

# CHAPTER 7

## LEGALLY SELECTING EMPLOYEES

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“O KAY, LAURA,” SAID Trisha Sangus brightly. “Where are we on the hiring of the new sales manager?”

Laura O’Leary, the director of sales and marketing at Trisha’s hotel, was very pleased. Three weeks ago, she had successfully presented the hotel’s owners with a proposal to expand the nine-member sales staff to ten, and the owners had accepted her recommendation. Now, Laura was heading the search for just the right candidate.

It was important to Trisha that the selection of a candidate for the new sales position go smoothly, and with some speed, because she wanted to demonstrate to the owners that their decision had been a good one. Trisha had discussed the new position with Laura at great length. The city was becoming a popular destination for several association meetings and annual conventions. Although the hotel had ample meeting and banquet facilities, this new market had gone virtually untapped. Trisha

was convinced that the right person and the right strategy could make a huge difference in the number of rooms and meetings booked. The result on the hotel's bottom line could be significant as well.

"I know you have held some interviews," said Trisha. "I'd like to review the resumes of your three finalists." Laura gave Trisha the file containing the resumes.

"We have three candidates who meet the criteria we established," Laura explained. "Each is very

### Strengths

Candidate One: Beverly

Four-year degree in HRI from State University

Candidate Two: Pat

Five years' hotel sales experience

Candidate Three: Leon

Two-year associate's degree

Two years' hotel sales experience

"I haven't ranked the candidates in order of preference, but I would like you to see candidates number one and three," said Laura. "I think either one could do a great job."

"I'm curious about your comments on candidate two," said Trisha. "I understand the strength, but help me be clear on the weaknesses. Let's start with the 'outside responsibilities.'"

"Well," Laura began, "it has to do with children." She paused. "I know what you are thinking," said Laura, as she watched Trisha arch an eyebrow in response to her comment. "We certainly didn't ask Pat if she was married or had children. But when we asked her about the ability to work past five o'clock, she replied that she had four children at home, ranging from 8 to 14 years old, and that, given advanced notice, arranging for child care was certainly possible."

Laura looked earnestly at Trisha Sangus, then continued, "You know Trisha," said Laura, "we don't always know when our staff will have to work late. Site tours can pop up anytime. And client dinners can drag on and on. I told the candidate that sometimes we knew ahead of time and sometimes we did not. I was just being honest."

Trisha was well aware of the hours involved in hotel sales. She had spent four years as a director of sales and marketing. She adjusted the rim of her glasses, and carefully reviewed Pat's resume. "Now help me understand the professional appearance comment."

different from the other, and each has strengths and weaknesses. On the whole, I'm very pleased with our choices."

Trisha rapidly scanned the resumes, along with the notes that Laura had taken during the candidates' interviews. She, Laura, and Michael Pinnard, the new human resource director, had come up with several important interview questions for this particular search.

### Limitations

First position in sales

Outside responsibilities

Professional appearance

Limited computer skills

"Well," Laura said, "you know how you stress that we should be professional looking at all times?"

Trisha smiled slightly. She knew that she was perceived in the hotel as a stickler for detail. Staff uniforms were required to be pressed and clean, and nametags had to be fastened straight, and Trisha's reaction in the staff meeting when a junior manager proposed "casual Friday" for the hotel's administrative staff was still talked about. In short, Trisha expected management personnel to look sharp at all times.

"Well," Laura continued, "this candidate wore no makeup at all—no nail polish, no lipstick, not even a little blush! I think our customers expect a higher level of sophistication than that."

Trisha looked at Laura. There was no doubt that well-groomed Laura did in fact present the appearance Trisha had come to associate with a professional salesperson.

"At times like this," Trisha thought, "it's nice to have a human resource director in the hotel who is both knowledgeable and a good communicator," so she called him. "Michael," she said, as the HR director picked up the telephone, "can you step in here for a minute? And bring your calendar. I think Laura will want to schedule some information sessions for her and her staff. And I want to schedule three interviews."

## IN THIS CHAPTER, YOU WILL LEARN:

1. To utilize job descriptions, qualifications, and other tools for legally selecting employees.
2. To avoid charges of discrimination by knowing the classes of workers that are protected under the law.
3. To understand the procedure for verifying the work eligibility of potential employees before offering them employment.
4. To distinguish the rights of both employers and employees under the at-will employment doctrine.
5. To understand the concept of collective bargaining and the legal obligations when interacting with labor unions.

## 7.1 EMPLOYEE SELECTION

Legally selecting and managing a staff can be a very challenging task in today's complex world of laws and regulations. Some managers, especially those with many years of experience, believe that finding, maintaining, and retaining a qualified, service-oriented staff is every manager's most difficult task. It is true that the challenges of managing people are generally greater than those involved in managing technologies or products. People are complex and are affected by so many non-work-related issues that you will find it both difficult and rewarding to be a leader to your staff.

The law is very specific regarding what you, as an employer, can and cannot do as you secure your workforce. Both you and your workers have rights that affect the employment relationship. In the next two chapters, we'll look at how to select and manage employees in accordance with the law.

As an employer, you will have wide latitude in selecting those individuals whom you feel would best benefit your business. However, it is critical that you develop an employee selection procedure that ensures fairness and compliance with the law (to avoid the risk of a discrimination lawsuit), while also allowing you to hire the best possible candidate for the job.

One tool that managers use to make good hiring decisions is the job description, which they then use as a basis for establishing a list of job qualifications that each candidate should possess.

### Job Descriptions

Before an employee can be selected to fill a vacant position, management must have a thorough understanding of the essential functions that the employee will need to perform. These are contained in the *job description*. Legally, only those tasks that are necessary to effectively carry out the responsibilities and perform the tasks required in the job should be used in the description.

Job descriptions need not be long. In most cases, a single typewritten page or two will be sufficient to detail the information that makes up the body of a job description. Figure 7.1 is a sample of a job description used in the hospitality industry. The description includes the job title, reporting relationship, tasks, and competencies required for the job.

The job description serves a dual role. It is important from an operational perspective in that it helps supervisors and the HR department keep track of the changing responsibilities of workers. However, it is also important from a legal perspective in that it may need to be produced in court to demonstrate that an employer fairly established the requirements of a job prior to selecting the candidates to fill those jobs.

#### LEGALESE

**Job description:** A written, itemized listing of a specific job's basic responsibilities and reporting relationships.

**Position Title:** Executive Chef**Reports To:** Food and Beverage Director**Position Summary:** The department head responsible for any and all kitchens in a foodservice establishment. Ensures that all kitchens provide nutritious, safe, eye-appealing, properly flavored food. Maintains a safe and sanitary preparation environment.**Tasks:**

1. Interviews, hires, evaluates, rewards, and disciplines kitchen personnel as appropriate.
2. Orients and trains kitchen personnel in property and department rules, policies, and procedures.
3. Trains kitchen personnel in food production principles and practices. Establishes quality standards for all menu items and for food production practices.
4. Plans and prices menus. Establishes portion sizes and standards of service for all menu items.
5. Schedules kitchen employees in conjunction with business forecasts and predetermined budget. Maintains payroll records for submission to payroll department.
6. Controls food costs by establishing purchasing specifications, storeroom requisition systems, product storage requirements, standardization recipes, and waste control procedures.
7. Trains kitchen personnel in safe operating procedures of all equipment, utensils, and machinery. Establishes maintenance schedules in conjunction with manufacturer instructions for all equipment. Provides safety training in lifting, carrying, hazardous material control, chemical control, first aid, and CPR.
8. Trains kitchen personnel in sanitation practices and establishes cleaning schedules, stock rotation schedules, refrigeration temperature control points, and other sanitary controls.
9. Trains kitchen personnel to prepare all food while retaining the maximum amount of desirable nutrients. Trains kitchen personnel to meet special dietary requests, including low-fat, low-sodium, low-calorie, and vegetarian meals.

Source: Anonymous

**Figure 7.1** Sample job description.**LEGALESE**

**Job qualifications:** The knowledge or skill(s) required to perform the responsibilities and tasks listed in a job description.

If you review Figure 7.1 carefully, you will see that the job description does not mention the physical or mental abilities required to perform the job. The role of the job description is to define the job itself, while the role of the *job qualification* is to define the personal attributes required to satisfactorily perform the job.

**Job Qualifications**

Once you know exactly what kinds of tasks employees must perform in a given job, it is possible to create a list of the skills or knowledge they must possess in order to successfully perform those tasks. These skills should be written down and attached to the job description. If a potential job candidate is not selected for employment, and later elects to bring legal action against you, it will be critical that you can show how each component of your job qualification list is driven by, or logically flows from, the job description.

Job qualifications can consist of both physical and mental requirements. It is important to remember that the job qualifications list must not violate the law nor include any characteristics that would unfairly prevent a class of workers from successfully competing for the position. If, for example, a hotel groundskeeper listed a height of 6 feet as a job qualification for a grass cutter, that qualification would be considered inappropriate, because there are minority groups that would have difficulty meeting it. The courts might interpret this job qualification as one that unfairly limits the potential for a minority candidate to secure the job. Even though the groundskeeper might be able to show that the tools normally used by the groundskeeping employees were located on shelves most easily reached by those who were 6 feet tall or taller, it is highly unlikely that this occupational qualification could stand up under the scrutiny of the courts, unless the groundskeeper could prove that a height of 6 feet was a *bona fide occupational qualification (BFOQ)*.

To establish that a qualification is, in fact, a bona fide occupational qualification, you must prove that a class of employees would be unable to perform the job safely or adequately, and that the bona fide occupational qualification is reasonably necessary to the operation of the business. In the case of the groundskeeper, simply moving the tools or making the reasonable accommodation of providing a short ladder would open the job to candidates of any height, and probably would prevent a discrimination lawsuit. The following types of qualifications are examples that are appropriate in jobs where knowledge or skill is a necessary requirement of the job.

Physical attributes necessary to complete the duties of the job, such as:

- The ability to lift a specific amount of weight
- Education
- Certifications
- Registrations
- Licensing
- Language skills
- Knowledge of equipment operation
- Previous experience
- Minimum age requirements (for serving alcohol or working certain hours)

## » ANALYZE THE SITUATION 7.1

CRUZ VILLARAIGOSA OWNS AND manages The Cruz Cantina, a lively bar and dance club that serves Cuban and other Caribbean-style cuisine. The club has a dance floor, has small tables, and serves outstanding food.

