



Employment Issues

Hiring Practices

CONTENTS

General information	1
Recruitment	2
The Americans with Disabilities Act and Pre-Employment Inquiries	2
Screening Applicants	3
Interviews	4
Post-Offer Inquiries	6
Medical and Other Tests	7
Drug Testing and Drug Addiction	8
Polygraph Testing	8
Reference Checks	8
Negligent Hiring	10
Criminal and Abuse Background Checks	12
Credit Checks	12
Hiring Practices Checklist	13
Orientation	14
Endnotes	14

General information

As a general rule, an employer can recruit, consider or hire anyone as long as decisions are not based on an applicant's age, race, creed, color, gender, national origin, religion, disability or union membership or activities. Title VII of the 1964 Civil Rights Act,¹ the Americans with Disabilities Act² (ADA) and the Iowa Civil Rights Act of 1965³, are anti-discrimination laws and prohibit employers from taking adverse actions against certain individuals because of their protected class status. The laws do not require employers to maximize employment opportunities for protected class members, or to employ a specific number of protected class members.

Unlike most private sector employers, Iowa school districts, AEAs and community colleges (herein collectively referred to as "school corporations") have affirmative action obligations under two state laws and a federal law. In contrast to the anti-discrimination statutes discussed above, those affirmative action statutes require Iowa school corporations to establish goals and timetables regarding the hiring of women and minority members and to remedy an "under-representation" those groups have in the corporation's workforce.

The Iowa Veterans Preference Act, as amended, IOWA CODE Chapter 35C, requires school corporations to give honorably discharged war veterans, including veterans of the Korean, Vietnam, and Persian Gulf conflicts, preference in employment or appointments "over other applicants of no greater qualifications."⁴ The public employer's statutory duty to investigate a veteran's qualifications includes its duty to provide, in writing and available for public inspection, the "specific grounds" for selection or rejection of veterans.⁵ The statute also provides veterans with the right to challenge the actions of appointing authorities in Iowa.⁶

The statutes and regulations discussed above have substantial impact on a school corporation's hiring practices and procedures. The ultimate goal of a school corporation's hiring practices and procedures remains finding and hiring the best qualified applicant. While it should never lose sight of this goal, a school corporation must, nonetheless, design its hiring practices and procedures to ensure they are based, to the extent possible, on objective and non-discriminatory factors. School corporations should also design their hiring procedures to ensure job vacancies are

widely publicized and all applicants have equal access to the hiring process.

Recruitment

The law does not dictate an employer's hiring sources. Employers use newspaper advertisements, university placement offices, job fairs, the Iowa Workforce Development Corporation, private search firms, professional organizations, walk-ins, word-of-mouth, union hiring halls, employment agencies and electronic tools. The Department of Education has an educator recruitment web site at

www.iowaeducationjobs.com.

Any board policy or contract provisions containing a job posting/bidding system must, of course, be followed. The law forbids hiring practices that exclude potential candidates based on preconceived stereotypes or arbitrary standards or practices that have an adverse statistical impact on protected class members. Advertisements should (and under most affirmative action plans must) include a statement similar to the following:

We are an Equal Employment Opportunity/ Affirmative Action Employer. Women, minorities and persons with disabilities are encouraged to apply.

It is an unlawful employment practice under Title VII for an employer to print or publish a job advertisement "indicating any preference, limitation, specification or discrimination based on race, color, religion, gender or national origin."⁷ Thus, school corporations should not, as a rule, advertise a position as an exclusively male or female job and should refrain from using references in job advertisements that suggest only one gender should apply. The use of terms like "attractive lady," "career-minded men" and "real sharp girl" must be avoided. Statements that refer or allude to age such as "young person," or "inexperienced worker" are also ill-advised.

It is essential that recruiting standards be uniformly followed throughout the school corporation and that all personnel who participate in hiring be trained in non-discriminatory screening and interviewing techniques. It also is

important that a school corporation not rely on "word of mouth" or other informal practices to fill vacancies. Informal practices, if exclusively relied upon, are subject to criticism because the practices can perpetuate the racial and gender makeup of the school corporation's existing workforce and do not give other individuals access to job vacancies. Reliance on informal recruitment practices can also violate a school corporation's affirmative action plan. Affirmative action plans typically require widespread publication of job vacancies, particularly in departments where racial minorities are underrepresented when compared to the relevant job market. Refer to the *Affirmative Action Manual* section of this service.

Affirmative action plans and progressive hiring practices also require many school corporations to engage in outreach programs to actively recruit members of racial minorities for vacant teaching positions and female applicants for administrative positions. Recruitment agencies are available to assist school corporations in locating qualified minority and female candidates, thereby increasing the pool of applicants available to the school corporation. Those agencies, however, only provide school corporations access to applicants who might not otherwise know about the job vacancies. The agencies do not require the school corporation to hire a particular job applicant and do not become involved in the interview and selection process.

