The San Fernando Valley Business Journal has once again turned to some of the leading employment attorneys and experts in the region to get their assessments regarding the current state of labor legislation, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving. Here are a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment in 2020 – from the perspectives of those in the trenches of our region today.

Thanks to our superb panel for their expert insights.
What are the most significant new laws taking effect that could be impactful to businesses?

ROSENBERG: Here are five new laws that could be impactful to businesses: 1) AB 9 extends the statute of limitations for filing job bias claims under CA law from one year to three years. This gives employees an additional two years to assert a claim of discrimination. 2) AB 5 codifies new rules making it extremely difficult for employers in California to properly classify workers as “independent contractors.” 3) AB 51 prohibits employers from requiring employees or job applicants to sign an agreement requiring the employee to arbitrate claims for violations of the state’s job bias laws or any claims under the CA Labor Code. Note: this law was recently enjoined by a federal court on the grounds that it is pre-empted by the federal law favoring arbitration. 4) AB 749 prohibits employers from including a so-called “no rehiring” provision in a settlement agreement with a current or former employee following the filing of a lawsuit, administrative agency complaint, alternative dispute resolution forum, or through an employer’s internal complaint process. The only exception is where the employer has made a good-faith determination that the settling employer engaged in sexual harassment or sexual assault. 5) SB 142 enacts several significant new requirements related to lactation rooms. Existing law requires that a lactation room shall not be a bathroom, and shall be in close proximity to the employee’s work area. Some of the new requirements are: (i) the room must be shielded from view and free from intrusion while the employee is pumping breast milk; (ii) the employee must have access to a sink with running water and a refrigerator suitable for storing milk (or another cooling device) in close proximity to the employee; (iii) employers must have access to electricity or alternative devices such as extension cords or charging stations needed to operate an electric or battery-powered breast pump.

BENDAVID: Without question, one of the most significant bills this year is Assembly Bill 5. AB 5 codified a so-called simplified “ABC” test for determining whether a worker can be classified as an independent contractor. It placed the burden of proof squarely on the shoulders of the hiring entity to prove the worker is correctly classified. Due to lobbying efforts, the legislature added several conditional and limited exemptions that make it extremely difficult for employers in California to properly classify workers as “independent contractors.” Due to lobbying efforts, the legislature added several conditional and limited exemptions that make it extremely difficult for employers in California to properly classify workers as “independent contractors.”

ROSENBERG: The California legislature is already starting the process to amend Assembly Bill 5. It just recently introduced Assembly Bill 1850 and stated: “This bill would declare the intent of the Legislature to enact legislation that would further clarify the application of the California Supreme Court’s decision in Dynamex and recently-enacted requirements under the Labor Code.” Employers who wish to lobby the legislature should move quickly to see if the legislature is willing to exempt their particular industry from the ABC test.

How do you advise clients regarding the implementation and enforcement of non-competes and other restrictive covenant agreements?

LIGHT: True non-competes are not enforceable in California except in limited circumstances (e.g., an owner sells her business). The best an employer can do is mirror what the law allows, which is, for example, provisions prohibiting solicitation using the Company’s proprietary information—which can include customer and vendor lists. An “announcement” is acceptable (“Hi it’s Jon, here’s my new contact info”); a solicitation is not (“Hi it’s Jon, I’d love your business, let’s have lunch, etc.”). Also, employers need to be careful about hiring people in or from other states; some states do allow restrictive covenants in what otherwise would be unenforceable in California.

BENDAVID: Review their agreements before hiring.

ROSENBERG: The California legislature is very protective of employee mobility, so most “non-compete” agreements are unenforceable. The law also permits employers to vigorously protect proprietary and trade secret information by having employers sign agreements which prohibit them from taking, using or making unauthorized disclosure of the employer’s confidential or trade secret information. The key is taking a proactive approach to identify what information is legally protectable, having employees sign an agreement that properly protects that information and the employer consistently enforcing those secrecy rules.

BENDAVID: The State of California strongly opposes non-compete agreements in most settings. With limited exceptions, businesses cannot prohibit former employees from seeking work, even with direct competitors. There are very narrow exceptions to this rule (when a business owner sells the owner’s stock for example – the prior owner can be subject to a limited non-compete). But generally, employers should not ask employees to sign non-compete agreements, nor expect such agreements to be enforceable in court. Employers can, and should however, protect their businesses by implementing strict confidentiality agreements and trade secret protection plans. Apart from confidentiality agreements, employers should have policies in place which advise employees about their obligations to protect the company’s confidential information and trade secrets. Employers should also ensure that databases are password protected and that information is distributed on a need to know basis only.