Cruz's clientele consists mainly of 20- to 40-year-old males, who frequent the Cantina for its good food as well as the extremely low-cut, Spanish-style blouses worn by the young female servers who bring the food and drinks to the tables. The Cruz Cantina advertises to women and families, as well as to young men, but the reputation of the facility is predicated upon the physical attractiveness of the women whom Cruz has hired to serve the guests, and the uniforms these servers wear.

Cruz employs women and men of all races and nationalities, but all food and drink servers are female. When Cruz elects not to hire a young man for a job as a server, Cruz is contacted by the young man's attorney. The attorney alleges the young man has been illegally denied a server's job at the Cantina because of his gender, and that sex cannot be a bona fide occupational qualification for a food and beverage server position.

### LEGALESE

#### **Bona fide occupational**

**qualification:** A job qualification, established in good faith and fairness, that is necessary to safely or adequately perform the job.

Cruz replies that her operation employs both men and women, but that one necessary job qualification for all servers is that they be “attractive to men,” and that the qualification of “attractiveness to men” is a legitimate one, given the importance of maintaining the successful image, atmosphere, and resulting business the Cantina enjoys. She maintains that the servers not only serve food and beverages but also play a role in advertising and marketing the unique features of the Cantina. Cruz also maintains that attractiveness is indeed an occupational characteristic that she can use to promote her facility, citing modeling agencies and TV casting agents as examples of employers who routinely use attractiveness as a means of selecting employees. Cruz states that her right to choose employees she feels will best benefit her business is unconditional, as long as she does not unfairly discriminate against a protected class of workers.

1. Do you think that the requirement that servers be “attractive to males” is a bona fide occupational requirement, and “necessary” for the continued successful operation of The Cruz Cantina?
2. If you were on a jury, would you allow Cruz to hire female servers exclusively, if she so desired? Why or why not?
3. What damages, if any, do you feel the male job applicant not selected for employment at the Cantina would be entitled to?

## Applicant Screening

When choosing potential applicants for employment, hospitality managers generally utilize some or all of the five major selection devices:

1. Applications
2. Interviews
3. Preemployment testing
4. Background checks
5. References

### *Applications*

The employment application is a document completed by the candidate for employment. It will generally list the name, address, work experience, and related information of the candidate. The requirements for a legitimate, legally sound application are many; however, in general, the questions should focus exclusively on job qualifications and nothing else. Most hospitality companies will have their employment application reviewed by an attorney who specializes in employment law. If, as a manager, you are responsible for developing your own application, it is a good idea to have the document reviewed by a legal specialist prior to its utilization.

It is important that each employment candidate for a given position be required to fill out an identical application, and that an application be on file for each candidate who is ultimately selected for the position. Figure 7.2 is a sample of a legally sound



**FOUR SEASONS**  
*Hotels and Resorts*  
 www.fourseasons.com

We are an Equal Opportunity Employer  
 Complying with all applicable Federal and State Laws

Please Type or Print

DATE TODAY \_\_\_\_\_

LAST NAME	FIRST	MIDDLE
STREET ADDRESS		
CITY	STATE	ZIP
PHONE-HOME	PHONE-WORK	
TO VERIFY PREVIOUS EMPLOYMENT, PLEASE INDICATE IF YOU HAVE WORKED UNDER A DIFFERENT NAME.		

POSITION(S) DESIRED	<input type="checkbox"/> FULL TIME	<input type="checkbox"/> PART TIME
	<input type="checkbox"/> ON-CALL/CASUAL	
SALARY DESIRED	DATE AVAILABLE FOR WORK	
SOCIAL SECURITY NUMBER		
ARE YOU PRESENTLY EMPLOYED? <input type="checkbox"/> YES <input type="checkbox"/> NO		
IF YES, MAY WE CONTACT YOUR CURRENT EMPLOYER? <input type="checkbox"/> YES <input type="checkbox"/> NO		
DO YOU HAVE A LEGAL RIGHT TO WORK IN THE U.S.? <input type="checkbox"/> YES <input type="checkbox"/> NO		
IF YOU HAVE WORKED FOR FOUR SEASONS HOTELS BEFORE, PLEASE STATE WHEN AND WHERE:		

**EMPLOYMENT RECORD**

List your previous experience beginning with your most recent position.

(Include military experience as a job.)

#1 EMPLOYER	
ADDRESS	PHONE
STARTING POSITION	STARTING SALARY
LAST POSITION	FINAL SALARY
DATES EMPLOYED From: To:	SUPERVISOR
DUTIES	
REASON FOR LEAVING	

**PLEASE FILL-IN COMPLETELY,  
 DO NOT USE "SEE RESUME"**

#2 EMPLOYER	
ADDRESS	PHONE
STARTING POSITION	STARTING SALARY
LAST POSITION	FINAL SALARY
DATES EMPLOYED From: To:	SUPERVISOR
DUTIES	
REASON FOR LEAVING	

#3 EMPLOYER	
ADDRESS	PHONE
STARTING POSITION	STARTING SALARY
LAST POSITION	FINAL SALARY
DATES EMPLOYED From: To:	SUPERVISOR
DUTIES	
REASON FOR LEAVING	

#4 EMPLOYER	
ADDRESS	PHONE
STARTING POSITION	STARTING SALARY
LAST POSITION	FINAL SALARY
DATES EMPLOYED From: To:	SUPERVISOR
DUTIES	
REASON FOR LEAVING	

**Figure 7.2** Employment application from the Four Seasons Hotel, Houston (Reprinted with permission).

**EDUCATION AND SKILLS (answer only if job related)**

		DIPLOMA / GED	
HIGH SCHOOL DEGREE OR GED EQUIVALENCY		<input type="checkbox"/> YES <input type="checkbox"/> NO	
COLLEGE	NAME	GRADUATED	MAJOR
		<input type="checkbox"/> YES <input type="checkbox"/> NO	
OTHER EDUCATION / TRAINING: (List any special skill(s) related to the job you are applying for)			

**AVAILABILITY**

ARE THERE ANY HOURS, SHIFTS, OR DAYS OF THE WEEK THAT YOU WILL NOT BE ABLE TO WORK?	YES	NO
IF YES, PLEASE STATE DAYS AND REASON:		
I AM WILLING AND ABLE TO WORK:		
<input type="checkbox"/> FULL TIME	<input type="checkbox"/> PART TIME	<input type="checkbox"/> TEMPORARY/SEASONAL
<input type="checkbox"/> ON-CALL/CASUAL	<input type="checkbox"/> DAYS	<input type="checkbox"/> EVENINGS <input type="checkbox"/> OVERNIGHT
<input type="checkbox"/> WEEKENDS	<input type="checkbox"/> HOLIDAYS	<input type="checkbox"/> OVERTIME

ARE YOU CAPABLE OF PERFORMING THE ESSENTIAL FUNCTIONS OF THE JOB YOU ARE APPLYING FOR WITH OR WITHOUT REASONABLE ACCOMODATION?
<input type="checkbox"/> YES <input type="checkbox"/> NO

HOW WERE YOU REFERRED TO FOUR SEASONS? PLEASE BE SPECIFIC.	<input type="checkbox"/> ADVERTISEMENT	<input type="checkbox"/> INTERNET	<input type="checkbox"/> ON YOUR OWN
NAME OF SCHOOL:	NAME OF COMPANY EMPLOYEE:	NAME OF AGENCY:	
OTHER:			

DO YOU HAVE RELATIVES OR ACQUAINTANCES WORKING IN THE HOTEL?	<input type="checkbox"/> YES <input type="checkbox"/> NO
IF YES, PLEASE LIST THEIR NAMES & RELATIONSHIP:	

IF UNDER AGE 18, INDICATE DATE OF BIRTH:	
IF APPLYING FOR A JOB INVOLVING ALCOHOLIC BEVERAGE SERVICE, ARE YOU AT LEAST AGE 21?	<input type="checkbox"/> YES <input type="checkbox"/> NO

HAVE YOU EVER BEEN CONVICTED OF A FELONY? <input type="checkbox"/> YES* <input type="checkbox"/> NO	DO YOU HAVE FELONY CHARGES PENDING AGAINST YOU? <input type="checkbox"/> YES <input type="checkbox"/> NO
IF YES, PLEASE GIVE DATES AND DETAILS:	
*CONVICTION OF A FELONY WILL NOT NECESSARILY DISQUALIFY YOU FROM EMPLOYMENT.	

**CERTIFICATION AND SIGNATURE – Please read carefully.**

I declare that my answers to the questions on this application are true, and I give Four Seasons Hotels the right to investigate all references and information given. I agree that any false statement or misrepresentation on this application will be cause for refusal to hire or immediate dismissal. I affirm that I have a genuine intent and for no other purposes in applying for a job with Four Seasons Hotels. I agree that my employment will be considered "at will" and may be terminated by this company at any time without liability for wages or salary except for such as may have been earned at the date of such termination unless or until superseded by specific written employment contract. If requested by management at any time, I agree to submit to a search of my person or of any locker that may be assigned to me and I hereby waive all claims for damages on account of such examination. I understand that Four Seasons Hotels is a Drug Free Workplace and has a policy against drug and alcohol abuse and reserves the right to screen applicants and test for cause. I acknowledge that if I need reasonable accommodation in either the application process or employment I should bring the request to the attention of the Human Resources department

I authorize you to make such legal investigations and inquiries of my personal employment, criminal history, driving record, and other job related matters as may be necessary in determining an employment decision. I hereby release employers, schools or persons from all liability in responding to inquiries in connection with my application.

I understand that an offer employment and my continued employment are contingent upon satisfactory proof of my authorization to work in the United States of America.

**CONFIDENTIAL MATERIAL AND THE PROPERTY OF  
FOUR SEASONS HOTELS LIMITED**

SIGN HERE: \_\_\_\_\_ DATE: \_\_\_\_\_  
(APPLICANT'S SIGNATURE) MONTH/DAY/YEAR

**Figure 7.2** (Continued)



employment application used by the Four Seasons Hotel, Houston. Note, specifically, how the questions are related to previous work history and job qualifications.

## ***Interviews***

From the employment applications or resumes submitted, some candidates will be selected for the interview process. It is important to realize that the types of questions that can be asked in the interview are highly restricted, because job interviews, if improperly performed, can subject an employer to legal liability. If a candidate is not hired based on his or her answer to—or refusal to answer—an inappropriate question, that candidate has the right to file a lawsuit.

The Equal Employment Opportunity Commission (EEOC) suggests that an employer consider the following questions in deciding whether to include a particular question on an employment application or in a job interview:

- Does this question tend to screen out minorities or females?
- Is the answer needed in order to judge this individual's competence for performance of the job?
- Are there alternative, nondiscriminatory ways to judge the person's qualifications?

