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# Filling the Empty Chairs

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Legal and Effective Hiring

Wednesday, October 10, 2012

Foster Pepper PLLC  
Seattle, Washington

Presented by:



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# Presentation

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Presented by:

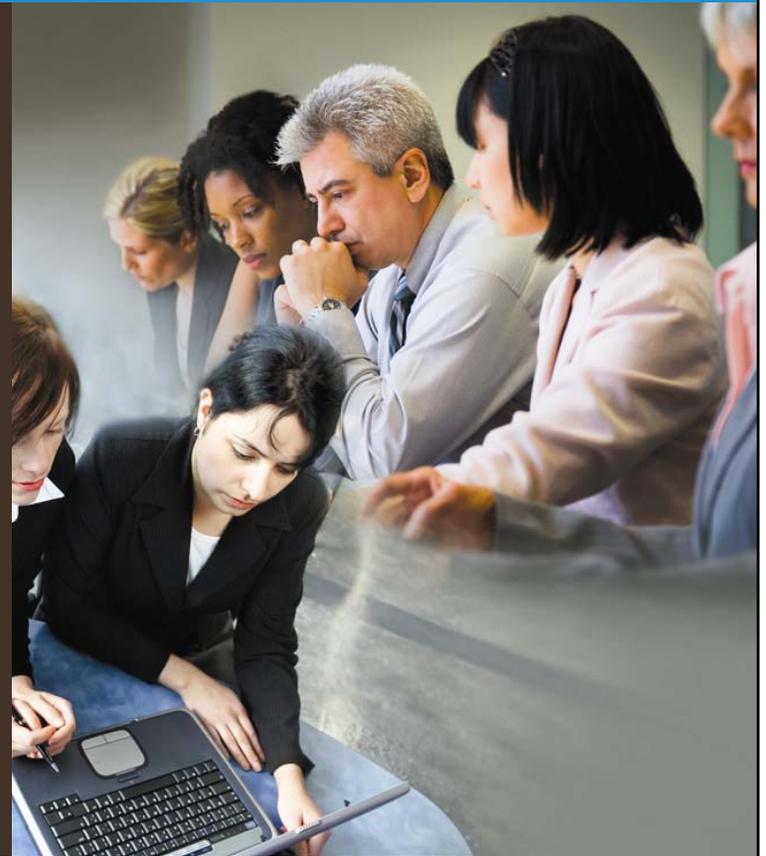




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# Filling the Empty Chairs: Legal and Effective Hiring

*October 10, 2012*

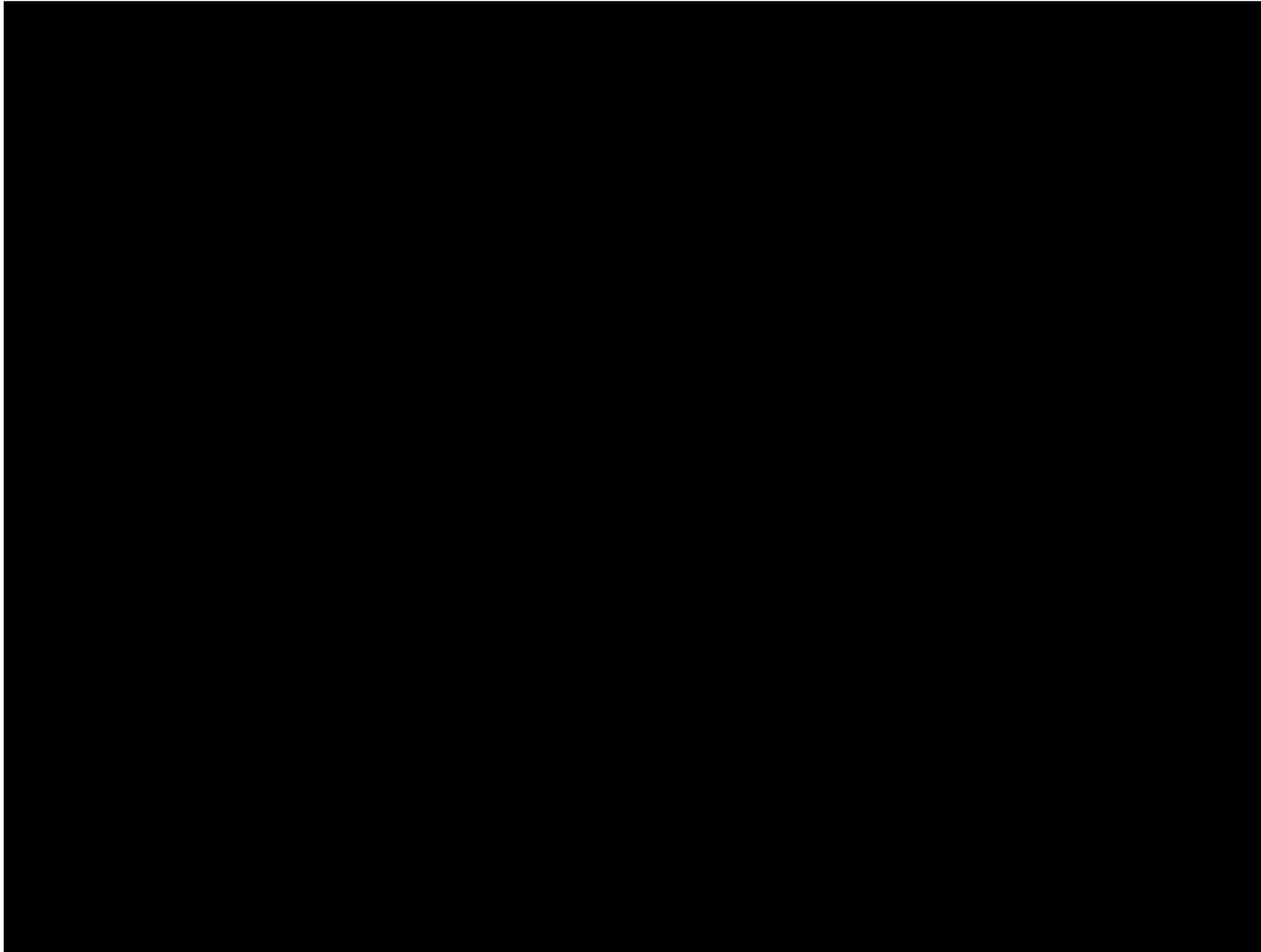


**MIND FILLING OUT THIS  
EVALUATION FORM FIRST?**



# The Origin of Job Interviews

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# Goals for the Hiring Process

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- Hire the right people based on best information
- Portray the organization in best light
- Avoid claims
  - Discrimination
  - Privacy rights of employees
  - Negligent hiring

# Three-Part Presentation

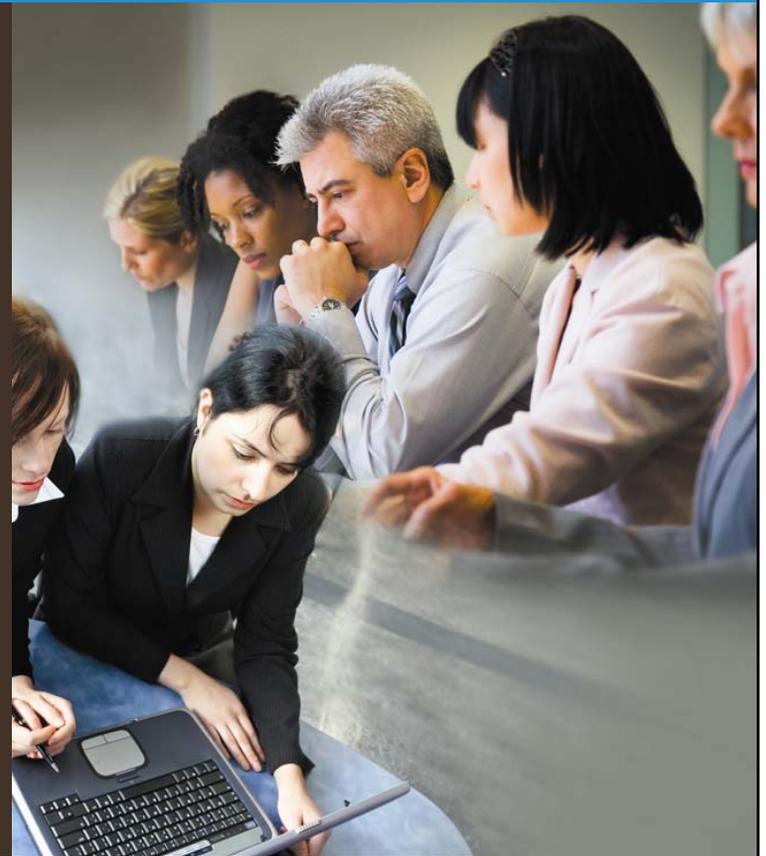
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- Gathering information and avoiding claims
- Recruiting candidates
- Interviewing



