

# UTAH EMPLOYMENT LAW UPDATE

Volume 3 / Issue 2

Winter 2019

## UPDATES AND BEST PRACTICES

Businesses, employers, and employees face constant changes in statutes, regulations, and laws. Staying current on these changes is vital to the effective operation of business and to safeguard rights and interests.

This newsletter provides quarterly updates and reminders of best practices for businesses located or operating in the state of Utah.



## IN THIS ISSUE

### Advertising a Job Position

Steps to take before hiring an employee to give the employer the best chance if litigation ensues. | Pg. 2

### Applications & Interviews

Best practices on what you can include in advertising a position and what can be asked in an interview. | Pg. 3

### Employee Handbooks are Critical to Prevent Successful Employee Lawsuits

Drug and alcohol policy. | Pg. 4

### Practice Profiles

Get to know Kathryn J. Steffey, James W. Stewart, and Clayton H. Preece. | Pg. 5

Kathryn J. Steffey  
ksteffey@SHutah.law  
Office: 801.413.1600

James W. Stewart  
jstewart@SHutah.law  
Office: 801.413.1600

Clayton H. Preece  
cpreece@SHutah.law  
Office: 801.413.1600  
Mobile: 801.367.5755



# ADVERTISING A JOB POSITION

By Clayton H. Preece

There are numerous rule and considerations that an employer must take into account when advertising a position. Not only is a job description often the first interaction a potential employee will have with the employer, but also presents many potential stumbling blocks for the employer. Employers should keep the following topics in mind during when advertising a position.

## Citizenship & Immigration Status

The Immigration and Nationality Act prohibits citizenship status and national origin discrimination with respect to hiring, termination, and recruiting or referring for a fee. 8 U.S.C. § 1324b(a)(1)(B).

- Do not include any language that requires U.S. citizenship or lawful permanent residence in the U.S. as a condition of employment.<sup>1</sup>
- Do not include any job requirement or criterion in connection with a job posting that discriminates on the basis of citizenship status or national origin.
- Do not include statements<sup>2</sup> like:
  - “U.S. citizenship preferred”
  - “Only U.S. Citizens”
  - “Citizenship requirement”
  - “Only U.S. Citizens or Green Card Holders”
  - “H-1Bs Only”
  - “Must have a U.S. Passport”
  - “Must have a green card”

## E-Verify

Utah Employers should indicate that they participate in E-Verify. Participation in E-Verify is generally required for private employers who employ 15 or more employees on or after July 1, 2010. Utah Code Ann. § 13-47-201. An employer may not hire a new employee on or after July 1, 2010 unless the employer is registered with and uses a status verification system such as E-Verify to verify the federal legal working status of any new employee. *Id.*

---

<sup>1</sup> There may be circumstances where such language would be necessary, such as a government contract which requires that workers have U.S. Citizenship, in such circumstances, consult with an attorney before posting.

<sup>2</sup> There may be circumstances where such language would be necessary, such as a government contract, in such circumstances, consult with an attorney before posting.

## Duties and Requirements

The description of the position and any requirements need to be objectively based on what the job actual requires. For each duty or requirement, the Employer should be able to answer the following question affirmatively “Can I point to a job-related function that makes this necessary?” This is to provide a potential defense to claims of disparate impact, discussed below.

## Posting Requirements for Government Entities

Also note that Government Entities must post the position on the Utah Department of Work Force Services Website (<https://jobs.utah.gov/employer/index.html>) Utah Code Ann. § 35A-2-203. A government entity “means the state or any county, municipality, local district, special service district, or other political subdivision or administrative unit of the state, a state institution of higher education as defined in Section 53B-2-101, or a local education agency as defined in Section 53A-30-102.” Utah Code Ann. § 35A-1-102(9).

## Other Requirements for Government Entities

Certain government positions also have requirements for finding and selecting employees. For example, under Utah Code Ann. § 67-19-15 for positions under Schedule B<sup>3</sup>, appointments must be made from a hiring list of applicants who have been selected by competitive procedures. Generally this means that the position is publicly advertised in a manner to attract the highest number of qualified individuals. The specifics of what is required vary by position. Note that there are numerous exemptions and classifications. For example, Utah Code Ann. § 67-19-15, contains over 15 different classifications of exempt state employees and Utah Code Ann § 17-33-8 contains numerous exempt county positions. Government employers should review the specific position with legal counsel to ensure that any requirements for advertising are satisfied.

<sup>3</sup> All positions filled through competitive selection procedures as defined by the executive director; or positions filled through department approved on-the-job examination intended to appoint a qualified person with a disability, or a veteran in accordance with Title 71, Chapter 10, Veteran’s Preference.

# APPLICATIONS & INTERVIEWS

By Clayton H. Preece

Employers frequently require candidates for a position to fill out an application. The employer may also conduct interviews to determine which candidate would be best for the position. While applications and interviews are important, employers must take certain steps to protect themselves during this process. Additionally, if the employer eventually needs to terminate an employee, the application is an important place to begin laying the framework for a defensible termination. Employers should keep the following topics in mind during the application and interview process.