As a manager, you must be very careful in your selection of questions to ask in an interview. In all cases, it is important to remember that the job itself dictates what is an allowable question. Questions should be written down and followed. In addition, supervisors, coworkers, and others who may participate in the interview process should be trained to avoid questions that could increase the liability of the facility.

Generally, age is considered to be irrelevant in most hiring decisions; therefore, date-of-birth questions are improper. Age is a sensitive preemployment question, because the Age Discrimination in Employment Act protects employees 40 years old and older. It is permissible to ask an applicant to state his or her age if he or she is younger than 18 years old because that age group is permitted to work only a limited number of hours each week. It is also important when hiring bartenders and other servers of alcohol, who must be above a state's minimum age for serving alcohol.

Race, religion, and national origin questions are also inappropriate, as is the practice of requiring that photographs of the candidate be submitted prior to or after an interview.

Questions about physical traits such as height and weight requirements have been found to violate the law because they eliminated disproportionate numbers of female, Asian-American, and Spanish-surnamed applicants.

If a job does not require a particular level of education, it is improper to ask questions about an applicant's educational background. Applicants can be asked about their education and credentials if these are indeed bona fide occupational qualifications. Certainly, it is allowable to ask a potential hotel controller if he or she has a degree in accounting, and which school granted that degree. Asking a potential table busser for the same information would be inappropriate.

It is permissible to ask an applicant if he or she uses drugs or smokes. It is also allowable to ask a candidate if he or she is willing to submit to a voluntary drug test as a condition of employment.

Questions concerning whether an applicant owns a home potentially discriminate against those individuals who do not own their own homes. Questions concerning the type of discharge received by an ex-military applicant are improper, because a high proportion of other than honorable discharges are given to minorities.

Safe questions can be asked about a candidate's current employment, former employment, and job references. In most cases, questions asked on both the application and in the interview should focus on the applicant's job skills, and nothing else. Figure 7.3 contains some guidelines, developed by the EEOC, for asking appropriate interview questions.

Subject	<i>Inappropriate Questions (May Not Ask or Require)</i>	<i>Appropriate Questions (May Ask or Require)</i>
Gender or marital status	<ul style="list-style-type: none"> <li>• Gender (on application form)</li> <li>• Mr., Miss, Mrs., Ms.?</li> <li>• Married, divorced, single, separated?</li> <li>• Number and ages of children</li> <li>• Pregnancy, actual or intended</li> <li>• Maiden name, former name</li> </ul>	<ul style="list-style-type: none"> <li>• In checking your work record, do we need another name for identification?</li> </ul>
Race	<ul style="list-style-type: none"> <li>• Race?</li> <li>• Color of skin, eyes, hair, etc.</li> <li>• Request for photograph</li> </ul>	
National Origin	<ul style="list-style-type: none"> <li>• Questions about place of birth, ancestry, mother tongue, national origin of parents or spouse.</li> <li>• What is your native language?</li> <li>• How did you learn to speak [language] fluently?</li> </ul>	<ul style="list-style-type: none"> <li>• If job-related, what foreign languages do you speak?</li> </ul>
Citizenship, immigration status	<ul style="list-style-type: none"> <li>• Of what country are you a citizen?</li> <li>• Are you a native-born U.S. citizen?</li> <li>• Questions about naturalization of applicant, spouse, or parents.</li> </ul>	<ul style="list-style-type: none"> <li>• If selected are you able to start work with us on a specific date? If not, when would you be able to start?</li> <li>• If hired, can you show proof that you are eligible to work in the United States?</li> </ul>
Religion	<ul style="list-style-type: none"> <li>• Religious affiliation or preference</li> <li>• Religious holidays observed</li> <li>• Membership in religious organizations</li> </ul>	<ul style="list-style-type: none"> <li>• Can you observe regularly required days and hours of work?</li> <li>• Are there any days or hours of the week that you are not able to work?</li> <li>• Are there any holidays that you are not able to work?</li> </ul>
Age	<ul style="list-style-type: none"> <li>• How old are you?</li> <li>• Date of birth</li> </ul>	<ul style="list-style-type: none"> <li>• Are you 21 or older? (for positions serving alcohol)</li> </ul>
Disability	<ul style="list-style-type: none"> <li>• Do you have any disabilities?</li> <li>• Have you ever been treated for (certain) diseases?</li> <li>• Are you healthy?</li> </ul>	
Questions that may discriminate against minorities	<ul style="list-style-type: none"> <li>• Have you ever been arrested?</li> <li>• List all clubs, societies, and lodges to which you belong.</li> <li>• Do you own a car? (unless required for the job)</li> <li>• Type of military discharge.</li> <li>• Questions regarding credit ratings, financial status, wage garnishment, home ownership.</li> </ul>	<ul style="list-style-type: none"> <li>• Have you ever been convicted of a crime? If yes, give details (If crime is job-related, as embezzlement is to handling money, you may refuse to hire).</li> <li>• List membership in professional organizations relevant to job performance.</li> <li>• Military service: dates, branch of service, education, and experience (if job-related).</li> </ul>

**Figure 7.3** Guidelines for conducting a job interview.

Source: Jack E. Miller, John R. Walker, Karen Eich Drummond, *Supervision in the Hospitality Industry*, Fifth Edition. Hoboken, NJ: John Wiley & Sons, Inc., 2007.

## ***Preemployment Testing***

Preemployment testing is a common way to improve the employee screening process. Test results can be used, for example, to measure the relative strength of two candidates.

In the hospitality industry, preemployment testing will generally fall into one of the following categories:

- Skills tests
- Psychological tests
- Drug screening tests

Skills tests were among the first tools used by managers to screen applicants in the employment process. In the hospitality industry, skills tests can include activities such as typing tests for office workers, computer application tests for those who use word processing or spreadsheet tools, or food production tasks to test culinary artists.

Psychological testing can include personality tests, tests designed to predict performance, or tests of mental ability. For both skills tests and psychological tests, the important rule to remember is this:

If the test does not have documented validity and reliability, the results of the tests should not be used for hiring decisions.

Preemployment drug testing is allowable in most states, and can be a very effective tool for reducing insurance rates and potential worker liability issues. A drug-free environment tends to attract better-quality employment candidates, with the resulting impact of a higher-quality workforce. There are, however, strict guidelines in some states as to when and how people can be tested. A document with language similar to that found in Figure 7.4 should be completed by each candidate prior to drug testing, and the signed document should be kept on file with the employee's application form.

If preemployment drug testing is to be used, care must be taken to ensure the accuracy of the testing. In some cases, applicants whose erroneous test results have cost them a job have successfully sued the employer. The laws surrounding mandatory drug testing are complex. If you elect to implement either a preemployment or postemployment drug-testing program, it is best to first seek advice from an attorney who specializes in labor employment law in your state.

### **Employee Consent Form for Drug Testing**

I agree, fully and voluntarily to submit to a urinalysis or blood test conducted by \_\_\_\_\_ for a drug screen as a condition of my consideration for employment. I understand that failing to meet the standards established for this test may result in the disqualification of further consideration of my application. Lastly, I understand that these results will be used only as the basis for an employment decision and will not be shared with any individual or organization outside the company.

The undersigned represents that he or she has read this information in its entirety and understands it.

Employee Signature \_\_\_\_\_ Date \_\_\_\_\_

Employer Witness Signature \_\_\_\_\_ Date \_\_\_\_\_

**Figure 7.4** Employee consent form for drug testing.

*Adapted from Foodservice Safety and Security Managers Handbook, by the National Restaurant Association Educational Foundation. Reprinted with permission.*

## Background Checks

Increasingly, hospitality employers are utilizing background checks prior to hiring workers in selected positions. It has been estimated that as many as 30 percent of all resumes and employment applications include some level of falsification. Because this is true, employers are spending more time and financial resources to validate information supplied by a potential employee. Common verification points include the following:

- Name
- Social Security number
- Address history
- Education/training
- Criminal background
- Credit reports

### LEGALESE

**Negligent hiring:** Failure on the part of an employer to exercise reasonable care in the selection of employees.

Background checks, like preemployment testing, can leave an employer subject to litigation if the information secured during a check is false or is used in a way that violates employment law. In addition, if the information is improperly disclosed to third parties, it could violate the employee's right to privacy. Not conducting background checks on some positions can, however, subject the employer to potential litigation under the doctrine of *negligent hiring*.

Consider the case of Holly Rosecrans. Ms. Rosecrans is the assistant general manager of a country club in Florida. One of her responsibilities is the selection and training of pool lifeguards, which are required in her facility by local statute. Each lifeguard must be certified in cardiopulmonary resuscitation (CPR). Ms. Rosecrans interviews a candidate who lists the successful completion of a CPR course as part of his educational background. If Ms. Rosecrans does not verify the accuracy of the candidate's statement, and if a death results because the lifeguard did not have CPR training, the club might well be held liable for the death of the swimmer.

Using background checks as a screening tool does involve some risk, as well as some responsibility. Employers should search only for information that has a direct bearing on the position a candidate is applying for. In addition, if a candidate is denied employment on the basis of information found in a background check, the employer should provide a candidate with a copy of that report. Sometimes, candidates can help verify or explain the content of their own background checks. Reporting agencies can make mistakes, and if you rely on obviously false information to make a hiring decision, it may put your organization at risk.

In all cases, a candidate for employment should be required to sign a consent form authorizing an employer to conduct a background check. Figure 7.5 is a sample consent form that could be used to document this authorization.

## References

In the past, employment references were a very popular tool for managers to use in the screening process. But in today's litigious society they are much more difficult to obtain. Although many organizations still seek information from past employers about an employee's previous work performance, few sophisticated companies will divulge such information. It is important to note that some employers have been held liable for inaccurate comments that have been made about past employees. In addition, there are companies that specialize in providing job searchers with a confidential, comprehensive verification of employment references from former employers. Thus, employers are becoming more cautious about supplying information on employees who have left their organization.

To help minimize the risk of litigation related to reference checks, it is best to secure the applicant's permission in writing before contacting an ex-employer. Employers must be extremely cautious in both giving and receiving reference

### Employee Consent Form for Background Checks and Application Verification

I agree, fully and voluntarily to checks related to:

1. (e.g., Criminal History)
2. (e.g., School Attendance Record)

as well as checks on information I have supplied in my employment application.

I understand that failing to meet the standards established for these checks as well as falsification of information on my application may result in the disqualification of further consideration of my application. Lastly, I understand that the results of these background checks and the accuracy of my application will be used only as the basis for an employment decision and will not be shared with any individual or organization outside the company.