The Americans with Disabilities Act and Pre-Employment Inquiries

The ADA is a comprehensive civil rights statute that prohibits employers, including school districts, from discriminating against individuals because of a "disability

The basic rule under the ADA is that an employer may not inquire whether an applicant is an individual with a disability or ask any questions regarding the nature or severity of the individual's **disability**.⁸ An employer can, however, ask about and require applicants to show how they would perform job-related **functions**.⁹ For example, an application form or interviewer may ask:

- Are you able to perform the tasks in the attached job description?

- How would you perform these tasks, and with what accommodation?

Most job descriptions describe the principal duties of a position and often list educational, professional, license or service requirements. It is critical, for ADA purposes, that the *essential functions* of a job are accurately listed if they are used in the screening process. Many employers use the services of a vocational rehabilitation therapist or occupational medicine specialist to develop appropriate job descriptions. Application forms and interviewers may *not* ask the following questions:

1. Have you ever been treated for any of the following [listed] diseases?
2. List all hospitalizations, including a description of your medical condition.
3. Is there any health-related reason preventing you from performing the job?
4. How many days did you miss work due to illness or injury?
5. Do you have any disability that could affect your work performance?
6. List any drugs you are taking. Have you ever been treated for substance abuse?
7. Describe any workers' compensation claims you have filed.

A drug test is not forbidden by the ADA. Under the federal law, the school district is required to test driver applicants who will be performing safety-sensitive functions. For other staff, a drug test must be able to withstand Fourth Amendment challenges.

Screening Applicants

Most school corporations permit individuals to submit an application for a job vacancy on or before a specified date. While a school corporation should, in most cases, stay with the date established for submitting applications and

not consider applications received after that date, the law does not prohibit a school corporation from reopening the application process if it is not satisfied with the quality or number of job applications received.

Often a school corporation will reopen the application process if it does not receive applications for qualified minority applicants and then double its recruitment efforts to ensure that qualified minority applicants are aware of the vacancy. If a school corporation reopens its application process for any reason, it is vitally important that it continue to abide by its nondiscriminatory recruitment practices and re-advertise the job vacancy. Reopening the application process to accommodate one individual or to unfairly "rig" the system is unwise and will open a school corporation to allegations of cronyism and illegal hiring practices.

After all applications are submitted, the school corporation must screen the applications it received and decide which applicants to interview for the vacancy. Two important questions must be answered before a school corporation begins screening applications. First, who will screen the applicants and second, what factors will be used to determine which applicants are screened out of the process and which applicants move on and receive an interview.

Most school corporations select a couple of administrators to screen applications and do not involve every person who will serve on the selection committee. Screening applications, if done properly, involves a review of each application to determine if the applicant meets the basic qualifications for the job. For example, a school corporation might establish the following basic qualifications for a high school principal position:

1. Administrative certification
2. Former experience as a high school teacher
3. At least three years experience as a building administrator (i.e., as an elementary, middle school or high school principal, vice principal or similar capacity).

For a second grade teacher, the following basic qualifications might be established:

1. Elementary certification
2. College grade point average of at least 3.0 or three to four years experience teaching at the elementary level
3. The ability to teach and deal effectively with young children.

It is important that the person or persons who screen the applications accept or eliminate applications based on the qualifications established for the job. Using the examples above, the persons screening for the vacant principal's position should eliminate applicants who have not taught at the high school level or who otherwise failed to meet the requirements established for the job. In like manner, the persons screening applications for the vacant teaching position should eliminate applicants who do not possess at least a 3.0 undergraduate grade point average or three years of elementary teaching experience. In addition, applicants who do not possess the certification necessary to perform the job should not be interviewed unless they can obtain a conditional license and meet the job's other qualifications.

The qualifications established for the job must have some relationship to the job's duties and responsibilities and should be objective and measurable. Qualifications like "nice person," "friendly" and "good rapport with parents and students" are subjective and should not be used to screen applicants. It is also difficult to make any meaningful assessment of an applicant's personal demeanor or rapport with students and parents based entirely upon application materials. A determination of those skills is best left for the interview.

Often, and particularly when the school corporation receives many applicants for a vacant position, screening based only on whether the applicants possess the qualifications for the job does not reduce the pool to a number that can be efficiently interviewed.

To further reduce the pool, the screening committee should carefully review the remaining applications and chose the five or six best candidates. The criteria used to further reduce the

applicant pool should be based, to the extent possible, on the qualifications established for the job and on objective factors such as prior academic record, length and type of work experience. The screening committee should take notes so they can later explain why they selected certain applicants for interviews and did not select others.

The limited information contained in application materials is often not sufficient to reduce the pool of applicants. Applicants tend to look the same on paper and meaningful distinctions do not emerge without additional investigation. To combat this problem, administrators will sometimes contact prior employers and other individual references. If the screening committee relies on reference checks to further screen applications, it is important that the person conducting the reference check record the conversation with the reference. The screening committee must be able to pinpoint the specific facts or information they learned during the reference check that was later used to further reduce the pool of applicants.