## At Will

If possible, employers should include an “at will” provision in the application which indicates that the position is at will and the employee may be terminated with or without cause. Note that some government positions may include a probation period. The application should state 1) the length of the probation period, and 2) that during the probation period, employee may be terminated without cause.

## Classification

Employers should also provide the appropriate classification for the position. For example, the application should state whether the position is exempt or non-exempt under the Fair Labor Standards Act. Additionally, government positions may include various classifications. Those classifications should be included on the application.

## Disparate Impact

Employers need to act fairly with respect to all applicants. Note also that courts recognize that even practices which are facially fair, may be discriminatory in their effect. *See e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (U.S. 1971)

(“The [Civil Rights Act] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.”) For example, requirements regarding education, experience, certification, or other physical characteristics may be unlawful if they serve to screen out

a disproportionately high percentage of candidates on the basis of protected status and are not justified by any business purpose. Some examples of disparate impact include requirements relating to written tests, height and weight requirements, educational requirements. If there is a disparate impact, the employer will need to show that there is a “business necessity” for the requirement. 42 USC § 2000e-2. Note that even if there is business necessity, if there is an alternate practice which would eliminate the disparate impact, the employer may still be liable.



**The “Four-Fifths Rule.”** A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. 29 CFR § 1607.4 D.

Protected classes included:

- Disability (both physical and mental)
- Race
- National Origin
- Religion
- Sex (this includes pregnancy, childbirth, and related conditions)
- Genetic information
- Age (over 40)

## Disability Related Questions

With regard to application and interview questions, the Equal Employment Opportunity Commission (“EEOC”) has provided the following guidance:

Under the law, an employer may not ask disability-related questions and may not conduct medical examinations until after it makes a conditional job offer to the applicant. This helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications. An employer may not ask disability-related questions or require a medical examination pre-offer even if it intends to look at the answers or results only at the post-offer stage.

Although employers may not ask disability-related questions or require medical examinations at the pre-offer stage, they may do a wide variety of things to evaluate whether an applicant is qualified for the job, including the following:

- Employers may ask about an applicant's ability to perform specific job functions. For example, an employer may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements.
- Employers may ask about an applicant's non-medical qualifications and skills, such as the applicant's education, work history, and required certifications and licenses.
- Employers may ask applicants to describe or demonstrate how they would perform job tasks.

EEOC, Notice 915.002 (available at <https://www.eeoc.gov/policy/docs/preemp.html>).

## EMPLOYEE HANDBOOKS ARE CRITICAL TO PREVENT SUCCESSFUL EMPLOYEE LAWSUITS

By James W. Stewart

This is the seventh article in a series explaining how Employee Handbooks play a critical role in preventing successful lawsuits. This post focuses on information on the need to include a Drug & Alcohol when writing an Employee Handbook.

### Drug & Alcohol Policy

Most often, full policies on drug and alcohol testing are not set forth in usually, only a summary of these policies is included.

If such a policy is summarized, the following should be included:

- Who is subject to testing—all applicants, all employees or both, or even management?
- What is prohibited—the use, possession, sale and/or being under the influence of drugs or alcohol while on company property and/or while) on company business.
- When testing will be conducted-following an accident or “near miss,” based upon reasonable suspicion, on a random basis, and/or as a follow up to completion of a treatment program.
- How the testing will be administered.
- What the consequences will be for refusing to be tested- generally discharge or being considered to have tested positive.
- Whether referral for rehabilitation will be made, and what the consequences will be for failure to complete the rehabilitation program.
- That company desks, lockers and employee lunch boxes, etc. may be searched at any time and that employees should have no expectation of privacy.

In Utah, there is a drug testing statute that can insulate an employer from most liability for drug testing, if the employer's written drug testing policy and practice implements the statute. To be effective, the policy must include testing management, not just employees. See Utah Code Ann. § § 34-38-1 through 34-38-1.

## PRACTICE PROFILES



### Kathryn J. Steffey

Kathryn J. Steffey is a partner at Smith Hartvigsen and has extensive experience in representing a diversity of clients in both state and federal courts. Ms. Steffey has acted as lead counsel for local general contractors regarding multi-faceted construction contract disputes concerning both private and public projects. She has also defended local governments in actions concerning a variety of matters ranging from breach of contract to violation of civil rights to union contract disputes. Ms. Steffey has also provided legal counsel and advice to governmental entities and private corporations regarding compliance with federal and state laws and regulations. In addition to appearing before the Tenth Circuit Court of Appeals, the United States District Court for the District of Utah, the Utah Supreme Court, the Utah Court of Appeals, and the state district courts located throughout Utah, she has also represented clients before state and local administrative agencies, including, but not limited to, the Utah Anti-Discrimination and

Labor Division and Utah's Division of Occupational and Professional Licensing.