The undersigned represents that he or she has read this information in its entirety and understands it.

Employee Signature \_\_\_\_\_ Date \_\_\_\_\_

Employer Signature \_\_\_\_\_ Date \_\_\_\_\_

**Figure 7.5** Employee consent form for background checks.

*Adapted from Foodservice Safety and Security Managers Handbook by the National Restaurant Association Educational Foundation. Reprinted with permission.*

information. Employers are usually protected if they give a truthful reference; however, that does not mean these employers will be spared the expense of defending a *defamation* case brought by an ex-employee.

If, for example, an employer giving a reference states that an ex-employee was terminated because he or she “didn’t get along” with his or her coworkers, the employer might have to be able to prove the truthfulness of the statement, as well as show proof that all of the blame for the difficulties were the responsibility of the ex-employee.

To minimize the risk of a lawsuit, you should never reply to a request for information about one of your ex-employees without a copy of that employee’s signed release authorizing the reference check. How much you choose to disclose about an ex-employee is your decision; however, your answers should be honest and defensible. Also, it is best never to disclose personal information such as marital difficulties, financial problems, or serious illness, because you could be sued for invasion of privacy. Many employers today give only the following information about past employees:

- Employer’s name
- Ex-employer’s name
- Date(s) of employment
- Job title
- Name and title of person supplying the information

If a prospective employee provides letters of reference, always call the authors of reference letters to ensure that they did in fact write them. When possible, it is best to put any request for reference information in writing, and ask that the response be in written form. If a verbal response is all you can get, document the conversation; write down as much of the dialogue as possible, including the name of the party you spoke to and the date and time the contact occurred.

Even with authorization, many employers are reluctant to give out information about former employees. If this happens, simply ask if the company would rehire that worker. The response to that question, combined with the information received from other employers, should help to determine the accuracy of the information given by the applicant.

#### LEGALESE

**Defamation:** False statements that cause someone to be held in contempt, lowered in the estimation of the community, or to lose employment status or earnings or otherwise suffer a damaged reputation.

The selection of the right employee for the right job is a specialized area of human resources, and the hospitality manager will often be able to rely on a human resources department or personnel director for assistance when undertaking this important task. For the independent entrepreneur, it is critical that the entire employee selection process be reviewed by an expert in employment law and continually monitored for compliance with established procedures.

## Wording of Classified Advertisements

One final aspect of employee selection that you must be aware of involves the wording of classified ads that you might place in newspapers or journals when announcing a job opening. As with job descriptions and qualifications, it is important that the terms you use in a classified ad do not exclude or discriminate against individuals. Federal law prohibits the use of words or phrases that might prevent certain types of people from applying for an advertised position. Phrases to avoid include references to age (“ages 20 to 30”), sex (“men” or “women”), national origin, and religion. There are a limited number of cases where a bona fide job qualification might limit the type of person who could apply, and that can be mentioned. In general, however, employers should focus their classified ads on a description of the job and any applicable educational, licensing, or background requirements needed.

## 7.2 DISCRIMINATION IN THE SELECTION PROCESS

Although employers are free to hire employees as they see fit, they are not free to unlawfully discriminate against people in their employment selection. Employment discrimination laws have been established to protect certain classes of people from unfair or exclusionary hiring practices.

The Fifth and Fourteenth Amendments of the U.S. Constitution limit the power of the federal and state governments to discriminate. The Fifth Amendment has an explicit requirement that the federal government not deprive any individual of “life, liberty, or property,” without the due process of the law. Though discrimination by employers in the private sector is not directly addressed in the Constitution, it has become subject to a growing body of federal and state laws, which were passed in recognition of the personal freedoms guaranteed by the Constitution. Although many antidiscrimination statutes affect employee selection, the most significant are:

- Civil Rights Act of 1964; Title VII
- Americans with Disabilities Act; Title I
- Age Discrimination in Employment Act

### Civil Rights Act of 1964, Title VII

Title VII of the Civil Rights Act of 1964, and its resulting amendments, applies to employers with 15 or more employees who are engaged in *interstate commerce*. Figure 7.6 presents the original language of the bill that relates to employee selection.

The act prohibits discrimination based on race, color, religion, sex, or national origin. Sex includes pregnancy, childbirth, or related medical conditions. The act makes it illegal for employers to discriminate in hiring, and in setting the terms and conditions of employment. Labor organizations are also prohibited from basing membership or union classifications on race, color, religion, sex, or national origin. The law also prohibits employers from retaliating against employees or candidates who file charges of

#### LEGALESE

##### Interstate commerce:

Commercial trading or the transportation of persons or property between or among states.

## Civil Rights Act of 1964

### UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. [Section 703]

- (a) It shall be an unlawful employment practice for an employer
- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
  - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
- (b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.
- (c) It shall be an unlawful employment practice for a labor organization
- (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
  - (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
  - (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

**Figure 7.6** Excerpt from the Civil Rights Act of 1964.

discrimination against them, who refuse to comply with a discriminatory policy, or who participate in an investigation of discrimination charges against the employer.

One outcome of the Civil Rights Act was the formation of the Equal Employment Opportunity Commission, which oversees and enforces federal laws regulating employer/employee relationships. The EEOC investigates complaints by employees who think they have been discriminated against. Businesses that are found to have discriminated can be ordered to compensate the employee(s) for damages such as lost wages, attorney fees, and punitive damages.

In later amendments, the Civil Rights Act was expanded to include *affirmative action* requirements. Affirmative action constitutes a good-faith effort by employees to address past and/or present discrimination through a variety of specific, results-oriented, procedures. This is a step beyond equal opportunity laws like Title VII, which simply ban discriminatory practices. State and local governments, agencies of the federal government, and federal contractors and subcontractors with contracts of \$50,000 or more—including colleges and universities—are required by federal law to implement affirmative action programs.

Employers have used a variety of techniques for implementing affirmative action plans. These include:

- Active recruiting to expand the pool of candidates for job openings.
- Revising the selection tools and criteria to ensure their relevance to job performance.
- Establishing goals and timetables for hiring underrepresented groups.

#### LEGALESE

##### **Affirmative action:**

A federally mandated requirement that employers who meet certain criteria must actively seek to fairly employ recognized classes of workers. (Some state and local legislatures have also enacted affirmative action requirements.)

Originally, affirmative action activities were intended to correct discrimination in the hiring and promotion of African Americans and other people of color. Now, affirmative action protections are being applied to women, and some government jurisdictions have extended affirmative action provisions to older people, the disabled, and Vietnam-era veterans. The goal of affirmative action is to broaden the pool of candidates and encourage hiring based on sound, job-related, criteria. The result is a workforce with greater diversity and potential for all.

In addition to the Civil Rights Act, many states also have their own civil rights laws, which prohibit discrimination. Sometimes, the state laws are more inclusive than the Civil Rights Act, in that they expand protection to workers or employment candidates in categories not covered under the federal Civil Rights Act, such as age, marital status, sexual orientation, and certain types of physical or mental disabilities. State civil rights laws may also have stricter penalties for violations, including fines and/or jail time. As a hospitality manager, you should know the provisions of your state's civil rights law.

## » ANALYZE THE SITUATION 7.2

JETTA WONG IS THE owner and manager of the Golden Dragon oriental restaurant. The restaurant is large, inexpensive, and enjoys an excellent reputation. Business is good, and the restaurant serves a diverse clientele.

Ms. Wong places a classified ad for the table busser in the employment section of her local newspaper. The response is good, and Ms. Wong narrows the field of potential candidates to two. One is the same ethnic background as Ms. Wong and the rest of the staff. The second candidate is Danielle Hidalgo, the daughter of a Mexican citizen and an American citizen. Ms. Hidalgo was born and raised in the United States.

While both candidates are pleasant, Ms. Wong offers the position to the candidate who matches the background of the restaurant and Ms. Wong. Her rationale is that, since both candidates are equal in ability, she has a right to select the candidate she feels will best suit her business. Because it is an oriental restaurant, Ms. Wong feels diners will expect to see oriental servers and bussers. No one was discriminated against, she maintains, because Ms. Hidalgo was not denied a job on the basis of race, but rather on the basis of what was best for business. Ms. Wong simply selected her preference from among two equal candidates. Ms. Wong relates her decision to Ms. Hidalgo.

Ms. Hidalgo maintains that she was not selected because of her Hispanic ethnic background. She threatens to file a charge with the EEOC unless she is offered employment.

1. Do you think Ms. Hidalgo was denied the position because of her ethnicity?
2. In the situation described here, does Ms. Wong have the right to consider race as a bona fide occupational qualification?
3. How should Ms. Wong advertise jobs in the future to avoid charges of discrimination?



## Americans with Disabilities Act

On July 26, 1990, the Americans with Disabilities Act (ADA) was enacted. The ADA prohibits discrimination against people with disabilities in the areas of public accommodations, transportation, telecommunications, and employment. The ADA is a five-part piece of legislation; Title I focuses primarily on employment.

There are three different groups of individuals who are protected under the ADA:

1. An individual with a physical or mental impairment that substantially limits a major life activity. Some examples of what constitutes a “major life activity” under the act are: seeing, hearing, talking, walking, reading, learning, breathing, taking care of oneself, lifting, sitting, and standing.
2. A person who has a record of a disability.
3. A person who is “regarded as” having a disability.

Employers cannot reduce an employee’s pay simply because he or she is disabled, nor can they refuse to hire a disabled candidate if, with reasonable accommodation, it is possible for the candidate to perform the job. Employers are also required to post notices of the Americans with Disabilities Act and its provisions in a location where they can be seen by all employees.

Even with the passage of the ADA, an employer does not have to hire a disabled applicant who is not qualified to do a job. The employer can still select the most qualified candidate, provided that no applicant was eliminated from consideration because of his or her qualified disability.

Although the law in this area is changing rapidly, the following conditions, among others, currently meet the criteria for a qualified disability, and are protected under the ADA:

- AIDS
- Cancer
- Cerebral palsy
- Tuberculosis
- Heart disease
- Hearing or visual impairments
- Alcoholism
- Epilepsy
- Paralysis

Conditions that are not currently covered under ADA include:

- Kleptomania
- Disorders caused by the use of illegal drugs
- Compulsive gambling
- Sexual behavior disorders
- Nonchronic conditions of short duration such as a sprain, broken limb, or the flu

The ADA has changed the way employers select employees. Questions on job applications and during interviews that cannot be asked include the following:

- Have you ever been hospitalized?
- Are you taking prescription drugs?