Which of California’s newer employment laws are most likely to land employers in court?

ROSENBERG: We envision a slew of class action lawsuits under AB 749 challenging a business’s classifications of workers as independent contractors. The new law creates a presumption that all workers are employees and places the burden on the employer to prove otherwise. Under the new law so-called “AB-C” test, it is now much harder for employers to satisfy this burden. This affects tens of thousands of CA workers.

What can companies expect from the California legislature in 2020?

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What about mediation in the context of employment disputes?

ROSENBERG: Mediation works and in most cases proves to be a much better method of conflict resolution that going to court. Court statistics show that fewer than 5% of all employment cases actually go to trial. That means that almost nearly 99% of all cases will eventually settle. Mediation is a voluntary process that will enable parties to explore resolution confidentially before they have run up a dinner full of legal bills. Legal claims are costly to defend and time consuming. Mediation can be a great escape valve allowing the company to move forward while minimizing the cost and hassle of the litigation process.

BENDAVID: It’s a great way to get to resolution before incurring a huge amount of legal fees. A company will usually pay more than it wants to pay, so get a realistic assessment early on from your attorney and don’t have a heart attack. It’s still cheaper and safer than litigation. We will go to mediation on receipt of a demand letter, especially if the facts aren’t pretty. Get the facts and documents together and encourage your attorney to share information with the other side; we don’t want surprises at mediation (on either side, generally). The more the other side knows about your case going in, the easier time you will have getting them to a result you can accept. If there are issues, be prepared to show your numbers and perhaps share before the mediation. Attorneys are lazy at reading financial documents and may need some help beforehand. Don’t automatically decline the mediator suggested by the other side. If they trust that mediator, they will have an easier time accepting what the mediator proposes.

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BENDAVID: Mediation is often hired to help parties resolve disputes. The mediator performs what I call “shuffle diplomacy” to help everyone realize that settlement can sometimes be better than litigating, and potentially losing the case at trial. A good mediator can often connect with the employee (sometimes on an emotional level) and get to the legal and factual weaknesses in their case. The mediator can also help employers understand they are not going to get rich by suing their former employees. If the mediator is effective, he or she can explain to the employer why settlement may be a more economical course of action depending on the law and the facts of each case.

What are your views on using arbitration agreements as an alternative to employment litigation?

LIGHT: I am 100% in favor of arbitration and can’t understand why some attorneys disagree. It’s safer, less expensive, and less time-consuming. Plaintiff attorneys don’t get to use a jury that may be more emotional, less focused on the facts, less under-standing of the law, and more likely to award big damages. Arbitration agreements also prevent employees from participating in wage and hour class actions (yes, that’s enforceable, still). Some attorneys believe that arbitration is worse than it wants to pay, so get a realistic assessment early on from your attorney and don’t have a heart attack. It’s still cheaper and safer than litigation. We will go to mediation on receipt of a demand letter, especially if the facts aren’t pretty. Get the facts and documents together and encourage your attorney to share information with the other side; we don’t want surprises at mediation (on either side, generally). The more the other side knows about your case going in, the easier time you will have getting them to a result you can accept. If there are issues, be prepared to show your numbers and perhaps share before the mediation. Attorneys are lazy at reading financial documents and may need some help beforehand. Don’t automatically decline the mediator suggested by the other side. If they trust that mediator, they will have an easier time accepting what the mediator proposes.

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standing that plaintiffs still may sue in court for wage and hour violations under the Private Attorneys General Act (PAGA). Before employers elect arbitration, a serious discussion on the issues should take place so the employer can make an informed decision that best fits its circumstances.

As automation becomes more ubiquitous in the workplace and employers adopt artificial intelligence tools for greater efficiency, what should businesses be aware of from a legal perspective?

BENDAVID: As employers modernize their processes with the use of Artificial Intelligence, they may lay off workers who previously performed the same tasks. Before employers conduct mass layoffs, they must determine whether they are obligated to provide advance notice under the federal and state Worker Adjustment and Retraining Acts (“WARN Acts”). Aside from that, another danger is running afoul of discrimination laws. Employers should ensure that when replacing staff with AI, they establish criteria for layoffs that do not have a disparate impact based on protected characteristics. To mitigate the impact, employers also should consider whether those employees being replaced with AI can be retrained for other positions within the company.

