

## **TRAPS FOR THE UNWARY RECRUITER: RISK FREE HIRING**

*By David R. Hammond, Esq.*

### **I. Reasons to Screen Applicants**

- A. The obvious reasons: Find and hire the best applicants while avoiding costly mistakes.
- B. Efforts to avoid workplace violence
- C. Potential employer liability for negligent hiring
  - 1. Distinction between vicarious liability (respondeat superior) and negligent hiring.
    - a. The tort of negligent hiring shifts the focus of employer liability from whether the employee acted within the scope of his or her employment to whether the employer itself was negligent in hiring a particular employee. Connes v. Mollalla Transport System, Inc., 831 P.2d 1316, 1320-1321 (Colo. 1992).
    - b. Consequently, the fact that the employee acted outside the scope of his or her employment is not by itself a defense to negligent hiring claims, and employers can be held liable for employee's intentional torts. Id. at 1321.
  - 2. Basis for finding liability
    - a. This tort is not intended to transfer an employer into "an insurer for violent acts committed by an employee against a third person." Id.
    - b. However, "[a]n employer has a duty to exercise reasonable care in making his decision to hire." Moses v. Diocese of Colo., 863 P.2d 310, 327 (Colo. 1993), cert. denied, 114 S. Ct. 2153 (1994).
    - c. Liability depends on whether, in hiring the employee, the employer failed to use sufficient care, thereby creating an undue risk of harm to others. Connes, 831 P.2d at 1321.

- d. A finding of employer negligence depends upon proof that the employer had reason to know that hiring the prospective employee would pose a danger to third parties:

“[L]iability is predicated on the employer’s hiring of a person under circumstances antecedently giving the employer reason to believe that the person, by reason of some attribute of character or prior conduct, would create an undue risk of harm to others in carrying out his or her employment responsibilities.”

Id. (emphasis added); but cf. Van Osdol v. Vogt, 892 P.2d 402, 408 (Colo. App. 1994), aff’d 908 P.2d 1122 (1996) (employer not liable because “insufficient nexus of foreseeability” between known, prior extra-marital affair and subsequent alleged sexual harassment and abuse).

3. Defining the extent of the employer’s duty to exercise reasonable care
- a. The extent of the employer’s inquiry depends on the “degree of contact” between the prospective employee and other persons while performing employment duties. Connes, 831 P.2d at 1321.
- b. Some positions may require the “employer to go beyond the job application form and personal interview and to make an independent inquiry into the applicant’s background.” Id.
- (1) Frequent contact with the public, e.g.:
- (a) Door-to-door salesmen;
- (b) Police; and
- (c) Bus drivers.
- (2) Close contact or special relationships between employee and third person, e.g.:
- (a) Health care professionals;

- (b) Counselors;
  - (c) Investment advisors and financial planners;  
and
  - (d) Child and elder care providers.
- (3) Employees given special access rights:
- (a) Apartment workers, see, e.g., Williams v. Feather Sound, Inc., 386 So.2d 1238, 1240 (Fla. App. 1980) (no duty to make independent inquiry for employee initially hired for outside maintenance, but duty to inquire into background when employee was transferred inside and given access to townhouse pass keys);
  - (b) Security guards, see, e.g., Welsh Mfg. v. Pinkerton's Inc., 474 A.2d 436, 440 (R.I. 1984) (security firm had greater duty to inquire into background of potential security guard for manufacturing facility containing sizeable quantities of gold); C.K. Security Sys., Inc. v. Hartford Accident & Indem. Co., 223 S.E.2d 453, 455 (Ga. App. 1976) (security firm had duty to determine whether hotel security guard was honest or likely to steal); and
  - (c) Cable television installers, see, e.g., D.R.R. v. English Enterprises, 356 N.W.2d 580, 584 (Iowa App. 1984) (special duty owed by cable television company because employee was given apartment master key).
- (4) No duty – in absence of circumstances giving prospective employer reason to believe that job applicant would constitute an undue risk to public – to check “official records of a job applicant’s criminal history.” Connes, 831 P.2d at 1322-1323

(no duty to check nonvehicular criminal record of long-haul driver).