- Have you ever been treated for drug addiction or alcoholism?
- Have you ever filed a workers' compensation insurance claim?
- Do you have any physical defects, disabilities, or impairments that may affect your performance in the position for which you are applying/interviewing?

In situations where a disabled person could perform the duties of a particular job, but some aspect of the job or work facility would prevent the applicant from doing so, the employer may be required to make a reasonable accommodation for the worker.

An employer has provided reasonable accommodation when it has made existing facilities readily accessible to individuals with mobility impairments or other disabilities, and restructured a job in the most accommodating manner possible to allow a disabled individual to perform it. The employer is not obligated to provide a reasonable accommodation where such accommodation would result in undue hardship to the employer. Generally speaking, an undue hardship occurs when the expense of accommodating the worker is excessive or would disrupt the natural work environment. The law in this area is vague; thus, any employer who maintains that accommodating a worker with a disability would impose an undue hardship should be prepared to document such an assertion. After investigation, the EEOC issues a "right to sue" letter to an employee if it concludes that an employer is in violation of the ADA.

## LEGALLY MANAGING AT WORK:

### Accommodating Disabled Employees

To reduce the risk of an ADA noncompliance charge related to reasonable accommodation, follow these guidelines:

1. Can the applicant perform the essential functions of the job with or without reasonable accommodation? (You can ask the applicant this question.)

If no, then he or she is not qualified and is therefore not protected by the ADA. If yes, go to question 2.

2. Is the necessary accommodation reasonable? To answer this question, ask yourself the following: Will this accommodation create an undue financial or administrative hardship on the business?

If yes, you do not have to provide unreasonable accommodations. If no, go to question 3.

3. Will this accommodation or the hiring of the person with the disability create a direct threat to the health or safety of other employees or guests in the workplace?

If yes, you are not required to make the accommodation and have fulfilled your obligation under the ADA.

## Search the Web 7.1

Go to [www.eeoc.gov](http://www.eeoc.gov).

1. Under About EEOC, select: Laws, Regulations, Guidance, & MOUs.
2. Select: EEOC Policy Guidance.
3. Select: Enforcement Guidances and Related Documents.
4. Select: Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act.
5. From the document displayed, determine:
  - a. What must an employer do after receiving a request for a reasonable accommodation?
  - b. Is the restructuring of a job to meet the needs of a disabled person considered a reasonable accommodation?

For additional information on job accommodation under the ADA, log on to the Job Accommodation Network for the ADA at [janweb.icdi.wvu.edu](http://janweb.icdi.wvu.edu).

One ADA provision that foodservice employers should be aware of concerns employees and job applicants who have infectious and communicable diseases. Each year, the U.S. Department of Health and Human Services publishes a list of communicable diseases that, if passed on through the handling of food, could put a foodservice operation at risk. Employers have the right not to assign to or hire an individual who has one of the identified diseases for a position that involves the handling of food, but only if there is no reasonable accommodation that could be made to eliminate such a risk.

## Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment—including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

The ADEA applies to employers with 20 or more employees, as well as to labor unions and governmental agencies. The ADEA makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. As a narrow exception to that general rule, a job notice or advertisement may specify an age limit in the rare circumstances where age is shown to be a bona fide occupational qualification (BFOQ) reasonably necessary to the essence of the business, or a minimum age qualification to legally perform the job.

## 7.3 VERIFICATION OF ELIGIBILITY TO WORK

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Even after an employer has legally selected an applicant for employment, the law requires the employer to take at least one more action before an employee can begin work. The employer must determine that the worker is, in fact, legally entitled to hold the job. Verification of employment status takes two major forms. The first is verification of eligibility to work, the second is verification of compliance with the child labor laws.

### Immigration Reform and Control Act

The Immigration Reform and Control Act (IRCA) was passed in 1986. The act prohibits employers from knowingly hiring illegal persons for work in the United States, either because the individual is in the country illegally or because his or her immigration and residency status does not allow employment. The law also applies to employers who, after the date of hire, determine that an employee is not legally authorized to work but continue to employ that individual.

Under provisions of the IRCA, employers are required to verify that all employees hired after November 6, 1986, are legally authorized to work in the United States. Unlike many other federal laws, IRCA applies to organizations of any size and to both full- and part-time employees. The act requires that when an applicant is hired, a Form I-9 must be completed (see Figure 7.7).

Form I-9 is often misunderstood. Its purpose is to verify both an employee's identity and his or her eligibility to work; thus, it serves a dual role. The Department of Homeland Security via USCIS (United States Citizenship and Immigration Services) imposes severe penalties on employers who do not have properly completed I-9s for all employees. USCIS has been very meticulous in its audits, issuing large fines for even minor errors such as incorrect dates.

Every employee hired is required to complete an I-9 when beginning work; specifically, the employee is required to fill out Section 1 of the form. The employer is then responsible for reviewing and ensuring that Section 1 is fully and properly completed. At that time, the employer will complete Section 2 of the I-9 form.

Figure 7.8 details the documents that can be used in completing an I-9. It is important to note that the documents used to verify eligibility and identity must be originals. To ensure compliance, employers will often remind individuals to bring necessary identification documents with them on their first day of employment. If an employee cannot produce the appropriate documents within 21 days of being hired, the employer is obligated by law to terminate that individual.

The employer's part of the Form I-9 must be completed within three business days, or at the time of hire if the employment is for less than three days. Each completed I-9 should be kept for three years after the date of employment, or one year after the employee's termination, whichever is longer. Keep all I-9s readily available, as they must be presented to the USCIS within 72 hours upon request.

An employer's good-faith effort in complying with the verification and record-keeping requirements will ensure its defense if any charges surface that the organization knowingly and willingly hired a person who was not legally authorized to work. It is prudent practice to follow the letter of the law in this area, as fines as high as \$10,000 per illegal employee can be levied against the business by the government. To ensure compliance, more and more hospitality employers are using the e-verify system found at: [www.uscis.gov](http://www.uscis.gov).

**INSTRUCTIONS**

PLEASE READ ALL INSTRUCTIONS CAREFULLY BEFORE COMPLETING THIS FORM.

**Anti-Discrimination Notice.** It is illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work eligible individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

**Section 1 - Employee.** All employees, citizens and noncitizens, hired after November 6, 1986, must complete Section 1 of this form at the time of hire, which is the actual beginning of employment. **The employer is responsible for ensuring that Section 1 is timely and properly completed.**

**Preparer/Translator Certification.** The Preparer/Translator Certification must be completed if Section 1 is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete Section 1 on his/her own. However, the employee must still sign Section 1 personally.

**Section 2 - Employer.** For the purpose of completing this form, the term "employer" includes those recruiters and referrers for a fee who are agricultural associations, agricultural employers or farm labor contractors.

Employers must complete Section 2 by examining evidence of identity and employment eligibility within three (3) business days of the date employment begins. If employees are authorized to work, but are unable to present the required document(s) within three business days, they must present a receipt for the application of the document(s) within three business days and the actual document(s) within ninety (90) days. However, if employers hire individuals for a duration of less than three business days, Section 2 must be completed at the time employment begins. **Employers must record: 1) document title; 2) issuing authority; 3) document number, 4) expiration date, if any; and 5) the date employment begins.** Employers must sign and date the certification. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. These photocopies may only be used for the verification process and must be retained with the I-9. **However, employers are still responsible for completing the I-9.**

**Section 3 - Updating and Reverification.** Employers must complete Section 3 when updating and/or reverifying the I-9. Employers must reverify employment eligibility of their employees on or before the expiration date recorded in Section 1. Employers **CANNOT** specify which document(s) they will accept from an employee.

- If an employee's name has changed at the time this form is being updated/reverified, complete Block A.
- If an employee is rehired within three (3) years of the date this form was originally completed and the employee is still eligible to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.
- If an employee is rehired within three (3) years of the date this form was originally completed and the employee's work authorization has expired or if a current employee's work authorization is about to expire (reverification), complete Block B and:

- examine any document that reflects that the employee is authorized to work in the U.S. (see List A or C),
- record the document title, document number and expiration date (if any) in Block C, and
- complete the signature block.

**Photocopying and Retaining Form I-9.** A blank I-9 may be reproduced, provided both sides are copied. The Instructions must be available to all employees completing this form. Employers must retain completed I-9s for three (3) years after the date of hire or one (1) year after the date employment ends, whichever is later.

**For more detailed information, you may refer to the Department of Homeland Security (DHS) Handbook for Employers, (Form M-274). You may obtain the handbook at your local U.S. Citizenship and Immigration Services (USCIS) office.**

**Privacy Act Notice.** The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by officials of the U.S. Immigration and Customs Enforcement, Department of Labor and Office of Special Counsel for Immigration Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.

**Reporting Burden.** We try to create forms and instructions that are accurate, can be easily understood and which impose the least possible burden on you to provide us with information. Often this is difficult because some immigration laws are very complex. Accordingly, the reporting burden for this collection of information is computed as follows: **1) learning about this form, 5 minutes; 2) completing the form, 5 minutes; and 3) assembling and filing (recordkeeping) the form, 5 minutes, for an average of 15 minutes per response.** If you have comments regarding the accuracy of this burden estimate, or suggestions for making this form simpler, you can write to U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., Washington, DC 20529. OMB No. 1615-0047.

**NOTE:** This is the 1991 edition of the Form I-9 that has been rebranded with a current printing date to reflect the recent transition from the INS to DHS and its components.

**EMPLOYERS MUST RETAIN COMPLETED FORM I-9  
PLEASE DO NOT MAIL COMPLETED FORM I-9 TO ICE OR USCIS**

Figure 7.7 Form I-9.

Department of Homeland Security  
U.S. Citizenship and Immigration Services

## Employment Eligibility Verification

**Please read instructions carefully before completing this form. The instructions must be available during completion of this form. ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.**

**Section 1. Employee Information and Verification.** To be completed and signed by employee at the time employment begins.

Print Name: Last	First	Middle Initial	Maiden Name
Address (Street Name and Number)		Apt. #	Date of Birth (month/day/year)
City	State	Zip Code	Social Security #
<b>I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.</b>		I attest, under penalty of perjury, that I am (check one of the following): <input type="checkbox"/> A citizen or national of the United States <input type="checkbox"/> A Lawful Permanent Resident (Alien #) A _____ <input type="checkbox"/> An alien authorized to work until _____ (Alien # or Admission #) _____	
		Employee's Signature _____ Date (month/day/year) _____	

**Preparer and/or Translator Certification.** (To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Preparer's/Translator's Signature _____	Print Name _____
Address (Street Name and Number, City, State, Zip Code) _____	
Date (month/day/year) _____	

**Section 2. Employer Review and Verification.** To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number and expiration date, if any, of the document(s).