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# PART 1: Gathering Information & Avoiding Claims



# Negligent Hiring

- Employee presented known risk of harm
- Employer knew or should have known of risk
- Employee injured plaintiff
- Injury resulted from hire decision

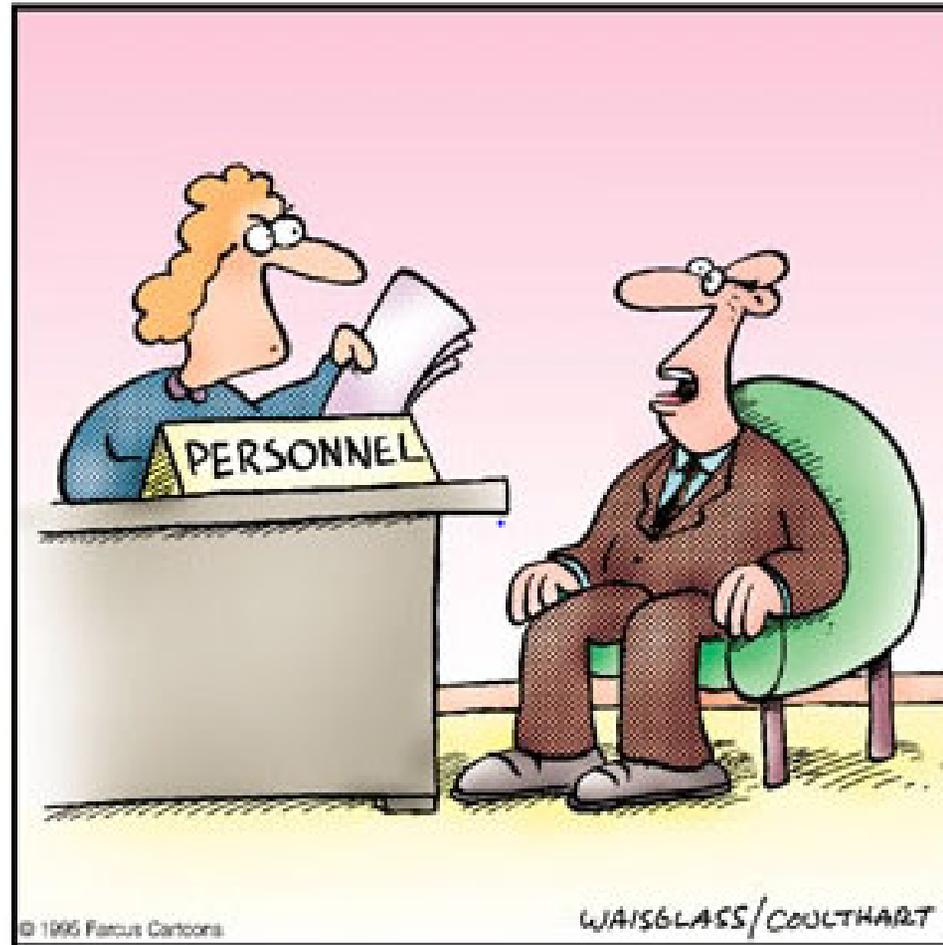
*Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 253, 868 P.2d 882 (1994);  
*Peck v. Siau*, 65 Wn. App. 285, 288-89, 827 P.2d 1108 (1992).

# Scrutinize

- All portions of application / resume
- Missing information
- Ambiguity or inconsistency
- Gaps in job or address history



# Resume Fraud Runs Rampant



**“I didn’t lie — I went to Harvard for my nephew’s graduation.”**

# Resume Fraud Runs Rampant

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- Embellished responsibilities - 38 percent
- Skill set - 18 percent
- Dates of employment - 12 percent
- Academic degree - 10 percent
- Companies worked for - 7 percent
- Job title - 5 percent

*[www.careerbuilder.com](http://www.careerbuilder.com)*

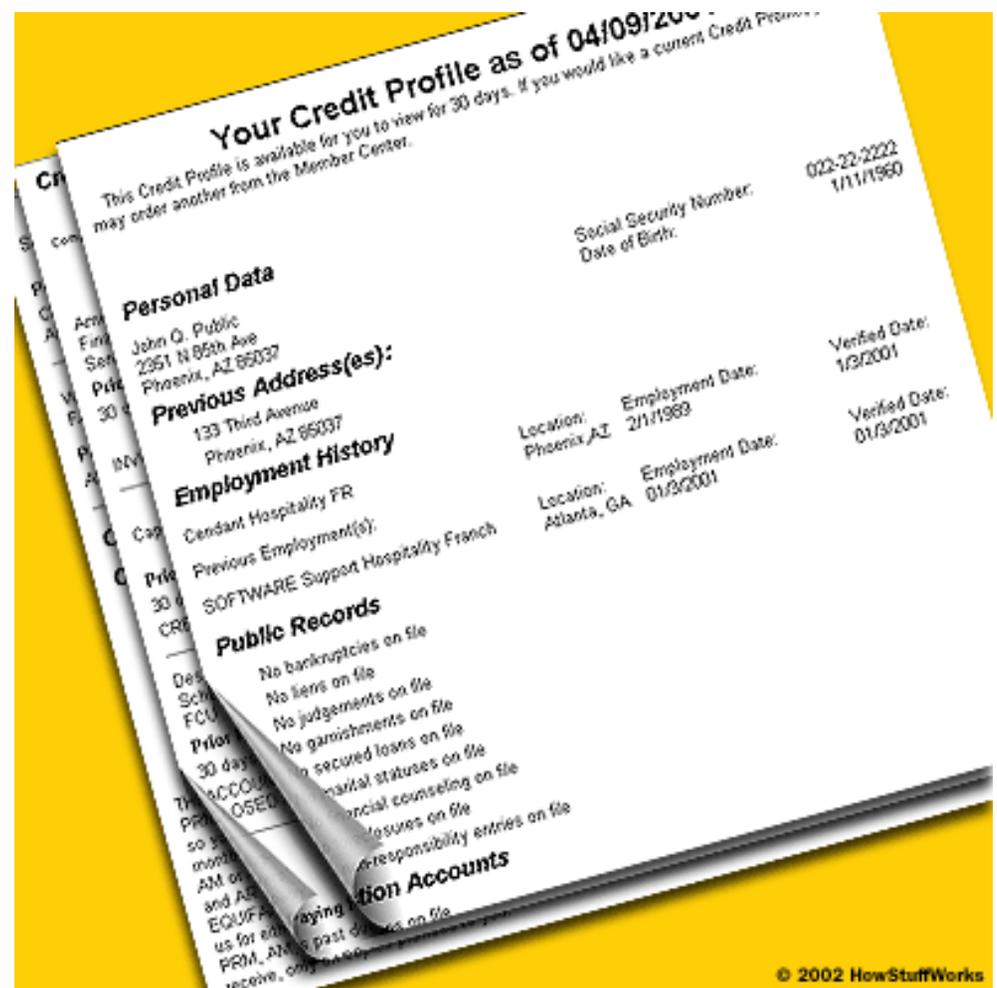
# Use Background Check Information



- License, degree or certification
- References
- Criminal background checks

# Fair Credit Reporting Act(s)

- Federal law –  
15 U.S.C. § 1681 *et seq.*
- Washington state law –  
RCW 19.182.010 *et seq.*



# Federal Fair Credit Reporting Act

- Requires that **certain procedures** be followed when a “consumer report” is used for employment purposes.
- Broad definition of “**consumer report**”
- Information obtained by a **consumer reporting agency**, including:
  - Criminal and civil records
  - Driving records
  - Civil lawsuits
  - Reference checks

# Federal Fair Credit Reporting Act

Employer must follow certain procedures at **each stage of the hiring process** when a background check is used:

- Disclosure Form
- Applicant's written authorization
- Addressing a negative report
- Taking adverse action

# Federal Fair Credit Reporting Act

Before taking “adverse action,” the employer must:

- Provide applicant with a copy of the report
- Provide applicant with a summary of his/her rights
  - FTC Summary of Rights,  
<http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf>



Protecting  
America's  
Consumers



# Federal Fair Credit Reporting Act

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Taking adverse action:

- Wait a **reasonable period of time** after providing the pre-adverse action notice and summary of rights
- Provide **notice of adverse action**
- Notice must disclose the **applicant's right to dispute information**

# Washington Fair Credit Reporting Act

Employers may obtain credit reports for employment purposes **only if:**

- credit check is “**required by law**” or “**substantially job related,**” *and*
- the employer has **disclosed** the reasons for using the information to the job applicant or employee.

