledgment on a separate standalone page (especially when they want to use it for background checking purposes).
- Unnecessarily asking for an applicant's social security number without having a specifically defined need for it (i.e., checking on an applicant's licensure status).
- Failing to include an "at-will" disclaimer to avoid the application ever being considered an employment contract.
- Asking an applicant for graduation dates. This exposes employers to age discrimination claims.
- Asking an applicant for a photograph. This exposes employers to a wide variety of discrimination claims (e.g., sex, race, national origin, color, etc.).
- Asking an applicant about his/her familial status or marital status. For example, **never ask any of the following questions:**
  - "Are you married?"
  - "Do you have any dependent children? If so, how many?"
  - "Will you require making childcare arrangements if hired?"

### About the Author

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### Disclaimer

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