As a final note, screening committee members should not know the age, race, gender, religion, national origin, etc. of the applicants. In many cases, the screening committee will know whether an internal candidate belongs to a protected class. However, if properly insulated from such information, the screening committee will not know the protected class status of outside applicants.

Ignorance of an applicant's protected class status can prove to be a valuable defense against a claim that an applicant was screened out because of his or her protected class status and not because he or she lacked the qualifications or attributes necessary to receive an interview. While school corporations maintain Equal Employment Opportunity (EEO) information on the applications they receive to comply with affirmative action requirements, applicants should be asked to volunteer that information on a separate form and the information should not be given to anyone who screens applications.

Interviews

Job interviews and the procedures used vary greatly from school corporation to school

corporation and, within a particular school corporation, from job to job. For teacher and administrator vacancies, school districts typically create an interview team that consists of the superintendent, building principal, a teacher or group of teachers and, in some cases, a student, parent or other representative from the community. For AEAs and community colleges, the approach is similar in seeking a diverse, representative interview team. In larger school corporations, a representative from the central administration (typically its personnel director or human resources manager) serves on the interview team to ensure consistent hiring practices from building to building. No matter who serves on the interview team, it is important that all team members know what type of questions they are permitted to ask. All team members should be aware of the criteria that will be used to select the successful applicant.

Many educators regard opening the interview process to non-administrators as a positive development. Involving non-administrators does, however, raise concerns that a school corporation must address before it finalizes its hiring procedures. The main question is what role will the non-administrators play in the interviewing process?

Some school corporations attempt to be as "democratic" as possible by permitting each member of the selection committee an equal vote in deciding which candidate the committee will recommend to the superintendent. This approach delegates hiring authority to non-administrators who are not accountable for the decisions they make and are not trained in effective selection methods. The better practice is to limit non-administrators to providing the administration with input regarding which applicant is preferable. The administrators serving on the interview team can then evaluate this information and their own appraisal of each applicant, along with other factors (including affirmative action obligations). A recommendation on which applicant should be hired can then be made to the superintendent.

School corporations tend to follow less formal hiring practices when filling classified positions, particularly non-supervisory positions. When hiring custodians, for example, most school

corporations permit the person responsible for evaluating the custodians to interview applicants and recommend to the superintendent who should be hired. The superintendent, in turn, makes a recommendation to the board of directors. In some school corporations, this means that the building principal conducts the interview. In others, the supervisor of plant and grounds (or a person in a similar position) does the interviewing. A formal hiring committee is not used because the skills necessary to perform the job are not as compelling. Also, high turnover may preclude conducting extensive interviews every time a vacancy occurs.

While the formality of the interview process may be more relaxed with respect to classified vacancies, the importance of following correct procedures is the same. Indeed, an argument can be made that the need to follow correct procedures is greater when a single administrator or manager screens applications and conducts interviews than when the interviews are conducted by a committee, since the process depends on the judgment and potential biases of a single or small group of administrators.

Once the school corporation decides who will interview the applicants that were designated by the screening committee, then it must decide what format to follow during each interview. While the law does not require a certain interview format, school corporations are generally advised to select a particular format before conducting interviews and to use the same format in all interviews. This provides applicants with an equal opportunity to demonstrate their qualifications and creates a level playing field among all applicants. Following a uniform format also reduces the risk that unsuccessful applicants will later attack the interview process as unfair or biased. If the same general format is followed during all interviews and if the person or persons conducting the interview ask the same type of questions, it is difficult for a single applicant to successfully claim that the process was somehow biased against them. This is particularly the case if all the questions asked during the interview are job related.

What questions can employers ask, and what questions can't be asked? The ADA is the only

equal employment opportunity statute that expressly limits what employers can and cannot ask at various stages of the hiring process. The ADA permits an employer to ask, during an interview, only whether an applicant can perform the essential functions of the job for which he or she is being considered. The employer is prohibited from making further inquiries regarding an applicant's physical condition or health status.¹⁰ The other equal opportunity laws, including Title VII and Iowa's Civil Rights Act, prohibit an employer from discriminating against an interviewee based on his or her protected class status.

Interviewers must assure that all questions seek job-related information. Seemingly innocuous comments or questions like "...we're building a young, aggressive management team" or "...do you plan to have children and stay home to raise them?" are often used as evidence in discrimination cases. To avoid improper or inappropriate questions, school corporations are advised to draft specific questions before the interviews and then ask only those questions. This procedure promotes consistency among interviews and reduces the risk that a member of the interview committee will make an inappropriate comment.

When deciding whether a particular question is appropriate or inappropriate, an interviewer should ask why the school corporation needs to know the answer. If the school corporation has a legitimate, nondiscriminatory reason to know the information requested, the question is probably permissible. For example, asking a high school teaching position applicant "What do you like most about teaching?" is clearly appropriate because it requests information that the school corporation has a legitimate interest in knowing. Questions that do not request relevant information should be avoided, particularly if the question suggests a bias against a particular minority group or is based on a common stereotype of a protected class.