RCW 19.182.020(2)(b)-(c).

# Fair Credit Reporting Act(s) – *Penalties*

- Federal FCRA provides for damages of \$100 to \$1,000 for each willful violation of the statute
- Washington FCRA provides for damages, treble damages, and attorneys' fees and costs under Washington's Consumer Protection Act



# EEOC Guidance – Use of Criminal History in Employment



U.S. Equal Employment  
Opportunity Commission

- **What:** Enforcement Guidance, *Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*
- **When:** Issued April 25, 2012
- **Why:** Criminal record exclusions may disproportionately impact people in protected classes (race and national origin)
- **How:** Providing guidance to EEOC investigators and assistance to employers in complying with Title VII

# EEOC Guidance – Use of Criminal History in Employment



U.S. Equal Employment  
Opportunity Commission

- People of certain races and national origins are arrested more frequently
- Employers applying blanket policies excluding any type of criminal history may cause a **disparate impact** in the non-hiring of certain minority groups, in violation of Title VII

# EEOC Guidance – Use of Criminal History in Employment



U.S. Equal Employment  
Opportunity Commission

- **No bright line exclusion rules!** (“We don’t hire felons.”)
- Conduct an “**individualized assessment**” of applicant
  - Nature and gravity of the offense
  - Time since the conviction and/or completion of the sentence
  - Nature of the job held or sought
- Employer **may** be able to avoid individualized assessments only if it can explain why certain criminal offenses have a “**demonstrably tight nexus to the position in question.**”

# EEOC Guidance – Use of Criminal History in Employment



U.S. Equal Employment  
Opportunity Commission

## What about arrest records? Risky!

- Use of arrest records has a *per se* disparate impact
- Arrest is not a reliable indication of criminal behavior
- Hiring decision *can* be based on the underlying conduct, after an investigation
- Similar provisions under Washington law, WAC 162-12-140 (cannot ask about arrests more than 10 years old)

# Proposed Seattle Ordinance

- Employers cannot request criminal background check **before conditional offer of employment**
- Employers cannot refuse to hire because of criminal record absent “**direct relationship**” to position



“Normally we do a background check, but...”

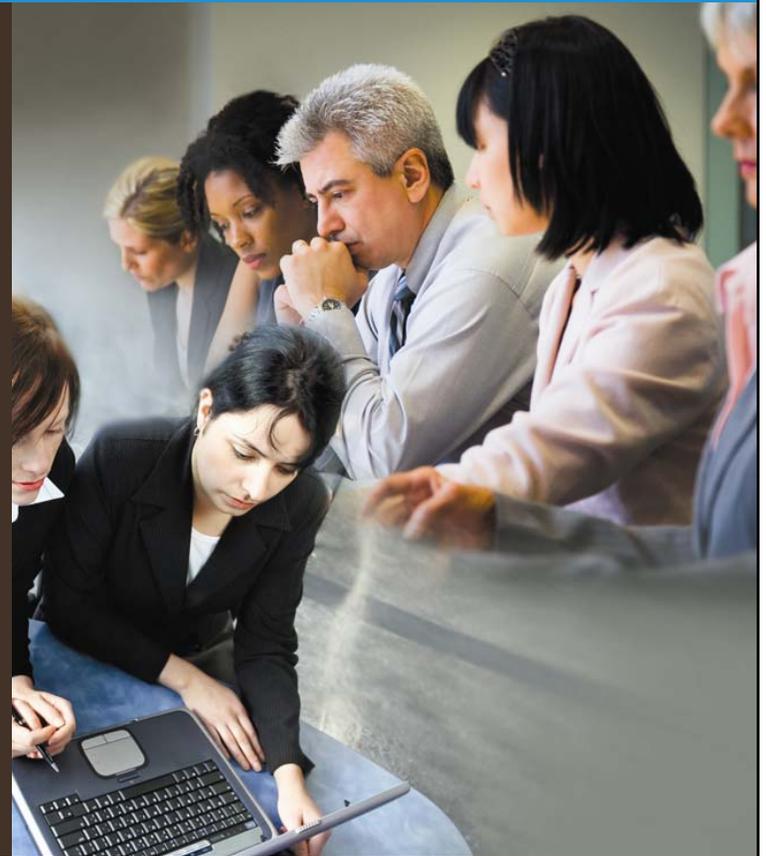
# Proposed Seattle Ordinance

- What is a **direct relationship**?
  - Criminal conduct that “has a direct bearing or connection to the employee’s or applicant’s fitness or ability to perform the position sought or held,” or
  - Where “reasonably foreseeable” that criminal conduct “will result in harm or injury to persons or property,” including business reputation
  - Factors similar to EEOC guidelines



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# PART 2: Recruiting Candidates





# EEOC Compliance – Certain Practices Will Be Scrutinized



U.S. Equal Employment  
Opportunity Commission

- Illegal use of job ads and recruitment agencies
- Word-of-mouth recruiting
- Homogenous recruiting
- Stereotyping in decision-making
- Discriminatory screening of applicants



# Best Practices



U.S. Equal Employment  
Opportunity Commission

Recruiting decisions must be:

- Job-related
- Consistent with business necessity

# Best Practices



U.S. Equal Employment  
Opportunity Commission

EEOC recommends:

- Recruit with EEO principles in mind
- Train managers at all levels
- Periodic self-analysis to confirm current hiring practices comply with EEO principles

# Job Description

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- Detail essential functions
  - Objective
  - Job-related qualification standards
- Should reflect reality
- Consider historical descriptions
  - Policy manuals
  - Handbooks

# Advertising & Job Posting

- No references to protected classifications
- Consider disparate impact
  - Ad copy
  - Choice of advertising medium
- Beware - “word of mouth” recruiting is likely not an EEO best practice
  - <http://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm>

# Job Posting Via Social Media



# Social Media - Why Should Employers Care?



# Why Should Employers Care?



# Prospective Employee Protected Status



7:41  
@

 Follow

Stocked up on baby wipes. Cant have enough baby wipes these days :) #expecting #pregnancy #planning #preparing #smiling

 Reply  Retweet  Favorite

# Prospective Employee Protected Status



Heather Burdick  
@Heather\_Burdick



Follow

Off to start my third and hopefully final  
round of chemo #letsdoit

← Reply   ↻ Retweet   ★ Favorite

# Prospective Employee Protected Status



XXXXXXXXXX

August 11, 2011

Complete Remission! Just over a year ago I was diagnosed with leukemia. Now, a year later, it's gone!! How can I thank all wonderful people in my life for the kind words, thoughts, prayers and support? I am blessed. I could not have made this journey without you.

# Prospective Employee Protected Status



Prospective Employee Protected Status  
@m00000

 Follow

I told my mama that I'm going job searching this week. She said you know if you get hired you have to take a drug test right? Tf?!

 Reply  Retweet  Favorite

11:01 AM - 11 Sep 12 - Embed this Tweet

# Prospective Employee Protected Status



[Blurred Name]  
@ [Blurred Handle]

 Follow

Medical and drug test passed.. Time to get high now!