List A	OR	List B	AND	List C
Document title: _____		_____		_____
Issuing authority: _____		_____		_____
Document #: _____		_____		_____
Expiration Date (if any): _____		_____		_____
Document #: _____		_____		_____
Expiration Date (if any): _____		_____		_____

**CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) \_\_\_\_\_ and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.)**

Signature of Employer or Authorized Representative _____	Print Name _____	Title _____
Business or Organization Name _____	Address (Street Name and Number, City, State, Zip Code) _____	
		Date (month/day/year) _____

**Section 3. Updating and Reverification.** To be completed and signed by employer.

A. New Name (if applicable) _____	B. Date of Rehire (month/day/year) (if applicable) _____
C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility. Document Title: _____ Document #: _____ Expiration Date (if any): _____	

**I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.**

Signature of Employer or Authorized Representative _____	Date (month/day/year) _____
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NOTE: This is the 1991 edition of the Form I-9 that has been rebranded with a current printing date to reflect the recent transition from the INS to DHS and its components.

**Figure 7.7** (Continued)

**LISTS OF ACCEPTABLE DOCUMENTS**

LIST A	OR	LIST B	AND	LIST C
<p><b>Documents that Establish Both Identity and Employment Eligibility</b></p> <ol style="list-style-type: none"> <li>1. U.S. Passport (unexpired or expired)</li> <li>2. Certificate of U.S. Citizenship (<i>Form N-560 or N-561</i>)</li> <li>3. Certificate of Naturalization (<i>Form N-550 or N-570</i>)</li> <li>4. Unexpired foreign passport, with <i>I-551 stamp</i> or attached <i>Form I-94</i> indicating unexpired employment authorization</li> <li>5. Permanent Resident Card or Alien Registration Receipt Card with photograph (<i>Form I-151 or I-551</i>)</li> <li>6. Unexpired Temporary Resident Card (<i>Form I-688</i>)</li> <li>7. Unexpired Employment Authorization Card (<i>Form I-688A</i>)</li> <li>8. Unexpired Reentry Permit (<i>Form I-327</i>)</li> <li>9. Unexpired Refugee Travel Document (<i>Form 1-571</i>)</li> <li>10. Unexpired Employment Authorization Document issued by DHS that contains a photograph (<i>Form I-688B</i>)</li> </ol>	OR	<p><b>Documents that Establish Identity</b></p> <ol style="list-style-type: none"> <li>1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address</li> <li>2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address</li> <li>3. School ID card with a photograph</li> <li>4. Voter's registration card</li> <li>5. U.S. Military card or draft record</li> <li>6. Military dependent's ID card</li> <li>7. U.S. Coast Guard Merchant Mariner Card</li> <li>8. Native American tribal document</li> <li>9. Driver's license issued by a Canadian government authority</li> </ol> <p><b>For persons under age 18 who are unable to present a document listed above:</b></p> <ol style="list-style-type: none"> <li>10. School record or report card</li> <li>11. Clinic, doctor or hospital record</li> <li>12. Day-care or nursery school record</li> </ol>	AND	<p><b>Documents that Establish Employment Eligibility</b></p> <ol style="list-style-type: none"> <li>1. U.S. social security card issued by the Social Security Administration (<i>other than a card stating it is not valid for employment</i>)</li> <li>2. Certification of Birth Abroad issued by the Department of State (<i>Form FS-545 or Form DS-1350</i>)</li> <li>3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal</li> <li>4. Native American tribal document</li> <li>5. U.S. Citizen ID Card (<i>Form I-197</i>)</li> <li>6. ID Card for use of Resident Citizen in the United States (<i>Form I-179</i>)</li> <li>7. Unexpired employment authorization document issued by DHS (<i>other than those listed under List A</i>)</li> </ol>

**Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)**

**Figure 7.7** (Continued)

**DOCUMENTS THAT ESTABLISH EMPLOYMENT ELIGIBILITY**

Social Security card

An original or certified copy of a birth certificate issued by a state, county, or municipal authority

Unexpired INS employment authorization

Unexpired reentry permit (INS Form I-327)

Unexpired Refugee Travel Document (INS Form I-571)

Certificate of Birth issued by the Department of State (Form FS-545)

Certificate of Birth Abroad issued by the Department of State (Form DS-1350)

United States Citizen identification (INS Form I-197)

Native American tribal document

Identification used by Resident Citizen in the United States

**DOCUMENTS THAT ESTABLISH IDENTITY ONLY**

State driver's license or identification card containing a photograph

School or university identification card with photograph

Voter's registration card

United States military identification card or draft record

Identification card issued by federal, state, or local governmental agencies

Military dependent's identification card

Native American tribal documents

United States Coast Guard Merchant Mariner card

Driver's license issued by a Canadian government authority

**DOCUMENTS THAT ESTABLISH IDENTITY AND EMPLOYMENT ELIGIBILITY**

Current United States passport

Alien Registration Receipt Card (INS Form I-151.)

Resident Alien Card (INS Form I-551), which must contain a photograph of the bearer

Temporary Resident Card (INS Form I-688)

Employment Authorization Card (INS Form I-688A)

**Figure 7.8** Form I-9 qualifying documents.

## Fair Labor Standards Act of 1938

The Fair Labor Standards Act of 1938 (FLSA) protects young workers from employment that might interfere with their educational opportunities or be detrimental to their health or well-being. It covers all workers who are engaged in or producing goods for interstate commerce or who are employed in certain enterprises. Essentially, the law establishes that youths 18 years and older may perform any job, hazardous or not, for unlimited hours, subject to minimum wage and overtime requirements.

Children aged 16 and 17 may work at any time for unlimited hours in all jobs not declared hazardous by the U.S. Department of Labor. Hazardous occupations include working with explosives and radioactive materials; operating certain power-driven woodworking, metalworking, bakery, and paper-products machinery; operating various types of power-driven saws and guillotine shears; operating most power-driven hoisting apparatuses including nonautomatic elevators, forklifts, or cranes; most jobs in slaughtering, meat-packing, and rendering plants; the operation of power-driven meat-processing machines when performed in wholesale, retail, or service establishments; most jobs in excavation, logging, and sawmilling; roofing, wrecking, demolition, and shipbreaking; operating motor vehicles or working as outside helpers on motor vehicles; and most jobs in the manufacturing of bricks, tiles, and similar products.



Youths aged 14 and 15 may work in various jobs outside school hours under the following conditions:

- No more than three hours on a school day, with a limit of 18 hours in a school week.
- No more than eight hours on a nonschool day, with a limit of 40 hours in a nonschool week.
- They cannot work before 7:00 A.M. or after 7:00 P.M., except from June 1 through Labor Day, when the evening hour is extended to 9:00 P.M.
- A break must be provided after five contiguous hours of work.

Workers 14 and 15 years of age may be employed in a variety of hospitality jobs, including cashiering, waiting on tables, washing dishes, and preparing salads and other food (although cooking is permitted only at snack bars, soda fountains, lunch counters, and cafeteria-style counters), but not in positions deemed hazardous by the U.S. Department of Labor. As with other types of employment law, there are stiff penalties for employers who violate provisions of the Fair Labor Standards Act. Employers can be fined between \$1,000 for first-time violations and \$3,000 for third violations. Repeat offenders can be subject to fines of \$10,000, and even jail terms.

All states have child labor laws as well. Employers in most states are required to keep on file documents and/or permits verifying the age of minor employees. When both state and federal child labor laws apply, the law setting the more stringent standard must be observed. Federal child labor laws are enforced by the Wage and Hour Division of the U.S. Labor Department's Employment Standards Administration. State and local child labor laws can vary, so it is best to confirm the specifics of the child labor laws in your own state by contacting your local state employment agency.

## 7.4 THE EMPLOYMENT RELATIONSHIP

The laws related to employment, like those in other areas, are fluid, and they change to reflect society's view of what is "fair" and "just," for both the *employer* and the *employee*. For example, in 1945, an employer in the United States could refuse to hire an individual on the basis of his or her race or religion. The employer would have had no fear of liability for such a decision, either from the government or the potential employee. Today, a decision to refuse employment on the basis of race or religion would subject the employer to legal liability both from the government and the spurned job candidate.

### At-Will Employment

The right of employers to hire and terminate employees as they see fit is still a fundamental right of doing business in the United States. In most states, the relationship you create when you hire a worker is one of *at-will employment*.

Simply put, the doctrine of at-will employment allows an employer to hire or dismiss an employee at anytime, if the employer feels it is in the best interest of the business. However, employers are still subject to the antidiscrimination laws reviewed earlier in this chapter (and addressed further in Chapter 8, "Legally Managing Employees"). Assume, for example, that you have legally hired four full-time bartenders for a club you manage. Business becomes slow, and you elect to terminate one of the bartenders. The doctrine of at-will employment allows you to do so. Further, the doctrine allows you to reduce your bartender staff even if you have not experienced a downturn in business. You might elect to do so if you felt that you could secure the services of a better bartender, should you need one. Generally speaking, any worker can be fired for cause (i.e., misconduct associated with the job). The at-will employment doctrine allows employers to dismiss a worker without cause.

#### LEGALESE

**Employer:** An individual or entity that pays wages or a salary in exchange for a worker's services.

#### LEGALESE

**Employee:** An individual who is hired to provide services to an employer in exchange for wages or a salary.

#### LEGALESE

**At-will employment:** An employment relationship whereby employers have a right to hire any employee, whenever they choose, and to dismiss an employee for or without cause, at any time; the employee also has the right to work for the employer or not, or to terminate the relationship at any time.

As an employer, your actions can affect the at-will employment status of your workers (e.g., by explicitly entering into an employment contract or making promises to keep an employee on for a year). In order to preserve the maximum flexibility for your business, it is important that you maintain your at-will employment status to cover all staff members that you select and manage. The scope of the at-will employment doctrine varies among different states, so you should familiarize yourself with the requirements placed on employers in the state in which you operate. These requirements are available from the state agency responsible for monitoring employer/employee relationships.

## Labor Unions and Collective Bargaining

### LEGALESE

#### Collective bargaining agreement (CBA):

A formal contract between an employer and a group of employees that establishes the rights and responsibilities of both parties in their employment relationship.