What are the most frequent mistakes made by employers when disciplining employees?

ROSENBERG: The biggies are: (i) not documenting performance problems in real-time; (ii) not giving the employee a fair chance to succeed before being fired; (iii) not understanding that an employee’s testimony is “evidence” that a jury can rely upon when evaluating a claim; (iv) not being consistent when meting out discipline (i.e., not treating likes alike); and (v) failing to understand that in certain cases (such as disability or religious accommodation), an employer must bend the rules and treating likes alike will get them in trouble.

LIGHT: Failure to document. Failure to document. Failure to document. Starting early enough in the process, before the employer realizes they are in trouble and then a mysterious fall in the lunch room (we had a case with a guy who poured coffee on the floor and then “fell”), claims “stress,” or anything else that “protects” them; it’s a great strategy by employers when disciplining employees.

What advice would you give to a new company with respect to the creation of an employee handbook?

ROSENBERG: Use a labor law expert. Handbooks are legal documents that must be written with great care and updated as laws change. Leaving this to consultants or in-house personnel without considerable legal background is risky because a typical handbook has 100+ legal regulations that must be accounted for and communicated correctly. Even small policy mistakes can easily land an employer in court and expose the company to a six figure jury award. Remember, you get what you pay for.

BENDAVID: An employer should be an equal opportunity employer, explain the company’s compliance with local, state, and federal laws, including the California Fair Employment and Housing Act (CFEHA), the California Pay Equity Act, and the California Family Rights Act (CFRA). The handbook should contain a complaint procedure, discipline policies, and termination policies. It should contain a statement on harassment and discrimination policies, and policies regarding various leave laws. As for discrimination and harassment matters, the handbook should explicitly state that harassment and discrimination will not be tolerated and provide instructions for how employees should notify the employer in the event they are being harassed or discriminated against. The handbook should state that all claims will be taken seriously, timely investigated, that the employer will keep the claim and investigation confidential to the extent possible, and that steps will be taken to correct the situation if the investigation reveals the claim is substantiated. It is also critical to have written policies describing your company’s compliant meal and rest breaks, the Family Medical Leave Act, the California Family Rights Act, and its ABC test (which includes, amazingly, the Avon Lady and the Repet Man). Are they in the “professional services” category with specific carve outs (grant writers, etc.)? Or, most generically, does this relationship qualify as a “bona fide business to business contracting relationship”? This is a company’s likely best shot, but the worker still must pass the old Borello test and demonstrate, among several criteria, that the worker has a business license, controls their work, actually has other clients/customers, and provides services to the company and not to the company’s customers (that one can be a killer).

BENDAVID: Employers must now use the A-B-C Test to determine whether or not a worker can be considered an independent contractor. To quote AB 5: “(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) The person performs work that is outside the usual course of the hiring entity’s business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.” The hiring entity bears the burden of proving each one of these elements. If any of the conditions are not satisfied, and if none of the exemptions apply, the worker is an employee in the eyes of the law.

Assuming employees actually qualify as independent contractors, are there any issues businesses need to be aware of in drafting agreements with them?

LIGHT: Don’t slide in “employee-looking” clauses like at-will, benefits, or expense reimbursements that logically should be the ICs’ responsibility. Don’t try to mirror the requirements of the new IC test under the Labor Code. DO NOT include “work for hire” or “work made for hire” language. Even if the IC arrangement is otherwise completely legitimate, those words will void the relationship under the unemployment laws and create an employment relationship requiring unemployment insurance contributions, according to the EDD. There are other ways to convey ownership rights in whatever the IC is creating for the company. A good business lawyer should be able to figure that out.

ROSENBERG: Under AB 5, you must have a written agreement with every independent contractor. And, the agreement will be scrutinized. What are some legal issues that companies often overlook during a layoff or termination process?

BENDAVID: As mentioned, the state and federal WARN Acts require certain employers to provide advance notice when
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conducting a mass layoff, plant closure, and in other circumstances. Aside from ensuring sufficient and proper notice is provided, employers should also develop sound criteria to determine who should be laid off and who retained — criteria that do not adversely affect a protected group (e.g., have a disparate impact based on race, national origin, age, etc.). Once the criteria is established, it should be documented and employers should ensure the laid off employees are timely paid all wages and accrued/earned vacation, reimbursed for expenses, made aware of changes to benefits, etc.