 Reply  Retweet  Favorite

# Searching Social Media

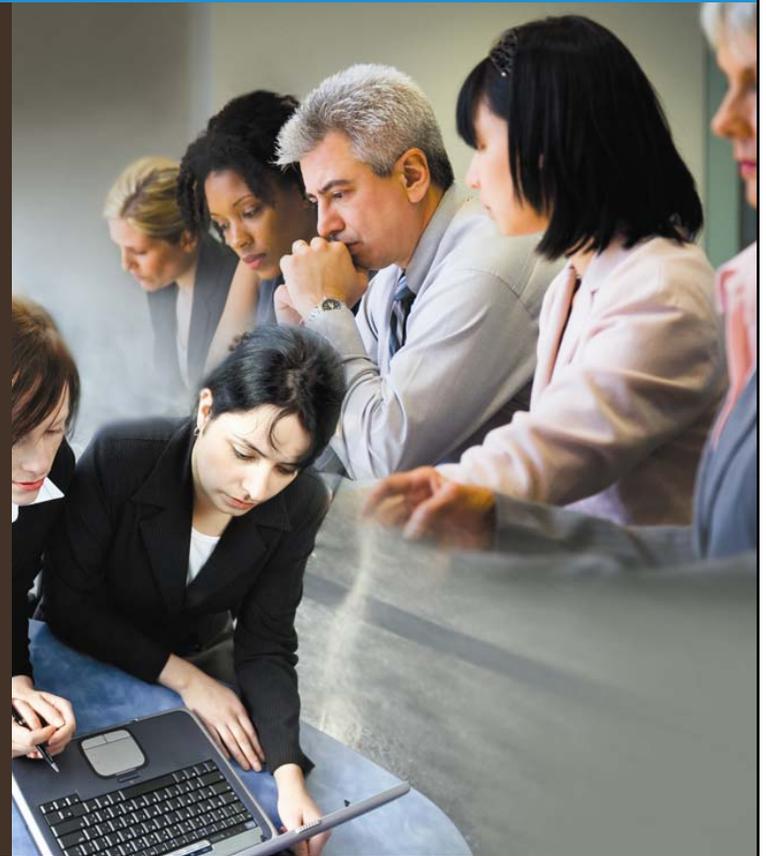
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- Consistency
- Designated searcher – NOT the hiring manager!
- Limited scope
- Disclose to applicant
- Document results and the basis for eventual hiring decision
- Communicate the policy to hiring managers



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# PART 3: Interviewing Candidates



# Interrogate

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- Ask tough questions
- Maintain forms and notes

# Avoid Risky Interview Questions

- Age
- Criminal convictions/arrests
- Citizenship/national origin
- Disability
- Family/children
- Height/Weight
- Marital status
- Military



# Avoid Risky Interview Questions

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- Name
- Organizations
- Photograph
- Pregnancy
- Religion
- Residence
- Gender/sexual orientation

# Ask Job Related Questions

## *The IKEA Job Interview*



# Ask Job Related Questions

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- **Broad-Brush Questions** cover a major topic. "Tell me about..."
- **Probing Questions** seek more detailed information. "Can you describe what you did on that project for...?"
- **Reflective Questions** seek elaboration and convey interest. "You seemed to enjoy your work experience at..."

# Ask Job Related Questions

- **Situation-Specific Questions** ask applicant to compare or contrast realistic problem situations. "What about your experience at \_\_\_\_\_ would be applicable to...?"
- **Self-Appraisal Questions** ask applicant to evaluate own abilities and personal qualities. "What is it about you...."
- **Silence** allows applicants to think and respond.

# Ask About Education

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- Describe your academic performance in school
- Tell me about some of the skills you acquired during the course of your education.
- In what areas of study do you feel most/least competent? In which areas did you improve?
- Tell me about a significant school project. What was it, and how did it turn out?
- Tell me about your role in [group or activity]. What was involved? How did you perform?

# Ask About Work Experience



# Ask About Work Experience

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- Tell me about a challenging work experience. What obstacles did you overcome, and what results did you achieve?
- How will your experience at \_\_\_\_\_ help you here?
- What strengths did you develop in your last job? What difficulties did you face?

# Ask About Work Experience

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- Tell me about something you achieved as part of a team. What was your role?
- Have you ever had a reversal at work that prevented the result you wanted? How did you adapt?
- If I were to call someone who knows your work well, what would they tell me about your work?

# Ask About Personal Qualities

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- What personal skills do you have that would be assets here?
- Tell me about a time when you worked under time constraints.  
What skills did you use to get the job done?
- In which areas could you improve your work performance?

# Ask About Personal Qualities

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- Do you like working better on teams or in groups, or do you like individual assignments better?
- How do you make decisions? If you change your mind during the course of a project, how do you explain the change to other team members?
- What personal qualities do you think a good \_\_\_\_\_ should have?

# Ask About Career Objectives

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- What factors influenced your choice of \_\_\_\_\_ as a career?
- What would be the ideal career path for you? What are your career objectives?
- How did you hear about our organization/the job opening? What about this place led you to apply here?
- What have you learned about us from employees or friends?
- Why do you want to work here?

REVIEW

**Are These Interview Questions OK?**

**YES**

**NO**

Are you married / dating anyone?



REVIEW

**Are These Interview Questions OK?**

**YES**

**NO**

What are your career goals / plans?



REVIEW

**Are These Interview Questions OK?**

**YES**

**NO**

What church do you attend?



REVIEW

**Are These Interview Questions OK?**

**YES**

**NO**

Did you go to college under an affirmative action program?



# Avoid Pitfalls at the End of the Interview

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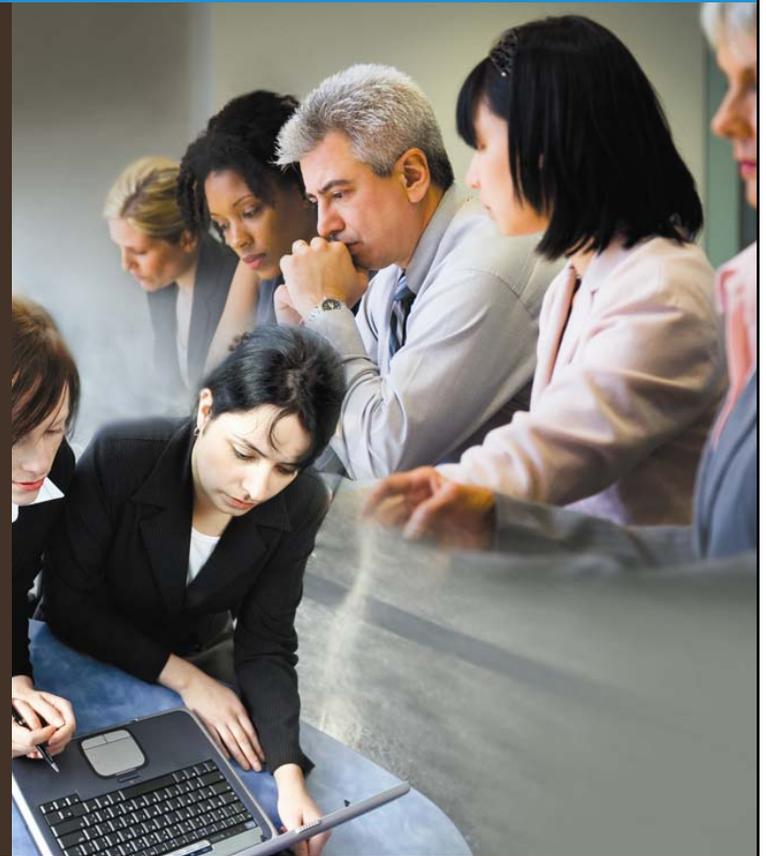
- Stating that that applicant has the job
- Promises of pay or benefits
- Undermining at will employment
  - Right to terminate at any time without cause or notice
  - Watch for promised or implied longevity



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# Filling the Empty Chairs: Legal and Effective Hiring

*October 10, 2012*



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# Speaker Bios

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Presented by:





## Steven R. Peltin

**E-mail:** pelts@foster.com

**Tel:** 206-447-6215 / Seattle

**Fax:** 206-749-2094

### Practices

Employment and Labor Relations CHAIR

### Industries

Emerging Companies and Venture Capital  
Retail

### Practice Summary

Steve's practice covers the gamut of employment and labor law. His advice practice is dedicated to helping employers solve problems such as employee discipline and discharge, leaves of absence, discrimination and harassment claims, and threats of employee violence. Steve enhances employee handbooks and prepares and negotiates employment, confidentiality and non-compete agreements. He also counsels executives and professionals on employment and separation agreements, and assists with corporate transactions such as purchases and sales of businesses.