## **II. Advertising**

The employer's screening process begins with its description to the public of the type of candidate it is seeking. Descriptions which directly or indirectly refer to protected characteristics can support a claim of job discrimination unless there is a bona fide occupational qualification for the particular job involved.

- A. Sex. Title VII is violated by a help-wanted advertisement which indicates a preference based on sex unless sex is a bona fide occupational qualification for the particular job involved. Placing an advertisement in columns classified by newspaper publishers on the basis of sex will be considered by the EEOC as an expression of a preference based on sex. 29 C.F.R. § 1604.5.
- B. Age. When help-wanted notices "contain terms . . . such as *age 25-35, young, college student, recent college graduate, boy, girl* . . . such a term or phrase deters the employment of older persons and is a violation of the [ADEA]," unless a bona fide occupational qualification for the particular job requires such a preference. "[P]hrases [such] as *age 40-50, age over 65, retired person, or supplement your pension* discriminate against others within a protected group and, therefore, are prohibited" unless there is a bona fide job qualification reason for stating such a preference. 29 C.F.R. § 1625.4.
- C. Other Categories. Similarly, advertisements referring to race, color, religion, national origin or disability will also be unlawful unless there is bona fide occupational qualification for the job. Specific height or weight requirements could also be problematic.

## **III. Improper Application Interview Questions**

- A. Race. Obviously, any question relating to race could support a conclusion that an applicant's race will be a factor in determining whether the person receives an interview or a job offer. Some employers ask candidates to provide race and gender information voluntarily to assist them with gathering flow data for affirmative action reporting purposes. Any such information should be supplied on separate forms which do not become part of the selection process.

- B. Gender. An employer may not consider an applicant's gender in making employment decisions unless there is some bona fide occupational qualification which requires that information. Asking different questions of men and women is illegal. Some gender-related inquiries have been held to be illegal. See, e.g., Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000) (asking questions of a female candidate about her interest in having additional children or whether she is pregnant is evidence of discrimination).
- C. Sexual orientation. In the City and County of Denver, employment discrimination based upon sexual orientation is illegal. See Revised Municipal Code § 28-93(a)(1). Employers who ask such questions, or who disseminate the responses, could be liable for invasion of privacy. See Ozer v. Borquez, 940 P.2d 371 (Colo. 1997).
- D. National origin. Discrimination on the basis of national origin is prohibited. Although employers are required to comply with immigration laws, that obligation does not justify national origin-related questions. Individuals who are not United States citizens may be eligible to work in this country. By receiving information required under the Immigration Reform and Control Act, the employer satisfies its legal duties. Discriminating against non-citizens violates Title VII. 29 C.F.R. § 1606.5(a). The EEOC has extended the protection of some employment laws to undocumented workers. See EEOC Enforcement Guidance on Remedies for Undocumented Workers under Laws Prohibiting Employment Discrimination (1999).
- E. Religion. It is illegal to discriminate on the basis of religion. Inquiries about an applicant's availability which tend to have an exclusionary effect on the employment of persons with certain religious practices will be deemed by the EEOC to violate Title VII unless the employer can show that: (i) its inquiries did not tend to exclude the prospect of employees who needed an accommodation for a religious practice; or (ii) the inquiries were justified by business necessity. 29 C.F.R. § 1605.3(b)(2).
- F. Age. An employer's request for an applicant's date of birth or age is not "in itself" a violation of the age discrimination employment act. However, requests for such information "will be closely scrutinized." 29 C.F.R. § 1625.5. The EEOC also encourages employers who request such information to advise applicants that hiring decisions will not be based on age. Id.