ROSENBERG: Many employers believe that a company can layoff whoever it wants without legal recourse. Actually, employees selected for layoff can sue (and win) if they were selected (i) on account of a protected status (such as age, gender, race,) (ii) because they voiced opposition to any practice that the employer reasonably believed was illegal, or (iii) in retaliation for having avowed themselves of a legal right (e.g., taking a pregnancy or work injury leave). Business should develop clear criteria for who stays and who goes. A well-documented layoff file is worth its weight in gold if you have to fight an employee claim or wish to convince an inquiring lawyer to turn down your former employee’s case. Timing is also critical. For example, laying off someone who just returned from maternity leave or who recently complained about workplace harassment is very risky.

Which pay practices are most likely to result in a company being sued in a wage-hour class action?

LIGUE: The list is (almost) endless: Failure to include non-discretionary bonuses in overtime calculations; rounding practices that mostly favor employers; failure to include shift differentials in overtime calculations; failure to provide the assessment to the applicant. ROSENBERG: No. Employers in California with just five or more employees must comply with the State’s “Ban the Box” law. This law prohibits these private employers from even asking a job applicant to disclose prior criminal convictions until after a conditional offer of employment is made. Where an employer wishes to delve into the applicant’s criminal record and deny employment based upon that information, the employer must provide the applicant a mandated “fair chance process” which allows the applicant time to respond to the employer’s concerns before filling the position. Employers in this situation must be prepared to show there is sufficient connection between the criminal offense and the applicant’s intended job duties to justify revoking the job offer.

LIGUE: Not these days. An employer must first wait until an offer is made before getting this information. Under the federal and state “Green Rules,” the employer must then evaluate the nature of the crime as it relates to the position sought. Is this a warehouse worker who won’t interact with the public, is closely supervised, does not handle cash, and is responsible for the company’s own office space? No way! Is this a DJ? Yes, it is possible that the employer can get the job offer revoked. How can we know? Can the employer just refuse to give the job offer to anyone who has a prior conviction of any type? No, it must have a “direct and adverse relationship with the specific duties of the job” — and it’s unlawful to do this anyway.

BENDAVID: California’s “Ban the Box” law prohibits employers from asking about criminal history before offering employment. Strict rules bar an employer from withdrawing the offer of employment if a criminal history is discovered after selecting a candidate for employment. The offer can be withdrawn, but only after an involved and time-consuming process of assessing the circumstances and allowing the applicant to respond. It is not easy to withdraw an offer of employment based on criminal history — there must be a “direct and adverse relationship with the specific duties of the job” — and it’s unlawful to bar a candidate’s application for employment, with limited exceptions. The City of Los Angeles has its own “Ban the Box” ordinance which is similar to the State’s rules, and which also requires employers to provide the assessment to the applicant.

ROSENBERG: What can employers do to remain current on the ever-evolving business and employment law trends?

BENDAVID: Make sure you have access to an HR professional who knows what they know and perhaps more importantly — knows who they do NOT know, so they can seek proper legal advice. That HR professional should regularly attend seminars, read updates on employment laws, and keep their finger on the pulse as laws are changing. Our clients read our blog and attend our regular updates during which we describe the changes in the law and the practical implications of those law changes. Companies should send their HR professionals to these training sessions so they can keep up to date.

How does a labor-focused law firm differentiate itself from the competition in 2020?

LIGUE: Respond to email and phone calls timely, or at least let the client know your timetable for a response. Provide practical business-oriented advice and not a legal treatise on the pros and cons of whatever legal issue is before the table. Weigh the real risks of a particular path and don’t necessarily always recommend the safest option. Our clients have businesses to run and a lawyer can kill them if you don’t give the safest option every time; but that often doesn’t solve a problem. Be practical, use common sense, understand what your client needs from you and provide actual advice: “If it were my business, here’s what I’d do.”

ROSENBERG: How can an employer legally impose a rule barring the employment of job applicants with criminal records?

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ROSENBERG: Number 1 is off the clock work. Starbucks found that does not adversely affect a protected group (e.g., have a disparate impact based on race, national origin, age, etc.). Once the criteria is established, it should be documented and employers should ensure the laid off employees are timely paid all wages and accrued/earned vacation, reimbursed for expenses, made aware of changes to benefits, etc.