On the litigation side, Steve represents public and private employers in lawsuits claiming discrimination, harassment, wrongful discharge and violations of wage and hour, employee benefits, trade secrets and non-compete obligations. He also appears before local, state and federal administrative agencies and arbitrators in employment and labor matters.

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### Experience

Foster Pepper PLLC  
Member, 2010-Present

K&L Gates LLP / Preston Gates & Ellis, LLP  
Partner, 1998-2010

Georgia-Pacific Corporation  
Senior Counsel, 1996-1998

Alzheimer & Gray, Chicago, IL  
Associate and Partner, 1986-1996

Isham Lincoln & Beale, Chicago, IL  
Associate, 1983-1986

U.S. District Court for the Western District of Wisconsin  
Law Clerk for Hon. John C. Shabaz, 1982-1983

### **Bar Admissions**

Washington, 1999

Illinois, 1983

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### **Representative Cases**

Won a jury trial for an employer accused of age discrimination by laid-off union employee.

Prevailed in a hearing before the United States Department of Labor brought by a union business agent who claimed that the company conspired with the union to discharge him.

Co-counsel in class action claiming pay for commuting in company vehicle; certification defeated and individual claim resolved promptly.

Co-counsel for large employers in two US Department of Labor collective actions claiming that employees worked off the clock; summary judgment obtained in one case, and the other was settled favorably.

Won summary judgment on discrimination / harassment claim for financial services company.

Obtained temporary restraining orders in two cases where employees removed and refused to return computerized documents and information.

Won summary judgment on sex bias claim by male employee of performing arts client.

Convinced OSHA that a safety whistleblower on a construction site was not subject to a hostile work environment.

Obtained anti-harassment orders against former employees.

Defended company in ERISA case brought by former executive seeking payments under a Supplemental Executive Retirement Plan.

### **Representative Transactions**

Employment and labor counsel in sales of business, including drafting of purchase agreement language, preparation of offer letters, executive employment agreements and employee communications.

Assistance to client in reductions in force.

Counseling of clients facing threat of workplace violence.

Creation of documentation for background investigations, hiring, leaves of absence, requests for disability accommodation, last chance agreement and severance agreements.

Preparation on policies such as travel pay, use of cell phones and blogging.

Management training on employment law topics, including avoiding harassment and discrimination, performance management and hiring.

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## Activities

Seattle Theatre Group  
Board of Directors  
Executive Committee

University Preparatory Academy  
Board of Directors 2011-2012  
Chair of Personnel Committee 2011-2012

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## Publications

Steve Peltin is a frequent contributor to Foster Pepper's Washington Workplace Law blog.  
Check out the latest news in this fast-changing area at: [www.washingtonworkplacelaw.com](http://www.washingtonworkplacelaw.com).

Employee or Independent Contractor? Washington Supreme Court Changes the Rules  
(Parts 1 and 2)

Employee or Independent Contractor? Washington Supreme Court Changes the Rules

Not So Fast III: NLRB Employer Posting Requirement Again Delayed

Back to Basics: Family and Medical Leaves (Parts 1, 2, 3 and 4)

Can't I Require a Job Applicant to Have a High School Diploma?

Not So Fast II: NLRB Again Delays Employer Posting Requirements

Court Rejects Arbitration Award Reinstating Employee Who Hung Noose at Work

Interns & Volunteers: Do We Really Have to Pay Them?

Letting Someone Else Dig for the Dirt: Hiring Vendors to Assist in Social Media Searches

Some Things Don't Have to Be In Writing: Supreme Court Protects Employees Against Retaliation After  
Making Verbal Complaints of Wage and Hour Violations

Unsafe at Any Speed: Unauthorized Passengers in Employer-Owned Vehicles May Sue Employer for  
Driver's Negligence

Effective Negotiation of Executive Employment Agreements

Author, *Inside the Minds: Negotiating and Employment Agreements, Leading Lawyers on Constructing Effective  
Employment Contracts*, 2012 Edition

Employers: Beware of High School Diploma Requirements

Author, *WIB HR & Training Digest* - February 2012

Bad Acts: Smaller Employers Should Confront Threats of On-The-Job Physical Assaults

Author, *Washington Journal*

Telecommuting: Legal and Management Risks For Employers

Author, *Corporate Counsel Magazine*

Reducing Telecommuting Management Risks

Author, *National Underwriter Magazine*

How To Reduce Workplace Violence

Author, *National Underwriter Magazine*

Whose Workforce Is It Anyway? The Worker Adjustment and Retraining Act in the M&A Context

Author, *Preston Gates & Ellis LLP E-Alert*

50-State Survey of Employment Libel and Privacy Law, Washington Chapter  
Author, *Media Law & Resource Center*

Hiring Employees: Disability Questions and Medical Exams  
Author, *Realty & Building*

Workplace Sexual Harassment  
Author, *Realty & Building*

Department of Labor Expands FMLA Leave Rights for Non-traditional Families  
Author, *K&L Gates Labor and Employment Alert*

## News

It's Not Just Paid Time Off -- It's the Law: Attorneys explain what Seattle's new sick leave ordinance means for employers  
Quoted in *Puget Sound Business Journal* - September 2011

Your Office Away from the Office  
Quoted in *Utah CEO Magazine*

Keeping violent employees out of the workplace  
Quoted in *Risk Management Magazine*

10 Considerations in Developing Telecommuting Policies and Agreements  
Quoted in HR.COM

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## Presentations

Seattle Paid Sick and Safe Time: Practical Guidance Employers Need to Know  
Speaker/Moderator, Foster Pepper Client Briefing

Legal Issues for Startups: Employment Law  
Presenter, SURF Incubator

Employment Law Challenges for Public Employers and Current Developments under the Public Employees Collective Bargaining Act  
Panelist, 2012 Association of Washington Housing Authorities (AWHA) Meeting

Reasonably Accommodating Employees with Disabilities  
Speaker/Moderator, Foster Pepper Client Briefing

High-Stakes Employment and IP Protections: Protect your Company from Increasing Employment Risks and Shield your Valuable Intellectual Property  
Panelist, Foster Pepper and Washington State Chapter of ACC America

Conducting Effective Workplace Investigations  
Speaker/Moderator, Foster Pepper Client Briefing

Managing the Process of Labor Negotiations  
Panelist, Washington Fire Commissioners Association 63rd Annual Conference

Out of Sight but Not Out of Mind: Untangling Employer Obligations under FMLA and Other Leave Statutes  
Speaker/Moderator, Foster Pepper Client Briefing

FMLA and Leave Law

Speaker, 14th Annual Labor & Employment Law Conference, The Seminar Group

Social Media in the Workplace

Speaker/Moderator, Foster Pepper Client Briefing

Payroll Management

Speaker, Lorman Educational Services

Time Off: State and Federal Laws on Employee Leave, Vacations and Holidays

Speaker, Lorman Educational Services

When Hand Washing is Not Enough: Legal Challenges Presented By the Flu Pandemic

Speaker, K&L Gates Breakfast briefing

Recent Developments under the Family and Medical Leave Act

Speaker, National Council of State Housing Agencies

10 Scary Issues You Need to Know About Your Employees

Speaker, ASTRA Women's Business Alliance

New Developments in Employment Law

Speaker, Seattle CFO Arts Roundtable

Best Practice in FMLA Administration

Speaker, Council on Education in Management

Conducting Effective Investigations Into Employee Complaints

Speaker, PUD and Municipal Attorneys Association

Cyberstalking: The Washington Employer's Perspective

Speaker, King County Bar Association

Blowing the Whistle: Policies & Procures under Sarbanes-Oxley

Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Workplace Investigations

Speaker, Council on Education in Management

Email and the Internet – Legal Challenges for Employers

Speaker, PUD and Municipal Attorneys Association

Minimizing Risks When Upsizing, Downsizing, and Using Alternative Work Arrangements

Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Negligent Hiring Liability, Pre-Hire Investigations and the Fair Credit Reporting Act