G. Disability. Under the Americans With Disabilities Act (“ADA”), prospective employers may not conduct a medical examination or inquire whether a job applicant is an individual with a disability. Nor may an employer ask about the nature or severity of a disability. However, an employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions. 42 U.S.C. § 12112(d)(2). In the EEOC Guidance on Preemployment Inquiries under Americans with Disabilities Act, the EEOC sets forth numerous examples of permissible and impermissible questions, including the following:

1. An employer can ask whether an applicant can perform any or all job functions, including whether the applicant can perform job functions with or without reasonable accommodations.
2. An employer may ask applicants to describe how they would perform any or all job functions so long as all applicants in the job category are asked to do so. If an applicant says that he or she will need a reasonable accommodation to perform the job demonstration, the employer must either provide a reasonable accommodation or allow the applicant to describe how he or she would perform the job function with that reasonable accommodation. Even if other applicants are not required to describe or demonstrate how they would perform a particular job, an employer can ask a particular applicant to do so if the employer reasonably believes that the applicant will not be able to perform a job function because of a known disability. A disability could be known either because it is obvious, e.g., the applicant is in a wheel chair, or because the applicant has voluntarily disclosed a hidden disability.
3. Generally, employers may not ask whether an applicant will need reasonable accommodations to perform a particular job because such questions are likely to elicit information as to whether a person actually has a disability.
4. However, when an employer reasonably believes that a particular applicant will need a reasonable accommodation, the employer may ask whether he or she will, in fact, need a reasonable accommodation and, if so, what.

5. An employer may also ask whether an applicant can meet attendance requirements in the future, as well as whether they have met them in the past. The EEOC permits such questions because there are many reasons other than the existence of a disability that could explain attendance past or current attendance issues.
6. The ADA permits an employer to ask applicants about arrest and conviction records because there are many reasons, unrelated to a disability, as to why someone may have an arrest or conviction record. C.f. Section I.I., below.
7. An employer may also ask questions about an applicant's impairments provided that the question is not likely to elicit information about a disability. For example, an employer could ask an applicant how he or she broke his or her leg.
8. Generally, an employer should not ask whether an applicant can perform a major life activities such as standing or walking unless those questions relate to the ability to perform job functions.
9. The EEOC prohibits questions about workers' compensation history because such questions are likely to elicit information about the existence or severity of a disability.
10. An employer may also ask applicants about current illegal use of drugs because an individual who currently illegally uses drugs is not protected under the ADA.
11. However, an employer cannot ask questions about lawful drug use because they are likely to elicit information concerning a disability.
12. An employer may also ask applicants questions about their drinking habits unless the particular questions may elicit information about alcoholism, which is a disability.

#### **IV. Reasonable Accommodation in the Application and Interview Process**

- A. An employer must provide a reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job unless providing that accommodation would constitute an undue hardship. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act.

- B. An employer may ask applicants whether they will need reasonable accommodation for the hiring process. For example, an employer can describe what the hiring process involves, e.g., a timed written test, and ask the applicants whether they will need reasonable accommodation to perform that test.
- C. An employer may ask an applicant for documentation of his or her disability when the applicant requests reasonable accommodation for the hiring process, if the need for accommodation is not obvious.

**V. Medical Examinations, Physical Tests, Psychological Tests, and the ADA**

- A. Pre-offer. An employer cannot conduct or require a medical examination before an employment offer is made. 42 U.S.C. § 12112(d)(2)(A).
- B. Post-offer/pre-employment. An employer may require a medical examination after an offer of employment has been made and before the individual begins work if:
  - 1. All entering employees are subject to such an examination regardless of disability;
  - 2. Information regarding the medical condition or history is collected and maintained on separate, confidential forms and in separate, confidential files to which access is prohibited except for:
    - a. supervisors and managers who must know about necessary restrictions upon work or duties of the employee and necessary accommodation;
    - b. first aid and safety personnel if the disability might require emergency treatment; and
    - c. government officials investigating compliance with the ADA. 42 U.S.C. § 12112(d)(3).
- C. What is a medical examination? Because medical examinations are prohibited before offers are extended and because they must relate to requirements of a job, it is important to know whether a particular exercise is a medical examination or a permitted activity, such as a physical fitness or agility test. The EEOC considers the following factors to determine whether a particular examination is a medical examination:

1. Is it administered by a health care professional or someone trained by a health care professional?
2. Are the results interpreted by a health care professional or someone trained by a health care professional?
3. Is the examination designed to reveal an impairment of physical or mental health?
4. Is the employer trying to determine the applicant's physical or mental health impairments?
5. Is the test invasive, e.g., does it require the drawing of blood, urine or breath?

See EEOC Guidance on Preemployment Inquiries under Americans with Disabilities Act.

D. Physical tests

1. An employer may require applicants to take physical agility tests in which they demonstrate their ability to perform actual or simulated-job tasks. Such a test is not considered a medical examination under the ADA. Id.
2. A physical fitness test designed to measure an applicant's performance of a physical task such as running or lifting is not a medical examination unless the applicant's physiological responses to the testing process are measured. Id.

E. Psychological tests

1. Under the ADA, an employer can require applicants to take psychological tests unless the particular test is a medical examination. See Section I.E.3, above. For example, a test designed to measure traits such as honesty, taste and habits would not be a medical examination, but one which could provide evidence of a mental disorder or impairment would be a medical examination.

## **VI. Drug Testing**

### **A. ADA**

1. The term “qualified individual with a disability” does not include applicants and employees currently engaging in the illegal use of drugs. 42 U.S.C. § 12112(a).
2. A test to determine the illegal use of drugs is not considered a “medical examination” within the meaning of Title I of the ADA. 42 U.S.C. § 12112(d)(1).
3. The ADA expressly states that Congress, in passing that legislation, was not encouraging, prohibiting or authorizing conducting drug testing for the illegal use of drugs or making employment decisions based on those test results. 42 U.S.C. § 12112(d)(2).

### **B. Invasion of privacy**

1. Drug testing can give rise to invasion of privacy claims based either on the physical invasion of privacy involved in the collection of urine or blood, especially if another person must be present during the collection to ensure an accurate test, or based upon a public disclosure of private facts.
2. To withstand an invasion of privacy claim, the drug testing program must meet a reasonableness standard. Important factors include: what, if any, public policies are served by the testing program; the employer’s reasons for implementing the program; the manner in which the testing is conducted; and the notice and opportunity to respond afforded to workers; and the care taken with the test results.
3. In most jurisdictions, consent is a defense to invasion of privacy. Therefore, it is important to obtain consent to drug testing before it occurs.

## **VII. Polygraph Testing**

- A. Prohibitions on lie detector use. Under the Employee Polygraph Protection Act, with limited exceptions, it is unlawful for an employer:
1. To require, request, suggest, or cause any employee or prospective employee to take any lie detector test;
  2. To use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;
  3. To discriminate against in any manner or deny employment to anyone because they have refused to take a lie detector test or to discriminate on the basis of results of any lie detector test.

29 U.S.C. § 2002.

- B. Exceptions. The Employee Polygraph Protection Act does not apply to:
1. Any federal, state, or local governmental employees;
  2. People involved in national defense and security jobs;
  3. FBI contractors;
  4. Private employers whose primary business consists of providing armored car personnel, personnel engaged in the design, installation, or maintenance of security alarm systems, or other uniformed or plainclothes security personnel.

29 U.S.C. § 2006.

## **VIII. Workers' Compensation History**

Many employers may be reluctant to hire individuals with an extensive workers' compensation history because they fear that claims may be filed against them. However, inquiring about workers' compensation history is problematic.

