



# Don't Pick the Bad Apples: What it Looks Like in Court if You Make a Bad Hiring Decision

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# What makes a prospective employee a “bad apple”?

- Inability or unwillingness to perform the job duties
- Poor communication skills
- Resistance to instructions and requests from supervisors
- No “filters” on speech or conduct
- Anger management problems
- Lack of patience and creativity when faced with problems
- Inability or unwillingness to work productively and respectfully with others
- Dangerous, threatening, or intimidating behavior, especially toward children or students

# How can your application process help to screen out the “bad apples”? (slide 1 of 3)

- CRIMINAL HISTORY AFFIDAVIT
  - 2010 Amendment to Criminal Offenders Employment Act prohibits inquiries as to criminal convictions at initial application stage. Such inquiries may be made when the applicant is considered a finalist for the position (i.e., when you create a “short list” and interview finalists.)

# How can your application process help to screen out the “bad apples”? (slide 2 of 3)

- AGREEMENT, AUTHORIZATION, WAIVER AND RELEASE

This is also part of your application form.

The applicant

- agrees to background and reference checks
- authorizes prior employers to disclose information about him or her

# How can your application process help to screen out the “bad apples”? (slide 3 of 3)

- When an application is received and selected for interview status, you will
  - make several copies of the Agreement, Authorization, Waiver, and Release page and send a copy to each of the prior employers, together with your reference questionnaire, or
  - fax these documents to the prior employers for a phone interview.

# Agreement, Authorization, Waiver, and Release to include in application

\_\_\_\_\_ SCHOOLS

[address]

[city, state zip code]

[phone number]

## AGREEMENT, AUTHORIZATION, WAIVER, AND RELEASE

I hereby certify that the information contained in this application is true, accurate and complete, to the best of my knowledge and belief. I understand and agree that any misrepresentation or willful omission of facts shall be sufficient cause for disqualification of my application or for termination of my employment. Failure to provide all or part of the information requested may result in the refusal of the \_\_\_\_\_ Schools (School District) to further consider me for possible employment.

# Other information to include in application forms (slide 1 of 4)

## EMPLOYMENT APPLICATION CERTIFIED POSITION

### \_\_\_\_\_SCHOOLS

Name: \_\_\_\_\_ Social Security No.: \_\_\_\_\_

Address: \_\_\_\_\_ Telephone No.: \_\_\_\_\_  
\_\_\_\_\_

*To the applicant: Please read the following and sign below.*

# Other information to include in application forms (slide 2 of 4)

1. The \_\_\_\_\_ (the District) is an equal opportunity employer, and does not discriminate on the basis of race, sex, color, national origin, religion, gender identity, sexual orientation, age, or disability.
2. Please let us know if you require an accommodation to allow you to complete the application form, or for any other aspect of the application process.

# Other information to include in application forms (slide 3 of 4)

3. You must complete this application in full and provide **all** information requested. If you do not have all the requested information with you, take the application with you, and return it completed at a later date. An incomplete application will not be considered.
4. The provision of any false, incomplete, or misleading statements on this application, on any other documents submitted with it, or as part of any other phase of the employment process, will result in the applicant's disqualification, withdrawal of offer of employment, termination or discharge, regardless of when the misrepresentation or omission is discovered.

# Other information to include in application forms (slide 4 of 4)

5. Applicants, including those for substitute and temporary positions, are subject to work history and education history checks, and to reference investigations. Finalists will also be subject to a criminal background investigation, including mandatory fingerprinting, at the applicant's expense, as a condition of further consideration for employment.
6. All offers of employment are contingent upon the satisfactory completion of background investigations. Criminal convictions shall not automatically bar an applicant from obtaining employment with the District, but pursuant to the Criminal Offender Employment Act, NMSA 1978 §§ 28-2-4 and 28-2-5, may be a basis for refusing employment

**I have read and understood the foregoing:** \_\_\_\_\_  
*Applicant's Signature*

# What to ask for regarding applicant's education

In addition to name of school, years attended, degrees awarded, etc., include a column for the applicant to list a reference or contact at each college or university attended.