Speaker, Preston Gates & Ellis LLP Breakfast Briefing

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**Honors & Awards**

*The Best Lawyers in America*®

- Labor Law – Management, 2012-2013
- Litigation – Labor & Employment, 2013

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**Education**

Cornell Law School, J.D., *cum laude*, 1983

University of Wisconsin-Madison, B.A., *with distinction*, 1978  
Phi Beta Kappa

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**Personal / Interests**

Raised in Milwaukee, Wisconsin

Investor and part-time employee in *Nena*, Steve's wife's gift and vintage shop in Seattle's Madrona neighborhood

Enthusiastic traveler, dog owner, and poker player



## Katie Carder McCoy

**E-mail:** cardk@foster.com

**Tel:** 206-447-2880 / Seattle

**Fax:** 206-749-1911

### Practices

Litigation and Dispute Resolution  
Employment and Labor Relations

### Industries

Retail  
Transportation Industries

### Practice Summary

#### Areas of Concentration:

Electronically Stored Information - ESI Squad  
Emergency Injunction Team  
Directors & Officers  
Intellectual Property  
Appellate Team

Katie's practice is concentrated in Litigation and Dispute Resolution, with an emphasis in commercial and employment litigation. She has broad experience litigating complex commercial disputes in state and federal courts and private arbitration, including contract claims, business torts, trademark and intellectual property claims, fraud claims, partnership disputes, and shareholder derivative actions. Katie has significant trial experience in court and private arbitration.

In her employment practice, Katie has experience in both federal and state courts defending employers and managers in employment litigation involving claims for violation of federal and state anti-discrimination, disability, and family and medical leave laws, wrongful discharge in violation of public policy, and emotional distress claims. She also helps employers enforce non-competition agreements, protect trade secrets and other confidential business information, and prevent unfair competition through negotiation, temporary restraining orders, and other injunctive relief.

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### Experience

Foster Pepper PLLC  
Associate, 2006-Present  
Summer Associate, 2005

Lane County Legal Aid - Eugene, OR  
Legal Extern, 2005

Oregon Department of Justice, Trial Division - Salem, OR  
Law Clerk, 2004-2005

## Bar Admissions

Washington, 2006  
Admitted to practice

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## Representative Cases

Defense of Northwest-based global retailer against former supplier's breach of contract, fraud, CPA, and unjust enrichment claims. Fraud claims dismissed on summary judgment. Client deemed the prevailing party after 12-day trial in private arbitration, defeating plaintiff's \$23 million damage claim and obtaining attorneys' fees and costs.

Defense of Northwest-based global retailer against claims brought by former supplier's bank involving supplier's sales contract and account. Dismissed on summary judgment in private arbitration, with attorneys' fees and costs awarded.

Defense of Northwest-based global retailer against fraudulent inducement, breach of contract, and unjust enrichment claims brought by former tax vendor. All claims denied following 4-day trial in private arbitration. Obtain temporary restraining order against Snohomish County employer's former employee who violated non-competition agreement and took trade secrets to direct competitor.

Obtain temporary restraining order in Whatcom County against signature gatherers trespassing on client's private property and harassing client's customers.

Defend mortgage company against trademark, breach of contract, false light and similar claims in federal court. Summary judgment dismissal of plaintiff's trademark infringement and dilution, breach of contract, false light, and misappropriation of likeness claims.

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## Activities

Washington State Bar Association

Legal Voice

Board Member

Auction Committee

Featured in 2010 Foster Pepper Pro Bono Annual Report

KCBA Housing Justice Project

Featured in 2009 Foster Pepper Pro Bono Annual Report

Helping Secure Land Rights for the World's Poorest - Bangladesh

Featured in 2006 Foster Pepper Pro Bono Annual Report

Real Change

Star Guild, Children's Hospital Guild Association

Board Member, 2006-2010

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## Publications

Katie Carder McCoy is a contributor to Foster Pepper's Washington Workplace Law blog.  
Check out the latest news in this fast-changing area at: [www.washingtonworkplacelaw.com](http://www.washingtonworkplacelaw.com).

Experts give their solutions to difficult workplace problems  
*What's Working in Human Resources* - August 2012

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## Presentations

Seattle Paid Sick and Safe Time: Practical Guidance Employers Need to Know  
Speaker, Seattle, WA - August 2012

Disability Accommodation: Navigating the Interactive Process  
Speaker, Reasonably Accommodating Employees with Disabilities, Seattle, WA - June 2012

Employment Law Challenges for Public Employers and Current Developments under the Public Employees Collective Bargaining Act  
Panelist, 2012 Association of Washington Housing Authorities (AWHA) Meeting, Seattle, WA - April 2012

Employee Investigations: A Practical Guide For Washington Employers  
Speaker, Conducting Effective Workplace Investigations, Seattle, WA - February 2012

Update on Developments in Employment Law  
Speaker, Social Media in the Workplace, Seattle, WA - May 2011

Just Cause  
Speaker, Civil Service Conference - October 2010

Compensation Issues under FLSA/Wage and Hour  
Speaker, Fundamentals of Employment Law, Seattle, WA - June 2010

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## Education

University of Oregon School of Law, J.D., 2006  
Oregon Law Review, Editor, 2004-2006  
Graduate Teaching Assistant, University of Oregon President Dave Frohnmayer, 2006

University of Washington  
B.A. Political Science, 2003  
B.A. Business Administration, 2003

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## Personal / Interests

Interests include traveling internationally, cheering for the Huskies, practicing yoga, hiking and enjoying the Great Outdoors.

Born in Santa Ana, CA



## Janelle Milodragovich

**E-mail:** miloj@foster.com

**Tel:** 206-447-6220 / Seattle

**Fax:** 206-749-2120

### Practices

Litigation and Dispute Resolution  
Employment and Labor Relations  
Business

### Industries

Transportation Industries  
Arts and Entertainment  
Wineries, Breweries and Distilleries

### Practice Summary

Ms. Milodragovich advises and represents all types of employers in a broad range of labor and employment law matters, including union avoidance, wage and hour disputes, discrimination complaints, progressive discipline issues, and employee terminations. She represents corporations and small business in union negotiations, organizing campaigns, elections and labor arbitrations. Ms. Milodragovich's practice also includes representing clients in unfair labor practice proceedings and 10j actions before the National Labor Relations Board and related administrative agencies.

In addition to her traditional labor experience, Ms. Milodragovich has significant experience defending employers of all sizes in employment litigation involving claims of disability and employment discrimination, wrongful termination, and wage and hour class actions. She has extensive California litigation experience, including representing employers in California state administrative proceedings. Ms. Milodragovich works closely with Human Resource professionals to ensure clients' compliance with applicable state and federal labor laws, as well as other statutory and contractual obligations. She also serves as Publisher of Foster Pepper's Washington Workplace Law blog: [www.washingtonworkplacelaw.com](http://www.washingtonworkplacelaw.com).

Prior to law school, Ms. Milodragovich worked as a Human Resources Generalist for a multi-state education company.

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### Experience

Foster Pepper PLLC  
Associate, 2010-Present

Littler Mendelson, PC - San Francisco, CA  
Associate, 2005-2010

Office of the Washington State Attorney General, Ecology Division - Olympia, WA  
Clerk, June-September 2004

Office of the Washington State Attorney General, UW Division - Seattle, WA  
Clerk, June 2003-June 2004; September-December 2004

### **Bar Admissions**

United States District Court  
Eastern District of Washington, 2012  
Central District of California, 2009  
Northern District of California, 2006

Washington, 2010

California, 2005

Ninth Circuit Appellate Court

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### **Activities**

American Bar Association

King County Bar Association

Washington State Bar Association

California Bar Association

Serbian Bar Association of America

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### **Publications**

Janelle Milodragovich is a contributor to Foster Pepper's Washington Workplace Law blog.  
Check out the latest news in this fast-changing area at: [www.washingtonworkplacelaw.com](http://www.washingtonworkplacelaw.com).

