



# DELAWARE

## EMPLOYMENT LAW LETTER

Part of your Delaware Employment Law Service

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### **WORKFORCE DEMOGRAPHICS**

## **Voluntary self-identification: best practices**

by Lauren E.M. Russell

*Federal law requires many employers to track applicant demographic data and report it to the federal government. Reporting may be imposed by the Equal Employment Opportunity Commission (EEOC) or by the Office of Federal Contract Compliance Programs (OFCCP), for example. But what about employers that aren't required to track demographic data? Here are some considerations.*

### ***The pros***

There are many reasons an employer may choose to track applicant demographic data, even if it's not required by law. First — and most altruistically — employers should be concerned with whether they are attracting and retaining diverse applicants. In this day and age, a diverse workforce can be a major marketing opportunity and leads to a diversity of ideas and increased creativity, among other benefits.

From a more selfish perspective, applicant and

employee tracking is helpful in litigation defense. Employers that are accused of discrimination in the hiring process or of targeting minority employees for discipline or discharge can effectively counter those allegations by having easy access to long-term data on hiring and retention practices of female and minority employees. If you don't maintain this data already, it can be time-consuming and costly to try to recreate the data at a later time.

Demographic tracking can also be combined with other forms of research. For example, if your business is interested in what forms of job advertising are most successful, a simple voluntary disclosure form can be expanded to include questions regarding how an employee learned about the job opportunity. Provided that necessary precautions are observed, there is no reason you can't use a multipurpose form to track multiple types of data.

### ***The cons***

Many employers balk at the prospect of demographic tracking because it creates knowledge where there was none. Remember that many types of demographic information — such as color, race, age, sex, pregnancy, and certain disabilities — may be immediately apparent when you interview an applicant. Many other types of demographic information may come out in the interview process. For example, interviewees may disclose their sexual orientation, genetic information, or marital status. Some demographic information may even be gleaned from the application alone, such as race and sex indicated by the applicant's name. With this in mind, we urge you not to shy away from tracking demographic data just because it might give rise to a failure-to-hire claim.

Other types of information, however, are disclosed only through a voluntary disclosure form. For example, many disabilities aren't readily apparent when meeting an applicant. In those cases, it's undeniable that an employer is placed on notice of a disability — and perhaps even a duty to accommodate — as a result of voluntary disclosure. However, the risks can be mitigated in these cases.

As a first step, the individual who receives the application and processes the demographic data should never be the same one who conducts the interview and makes the hiring decision. Whenever possible, have an administrative aide receive the application and separate the background information and résumé from the voluntary disclosure form. In the same vein, the individual who processes the application should be carefully trained not to disclose any demographic data about the applicant to the interviewer.

After the demographic data are removed, they should be maintained in a separate file, apart from any application materials and the individual's personnel file (if she is hired). Ideally, these files should be inaccessible to other employees, either in a locked filing cabinet or, if maintained electronically, in a password-protected file.

Finally, the voluntary disclosure form should clearly indicate that the disclosure of information is strictly voluntary, won't be used in the decision-making process, and won't affect the individual's employment in any way. In addition, you may consider including contact information for an HR representative if the applicant believes her disclosure has affected the employment decision.

### ***Bottom line***

With reasonable precautions in place, there is no reason to avoid tracking applicant demographic data through a voluntary disclosure form. There are significant benefits to understanding your applicant pool, and the legal exposure is relatively minor. However, before implementing any voluntary disclosure plan, please speak with your labor and employment counsel.

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