- A. As discussed above, the ADA prohibits pre-employment inquiries which could elicit information about the existence or severity of a disability. The EEOC has issued an opinion stating that inquiring about workers' compensation history is illegal under the ADA. See EEOC ADA Technical Assistance Manual § 5.5.

- B. In Colorado, it is illegal to terminate employment because an employee has exercised his or her workers' compensation rights. See, e.g., Lathrop v. Entenmann's, Inc., 770 P.2d 1367 (Colo. App. 1989). Arguably, an inquiry by an employer during the application stage could demonstrate a general bias toward workers' compensation claimants.

## **IX. Arrests and Convictions**

- A. Sealed records. In Colorado, prospective employers may not require employees to disclose any information contained in sealed criminal records. An employer cannot refuse to hire an applicant solely because of a refusal to disclose sealed arrest and criminal record information. C.R.S. § 24-72-308(1)(F)(i).
- B. Discrimination
1. Arrests. The courts have held that employment inquiries concerning arrest records and other criminal proceedings other than convictions are illegal under Title VII on the theory that minorities are arrested on a statistically disparate basis for discriminatory reasons. Consequently, employer inquiries about arrest records – as opposed to convictions – are illegal. See, e.g., Gregory v. Litton Corp., 472 F.2d 631 (9th Cir. 1972) (employer's "no hire" policy for a candidate who was arrested but not convicted was not justified by business necessity and was unlawful racial discrimination).
  2. Convictions. It is lawful to ask applicants about criminal convictions but employers should take into account the surrounding circumstances before deciding against hiring a particular applicant. See, e.g., Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1298-99 (8th Cir. 1975) (unlawful to refuse to hire anyone convicted of any crime).

## **X. Financial Condition**

It is also illegal to inquire about the financial record or condition of applicants because such inquiries tend to have a disparate impact upon members of minority groups which cannot be justified by "business necessity" arguments. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

## **XI. Fair Credit Reporting Act**

Under the Fair Credit Reporting Act, consumer reports may be obtained and used for employment purposes. 15 U.S.C. § 1681b(a)(3)(B). However, to obtain and use such information, the employer must satisfy certain requirements.

- A. The employer must certify in writing to the consumer reporting agency that it will not use any report in violation of employment discrimination laws and regulations. 15 U.S.C. 1681b(b)(1)(A)(ii).
- B. The employer must also certify in writing to the consumer reporting agency that it has “clearly and conspicuously” disclosed to the employee or applicant, in writing and in a separate document, that it may obtain a consumer report for employment purposes. 15 U.S.C. §§ 1681b(b)(1)(A), 1681b(b)(2)(A).
- C. The employer must certify that the applicant has authorized the procurement of the report. 15 U.S.C. §§ 1681b(b)(1)(A), 1681b(b)(2)(B).
- D. The employer must certify to the agency that, before it takes any adverse action against an applicant or employee, based “in whole or in part on the report” that it will provide the person with a copy of the report and a written description of the individual’s rights under the Fair Credit Reporting Act. 15 U.S.C. §§ 1681b(b)(A)(i), 1681b(b)(3).
- E. The employer must then provide the individual with a copy of the report before taking any adverse action. 15 U.S.C. §§ 1681b(b)(3), 1681m(a).

## **XII. Screening for Violent Tendencies**

- A. All employees
  - 1. Applications and questionnaires
    - a. Unexplained gaps in employment or educational history;
    - b. Reasons for leaving past employment;
    - c. Military history and type of discharge;

- d. Criminal convictions (not arrests); and
  - e. Applications should contain a prominent statement that applicants who make false statements can be rejected for employment and, if hired, terminated immediately upon discovery of such statements.
2. Employment interviews
- a. Questions must be job-related.
    - (1) Cannot ask about history of illnesses, including mental illnesses.
    - (2) Mental, as well as physical, impairments can be disabilities within the meaning of the Americans with Disabilities Act.
    - (3) Should ask about criminal convictions, but should not ask about arrests.
  - b. Predicting violence requires an understanding of the ways people perceive workplace situations and react to them.
    - (1) Questions should be designed to learn about how the applicant will react to job situations.
    - (2) Important questions address the ways in which the applicant deals with job stresses.
      - (a) How has the applicant dealt with competing demands at work?
      - (b) Do the applicant's statements reveal an ability to empathize with what others go through?
    - (3) A key question: Ask the applicant about situations in which there was a conflict or in which he or she had difficulty accomplishing a goal.
      - (a) What did the person do?