"Do you plan to have children and stay home to raise them?" is a perfect example of a question that is not related to most jobs. Also, the question suggests the interviewer either has a bias against women who work outside the home or holds

certain stereotypes that women who have children while they are employed should not or will not return to the workforce. This type of question is particularly dangerous since interviewers typically ask only female applicants and never make any inquiry regarding the family plans of male applicants.

The *EEOC Guide to Pre-employment Inquiries* (available in the sample forms section) provides school corporations insight on what questions their representatives should and should not ask during an employment interview.

Post-Offer Inquiries

While restricting what an employer can ask before it offers an applicant a job, the ADA permits employers to conduct post-offer medical examinations and inquiries before an employee starts working, provided the employer examines all other employees in the same job classification. However, if an employer seeks to withdraw a conditional job offer based on information obtained through a post-offer physical exam or other inquiry, the reason for withdrawing the conditional offer must be job-related and supported by business necessity.

For example, it is permissible to ask recently hired custodians to undergo complete physical examinations after they receive a conditional job offer. If the physical exam shows the custodian suffered a back injury two years ago and is now permanently restricted from lifting over 15 pounds and from standing, bending or twisting for prolonged periods, the school corporation could withdraw the conditional offer if those restrictions prevent the applicant from performing the essential functions of the custodial position.

A school corporation should, however, seek the advice of a medical doctor and perhaps a vocational rehabilitation counselor before it withdraws the conditional offer of employment. The ADA requires employers to keep all medical information about an employee in a separate confidential medical file. Any medical information an employer learns about an applicant during post-offer, pre-placement inquiries must also be kept in a separate and confidential medical file.

Medical and Other Tests

The EEOC's *Uniform Guidelines on Employee Selection* indicate that an employer relying on pre-employment tests should be prepared to produce evidence that the tests have been validated as accurate predictors of job performance.¹¹ Most courts, however, in the absence of proof that a particular test or selection criterion excludes a disproportionately high number of protected class members, do not require validation if the selection criterion is job-related.

Under the ADA, any test that excludes persons with disabilities must be job-related and consistent with business necessity.¹² The EEOC has defined "business necessity" as "a clear relationship between performance on the selection procedure and performance on the job."¹⁴ A person with disabilities who is rejected for a reason unrelated to the disability has no discrimination claim. The EEOC's *Technical Assistance Manual* gives the following example:

If a person with paraplegia who uses a wheelchair is screened out because he or she does not have sufficient speed or accuracy on a typing test, this person probably was not screened out because of his or her disability. The employer has no obligation to consider this person for a job that requires fast, accurate typing.

A medical examination can be required, and continued employment conditioned on the results, but only after an employment offer has been made, and only if other employees in the same job category (supervisory, clerical or physical plant, for example) have the same requirement.¹⁵ The EEOC's *Technical Assistance Manual* contains the following illustrations:

1. A medical history reveals that the individual has suffered serious multiple re-injuries to his back doing similar work, which have progressively worsened the back condition. Employing this person in this job would incur significant risk that he would further re-injure himself.
2. A medical examination reveals an impairment that would require the individual's frequent lengthy absence

from work for medical treatment, and the job requires daily availability for the next three months. In this situation, the individual is not available to perform the essential functions of the job, and no accommodation is possible.

3. If a medical examination reveals that an individual has epilepsy and he is seizure-free or has adequate warning of the seizure, it would be unlawful to disqualify a person from a job because of the fear or speculation that he might pose a risk to himself or others. But if the examination and other medical inquiries reveal that an individual with epilepsy has seizures resulting in loss of consciousness, there could be evidence of significant risk in employing this person as a machine operator. However, even where the person might endanger himself by operating a machine, an accommodation, such as placing a shield over the machine to protect him, should be considered.

An employer may exclude a qualified person with a disability who poses a direct threat to the health and safety of the individual or other individuals in the workplace.¹⁵ A "direct threat" is defined by EEOC regulations as a "significant risk of substantial harm" to the employee or others that cannot be eliminated by reasonable accommodation.¹⁶ EEOC regulations also provide that the determination regarding whether an individual poses a "direct threat" must be based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job."¹⁷ The employer must also base that assessment on "a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence."¹⁸ The employer has the burden of proving that an applicant constitutes a direct threat as defined by the ADA and was properly rejected for a job vacancy for that reason.¹⁹

The results of medical examinations must be maintained in separate medical files and treated as confidential records, apart from employees' personnel files.²⁰ The ADA permits employers to require physical exams or inquire regarding an existing employee's physical or mental condition

provided the exam or inquiry is necessary "to determine whether the employee is still able to perform the essential functions of his or her job."²¹ Physical exams and medical inquiry can also be taken or made if the employer needs the requested information to reasonably accommodate the employee's disability.²² Examinations required by federal or state laws may also be conducted.²³ The Department of Education (DE) requirement (281 IOWA ADMINISTRATIVE CODE 12.4, 321.376) that school employees pass physical examinations every three years, and bus drivers pass Department of Transportation physicals remains effective.