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### **Presentations**

Seattle Paid Sick and Safe Time: Practical Guidance Employers Need to Know  
Panelist, Seattle, WA - August 2012

Managing the Process of Labor Negotiations  
Panelist, WFLA 63rd Annual Conference - October 2011

Civil Service & Collective Bargaining – A Short History  
Speaker, 2011 Civil Service Conference - September 2011

Out of Sight, But Not Out of Mind: Untangling Employer Obligations Under FMLA and Other Statutes  
Speaker, Seattle, WA - September 2011

Issues Arising From Off-Duty Use of Social Media  
Speaker, Social Media in the Workplace - May 2011

Collective Bargaining and Managing The Unionized Workforce  
Speaker, PNRC-NAHRO conference - May 2011

Employment-Related Due Diligence For Transactional Attorneys  
Speaker, WSBA YLD Summit - April 2011

Employment Issues for Filmmakers

Co-Presenter, Washington Lawyers for the Arts - March 2011

Trends in Collective Bargaining

Speaker, NW Hospital Council - March 2011

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## **Education**

University of Washington School of Law, J.D., 2005

Washington State University, B.A.

Selected by Governor Gary Locke as first Student Regent, 1998-1999

Student Speaker, WSU Commencement, 1999

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# Speaker Materials

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Presented by:



# Washington Workplace Law

## Foster Pepper PLLC

# What Happens in Vegas Doesn't Stay in Vegas: Best Practices For Using Social Media in The Recruiting Process

Posted by [Janelle Milodragovich](#) on May 10, 2011

Several attendees at the May 10 Social Media Breakfast Briefing asked about best practices for use of social media in the recruiting process. A candidate's publicly-available social media profile may provide valuable information related to his or her work qualifications, interests and negative work history or behavior.

Social media searches used during the recruiting process must be consistent and carefully crafted. Failure to establish a consistent search methodology may yield too much information (e.g., information on protected status such as ethnicity, disability, pregnancy, or union affiliation) and therefore may generate a claim for failure to hire or for post-hire discrimination.

So, what are some guidelines for social media checkups during the hiring process?

**1. Consistency:** All applicants should be processed consistently. Any searches should be conducted at the same phase of the interview process (e.g., before the initial interview or after the first phone screen). The process should be followed for each candidate without regard to age, appearance, or perceived lifestyle choices. If you decide that not every position merits investigation using social media checks, designate particular job categories or departments that are included and consistently follow those guidelines.

**2. Designated searcher:** The organization should designate one employee (or small group of employees) to conduct the search. As an alternative, the organization may want to engage a third party service provider to perform the work. The employee conducting the search should not be the hiring manager.

**3. Screen the hiring manager:** The goal of naming a designated searcher is to avoid revealing protected information to the hiring manager. Protected information includes, for example, data about the age, race, religion, disability, genetic information, and political association of the candidate.

**4. Limited scope:** Before incorporating social media searches in recruiting, the organization should identify the social media sites they wish to search, focusing on securing

relevant, work-related information. The search should seek publicly available information; do not allow the searcher or others in the recruiting department to "friend" an applicant in order to see private profile information.

**5. Disclosure to applicant:** Follow the same notice and disclosure policies the organization already has in place. Include a proviso regarding social media on the organization's application for employment or in a separate disclosure.

**6. Document results:** Those conducting the review should consistently document the results of the social media search, removing any protected information that was inadvertently obtained. Search results should be maintained consistently with the organization's recordkeeping policies.

**7. Document the basis for hiring decisions:** If you use social media search results to reject an applicant, such decisions should be based on legitimate, job-related reasons (e.g., work history was inconsistent with resume). The decision should be documented consistent with existing recruiting policies and procedures.

**8. Communicate the policy to hiring managers:** Hiring managers should be informed of the organization's policy, and should be specifically advised not to perform their own social media searches.

If you have any questions about this information, please feel free to contact the [Foster Pepper Employment and Labor Relations Group](#). Materials from the May 10 Breakfast Briefing, including a sample social media policy, are available under the "News/Pubs" link on the [ELR Group page](#).

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# Can't I Require a Job Applicant to Have a High School Diploma?

Posted by [Steve Peltin](#) on January 10, 2012

For many jobs, employers require undergraduate or advanced degrees. For lower-level positions, a high school diploma often is expected, regardless of the nature of the job. However, the EEOC recently cautioned that such an educational requirement may be impermissible.

On November 17, the [EEOC issued an opinion letter in response to an employer inquiry](#). The letter noted that some individuals with learning disabilities cannot pass high school exams and therefore don't have a diploma.

An applicant with a learning disability may be protected under the Americans with Disabilities Act (ADA) and under state and local law. Once a condition is determined to be a disability, the employer has a duty not to discriminate and an affirmative obligation to reasonably accommodate.

The ADA specifically regulates preemployment requirements. As the EEOC explained in the November 17 letter:

[A] qualification standard, test, or other selection criterion, such as a high school diploma requirement, that screens out an individual or a class of individuals on the basis of a disability must be job related for the position in question and consistent with business necessity. A qualification standard is job related and consistent with business necessity if it accurately measures the ability to perform the job's essential functions (i.e. its fundamental duties). Even where a challenged qualification standard, test, or other selection criterion is job related and consistent with business necessity, if it screens out an individual on the basis of disability, an employer must also demonstrate that the standard or criterion cannot be met, and the job cannot be performed, with a reasonable accommodation.

The EEOC then applied these principles to a high school diploma prerequisite. If the prerequisite screens out applicants who could not graduate because of a learning disability, the employer must show that the diploma requirement is "job related and consistent with business necessity." If a person without a diploma can easily perform the essential job duties, the employer can't defend the requirement.

Even if the diploma requirement is demonstrably “job related and consistent with business necessity,” the employer may still be unable to automatically exclude applicants with disabilities and without diplomas. Instead, an individualized review may be necessary. The EEOC suggested that the employer may need to consider the applicant’s work history or allow the applicant to show that he or she can perform the essential job functions.

Although not discussed in the November 17 letter, a high school diploma requirement also can create potential liability for race or other discrimination. In 1970, the US Supreme Court, in *Griggs v. Duke Power*, invalidated a diploma requirement, finding that it violated Title VII of the Civil Rights Act of 1964. Duke Power required applicants to have either a high school diploma or a specified score on an IQ test. These criteria disqualified African Americans at a substantially higher rate than whites. Since Duke Power could not show that these requirements successfully measured the ability to do the jobs in question, it could not continue to use them.

If an employer would like to set educational requirements, how can it avoid discrimination claims?

**1. Carefully evaluate whether the educational prerequisite really is necessary.**

Is there a relationship between educational attainment and ability to perform the job? If not, the employer should consider whether to keep the requirement. The employer still can choose the best qualified candidate – including one with superior educational credentials – so long as all who can do the job have the chance to be considered on their merits.

**2. If the educational requirement is necessary, be prepared to demonstrate why.**

The starting point for the demonstration is the job description. Does it identify the essential job functions? If so, do those functions require a diploma? Are these same functions considered in the performance evaluation process? Will the supervisor – who oversees the performance of the work – support the requirement? If the employer doesn’t know the answer to these questions, it isn’t ready for the discrimination claim.

**3. Even if the educational requirement is permissible, consider making an exception.**

If an applicant reports a disability and requests an accommodation, the employer should consider allowing the applicant to prove job proficiency, either through past employment success or through on-site skills demonstration. The applicant may request other accommodations in the selection process, which the employer should consider. The employer should document all of these steps, so it can show that it responded properly to the accommodation request.

If you have questions about the information in this post or about your organization’s application and selection process, please feel free to contact the [Foster Pepper Employment and Labor Relations Practice Group](#).

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# Access Denied: Legislation Prevents Employers from Demanding Employees' Social Media Passwords

Posted by [Alicia Feichtmeir](#) on April 16, 2012

Many employers use social media to screen prospective job applicants. We've written several posts identifying "[best practices](#)" for researching a job candidate's online history.

Recent bills introduced in several states, including [California](#), [Illinois](#), and now [Washington](#), provide another reason for avoiding Facebook and other social media passwords.

Maryland is the first state to pass a [law](#) prohibiting employers from requiring or seeking social media usernames and passwords. Similar [legislation](#) has been introduced in the Washington State Senate. Senate Bill 6637 would make it unlawful for public and private employers to seek access to an employee's social media profile as part of a job application or as a condition of continued employment. Employers who violate the law would be subject to a \$500 penalty payable to the prevailing employee, as well as attorneys' fees.

Even absent these legislative requirements, employers should not require current or potential employees to provide social media usernames or passwords as a condition of employment. There are ways to screen or monitor employees without demanding direct access to non-public Facebook pages, and to thereby avoid financial penalties and infringing on employees' privacy rights. One option, discussed in one of our [posts](#), is to engage an outside vendor to conduct social media searches on an employer's behalf.