### James W. Stewart

James W. Stewart is of counsel in the law firm of Smith Hartvigsen, PLLC. He is listed by his peers and *Utah Business Magazine* as one of the Legal Elite labor and employment attorneys in Utah. Mr. Stewart has also been listed by the nationwide *Chambers* business publications as one of Utah's key labor and employment attorneys. He represents national, regional, and Utah employers. Mr. Stewart advises employers in virtually all areas of employment law and labor law, and frequently defends employers in court litigation and arbitration in employment disputes at both the trial and appellate level. He has been the director of employment law continuing education programs for the Utah State Bar. Mr. Stewart frequently gives employment law seminars for business. He has written numerous employment law publications and is a former editor of the *Utah Employment Law Letter* and the *Brigham Young University Law Review*. Mr. Stewart

has served as a founding member for the First American Inn of Court and has been a board member and president of the Utah Lawyers for the Arts. He earned a Bachelor's of Arts, magna cum laude, a Juris Doctorate, and a Master's in Business Administration from Brigham Young University. Mr. Stewart also served as a judicial clerk to the Honorable Stephanie Seymour, U.S. Federal Court of Appeals for the Tenth Circuit. In addition, Mr. Stewart has substantial experience providing transactional advice to businesses and represents businesses in other corporate and commercial litigation.

For regular updates and best practices relating to labor and employment law, subscribe to the Employment Law for Business Blog at <https://employmentlawyerutah.com> or subscribe to the twitter feed @UTemploylaw.



## Clayton H. Preece

Clayton H. Preece is an associate in the law firm of Smith Hartvigsen, PLLC. He represents businesses and employers in a wide range of litigation matters including labor and employment. Mr. Preece assists both national and local businesses with their labor and employment concerns. Mr. Preece is an author and editor of the Employment Law for Business Blog. Additionally, Mr. Preece represents individuals, businesses, and governmental entities, relating to land use and zoning, construction litigation, commercial litigation, natural resources litigation, and appeals. He also serves on the Utah State Bar's Unauthorized Practice of Law Committee and serves the community through the University of Utah's Street Law Clinic. Mr. Preece earned his Juris Doctorate from The George Washington University Law School in Washington, D.C. Mr. Preece is a former notes editor of the *Federal Communications Law Journal*. He earned his

Bachelor's in Arts from Utah Valley University, graduating summa cum laude and valedictorian, where he also was the editor in chief of the *Intersections Journal*.



**Smith|Hartvigsen** is a law firm comprised of attorneys, paralegals, legal assistants, and staff who are dedicated to professionalism and providing quality legal services to our clients. To us, professionalism means using our combined decades of experience to zealously advocate for our clients and to develop creative and effective solutions to our clients' problems. Professionalism means listening to our clients, and working within our clients' budgets to accomplish their goals. Professionalism means promptly responding to our clients' emails and phone calls, and keeping our clients informed regarding all aspects of their case. Professionalism means being big enough to handle large complicated matters, but small enough to provide personal service to each client. Professionalism means always striving to be the most knowledgeable experts in our areas of practice, and practicing law with the highest level of ethics, integrity, and ability. We look forward to meeting your legal needs by serving as your counsel and demonstrating to you our commitment to professionalism. Smith Hartvigsen represents individuals, businesses, and governmental agencies in almost all areas of law, including, Water Law, Family Law & Estate Planning, Municipal, District, and Local Government Law, Real Estate, Land Use and Redevelopment, and both trial and appellate litigation.



## CONTACT US

**Smith Hartvigsen, PLLC**  
257 East 200 South, Suite 500  
Salt Lake City, Utah  
801.413.1600  
<http://smithhartvigsen.com/>

Kathryn J. Steffey  
[ksteffey@SHutah.law](mailto:ksteffey@SHutah.law)  
Office: 801.413.1600

James W. Stewart  
[jstewart@SHutah.law](mailto:jstewart@SHutah.law)  
Office: 801.413.1600

Clayton H. Preece  
[cpreece@SHutah.law](mailto:cpreece@SHutah.law)  
Office: 801.413.1600  
Mobile: 801.367.5755

## UTAH EMPLOYMENT LAW FOR BUSINESS

The Employment Law for Business Blog provides general information and updates regarding general business and employment law relevant to businesses and employers in the State of Utah and through the United States.

Businesses, employers, and employees face constant changes in statutes, regulations, and laws. Staying up to date on these changes is vital to the effective operation of business and to safeguard rights and interests. For regular employment law updates follow the Employment Law for Business Blog or subscribe to our Twitter feed.

<https://employmentlawyerutah.com/>

Twitter: @UTemploylaw

## DISCLAIMER

This newsletter is written for the information and education of its readers only. It should not be construed as legal advice and is not intended to create an attorney-client relationship. Given the general nature of this newsletter, no one should act on its contents without seeking independent legal advice.