Drug Testing and Drug Addiction

Drug testing, except for that required for certain employee groups as authorized by the Federal Highway Administration must meet the constitutional demands of the Fourth Amendment.

The Federal Highway Administration published regulations that require employers to conduct random, reasonable suspicion and post-accident drug tests on employees whose job duties require them to possess a commercial driver's license, such as school bus drivers and other employees who drive vehicles transporting 16 or more people (including the driver), and who drive vehicles weighing over 26,001 pounds. School employees who meet these requirements must be tested for drugs and alcohol.

Under the ADA, current drug abusers are not "disabled." A former abuser who has been rehabilitated may be protected by the act, provided he or she is otherwise a "qualified individual with a disability" within the meaning of the ADA.²⁴

The Iowa Civil Rights Act's disability discrimination provisions protect alcoholics provided their alcoholism does not prevent them from performing their job in a reasonably competent and satisfactory manner.²⁵ Hence, a school corporation cannot fire a teacher simply because the teacher is an alcoholic, provided the teacher has his or her drinking under control while on duty. A school corporation can, however, discharge a teacher who repeatedly reports to work under the influence of alcohol.

Voluntary medical examinations, conducted under an employer's health screening or wellness program, are permissible under the ADA. Nothing in federal or Iowa law restricts an employer from requiring medical certification supporting a sick or medical leave request (as authorized by IOWA CODE Section 279.40).

Polygraph Testing

Section 730.4 of the IOWA CODE prohibits employers from requesting, requiring or threatening to require an applicant or employee to take a polygraph test. An employer violating this prohibition is subject to a court order for an injunction, reinstatement, back pay, attorney fees and court costs. The Employee Polygraph Protection Act of 1988, a federal statute, contains a similar prohibition; however, state and local governments, including school corporations and other political subdivisions, are expressly excluded from the act's coverage.²⁶

Reference Checks

Conducting thorough and complete reference checks is one of the more important functions the school administrator will perform during the hiring process. This function is particularly crucial to school corporations since most of the individuals they employ have direct and daily access to children. An Iowa law, passed during the 1997 legislative session provides immunity, under certain circumstances, from liability to school districts that provide reference check information about current or former employees. Also, the common law has long recognized that school corporations are entrusted with the lives of the children they instruct and, therefore, owe those students a certain level of care during school hours.²⁷ While this duty of care is typically asserted in lawsuits regarding playground injuries and similar situations, the duty can also form the basis of a negligent hiring lawsuit if a school corporation conducts an inadequate background check before it hires an employee. In a recent California case, *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997), the court concluded that the former school district was liable because it did not provide the hiring school district accurate and complete information about the administrator's involvement with young women.

While the vast majority of Iowa teachers and school employees are dedicated professionals and would not harm students under any circumstances, a school corporation opens itself to liability if it does not take proper steps to ensure that the employees it hires do not have a record of sexually or physically abusing children.

The extent to which a school corporation must go when checking the background of a new employee will vary depending upon the responsibilities of the position involved. Some positions, such as a night custodian, involve little or no unsupervised contact with the children and do not warrant as extensive a background check as do positions that involve concentrated and unsupervised contact with children. More intensive background checks should also be conducted with respect to licensed employees, like teachers and counselors, since they are typically placed in positions of authority over students and can readily abuse that authority by sexually or physically abusing students. This is also true of employees hired to staff a school-sponsored day care or after-school hours program, since they assume a role very similar to that of a teacher and are, by necessity, often alone with young children.

The biggest problem a school corporation faces when performing reference checks is lack of information. Because they fear potential defamation suits, many employers will only provide limited information when they are contacted regarding a former employee. A school district may consider including a statement in its employment application that authorizes the school corporation to contact the applicant's former employers and other individuals the applicant listed. The statement also requires the applicant to expressly release any defamation claim he or she might have because a former employer or reference disclosed facts and opinions regarding prior work performance, character and fitness to work with and around children. A statement to this effect can later be sent to employers and references listed in the application and may help quiet fears they have regarding potential liability. If the employer or reference is reluctant to discuss the applicant's work record, the school corporation can then ask the applicant to contact the employer

or reference and provide them with further authorization.

While former employers and references can provide crucial information about an employee's conduct in the workplace and general information on the employee's character and reputation, their knowledge about matters not related to work may be limited. For example, former employers might not know whether the applicant has ever been convicted of a felony or convicted of a criminal offense involving the mistreatment of minors. Also, former or existing employers may cover up incidents that occurred while the applicant worked for them because it is painful or embarrassing for the employer to relive specific incidences of misconduct. Also, an employer's desire to get rid of a problem employee may outweigh its willingness to be candid and frank. The person conducting the reference check must ask thorough and complete questions to overcome this hesitancy. A telephone reference guide is available in the sample forms section. They should also explain why they need the information and reassure the employer or reference that the information will remain confidential.