- Helpful if the applicant has no work history since his or her last degree or period as a full time student.
- For applicants with relatively short work records, get name of a contact at their university.

## What to ask for regarding applicant's employment history (the *most important section* of the application)

Mandatory information about each position:

- (1) Employer's name and address;
- (2) Last position held;
- (3) Term of employment (months and years);
- (4) Reason for leaving; and
- (5) Name and telephone number of *immediate* supervisor.

# The screening process

- Scope and content
  - Limited by State and Federal law
  - Unlawful inquiries
    - Discrimination (age, race, sex, national origin, religion, pregnancy, disability (mental and physical), spousal affiliation, ancestry, **sexual orientation and gender identity**)
    - Defamation
    - Invasion of privacy
- Inadequate screening process
  - Subject to the New Mexico Tort Claims Act
  - Potential Liability
    - Negligent hiring
    - Negligent retention
    - Negligent supervision

# Reference checks (slide 1 of 4)

- Fear of defamation lawsuit
  - “Name, rank and serial number” references
  - No information at all
  - Use release included in job application/authorization form to seek candid information
- Reference check information
  - Use authorization form
  - Condition of application
    - No form = no job

# Reference checks (slide 2 of 4)

## Authorization Form:

I hereby authorize you to release information regarding my prior employment with \_\_\_\_\_ for the purposes of the [School District's] pre-employment investigation. You are released from any and all liability that may result from furnishing such information to the [School District]. In addition, I hereby recognize and acknowledge your immunity from liability as set forth in New Mexico Statutes Annotated § 50-12-1 (1995).

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Date

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Applicant's Signature

# Reference checks (slide 3 of 4)

## Sample Form Requesting Information from Prior Employment

Name of Applicant: \_\_\_\_\_

SSN: \_\_\_\_\_

1. Dates of Employment: \_\_\_\_\_
2. Reason for leaving your employment: Discharge\_\_\_\_\_; Resignation (including resignation in lieu of termination/discharge)\_\_\_\_\_; Lay-off\_\_\_\_\_; Military duty\_\_\_\_\_; Other\_\_\_\_\_.
3. Duties and responsibilities of employment \_\_\_\_\_
4. Was the individual's general conduct satisfactory? \_\_\_\_\_
5. Would you rehire this individual? \_\_\_\_\_. If your answer is NO, please explain: \_\_\_\_\_
6. Please rate the individual in the following areas:

	Good	Fair	Poor
Disposition, Tact, Ability to Get Along with Others	_____	_____	_____
Initiative, Resourcefulness	_____	_____	_____
Safety	_____	_____	_____
Ability to Perform Duties and Responsibilities	_____	_____	_____
Aptitude	_____	_____	_____
Loyalty	_____	_____	_____

7. Do you know of any reason why this individual could not perform the job, duties and responsibilities of the position for which (s)he is being considered? Yes \_\_\_\_\_ No \_\_\_\_\_. If your answer is YES, please comment: \_\_\_\_\_
8. Was there any conduct by the individual which would affect the individual's licensure in the future? Yes \_\_\_\_\_ No \_\_\_\_\_. If you answered YES, please explain: \_\_\_\_\_
9. Any other remarks: \_\_\_\_\_

# Reference checks (slide 4 of 4)

- Duty to provide reference
  - If you provide a reference, it must be complete and candid
  - *Davis v. Doña Ana County Sheriff's Office*, 127 N.M. 785 (Ct. App. 1999)
    - Dangerous deputy
    - Injured another in new job
    - “Passing the trash”
- Protection from liability
  - N.M. Stat. Ann. § 50-12-1 (1995)
  - Immune from liability (defamation, slander & libel)
  - Must be made in good faith
  - Cannot be knowingly false, malicious, or misleading
  - Cannot violate any civil rights of the former employee
  - No waiver of immunity under the N.M. Tort Claims Act
    - School district
    - Individual liability

# Background check (slide 1 of 3)

- **CRIMINAL AFFIDAVIT**

- Criminal Offender Employment Act of New Mexico (N.M. Stat. Ann. § 28-2-1 *et seq.*)
  - No automatic bar to employment
  - Criminal Affidavit provides information to protect students
- **Use it!**
  - Ask about arrests and charges – not just convictions
  - Ask about misdemeanors – not just felonies
  - Ask about tickets and warrants
  - Ask about CYFD complaints
  - Ask about abuse issues

