

Introduction

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Introduction

A North Carolina town manager once said that hiring was the hardest part of his job. Given the high cost of training and of turnovers, he felt enormous pressure to find and choose the best applicant for every position. Learning enough about applicants to make an informed decision about whether they would be a good fit for the position would be difficult enough if there were no limitations on the questions that could be asked and the factors that could be taken into consideration. The process of finding a seemingly best candidate is that much harder given the number of rules and prohibitions governing the hiring process. Included in that list of rules governing recruitment and selection are the following:

1. Unless the law has created a specific exception, all employees are at-will employees. In the hiring context, the employment-at-will rule means that employers may generally hire whomever they please, even if the person selected is not the most qualified applicant for the position.
2. Notwithstanding the employment-at-will rule, federal and state antidiscrimination laws prohibit employers from making hiring decisions based on race, color, gender, religion, national origin, age, disability, or military status.
3. Unintentional discrimination is as illegal as intentional discrimination.

4. There are no general federal or state laws that require public employers to post, advertise, or otherwise seek applicants for vacant positions in any particular way, but an organization may adopt policies that establish procedures for hiring. Where such policies are adopted by statute or ordinance, the policies have the force of law and must be followed.
5. An employer may not reject a job applicant because that applicant is a member of the Armed Forces or Armed Forces reserves and may be subject to a call to duty.
6. No applicant may be automatically disqualified on the basis of a criminal conviction.
7. No applicant may be automatically disqualified on the basis of poor credit history or bankruptcy.
8. Employment tests of various kinds are permitted so long as they are not used to discriminate on the basis of a protected category and do not unintentionally discriminate by disproportionately weeding out members of one or more protected classes.
9. An employer may not ask any medical questions or require any medical examinations of an applicant until a conditional offer of employment has been made.
10. No public employer may hire a person without verifying that he or she has registered with the United States Selective Service.
11. All employees must be eligible to work in the United States.
12. An employer who uses a third-party vendor or agency to do a background check on an applicant must comply with the requirements of the Fair Credit Reporting Act.
13. Most rules governing initial hiring also apply to promotions.

The list set forth above is not exclusive, and these and other rules that govern hiring cannot be found in any overarching federal or state statute. The law of hiring is instead a patchwork of rules. Some are directly stated in federal or state statutes and regulations, some are interpreted or derived from statutes, and others are rules of common law. In the public sector, still other rules derive from the federal and state constitutions.

North Carolina Local Government and Community College Employers: Who Are They?

This book covers the law of recruitment and selection as it applies to North Carolina local government and community college employers. Cities and counties are the units of local government that people most commonly associate with the term “local government,” and the law of hiring as it applies to North Carolina cities and counties is a major focus of this book. But in North Carolina, and for the purposes of this book, local government employers also include area mental health authorities (sometimes known as local management entities or LMEs), water and sewer authorities, public health authorities, local Alcohol and Beverage Control (ABC) boards, and regional councils of government (COGs, which are created to provide technical assistance and assistance in economic development and grant administration to local governments in multi-county areas). The practices of cities and counties will be discussed more frequently than those of other forms of local government and will be the subject of numerous examples. But unless specifically singled out for exception, the term local government employer and discussions of recruitment and selection law will apply equally to area authorities, water and sewer authorities, public health authorities, local ABC boards, and COGs.

Community Colleges

The North Carolina Community College System was created by the North Carolina General Assembly and made a joint responsibility of the state and of local government. Both the operating authority and decision-making power and the expense of running a community college are shared. The State Board of Community Colleges and the board of trustees of the local community college have each been delegated a share of operational and decision-making responsibility, and the state provides the bulk of the funding for educational programs while the counties a college serves bear the cost of building and maintaining its facilities. For some purposes, a community college functions more like a state agency (as when it participates in the Teachers and State Employees Retirement System and the State Health Plan of North Carolina), and for others, more like a local government (as in its close relationship with the local public schools and the role of the

local school board and the board of county commissioners in choosing the college's trustees).

For the purposes of this book, community colleges are much more like local governments than they are like state agencies or local boards of education. In general, community colleges are subject to the same law as local governments when it comes to hiring. For this reason, community colleges are included among the units of government covered by this book.

Local Government Entities Not Covered by This Book

Other forms of local government entity exist in the State of North Carolina, including housing authorities, airport authorities, public (usually county) hospitals, sanitary districts, and local fire protection districts. These units of local government, to the extent that they exist as local government employers separate and independent of the cities or counties where they are located, are not covered by this book.

In North Carolina, the public school systems, like the state's community colleges, receive funding from the counties in which they are located and are closely tied to their local communities. Indeed, local boards of education are generally considered to be units of local government. But the structure, authority, and rules governing public school employment are substantially different from those of other forms of local government employment. For this reason, public schools are not considered local government employers for the purposes of this book.