The information the school corporation receives when it checks employer references may be incomplete. However, it is important from a negligent hiring standpoint to contact every employer an applicant lists on his or her application to verify whether the applicant has been convicted of a felony or some other criminal offense involving the mistreatment of children. The school corporation should also ask whether the applicant has ever been accused of child abuse or has ever been involved in any incidences involving the mistreatment of children. All reference checks should be thoroughly documented. The questions asked during the reference check should be written out and a detailed description of the responses given should also be prepared. These reference check notes should be filed along with the applicant's other application materials. A sample telephone reference check form is included in the sample forms section of this site.

Finally, a school corporation must also thoroughly review the applicant's employment history to see if it contains any significant gaps of employment

or any glaring inconsistencies. In one of the more famous negligent hiring cases, an employer quickly reviewed an applicant's employment history and did not check any references before hiring. The person had access to homes by virtue of his employment and later raped and assaulted one of the employer's customers. The customer sued, alleging the employer did not exercise proper care before hiring. During trial, the application was used as an exhibit. Much to the employer's horror and dismay, the application not only contained significant gaps of employment which the applicant was never required to explain, but the individual had also listed the address of the state prison as a former place of residence. Needless to say, the employer did not win the case. A school corporation can avoid such problems by carefully examining every employment application it receives and by attempting to the extent possible, to independently verify the information contained in the application.

The steps school corporations should take, at minimum, before hiring any applicant are summarized as follows:

1. Require the applicant to provide his or her complete employment record for the last 10 years including the specific dates the applicant worked, what position or positions the applicant held and the reason the applicant left employment.
2. Require the applicant to list at least three people who are not family members or close relatives to serve as professional references.
3. Contact each former employer and reference and ask at least the following questions:
 - a. Has the applicant ever been convicted of a felony or an offense involving mistreatment of children? (If so, please provide details.)
 - b. Has the applicant ever committed an offense involving mistreatment of children? (If so, please provide details.)
 - c. Does the applicant have a violent temper?
 - d. Has the applicant ever assaulted or physically threatened anyone?
 - e. Has the applicant ever sexually harassed or mistreated fellow employees? (If so, provide details.)
 - f. Has the applicant ever been found to have engaged in sexual or physical abuse of children pursuant to Chapter 102 of the Iowa Department of Education's administrative rules?
 - g. If the applicant is a teacher or administrator, to the best of your knowledge, has the applicant's teaching license ever been suspended or revoked or has the teacher or administrator ever been reprimanded by the state licensing board?

In addition to these steps, a school corporation should, before hiring a teacher or administrator, contact the licensing board in each state in which the applicant has worked to see if the state board has ever revoked or suspended the applicant's license or reprimanded the applicant. The school corporation should also ask whether the state board has received any complaints about the applicant and how those complaints were resolved. If the complaint was discussed without any finding of fault on the applicant, then the school corporation should not consider those complaints when making its hiring decision. All information filed with a state board of educational examiners is part of the public record and can be obtained simply by asking. A school corporation is arguably remiss if it does not at least inquire.

Negligent Hiring

In 1999, the Iowa Supreme Court recognized that negligent hiring was actionable. Liability for negligent hiring is based on the theory that an entity has a duty to hire employees who won't cause harm to others. Negligent hiring also extends to negligent retention or negligent supervision of employees. *Godar v. Edwards*, 588 N.W.2d 701 (Iowa 1999).

Typically, this type of action arises from injuries caused to third parties by employees, such as

delivery persons. In an earlier Iowa Court of Appeals case, the employer hired a cable installer and provided a master key to an apartment complex, which the employee then used to enter a customer's apartment and rape her. The Iowa Court of Appeals held it was a question of fact for a jury whether the employer hired the employee without checking the employee's criminal record. *D.R.R. v. English Enterprises, CATV*, 356 N.W.2d 580 (Iowa App., 1984)

The *Godar* case involved claims against the Marion Community School District by a former student who claimed a curriculum director, employed by the school district, had sexually abused Godar as a student. The Iowa Supreme Court held the Marion School District was not liable because there was not enough evidence introduced at trial to show the school district knew or should have known the employee was sexually abusing the student. There was also no evidence to alert the school district the employee might engage in such conduct. The plaintiff admitted the school district had no actual knowledge of the abuse. Regarding the question of whether the school district "should have known" the abuse existed or may have existed, the plaintiff did not introduce any evidence about the school district's hiring policies that would lead the court to find the school district should have known, from the employee's background, he might abuse students. Although the court did not specifically state employers are under a duty to conduct background checks, the discussion of hiring policies supports the inference that background checks must be a part of hiring policies in order to avoid liability.

In order to win a negligent hiring suit, a plaintiff must prove:

- that the employer knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time of hiring;
- that through the negligent hiring of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and
- that there is some employment or agency relationship between the wrongdoer and the defendant employer.

Godar v. Edwards, 588 N.W.2d 701 (Iowa 1999).