In some hotels and businesses, certain categories of employees may belong to an organized labor union. Unions were formed to protect the rights of workers and to establish specific job conditions that would be agreed to and carried out by employers and employees. In this type of arrangement, a group of employees will elect to make one collective employment agreement with an employer that will outline specific characteristics of their job position, such as the wage, hourly rate of pay, or limits on the hours per day or week that can be worked. The agreement would cover anyone employed in that position. This type of employment agreement is called a *collective bargaining agreement (CBA)*, and can also be referred to as a “union contract.”

The terms and conditions set forth in a CBA are developed using a process of collective bargaining between the employer and employees. Generally, the members of a labor union working for a specific company (or industry) will elect a representative, who will negotiate the terms and conditions of a collective bargaining agreement for the entire group. The bargaining process is carried out according to rules established by the National Labor Relations Act of 1935, which guarantees the right of employees to organize and bargain collectively, or to refrain from collective bargaining. To enforce this act and oversee the relationship between employers and organized labor, Congress created an independent federal agency known as the National Labor Relations Board (NLRB). The NLRB has five principal functions:

1. *Conduct elections.* The NLRB allows private-sector employees to organize bargaining units in their workplace, or to dissolve their labor unions through a decertification election.
2. *Investigate charges.* Employees, union representatives, and employers who believe that their rights under the National Labor Relations Act have been violated may file charges alleging unfair labor practices at their nearest NLRB regional office.
3. *Seek resolutions.* When a charge is determined to have merit, the NLRB will explain the decision and offer the charged party an opportunity to settle before a formal complaint is issued.
4. *Decide cases.* On the adjudicative side of the NLRB are 40 administrative law judges and a board whose five members are appointed by the president and confirmed by the Senate.
5. *Enforce orders.* The majority of parties voluntarily comply with orders of the board. When they do not, the agency’s general counsel must seek enforcement in the U.S. Courts of Appeals. Parties to cases also may seek review of unfavorable decisions in the federal courts.

The NLRA identifies the activities and practices that would be considered “unfair.” Employers are forbidden to:

- Threaten employees with loss of jobs or benefits if they join or vote for a union or engage in protected concerted activity.
- Threaten to close the plant if employees select a union to represent them.

- Question employees about their union sympathies or activities in circumstances that tend to interfere with, restrain or coerce employees in the exercise of their rights under the Act.
- Promise benefits to employees to discourage their union support.
- Transfer, lay off, terminate, assign employees more difficult work tasks, or otherwise punish employees because they engaged in union or protected concerted activity.
- Transfer, lay off, terminate, assign employees more difficult work tasks, or otherwise punish employees because they filed unfair labor practice charges or participated in an investigation conducted by NLRB.

Under the law, employers are also protected from unfair labor practices that might be undertaken by a union. Examples of prohibited activities by union representatives include:

- Threats to employees that they will lose their jobs unless they support the union.
- Seeking the suspension, discharge, or other punishment of an employee for not being a union member, even if the employee has paid or offered to pay a lawful initiation fee and periodic fees thereafter.
- Refusing to process a grievance because an employee has criticized union officials or because an employee is not a member of the union in states where union security clauses are not permitted.
- Fining employees who have validly resigned from the union for engaging in protected concerted activities following their resignation or for crossing an unlawful picket line.
- Engaging in picket line misconduct, such as threatening, assaulting, or barring nonstrikers from the employer's premises.

Striking over issues unrelated to employment terms and conditions or coercively enmeshing neutrals into a labor dispute. It is up to the individual employer, union, or employee to request assistance from the NLRB in cases of unfair labor practices, or to hold an election that may unionize a job position. Complaints must be filed with the NLRB within six months of the alleged unfair activity. A representative from the NLRB will investigate the complaint. If the complaint is justified, and the parties have not taken steps to settle or withdraw the complaint, then the NLRB will hold a hearing. If an unfair labor practice is found to have occurred, then the NLRB will issue an order demanding that the unfair labor practice stop, and may also require the guilty party to take steps to compensate the injured party through job reinstatement, by payment of back wages, or by reestablishing conditions that were in place before the unfair activity took place. Either party may appeal the order in federal court.

Under the NLRA, employees have the right to form unions and bargain collectively. Once a union is established, new employees hired for a specific position may be required to join the union that represents that job position. However, many states have passed "right to work" laws that stipulate that an employee is not required to join a union if hired for a given position, even if other employees holding that position are unionized. As a manager, you should learn if your state has a "right to work" law.

For managers, a collective bargaining agreement should be treated in the same manner as any other formal contract. Its provisions should be read, understood, and followed. Membership in a union may give employees certain freedoms or conditions as part of their jobs, but employees still must be accountable for their work, and managers are still responsible for ensuring that employees perform their jobs properly, safely, and in accordance with the company's established policies and procedures. If problems do surface, a hospitality manager should consult with his or her company's designated union representative. Most CBAs have specific conditions for hiring new employees for a given position. As a manager, you should review and know this segment of the CBA especially well.

**» ANALYZE THE SITUATION 7.3**

WALTER HORVATH IS THE executive housekeeper at the Landmark Hotel. This 450-room historic property caters to leisure travelers. Occupancy at the hotel is highest on the weekends.

Like many hotels in large cities, the housekeeping staff is difficult to retain. Turnover tends to be high, and the labor market tight. Mr. Horvath works very hard to provide a work atmosphere that enhances harmony and encourages employees to stay. Although he has little control over wage scales, his general manager does allow him wide latitude in setting departmental policies and procedures, as long as these do not conflict with those of the management company that operates the Landmark.

Housekeepers in Mr. Horvath's department highly prize weekends off, yet these are the busiest times for the hotel. In a staff meeting, Mr. Horvath and the housekeepers agreed to implement a policy that would give each housekeeper alternating weekends off, with the stipulation that those housekeepers who are working on weekends might be required to work overtime to finish cleaning all the rooms necessary to service the hotel's guests. The housekeepers agreed to this compromise, and the policy was written into the department's procedures section of the employee handbook, which all new housekeeping employees must read and sign prior to beginning work.

When the holiday season approaches, Mr. Horvath finds that his department is seriously understaffed. The hotel is filling to capacity nearly every weekend as guests flock to the city to do their Christmas shopping. During a job interview with Andreanna White, Mr. Horvath mentions the alternating weekend policy for housekeepers. Ms. White states that she is the choir director for her church. "I could," she says, "miss alternating Sunday mornings, because I could arrange a substitute. Working overtime on Sundays, however, would cause me to miss both the morning and evening services, and I would not be willing to do that. I could, however, work an eight-hour day of Sundays with no problem, because then I could go to either the morning or evening service."

1. Should Mr. Horvath hire Ms. White, despite her inability to comply with the departmental policy in place at the hotel?
2. If Mr. Horvath hires Ms. White, can he still enforce the alternating weekend policy with currently employed housekeepers, who also might prefer not to work overtime on Sundays?
3. Do you believe Ms. White's choir director position warrants an exception to the departmental policy?
4. How should Mr. Horvath advertise position vacancies in the future?



## INTERNATIONAL SNAPSHOT

### Canadian Employment Laws

If you operate a hotel anywhere in Canada, you need to consider employment-related laws in the province or territory where the hotel is located. The following is a summary of some important differences between U.S. and Canadian laws.

#### No “EMPLOYMENT AT WILL”

The U.S. concept of employment at will described elsewhere in this book does not exist in Canada. In Canada, both employment standards legislation and the common law require an employer that terminates an employee’s employment without just cause to provide certain entitlements.

Under employment standards legislation in each province, an employer must provide an employee notice of termination of employment or pay in lieu of notice (usually one week per year of service to a maximum of eight weeks: more for group terminations), unless the employee is terminated for willful misconduct or willful neglect of duty. Some jurisdictions also require an employer to pay severance pay in addition to providing notice. For example, in Ontario, an employee with five or more years of service with an employer that has an annual payroll of at least \$2.5 million is entitled to one week’s pay per year of service up to a maximum of 26 weeks.

The common law requires that an employer provide an employee “reasonable” notice of termination or pay in lieu of notice unless just cause exists, there is a clear agreement otherwise, or a union represents the employee. Reasonable notice for each employee is determined on a case-by-case basis and depends on a number of factors, such as the employee’s position, age, and length of service, and the availability of similar employment elsewhere. Reasonable notice at common law almost always exceeds the notice required by applicable legislation.

#### PREGNANCY AND PARENTAL LEAVE

Whereas the U.S. Family and Medical Leave Act (FMLA), as further discussed in Chapter 8, requires an employer to provide an employee up to 12 weeks of unpaid leave, employment standards legislation in all Canadian jurisdictions require an employer to provide up to at

least 52 weeks of pregnancy and parental leave. In addition, the right to pregnancy and parental leave applies to all employees in Canada, not just to those employed by employers with 50 or more employees (as provided by the FMLA).

#### DISCRIMINATION AND HARASSMENT

Prohibitions against discrimination and harassment in employment under various U.S. statutes, such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967, may be found in each province’s or territory’s human rights legislation (e.g., in Ontario, the Human Rights Code). Canadian human rights legislation in all jurisdictions prohibit discrimination and harassment on the basis of sex, disability, age, race, national or ethnic origin, color, religion or creed, marital status, and sexual orientation.

An employee in Canada may not file a civil action for discrimination, as is permitted in the United States. An employee may complain only to an administrative tribunal in the province he or she works, which adjudicates complaints. Administrative tribunals across Canada have wide powers to order reinstatement of employees, to require an employer to take steps to prevent discrimination and harassment, and to award monetary compensation. Monetary awards, however, are generally much lower than U.S. jury awards.

There are other significant differences between Canadian and U.S. employment laws. Local legal counsel can help to ensure that you are in compliance with all applicable laws. Other Canadian employment-related laws with which you should comply include:

- *Employment standards legislation*, which regulates minimum wages, hours of work, breaks, overtime pay, vacation and holidays with pay, entitlements on termination, and leaves of absence.
- *Labor relations legislation*, which governs certification/decertification of unions and collective bargaining.
- *Occupation health and safety legislation*, which governs an employer’s obligation to provide a safe workplace.

- *Statutory workers' compensation/workplace safety and insurance legislation*, which governs an employer's obligations respecting workplace injuries and accidents.
- *Pay equity and employment equity legislation*, which require equal pay for equal work and equal employment opportunities for employees.