- **REPORTING ON LICENSURE**

- Duty to report any conduct that would have an effect on the individual's licensure under NMAC § 6.60.9.12
- Report even if employee resigns before end of investigation or resigns in lieu of discharge or termination
- Report in writing
- **PROVIDE REFERENCE TO ANY PROSPECTIVE EMPLOYER!!!**

# Background check (slide 2 of 3)

Results of Criminal Background Check (Criminal Offenders Employment Act (COEA) § 28-2-4 NMSA 1978)

Power to Refuse, Renew, Suspend or Revoke Public Employment or License (§ 28-2-4 NMSA 1978)

- Any board may refuse to grant or renew or may suspend or revoke employment or license of any public employee
  - convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction directly relates to the particular employment, trade, business or profession;
  - convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to the particular employment, trade, business or profession, if the board or other agency determines after investigation that the person so convicted has not been sufficiently rehabilitated to warrant the public trust;

# Background check (slide 3 of 3)

- ❑ convicted of trafficking in controlled substances, criminal sexual penetration or related sexual offenses, or child abuse and the applicant, employee or licensee has applied for reinstatement or issuance of a teaching certificate, regardless of rehabilitation; and
- ❑ shall explicitly state in writing the reasons for a decision which prohibits the person from engaging in the employment, if the decision is based in whole or in part on conviction of any crime described in the COEA. Completion of probation or parole supervision or expiration of a period of three years after final discharge or release from any term of imprisonment without any subsequent conviction shall create a presumption of sufficient rehabilitation for the Act.

# Spotting “bad apples” in the interview process (slide 1 of 4)

- Interviews can and should be used as means to develop additional valuable information
- Avoid dangerous areas of questioning
- Ask open-ended questions
- Document all employment interviews and preserve documentation
- Have an interview checklist for:
  - uniformity of questions, and
  - consistency in evaluating applicants

# Spotting “bad apples” in the interview process (slide 2 of 4)

- Interview checklist
  - Have prepared interview questions for all applicants
  - Document applicants’ responses and **keep notes/forms**
  - Have prepared statement regarding at-will employment for interviewer
  - Review the essential functions of the job
    - Tailor questions to the requirements of the job and your need; *i.e.*, need a teacher good at discipline because former teacher (now retired) let it go, or need principal to enforce conduct rules
  - Required qualifications

# Spotting “bad apples” in the interview process (slide 3 of 4)

- One interviewer to discuss salary, benefits etc.
  - avoids confusion
  - avoids an interviewer changing the offer
- Suspect areas of questioning
  - Sex and marital status
    - Childcare arrangements
  - Arrest, conviction, and litigation
    - Use Criminal History Affidavit

# Spotting “bad apples” in the interview process (slide 4 of 4)

- Additional suspect areas of questioning
  - Financial status or reliability
    - Employer Immunity for Employee Reference Act
    - Credit reports
  - Citizenship or national origin
  - Disability or handicap
  - Physical appearance and mannerisms
  - Religion
  - Other problem areas

## Types of questions you could be asked in court regarding a “bad apple” (slide 1 of 2)

- Did the School District check this person’s references and background before this person was hired?
- If so, then why didn’t the School District know about this person’s history of *[insert type of misconduct – fraud, child molestation, violent assault, etc.]* before hiring this person?
- Why didn’t the School District know that this person had been fired for *[insert type of work misconduct – drinking on the job, punching a supervisor, duct-taping a student to a chair, etc.]* before hiring this person?

## Types of questions you could be asked in court regarding a “bad apple” (slide 2 of 2)

- What, if anything, did the School District do about any troubling information discovered in the reference and/or background check?
- Why did the School District hire this person knowing about the person’s history of *[insert problematic conduct shown in reference check or background check]*?
- Who knew about this history before this person was hired?

## Key issues

- What did you know?
- When did you know it?
- What did you do with that knowledge?

You and the School District will need good answers!

# Contact Information



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