With advancements in technology and a statewide records system that should include all Iowa criminal records, failure to check is arguably failure to exercise ordinary care.

The Iowa Supreme Court also held that it would recognize a cause of action for negligent retention or negligent supervision. This action would arise from the employer's failure to discharge an employee after becoming aware of, or after it should reasonably have become aware of, the employee's unfitness. In *Schoff v. Combined Insurance Company of America*, 604 N.W.2d 43 (Iowa, 1999), the court held that an employer cannot be held liable for negligent supervision or training where the conduct that proper supervision and training would have avoided, is not actionable against the employer. In other words, the injury must have been the result of wrongful or illegal conduct. In *Schoff*, the plaintiff had been hired conditionally, pending the results of surety bonding. In filling out his application for the bond, the plaintiff was told by the supervisor that he did not have to disclose the fact that he had been charged but not convicted of felonies. The surety bond was denied because the plaintiff failed to reveal his felony charges, and that he was subsequently discharged from employment. The court held there was no liability because the negligent action of the supervisor in telling the plaintiff that he did not have to reveal the felony indictments could not, by itself form the basis for a cause action.

The California Supreme Court has gone even further in recognition of the theory of negligent hiring. In *Randi W. v. Muroc Joint Unified School District*, 14 Cal.4th 1066 (1997), the plaintiff was a student who alleged she was abused by a former employee of the school district. School district officials had provided glowing recommendations of the employee's character, which were characterized by the court as "misleading half-truths." The court held the former school district was liable to the student for the resulting abuse. If the school district's officials had not provided any information, or if they had simply confirmed dates of employment, there would have been no liability. Therefore, in responding to inquiries about former employees, school districts must be sure to avoid misleading potential employers if

the school district has knowledge of an employee's unfitness.

These cases demonstrate that it is imperative for school districts to conduct reasonable pre-employment background checks of candidates for employment. An employer will be charged with knowledge of the risk of danger if it was readily discoverable in a background check. Employment experts uniformly agree background checks provide the best defense against liability and potentially expensive lawsuits. Furthermore, school districts must carefully assess policies on responding to information requests concerning former employees in order to ensure misleading information is not provided.

Criminal and Abuse Background Checks

Since Oct. 1, 2000, the Board of Educational Examiners (BOEE) has done criminal background checks on educators applying for initial licensure with the state of Iowa. An initial license is the first time the individual has been licensed in Iowa. The initial licensure may be for paraeducators, teachers, substitute teachers, out-of-state teachers, coaches, behind-the-wheel authorizations and administrators. All applicants for initial licensure must complete a waiver and fingerprint card allowing the Iowa Division of Criminal Investigation (DCI) and the Federal Bureau of Investigations (FBI) to conduct a criminal background check, at the applicant's expense. If an applicant holds an Iowa teaching license and is applying for an administrative license, the BOEE will not perform a new FBI check.

Districts can obtain the Division of Criminal Investigation request form and waiver online at

http://www.dps.state.ia.us/DCI/Records_Ident/obtain_records.shtml

The fingerprint cards are available from the BOEE. The cards include an instruction sheet. The FBI check may take four to six weeks. Because of that delay, a temporary permit is issued to applicants who have successfully passed the DCI background check but are still awaiting the FBI results. This permit will be valid for 90 days while the fingerprint card is being processed and reviewed. The permit will include all

pertinent information about the license. It is official if the raised Board of Educational Examiners seal is on the lower right side.

In addition to the DCI and FBI checks, the applicant will be checked against the child abuse and sex offender registries. The results of these checks will be submitted to the executive director of the BOEE, who, after consulting with the Iowa Attorney General's office will determine if any of the offenses merit denial of a license. Local districts will not have access to the criminal background check reports requested by the BOEE.

Licensed staff requesting license renewal will not be asked by BOEE to submit to a criminal background check. Those employees will be asked to self-report any criminal offenses on the license renewal form. Unless the employee indicates they have had a conviction or arrest, the BOEE will not perform a background check before issuing a license renewal.

Having the BOEE background check does not mean that a school district has adequate information upon which to hire if the applicants received their initial licenses prior to October 2000. There may also be applicants who have licenses, even though the criminal background checks showed "hits" or record of criminal offenses, because the BOEE did not believe the offenses prohibited them from receiving licensure. Therefore, it is recommended that districts conduct their own criminal background and reference checks and adopt a policy to ensure that it is done routinely.

The district does not need to do a background check on every applicant and it may choose to limit the check to final candidates for a position. It is recommended the final candidate's check consist of at least a DCI check, a sexual abuse registry check and a child abuse registry check.

Credit Checks

If hiring a superintendent or business manager who will have accessibility to school district funds, the district may decide to do a credit check in addition to the above-mentioned checks. A credit check may provide information about the applicant's credit history. If the district's human resources official can do the check using public

databases, then the federal Fair Credit Reporting Act (FCRA) doesn't apply. If the district hires a third party such as a consultant, private investigator, law firm, records search firm or employee screening firm to assist in doing a credit check, the district must comply with requirements under the FCRA.