If you have any questions about these issues, please feel free to contact the [Foster Pepper Employment and Labor Relations Group](#).

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WAC 162-12-140  
Preemployment inquiries.

(1) The following examples of fair and unfair inquiries apply when made in reference to job application forms, preemployment interviews, or any other type of inquiry made of job applicants. The rules also apply to inquiries made to persons other than an applicant and to inquiries made by third parties such as a credit reporting service. The rules do not apply after a person is employed. See WAC 162-12-180.

(2) Employers and employment agencies shall comply with these rules except where one or more of the following conditions exist:

(a) When there is a "bona fide occupational qualification."

(b) A voluntary affirmative action plan that is in compliance with the requirements of a government agency or other competent authority such as a court, and if made in a manner provided in WAC 162-12-160 and 162-12-170.

(c) A requirement of federal law or regulation, as explained in WAC 162-12-150.

If one or more of the above conditions apply, the inquiries of employers and employment agencies must be accompanied by a written explanation of their purpose. See WAC 162-12-135, 162-12-160 and 162-12-170.

(3) The following examples of fair and unfair preemployment inquiries define what is an unfair practice under RCW 49.60.180(4) and 49.60.200. These examples, however, are not all inclusive. All preemployment inquiries that unnecessarily elicit the protected status of a job applicant are prohibited by these statutes irrespective of whether or not the particular inquiry is covered in this regulation.

	FAIR	UNFAIR
<b>SUBJECT</b>	<b>PREEMPLOYMENT INQUIRES</b>	<b>PREEMPLOYMENT INQUIRES</b>
a. Age	Inquiries as to birth date and proof of true age are permitted by RCW 49.44.090.	Any inquiry not in compliance with RCW 49.44.090 that implies a preference for persons under 40 years of age.
	(For age discrimination, RCW 49.44.090 must be read in conjunction with RCW 49.60.180 and 49.60.200. RCW 49.44.090 limits age discrimination coverage to persons 40 years of age and older, and makes other limitations and exceptions to the age discrimination law.)	
b. Arrests (see also Convictions)	Because statistical studies regarding arrests have shown a disparate impact on some racial and ethnic minorities, and an arrest by itself is not a reliable indication of criminal behavior, inquiries concerning arrests must include whether charges are still pending, have been dismissed, or led to conviction of a crime involving behavior that would adversely	Any inquiry that does not meet the requirements for fair preemployment inquiries.

	<p>affect job performance, and the arrest occurred within the last ten years. Exempt from this rule are law enforcement agencies and state agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults. See RCW <a href="#">43.20A.710</a>; <a href="#">43.43.830</a> through <a href="#">43.43.842</a> ; and RCW <a href="#">72.23.035</a>.</p>	
c. Citizenship	<p>Whether applicant is prevented from lawfully becoming employed in this country because of visa or immigration status. Whether applicant can provide proof of a legal right to work in the United States after hire.</p>	<p>Whether applicant is citizen. Requirement before job offer that applicant present birth certificate, naturalization or baptismal divulge applicant's lineage, ancestry, national origin, descent, or birth place.</p>
d. Convictions (see also Arrests)	<p>Statistical studies on convictions and imprisonment have shown a disparate impact on some racial and ethnic minority groups. Inquiries concerning convictions (or imprisonment) will be considered to be justified by business necessity if the crimes inquired about relate reasonably to the job duties, and if such convictions (or release from prison) occurred within the last ten years. Law enforcement agencies, state</p>	<p>Inquiries concerning convictions and imprisonment which either do not relate reasonably to job duties or did not occur within the last ten years will not be considered justified by business necessity.</p>

	<p>agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults are exempt from this rule. See RCW <a href="#">43.20A.710</a>; <a href="#">43.43.830</a> through <a href="#">43.43.842</a> ; and RCW <a href="#">72.23.035</a>.</p>	
e. Family	<p>Whether applicant can meet specified work schedules or has activities, commitments or responsibilities that may prevent him or her from meeting work attendance requirements.</p>	<p>Specific inquiries concerning spouse, spouse's employment or salary, children, child care arrangements, or dependents.</p>
f. Disability	<p>Whether applicant is able to perform the essential functions of the job for which the applicant is applying, with or without reasonable accommodation. Inquiries as to how the applicant could demonstrate or describe the performance of these specific job functions with or without reasonable accommodation. Note: Employers are encouraged to include a statement on the application form apprising applicants that if they require accommodation to complete the application, testing or interview process, to please contact the employment office, personnel or human resources department</p>	<p>Inquiries about the nature, severity or extent of a disability or whether the applicant requires reasonable accommodation prior to a conditional job offer. Whether applicant has applied for or received worker's compensation. Also any inquiry that is not job related or consistent with business necessity.</p>

	or other office as may be able to assist them.	
g. Height and Weight	Being of a certain height or weight will not be considered to be a job requirement unless the employer can show that all or substantially all employees who fail to meet the requirement would be unable to perform the job in question with reasonable safety and efficiency.	Any inquiry which is not based on actual job requirements and not consistent with business necessity.
h. Marital Status (see also Name and Family)	None.	( ) Mr. ( ) Mrs. ( ) Miss ( ) Ms.  Whether the applicant is married, single, divorced, separated, engaged, widowed, etc.
i. Military	Inquiries concerning education, training, or work experience in the armed forces of the United States.	Type or condition of military discharge. Applicant's experience in military other than U.S. armed forces. Request for discharge papers.
j. Name	Whether applicant has worked for this company or another employer under a different name and, if so, what name. Name under which applicant is known to references if different from present name.	Inquiry into original name where it has been changed by court order or marriage. Inquiries about a name that would divulge marital status, lineage, ancestry, national origin or descent.
k. National Origin	Inquiries into applicant's ability to read, write and speak foreign languages,	Inquiries into applicant's lineage, ancestry, national origin,

	when such inquiries are based on job requirements.	descent, birthplace, or mother tongue. National origin of applicant's parents or spouse.
I. Organizations	Inquiry into organization memberships, excluding any organization the name or character of which indicates the race, color, creed, sex, marital status, religion, or national origin or ancestry of its members.	Requirement that applicant list all organizations, clubs, societies, and lodges to which he or she belongs.
m. Photographs	May be requested <i>after</i> hiring for identification purposes.	Request that applicant submit a photograph, mandatorily or optionally, at any time before hiring.
n. Pregnancy (see also Disability)	Inquiries as to a duration of stay on job or anticipated absences which are made to males and females alike.	All questions as to pregnancy, and medical history concerning pregnancy and related matters.
o. Race or Color	None. See WAC 162-12-150, 162-12-160, and 162-12-170.	Any inquiry concerning race or color of skin, hair, eyes, etc., not specifically permitted by WAC 162-12-150, 162-12-160, and 162-12-170.
p. Relatives	Name of applicant's relatives already employed by this company or by any competitor.	Any other inquiry regarding marital status, identity of one's spouse, or spouse's occupation are considered unfair practices in accordance with WAC 162-12-150.

(While the law does not prohibit company policies governing the employment of relatives, any policy that has the effect of disadvantaging minorities, women, married couples, or other protected classes, would be in violation of the law unless it is shown to serve a necessary

business purpose.) See WAC 162-12-150, 162-12-160, and 162-12-170.

q. Religion or Creed	None.	Inquiries concerning applicant's religious preference, denomination, religious affiliations, church, parish, pastor, or religious holidays observed.
r. Residence	Inquiries about address to the extent needed to facilitate contacting the applicant.	Names or relationship of persons with whom applicant resides. Whether applicant owns or rents own home.
s. Sex	None.	Any inquiry concerning gender is prohibited.

[Statutory Authority: RCW 49.60.120(3), 00-01-177, § 162-12-140, filed 12/21/99, effective 1/21/00; 96-21-054, § 162-12-140, filed 10/14/96, effective 11/14/96; Order 19, § 162-12-140, filed 1/20/75; Order 18, § 162-12-140, filed 1/20/75; Order 16, § 162-12-140, filed 5/22/74; Order 9, § 162-12-140, filed 9/23/71; Order 8, § 162-12-140, filed 6/22/70; § 162-12-140 and chart, filed 10/23/67.]