- (b) What did the person think about the situation?
  - (c) What would the person do differently if he or she were to face a similar situation again?
  - (d) What does the person typically do to accomplish goals?
- (4) Example: Hiring for a sales position suggests asking how the applicant has dealt with stressful sales situations or difficult customers.

### 3. Reference checks

- a. Even if you believe you will get little or no useful information, you should at least attempt to check references to avoid claims that you are liable for negligent hiring.
  - (1) Call the prior employer's Human Resources Department.
  - (2) Call the applicant's direct supervisors.
    - (a) Performance.
    - (b) Incidents of violence, harassment, or the like.
    - (c) Reason for leaving.
- b. Ask the applicants to sign a release which authorizes prior employers to release all information regarding the applicant and agrees to hold them (and you) harmless for providing, receiving, or acting on, that information.
- c. Check publicly available information regarding criminal convictions.

B. Extra steps for high risk positions

1. Drug testing

- a. The use of illegal drugs can interfere with reasoning ability, social inhibition and judgment. The use of illegal drugs also is associated with aggressive behavior and violence.
- b. The Americans with Disabilities Act permits employers to screen applicants for the current use of illegal drugs -- tests for the current use of illegal drugs are not “medical examinations” for the purposes of the ADA.
- c. Employers cannot ask an applicant whether he or she has ever used illegal drugs.
- d. A person who has completed a supervised drug rehabilitation program and no longer uses illegal drugs, or who has otherwise been successfully rehabilitated, is protected.
- e. A person who is currently participating in such a program and who is no longer using illegal drugs is protected.

2. Psychological testing and screening

- a. Employers currently employ a wide variety of psychological examinations – I.Q. tests, aptitude tests, personality tests, and honesty tests.
- b. Most authorities are convinced that no psychological tests can sufficiently measure a person’s internal thoughts and feelings to make an accurate prediction about how that person will behave.
- c. The effectiveness of psychological tests in screening out individuals who might have a propensity toward violence has never been demonstrated.
- d. Pre-offer “medical examinations” are prohibited by the Americans with Disabilities Act.

- e. The EEOC has taken the position that psychological tests are “medical” tests if they provide evidence concerning whether an applicant has a mental disorder or impairment. Even if not specifically designed to assess the nature, severity, or existence of a mental impairment, a psychological test may still be a “medical” test if it is used by the employer to assess whether an applicant has a mental impairment or to assess an applicant’s general psychological health. See EEOC Enforcement Guidance on Pre-Employment Inquiries under the Americans with Disabilities Act.

### **XIII. Obligations to Prior Employers**

In addition to finding out whether a particular individual is qualified, employers should also learn whether the candidate has obligations to a current or former employer which must be honored by the employee and with which a new employer should not interfere.

- A. Actual and potential obligations of the applicant
  - 1. Covenant not to compete;
  - 2. Nondisclosure of trade secrets;
  - 3. Nondisclosure and confidentiality agreement;
  - 4. Agreement not to solicit employees; and
  - 5. Duty of loyalty and fiduciary duty.
- B. Potential claims against the new employers. There are several possible claims which could be asserted against a company which hires someone who may have knowledge of his former employer’s trade secrets.
  - 1. Tortious interference with contract. By hiring someone to compete with his or her former employer, a company could be liable for tortiously interfering with that employee’s contractual obligation to the former employer to avoid competition or to preserve the confidentiality of trade secrets.