To comply with the FCRA, the employer must obtain the job applicant's written permission, separate from the application form, to acquire any credit information. If the district refuses to hire, based on anything in the report, the school district must provide the applicant with two items: a copy of the consumer report and an FTC-prescribed summary of legal rights. The applicant then has the opportunity to rebut the information in the report. After giving those documents to the applicant, the school district must provide the following in either oral, written or electronic format:

1. Notice of the adverse action taken;
2. The name, address, and telephone number of the consumer reporting agency that furnished the report;
3. A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to give the applicant or employee the specific reason adverse action was taken; and
4. Written notice that even though the applicant or employee has already received a copy of the report, he or she has the right to obtain another free copy from the consumer reporting agency within 60 days after the adverse action and to dispute its accuracy with the agency.

There are penalties for non-compliance with the FCRA act, so if your district decides to do a credit check on an applicant, consult with your attorney to ensure compliance with the FCRA provisions.

The district is obligated to assess the information received from a background check to determine if the offense or violation is job related and can pose a threat to district operations. A "hit" does not necessarily eliminate the applicant from consideration. At a minimum, the school district should consider the offense and when the offense occurred. A district can also do a thorough

reference check combined with a criminal background check to determine how the candidate has performed in their professional capacity since the offense occurred.

Hiring Practices Checklist

1. The responsibility for developing EEO policies, designing employment applications and recruiting procedures and compliance should be coordinated by a single person or department.
2. All personnel involved in the hiring process or employment decisions should undergo hiring techniques training.
3. Physicians or other medical personnel providing recommendations or opinions must be educated on the specific requirements and working conditions of all school corporation jobs.
4. Be sure applicants and supervisors know how long applications will remain active and on file.
5. Be sure to treat provisions of personnel policies as if they are binding contractual commitments.
6. Annually review whether your recruitment sources provide a representative sample of the labor market.
7. Your records should explain in detail why applicants were selected or rejected. The explanation must be based on legitimate nondiscriminatory reasons.
8. Annually review whether your selection criteria are related to the job's essential functions.
9. Annually review the accuracy of your job descriptions with supervisors and employees who perform the jobs.
10. Hiring decisions based on applicant's arrest records will be rejected by courts or regulatory agencies.

11. Height and weight requirements will seldom be relevant to the effective performance of any school job.
12. Applicants should be required to certify that information provided is truthful and any falsification is grounds for immediate discharge.
13. An applicant's permission should be secured to undertake a credit check.
14. Garnishment of a person's wages cannot be the basis for an adverse personnel action.
15. It is unlawful to exclude an applicant based on the cost to insure him or her.
16. It is unlawful to discriminate against a person who spoke out against workplace discrimination.

Orientation

A uniform, systematic familiarization program for new employees is a sensible component of a school corporation's employment relations policies. An orientation checklist is available in the sample forms section. A checklist can ensure completion of employment forms (*IRS W-4, IRS I-9, benefit plan enrollment*), distribution of personnel policies or work rules (*receipt for which should be acknowledged in writing*), explanation of personnel office services and complaint or grievance procedures and introduction to supervisor and co-workers. Employees should also be given the opportunity to raise any questions.

Endnotes

1. 42 U.S.C. § 2000e et. seq.
2. 42 U.S.C. § 12111 et. seq.
3. IOWA CODE Chapter 216.
4. IOWA CODE § 35 C.1 (1993).
5. IOWA CODE § 35 C.3 (1993).
6. IOWA CODE § 35 C.5 (1993).
7. 42 U.S.C. § 2000e-3(b).
8. 42 U.S.C. § 12112 (d)(2)(A).
9. 42 U.S.C. § 12112 (d)(2)(B).
10. 42 U.S.C. § 12112 (d)(2)(A).
11. 29 C.F.R. Part 1607.
12. 42 U.S.C. § 12112(b)(6).
13. 29 C.F.R. Part 1630, Appendix (Section 1630.10).
14. 42 U.S.C. § 12112 (d)(3).
15. 42 U.S.C. § 12113 (b).
16. 29 C.F.R. § 1630.2(R).
17. *Id.*
18. *Id.*
19. 29 C.F.R. Part 1630, Appendix (Section 1630.2(r)).
20. 42 U.S.C. § 12112 (d)(3)(B).
21. 42 U.S.C. § 12112 (d)(4).
22. 29 C.F.R. Part 1630, Appendix (Section 1630.14(c)).
23. 29 C.F.R. Part 1630, Appendix (Section 1630.14(c)).
24. IOWA CODE § 730.5(3),(7)(1993).
25. *Consolidated Freightways, Inc. v. Cedar Rapids Civil Comm'n*, 366 N.W. 2d 522 (Iowa 1985).
26. 29 U.S.C. § 2006.
27. 57A Am. Jur. 2d, Negligence §91.