Small Employers

Some of North Carolina's smallest municipalities have only a handful of employees, while the state's larger cities and counties may have over 6,000 employees, as does the city of Charlotte. While most employment laws apply to most employers, many have exceptions for small employers. The difficulty is that different statutes' coverage is triggered by different numbers of employees. Federal antidiscrimination statutes such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act, apply to employers with 15 or more employees, but the Age Discrimination in Employment Act applies only to employers with 20 or more employees. The Fair Labor Standards

Act and the Family and Medical Leave Act (neither of which regulates the hiring process) apply to employers with a single employee and 50 employees respectively. The North Carolina law prohibiting discrimination in employment against persons lawfully using lawful products applies to all public employers. To assist small local government employers in understanding the extent of their obligations under the law, Appendix 1 sets forth the number of employees that a local government employer must have before each of the statutes discussed in this book applies.

Initial Hiring versus Promoting from Within

The book's title, *Recruitment and Selection Law for Local Government Employers*, can refer to two different ways of filling a vacant position; namely, by hiring from outside the organization and by promoting from within the organization. Although many of the book's examples, hypotheticals, and discussions focus on the more common of the two circumstances, hiring from without, the book is also meant to be a resource on the law as it applies to the selection of existing employees for promotion. Promotions are not treated in a stand-alone chapter. Instead, except where noted or where the law or discussion is obviously inapplicable to promotions, everything that is said about initial hiring should be understood to apply equally to promotions.

Entry-level positions are usually advertised outside an organization. But every time a vacancy occurs in any other type of position, an employer faces a choice of whether to advertise the position or to promote an already existing employee into it, either by soliciting applications from those eligible for promotion or by making an executive decision solely by reference to the employee's performance and conduct on the job. Whether interest in a promotion is solicited or not, employers may not choose who to promote on the basis of race, color, gender, religion, national origin, age, disability, military status, or lawful use of lawful products, just as they may not make an initial hire on that basis. Additionally, the same restrictions on criminal background and credit checks and on the use of written examinations, physical agility tests, and assessment centers apply to evaluation of current employees just as they do to evaluation of new applicants.

A Summary of the Book's Contents

The initial chapters of the book survey the patchwork of rules that comprise the law of hiring for North Carolina public employers. Later chapters look more closely at the different stages of the hiring process. This book is guided throughout by the need and desire of North Carolina's local government and community college employers to achieve a workforce composed of individuals who have excellent training and skills, take initiative, are reliable and motivated, have a commitment to public service, and reflect the diversity of the communities they serve. What follows is a brief description of the book's contents.

Chapter 1, "An Overview of the Laws Governing Recruitment and Selection," surveys those laws other than antidiscrimination statutes that govern the law of hiring for North Carolina public employers. It begins with a discussion of the way in which the North Carolina General Statutes grant hiring authority to cities, counties, and other units of local government. It then discusses the rule of employment at will before turning to some provisions of law that may be less well known to local government employees with human resources responsibilities—the Fair Credit Reporting Act, the Immigration Reform and Control Act, North Carolina's own E-Verify requirement, and state laws prohibiting discrimination on the basis of tobacco use (lawful use of lawful products), requiring U.S. selective service registration, and prohibiting employers from charging applicants for the cost of employment-related examinations and records.

Chapter 2, "Discrimination Law in the Recruitment and Selection Context," surveys federal antidiscrimination laws (Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and the Uniformed Services Employment and Reemployment Rights Act) and their North Carolina state law counterparts. The chapter contains an in-depth discussion of the theory of adverse impact, which underlies many of the legal issues that arise during the recruitment and selection process. It also introduces and discusses the constitutional concept of equal protection.

Chapter 3, "Defining and Advertising the Job," begins with a discussion of job descriptions and focuses on the ways in which they can help or hurt an employer's defense to an employment discrimination claim. It then uses a draft job advertisement for a hypothetical position with a North Carolina local government to illustrate the legal issues raised by the con-

tent of a job advertisement. The chapter concludes by considering the legal implications of promoting a current employee to a newly created position without posting or advertising, offering a position to an outside candidate without posting or advertising, and using word-of-mouth recruiting in lieu of advertising.