Once the criteria is established, it should be documented and employers should ensure the laid off employees are timely paid all wages and accrued/earned vacation, reimbursed for expenses, made aware of changes to benefits, etc. Number 2 is meal and rest breaks. Employers should ensure that employees are completely done working- even for a few minutes- can result in a huge liability. Number 3 is paystub deficiencies. Every paycheck must have the required data or the company faces a fine. Number 4 is time clock “rounding”. While the practice technically is still legal, the employer will face legal liability if the practice end up working in the favor of the employer.

Are there new issues arising with immigration-related claims?

BENDAVID: Yes. The Social Security Administration’s “No-Match” letters are back after an eight-year hiatus. Employers receiving one should consult with a legal expert before responding. Also, ICE is on a tear with stepped up workforce enforcement actions (i.e., “ raids”). Also, recently enacted CA laws make it illegal for members of management and supervisors to threaten employers with deportation or reports to immigration.

BENDAVID: Claims for harassment and discrimination because of national origin or perceived national origin continue to be an issue for employers. The laws are quite broad and apply to a wide variety of workers. For example, laws protect those who speak English as a second language, affiliate with ethnically based organizations, or marry someone associated with a national origin group. Federal and state laws prohibit discrimination in hiring and firing based on citizenship status as well as intimidation and retaliation. Equal employment opportunity policies should be reviewed and modified as necessary to address these issues.

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ROSENBERG: The key ingredient is taking the time to really know your client, their business, their needs and their goals and changing a fair fee for your services. There are lots of lawyers who are well versed in the basics. However, the lawyers and law firms that stand out are those who possess substantial industry expertise, are creative problem solvers and who take the time to really understand a client’s goals and objectives.

BENDAVID: Our Employment Practice Group represents employers only in all stages of litigation, whether our clients are considering mediation, arbitration, or trial. We represent employers in various jurisdictions where claims may be filed (Labor Commissioner, the U.S. Department of Labor, the EEOC, and of course in state and federal courts). But even before we get to the stage where an employer makes a claim, we are intent on helping employers reduce the risk of claims being made in the first place. That means helping businesses manage their challenging employee situations, training their staff, managers and HR professionals, auditing policies and pay practices, and advising clients. Additionally, unlike employment law boutique firms, we have the benefit of having lawyers in house with overlapping practice areas in franchise, mergers and acquisitions, intellectual property, tax, etc. We often collaborate with these other departments when there is a client need.
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Communicate Effectively with Your Staff

By Barton Goldsmith, Ph.D.

To understand how to effectively communicate in the workplace, you have to first understand some basic psychological truths about how we, as people, tend to communicate.

If we communicate to a person in the way they understand best, that communication will be accepted and the team member will respond faster and with more motivation. There are three types of communicators. The first are the Visuals, those people that take in and process information through their eyes. They also prefer to think, or rather visualize with their mind’s eye. To be effective with them, you need to use key words such as “look, see, picture,” etc. It is also valuable to give them printed or written materials to go along with what it is you are communicating. They prefer words that enable them to picture things. They like words that help them understand best, that communication will tend to communicate.

The second type are Auditory communicators, these people use their hearing to develop understanding. They talk to themselves in words that their minds can listen to. They like words that help them hear things. When talking with them, use key words like “hearing, listening, sound,” etc. These people tend to process information quickly and are sometimes likely to respond before you have finished talking.

Kinesthetic, the third type, are feeling people. It doesn’t matter how things look or sound to them, it needs to feel right (not necessarily good). Still, others imagine things in terms of movement, feeling and action. The famous scientist Einstein used this kinesthetic type of thinking when he formulated his famous theory of relativity. Listen to how your team member communicates, they will use the key words for their type in normal conversation. After you have discovered how they communicate, speak with them in the same manner. It will greatly enhance your interactions.

To gain maximum interest, remember people are most interested in anything that has to do with them. This isn’t egotistical – it’s natural. Once you understand this, you can tailor your communications so that you receive maximum interest.

BE AWARE OF NON-VERBAL COMMUNICATIONS

Our senses shape our thinking. We remember and think about things as we saw, heard, or felt them. Some individuals and cultures stress one kind of thinking more than others do, though all cultures use all of them at one time or another.

You may not be sending the message you intend when dealing across cultures. You may be misinterpreting the sender’s message because of cultural differences. It is important to be aware of mixed messages and not make assumptions about the meaning of non-verbal communications.