For more information on any Canadian employment law issues, contact James R. Hassell or Patricia S. W. Ross of the Employment and Labor Law Department of Osler, Hoskin & Harcourt LLP Barristers & Solicitors, P.O. Box 50, 1 First Canadian Place, Toronto, Ontario,

M5X 1B8, (416) 362-2111. Or log on to [www.osler.com](http://www.osler.com), Osler, Hoskin & Harcourt's website, which contains numerous articles on Canadian labor and employment law: [canadaonline.about.com/od/labourstandards/Canada\\_Employment\\_and\\_Labour\\_Standards.htm](http://canadaonline.about.com/od/labourstandards/Canada_Employment_and_Labour_Standards.htm) for links to Ministry of Labour websites across Canada that provide information on employment standards, health, and safety, and labor relations; and to [www.ohrc.on.ca](http://www.ohrc.on.ca), for Ontario's Human Rights Commission, and links to other human rights agencies across Canada.

Provided by James R. Hassell and Patricia S.W. Ross of Osler, Hoskin & Harcourt LLP, Toronto, Ontario. [www.osler.com](http://www.osler.com).

## WHAT WOULD YOU DO?

Alex Bustamante is applying for the position of executive chef at the hospital where you serve as director of human resources. The hospital has more than 800 beds, and the

meal service offered to patients and visitors alike is extensive. Patients in this facility are extremely ill, and because of their weakened condition, dietary concerns are an important consideration.

While reviewing Mr. Bustamante's work history with him during an interview, he states that he was let go from his two previous positions for "excessive absence." When you inquire as to the cause of his excessive absence, Mr. Bustamante offers that it was due to the effects of alcoholism, a condition with which he has struggled for over ten years, but for which he is currently undergoing weekend treatment and attending meetings of Alcoholics Anonymous (AA). He states that he never drank while at work but sometimes missed work because he overslept or was too hung over to go in. His past employers will neither confirm

nor deny Mr. Bustamante's problem. Both simply state that he had worked for them as an executive chef and that he was no longer employed by their organizations.

Based on his education and experience, Mr. Bustamante is clearly the best-qualified candidate for the vacant executive chef's position. However, based on his life history, his ability to overcome his dependence on alcohol is, in your opinion, clearly questionable. Your recommendation on Mr. Bustamante's hiring will likely be accepted by the manager of dietary services.

1. Have you broken the law by inquiring into Mr. Bustamante's difficulty in prior positions?
2. Is Mr. Bustamante protected under the ADA?
3. If Mr. Bustamante were hired but needed three days off per week to undergo treatment, would you grant that accommodation? Under what circumstances?
4. How do the rights of Mr. Bustamante and the concept of negligent hiring mesh in this instance?

To understand how difficult it is to interpret and comply with antidiscrimination laws, consider the case of *Schurr v. Resorts Int'l Hotel*, 196 F.3d 486 (3d Cir. 1999).

### FACTUAL SUMMARY

Karl Schurr (Schurr), a white male, worked on a part-time basis as a light and sound technician for Resorts International Hotel (Resorts), a New Jersey casino and hotel. In 1994, a full-time position became available for which Schurr applied. He was one of five applicants for the position. Resorts narrowed down the pool to Schurr and one other candidate, Ronald Boykin, a black male. Both candidates were qualified for the position and were regarded as equally qualified by Resorts.

A New Jersey law was in effect requiring all casino license holders to take affirmative action measures to ensure equal employment opportunities. In short, the regulations required the casinos in New Jersey to employ a certain percentage of women and minorities in specific job categories throughout the casino organization. The job for which Schurr and Boykin applied was in the technician category. Under the regulations, 25 percent of Resorts technicians were to be minorities. At the time Schurr and Boykin applied, only 22.25 percent of the technicians working for Resorts were minorities.

In an attempt to comply with state law and state casino regulations, the management for Resorts hired Boykin over Schurr on the basis of race. Bill Stevenson, the director of show operations and stage manager for Resorts, stated he was obligated to pick the equally qualified minority candidate in order to put Resorts in line with state employment goals. Schurr filed a complaint with the Equal Employment Opportunity Commission for discrimination on the basis of race and sued Resorts for a violation of Title VII of the Civil Rights Act of 1964.

### QUESTION FOR THE COURT

The question for the court was whether the consideration of race as a factor in hiring was a remedial measure allowed under Title VII. Schurr argued the use of race as a factor in hiring was a violation of Title VII. Resorts claimed the use of race was a non-discriminatory component of its affirmative action plan designed to increase minority representation in certain job categories, hence fell under the remedial section of Title VII. The remedial aspect of Title VII was designed to cure past discrimination and inequities in minority hiring. Schurr argued Resorts' affirmative action plan and the casino regulations were not based on evidence of historic or current discrimination in the casino industry.

### DECISION

The court held the affirmative action plan used by Resorts and the New Jersey law violated Title VII. The plan was not based on historic or current discrimination in the casino industry or in the technician job category. Since there was no evidence of past or current discrimination, Resorts' affirmative action plan was not necessary in the technician job category.

### MESSAGE TO MANAGEMENT

The law in this area is extremely complex. Before implementing an affirmative action policy that discriminates on the basis of a protected class, be sure to have it thoroughly scrutinized for compliance with Title VII and current EEOC guidelines.

For a discussion of at-will employment in the state of Illinois, and a touchy discrimination case, consider the case of *Riad v. 520 South Michigan Avenue Assocs.*, 78 F. Supp. 2d 748 (N.D.Ill. 1999).

## FACTUAL SUMMARY

Nady Riad (Riad) was a general manager for the Congress Hotel (Congress) in Chicago, Illinois. Riad was an Egyptian-born naturalized American. He was recruited by the company managing the hotel, Hostmark Investor Limited Partnership (Hostmark), in part because of his excellent reputation in the hotel industry. As part of the recruitment process, Riad was offered a competitive salary that included participation in an incentive bonus program. If the Congress met certain performance goals under Riad's management, he would be entitled to a fairly large bonus upon approval by the owner of the Congress. Riad accepted the position on an employee-at-will basis.

The Congress Hotel was owned by 520 S. Michigan Avenue Associates Limited (520). The majority owner of 520 was Albert Nasser (Nasser). Nasser is Jewish and was educated in Israel. Shlomo Nahmias (Nahmias) worked for 520 as the owner's representative at the Congress Hotel. Nahmias is also Jewish and was born in Israel.

During his time at the Congress, Riad improved the performance and the financial outlook of the hotel. The exact amount was disputed but the improvement was significant. Pursuant to his employment agreement, Riad believed he was entitled to and did ask for a bonus. Nahmias, acting as the owner's representative, denied his request, stating the Congress was in bankruptcy. Riad instead asked for a pay increase, which was also denied. During his tenure at the Congress Hotel, Riad never received a bonus or a pay increase despite consistently strong employment reviews.

Riad's Egyptian heritage was a possible factor in his being denied pay increases and bonuses. Nahmias made several references to Riad being an Arab managing a Jewish-owned hotel. In front of several employees, Nahmias made several derogatory comments about Riad and his Arab or Egyptian heritage. Eventually, Riad was fired from the Congress despite his excellent performance and the improved financial position of the Congress. Riad sued 520 for employment discrimination on the basis of race.

## QUESTION FOR THE COURT

The questions for the court were, one, whether Riad presented sufficient direct evidence of discrimination and, two, whether Riad presented enough evidence for an indirect case of discrimination. Riad argued that Nahmias, who had the power to hire and fire hotel employees, was motivated by race in making decisions regarding Riad's employment. Nahmias and Nasser argued isolated comments about the race of an individual were not enough to show discrimination. They argued there was no connection between the statements and the decision to terminate Riad's employment.

Riad also argued there was evidence of indirect discrimination. Riad argued he was a member of a protected class, was performing his job adequately, and suffered adverse consequences. Again Nasser and Nahmias argued there was no evidence.

## DECISION

The court held that Riad presented evidence of both direct and indirect discrimination. Nasser and Nahmias used Riad's race to make an employment decision and were liable to him for damages.

## MESSAGE TO MANAGEMENT

Discrimination on the basis of a protected class (in this case, race) does not have a place in the hospitality industry. Establishing a proactive policy of diversity and inclusion via mutual respect can help prevent outcomes such as this one.

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Today, you cannot just hire anyone, and many different laws have been passed that affect the way in which you can legally hire and manage employees. Tools, such as written job descriptions, job qualifications, employment applications, and an established employee selection process that contains written guidelines for conducting interviews, preemployment tests, background checks, and reference checks are all used by the companies to ensure—and document—that they are selecting employees in compliance with the law.

It is illegal to discriminate against protected classes of workers in the job selection process. The Civil Rights Act of 1964 outlaws discrimination on the basis of race, color, religion, sex, or national origin. The Age Discrimination in Employment Act protects individuals 40 years old and older from discrimination based on age. The American with Disabilities Act not only protects those with disabilities from discrimination in the selection process but also requires companies to make reasonable accommodations to facilities or job responsibilities that will permit disabled individuals to work in a given job.

A last step before assigning someone to your workforce is to ensure that he or she is eligible to be employed in the United States by complying with the requirements of the Immigrations Reform and Control Act.

The at-will employment doctrine defines the rights of employers and employees in most states, unless an employment contract modifies that relationship. Labor unions are associations of workers that join together to bargain as a unit with management or business ownership. Collective bargaining agreements establish the regulations and the terms that must be followed by both unionized employees and nonunion managers during the employment relationship.

## WHAT DID YOU LEARN IN THIS CHAPTER?

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After you have studied this chapter, you should be prepared to:

1. Identify at least three exceptions to the at-will employment doctrine, and prepare a rationale for each exception's existence.
2. Create a description for your most recent job. Use that information to create a job qualifications list for the same job.
3. Appraise the pros and cons of refusing to supply detailed performance information about past employees to those who call for reference checks on them.
4. Use the Internet to determine the union organization in your home state or country that represents the largest number of hospitality workers.
5. Discuss the relationship between affirmative action and diversity awareness.
6. Develop your rationale for determining whether a visually impaired individual, whose sight is fully corrected by prescription glasses, falls under the protection of the ADA.
7. Create a checklist that could be used by a restaurant for complying with the requirements of the Immigration Reform and Control Act (IRCA).
8. Using the Internet, find the state or local agency that regulates child labor laws in your hometown, and compile a list of positions in the hospitality industry that could not be filed by 14- and 15-year-olds under its regulations.

## RAPID REVIEW

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In teams, draft a job description for a hospitality line position (dishwasher, server, front desk agent, etc.) of your choice. List at least five qualifications the potential employee must have; then identify and list the selection tools (i.e., references, tests, drug screenings) that you would use to match the right applicant with the job described.

## TEAM ACTIVITY