2. Conspiracy. A new employer could also be liable for conspiring with its new employee to commit some illegal act. For example, if the employee begins to compete with his current employer while still employed by that company, he would be violating his duty of loyalty and fiduciary duty owed to the current employer. See Jet Courier Service, Inc. v. Mulei, 771 P.2d 486 (Colo. 1989).
3. Misappropriation of trade secrets. Even if the employee does not have a covenant not to compete, a new employer can be liable for misappropriation of trade secrets.
  - a. Some courts have held that, notwithstanding good faith efforts made by both the employee and the new employer, there may be “inevitable disclosure” of trade secrets to the new employer. PepsiCo., Inc. v. Redmond, 54 F.3d 1262, 1269 (7<sup>th</sup> Cir. 1995) (Unless the former employee “possessed an uncanny ability to compartmentalize information, he would necessarily be making decisions [for his new employer] by relying on his knowledge of [his old employer’s] trade secrets.”).

C. Evaluating the risks

1. Is there a covenant not to compete and is the covenant not to compete enforceable?
  - a. Assignability. If an employee signs a covenant not to compete with an employer who is subsequently acquired by another company, there may not be a valid assignment of the covenant not to compete to the new company. In some states, there is not an automatic assignment of covenants not to compete to acquiring companies absent an express agreement by the employee permitting the assignment of the covenant not to compete.
  - b. Void. In many states, covenants not to compete are void, unless the employee or the company falls within certain exceptions. For example, in Colorado, covenants not to compete are void except:
    - (1) in connection with a contract for the purchase and sale of a business or the assets of a business;

- (2) a contract for the protection of trade secrets;
- (3) a contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years; and
- (4) executive and management personnel and officers and employees who constitute professional staff of the executive and management personnel. C.R.S. § 8-2-113(2).

c. Is the covenant not to compete reasonable in scope?

- (1) Duration.
- (2) Geographic area.
- (3) Protected activity.

2. Will the employee actually be competing with his/her former employer?
3. Has the former employer previously attempted to enforce covenants not to compete?

Answering this question will not only tell you something about the possible inclination of the former employer to file litigation; it will also tell you whether the former employer has failed to protect the confidentiality of its trade secrets, thereby possibly losing trade secret protection.

Moreover, because enforcement of a covenant not to compete can turn upon the Court's assessment of what seems fair in a particular situation, an employer's failure to enforce a covenant against employees who left earlier could be an important fact.

4. Regardless of whether the employee signed a covenant not to compete, does he/she have trade secrets?

5. Even if the employee does not have a covenant not to compete or even if it is unenforceable, the new employer could still be liable for misappropriation of trade secrets. See Redmond, 54 F.3d at 1269; FMC Corp. v. Varco International, Inc., 677 F.2d 500, 504 (5<sup>th</sup> Cir. 1982).
6. Has the employee decided to leave his or her former employer or is the new company inducing him/her to leave?

D. Minimizing the risks

1. The new employer should make it clear that it is not hiring the employee to obtain trade secrets.
  - a. Before an offer is made, tell the employee that you are not trying to obtain his current or former employer's trade secrets.
  - b. Include the same statement in a written offer letter.
  - c. Issue an instruction to the new employee, which he or she should acknowledge in writing, that he or she is not to use any trade secrets or proprietary information of a former employer in the course of his or her work for his or her new employer.
  - d. Instruct co-workers that they are not to attempt to learn the new employee's trade secret knowledge.
  - e. Consider making a written statement to the former employer that you have hired that company's former employee but that you have no intention of taking advantage of any trade secret knowledge that person may have.
2. Assign the employee to work in a different area – product as well as geographical -- from the area in which she or he worked for the former employer.
3. Consider excluding key accounts of the former employer from the account list of the new employee.

4. Can you make a deal with the former employer?
  - a. Lump sum.
  - b. Royalty on sales.
  - c. Excluding accounts of the former employer.