Many people believe that when they speak, their words are the primary transporters of their thoughts. That’s just not the case. Become aware of nonverbal messages to harness your communication power.

DON’T LOSE IT

This final tip is one of the most powerful things you should NOT DO. If you get angry, you lose. When you “lose it” in front of team members, their confidence is shaken and your credibility is undermined. If you start to get over-excited, take 20 minutes to cool off and then reconvene your meeting. It may help you to remember this quote by Thomas Jefferson: “Nothing gives one person so much advantage over another as to remain cool and unruffled under all circumstances.”

Dr. Barton Goldsmith is a keynote speaker, business consultant and author. Considered an expert on small business, he has spoken to audiences worldwide. He may be contacted through his web site BartonGoldsmith.com or at (818) 879-9996.

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The Interview Process: How to Select the Right Person

How do you select the right person for your business? There is no perfect answer, but the interview process can be a tremendous help if you use it effectively. In other words, you must have completed all of the other steps in the hiring process in order to get the most out of the interview process. Interviewing candidates for a position within your company is one of the final steps in the hiring process. Before you get to this step, you want to make sure that you’ve completed all of the preceding steps since each of these steps will have a direct impact on how effective the interview process will be. Below is a list of the steps involved in the hiring process. Note that after you have completed the interviewing process, there are still two additional key steps that you need to complete. In order to achieve the best hiring results possible, just remember that all of the steps are important.

In order, the key steps to finding the right person to fill a position in your company include:

• Determining the salary for the position, based on the job's description and specification.
• Writing a job description and job specification for the position based on the job's description and specification.
• Interviewing the most qualified candidates for the position, based on the job's description and specification.
• Checking references.
• Hiring the best person for the job.

Hopefully, after reviewing all of the resumes, you will be able to pick and choose a select number of qualified applicants to be interviewed. (If not, you may want to expand your time frame and re-write any ad copy and/or look at another recruitment technique)

Now that you know where the interview process fits into the hiring process, let’s take a look at conducting a successful interview.

THE SUCCESSFUL INTERVIEW - WHAT NOT TO DO

The following list is comprised of subject matter that is widely regarded as “off-limits” for discussion in an interview by employment experts. Most of these subjects relate directly to federal and state employment laws. Legislation covering equal employment opportunity is extensive and complex. Check not only federal laws, but also your own state’s laws and guidelines. Remember, state laws vary! Consult an attorney for legal advice (before you begin the search process for a new employee).

In an interview, or on an employment application, do not ask questions...

• concerning the age of the candidate. Be careful using the words “over qualified” with older candidates.
• about their arrest record (this is different from convictions - in most states, it is permissible to ask if the candidate has ever been convicted of a crime).
• about race or ethnicity
• concerning the candidate’s citizenship of the U.S. prior to hiring (It is permissible to ask “Will you be able to provide proof of eligibility to work in the U.S. if hired?”
• concerning the candidate’s ancestry, birthplace or native language (it is permissible to ask about their ability to speak English or a foreign language if required for the job).
• about religion or religious customs or holidays.
• concerning the candidate’s height and weight if it does not affect their ability to perform the job.
• concerning the names and addresses of relatives (only those relatives employed by the organization are permitted).
• about whether or not the candidate owns or rents his/her home and who lives with them. (asking for their address for future contact is acceptable).
• concerning the candidate’s credit history or financial situation. In some cases, credit history may be considered job-related, but proceed with extreme caution.
• concerning education or training that is not required to perform the job.
• concerning their sex or gender. Avoid any language or behavior that may be found inappropriate by the candidate. It’s better to standard of conduct that must be met.
• concerning pregnancy or medical history.

Attendance records at a previous employer may be discussed in most situations as long as you don’t refer to illness or disability.

• concerning the candidate’s family or marital status or child-care arrangements (it is permissible to ask if the candidate will be able to work the required hours for the job).
• concerning the candidate’s membership in a non-professional organization or club that is not related to the job.
• concerning physical or mental disabilities (asking whether the candidate can perform the essential job duties is permitted. The ADA allows you to ask the applicant to describe or demonstrate how they would perform an essential function(s) when certain specific conditions are met. Check the law or consult with an attorney before moving forward).

Remember, when in doubt, ask yourself if the question is job-related if not, don’t ask!

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