Chapter 4, “Personnel Policies Related to Recruitment and Selection,” analyzes the legal issues raised by three policies that North Carolina public employers frequently adopt: residency requirements restricting employment to residents of the hiring jurisdiction or its surrounding area, anti-nepotism policies restricting the employment of members of the same family or household, and policies limiting consideration of former employees for rehire. In the case of residency requirements, the North Carolina General Statutes expressly authorize local government employers to adopt them, and the chapter therefore explains how they may nonetheless violate federal constitutional and statutory antidiscrimination law, drawing on the discussion of equal protection and disparate impact in Chapter 2. Anti-nepotism policies are also prevalent in North Carolina local government employment. This section of the chapter discusses equal protection challenges and whether a public employer can prohibit spouses and family members from working in different departments in the same organization or prohibit employees from dating one another. Neither of these issues has been considered by courts having jurisdiction over North Carolina.

Chapter 5, “Lawful and Unlawful Questions: Applications and Interviewing,” is divided into two sections. The first section discusses the explicit prohibitions against medical inquiries and examinations under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. The second section discusses questions that are not unlawful on their face but could lead applicants, the Equal Employment Opportunity Commission, and juries to question whether the employer had discriminatory intent in asking them. Both sections discuss possible ways to rephrase a question that looks unlawful or improper but is actually seeking relevant and lawful information.

Chapters 6 and 7 turn to the use of scored testing in making decisions to hire or promote candidates. Chapter 6, “Testing of Applicants and Candidates for Promotion: Written Examinations,” discusses written examinations for entry-level and promotional positions in public safety, because that is primarily where they are used, although scored written

examinations may be used in hiring for other local government positions as well. This chapter focuses on the potential for disparate impact that scored testing poses. Through a discussion of cases, it explains methods of test construction validation that can support an employer's disparate impact defense of job related and consistent with business necessity. The chapter concludes with a discussion of the United States Supreme Court case *Ricci v. DeStefano* and how public employers should handle testing results that have disparate impact. Chapter 7, "Testing of Applicants and Candidates for Promotion: Physical Ability Tests and Assessment Centers," looks at scored testing in the context of physical ability tests and assessment centers and the difficulties that are unique to them. It also considers the perils inherent in introducing local modifications to the North Carolina Police Officer Physical Ability Test (POPAT), a common practice among small employers.

Chapter 8, "Background Investigations of Applicants for Employment: Criminal Records, Credit History, References, and Internet Checks," looks at the four most common types of background checks used by North Carolina local government and community college employers: criminal history checks, credit checks, reference checks, and Internet background checks. The sections on criminal history and credit checks focus on the disparate impact that use of arrest and conviction records and credit histories may have on minority applicants and on the Equal Employment Opportunity Commission's new initiatives to combat misuse of that information. The discussion on reference checks incorporates North Carolina statutory provisions and the development of North Carolina's common law rule of negligent hiring. The law governing the use of the Internet to develop background information on applicants is still in its infancy, and this section focuses primarily on information found through the use of search engines such as Google and social media sites like Facebook, with particular emphasis on the need to balance an applicant's First Amendment rights with the government employer's needs. The chapter concludes with a discussion of the Fair Credit Reporting Act's requirements governing the use of a third-party agency for uncovering criminal history, credit, and other background information.

Chapter 9, "Hiring Employees versus Engaging Independent Contractors," turns to an issue in which the Internal Revenue Service and the U.S. Department of Labor have taken renewed interest of late. As tight budgets

force public employers to cut personnel costs, many are tempted to bring on workers as so-called contract employees, more properly known as independent contractors. Employers who engage independent contractors are not required to pay FICA taxes on them or to make statutory contributions on their behalf to the North Carolina retirement system. Employers also save money because independent contractors do not have to be paid overtime or included in the employer's health insurance group plan or under its workers' compensation or general liability insurance policies. But the misclassification of an employee as an independent contractor is fraught with risk. This chapter sets forth the tests for determining employee and independent contractor status under the Fair Labor Standards Act and the Internal Revenue Code.

Chapter 10, "Applicant Records: Confidentiality and Retention," begins by discussing the confidentiality requirements imposed by the North Carolina General Statutes on applicant information. It then turns to the requirements of the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act that medical information be kept confidential in the context of the hiring process. The chapter discusses the data retention required for Equal Employment Opportunity Commission reporting purposes and concludes by surveying federal and North Carolina law governing the retention and disposition of applicant records.

The book also contains five appendixes that summarize or contain more in-depth discussions of material found within the text proper. Appendix 1 sets out in chart form how the employment laws discussed in the book apply to small local government and community college employers. Appendix 2 provides an in-depth discussion of the history and current status of affirmative action in public-sector hiring. Appendix 3 summarizes what it means to validate a practice, test, or process used in recruitment and selection of employees. Appendix 4 provides a model summary of consumer rights for use by local government and community college employers who use third-party companies to perform background checks. Appendix 5 contains the Equal Employment Opportunity Commission's Form EEO-4, which public employers must file with the agency.