

# An Analysis of Litigation Associated with the Use of the Application Form in the Selection Process

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This study provides empirical data on the actual degree of litigation associated with the use of the application form in the employee selection process. More than 300 federal court cases involving the use of the application form were identified and analyzed. Data is presented that shows the relative frequency of litigation associated with different types of application form questions and inquiries. Data is also provided on the court case outcomes associated with the different types of application form inquiries. Additionally, data is presented that shows that certain job and industry types are at greater risk of litigation than others. The findings of this study can be used by organizations that are interested in reducing their risk of exposure to future litigation. Some general recommendations are offered for developing application forms that are both effective and legally sound.

The first contact that a job seeker has with an organization typically involves an application form. The application form is classified more technically as a "pre-employment inquiry" method. Practically all organizations use application forms to collect pre-employment information that can be used to screen applicants.<sup>1</sup> Information may be requested regarding applicants' job experience, education, training, and any other knowledge, skills, or abilities that are deemed relevant. Most job seekers are eliminated in this initial stage. Those few who survive the initial application stage may be later tested using "substantive" selection methods.<sup>2</sup> Substantive methods (e.g., cognitive ability tests, personality tests, work sample tests, structured interviews, etc.) are used to make more specific predictions regarding the likely level of performance of job candidates. Since most job seekers are "weeded out" in the application stage, this initial stage of the selection process is critically important to both applicants and organizations.

Although application forms appear to be rather innocuous information gathering devices, they may be used to unfairly discriminate against certain individuals. Pre-employment inquiries such as the application form have a good deal of potential for the occurrence of employment discrimination early in the organizational selection process. The Equal Employment Opportunity Commission (EEOC) has issued a *Guide to Pre-Employment Inquiries* which provides advice regarding specific types of ques-

tions that may result in unfair discrimination. But the abovementioned guidelines are not laws, and thus, some employers still use application blanks that could be questioned in terms of their fairness.<sup>3</sup>

The purpose of the current study was to provide some much needed empirical data on the actual degree of litigation associated with the use of application forms. To date, no research data exists regarding the extent to which application form inquiries and questions have been legally challenged in federal courts of law. Some surveys indicate that several public and private organizations use application forms of questionable fairness and legality; however, it is not yet known whether these potentially problematic questions translate into legal action taken against these firms. The research findings yielded by the current study could be of some use to organizations. Organizations could use the information provided by the current study to assess their current application forms and pre-employment inquiries as to their degree of legal risk. They could revise or eliminate currently used application form inquiries that have been found to lead to more legal challenges.

The direct and indirect costs of formal charges and legal action related to employment discrimination can be quite high. Litigation expenses or monetary settlements can drain an organization of its funds. The reputation and public image of the organization could also be irreparably damaged, regardless of the outcome of the lawsuit. This, in turn, may make it more difficult to recruit, hire and retain high quality human resources. The demand for an organization's goods or services may also decline dramatically due to damage to an organization's reputation springing from charges of employment discrimination. Even if the use of inadvisable application form inquiries does not lead to EEOC charges or legal action, the organization can still be adversely affected. For example, research has found that applicants who had completed forms of questionable fairness were less likely to pursue employment with the organization, were less likely to accept a job offer, and were less likely to recommend the organization to friends.<sup>4</sup> Clearly, it is in the best interest of the organization to do everything possible to develop and use legally sound application forms. Job seekers would also benefit from the increased use of application forms that are less discriminatory and less apt to lead to negative reactions. Job applicants should be screened and selected solely on the basis of job related qualifications.

Generally speaking, organizations should not include questions on their application forms that directly identify the applicant's protected group status. Thus, questions about sex or gender, race, national origin, religion, age, or physical or mental disabilities should be avoided. Questions concerning citizenship could also create problems related to charges of possible national origin discrimination. Questions that have traditionally been used to screen out members of protected groups should also be avoided. Thus, questions related to marital status, dependents/children, and childcare arrangements could lead to legal problems. Application form inquiries about relatives/friends who may work for the employer could also be risky. If the organization employs very few minority workers, such questions may be seen as an attempt to perpetuate the current composition (majority dominated) of the workforce.

Non-job related questions that may have an adverse impact on members of protected groups are also potentially problematic. For example, questions regarding height, weight and certain physical abilities may screen out relatively more women than men. Similarly, questions related to military discharges, arrests, convictions, driving record/traffic violations, and one's credit history may lead to adverse impact for some minority groups.<sup>5</sup> Application form inquiries regarding educational and training requirements, licensing and certification requirements, work history and experience requirements may also have a disproportionate impact on minorities. If such questions are not demonstrably job related, they may be discriminatory in nature.

Some surveys have been conducted on the extent to which organizations' application blanks conform to the EEOC's guidelines. For example, Miller examined the application forms of 151 Fortune 500 companies and found that 98.7 percent of them included one or more items that were considered to be "inappropriate" in that they did not appear to be job related and were potentially discriminatory. The application forms had an average of 9.74 items that were considered inappropriate.<sup>6</sup> Burrington reviewed the application forms of state personnel offices in 50 states and found that every form had at least one inappropriate information request. Further, the forms had an average of 7.7 inappropriate items. The most common inappropriate items were those that asked for information on sex/gender, race, education, and handicaps.<sup>7</sup>

Lowell and DeLoach reviewed the application blanks of 50 large, well known U.S. firms, and found 17 types of questions that did not conform to EEOC guidelines. Only two of the application blanks that were reviewed did not contain any such violations, and 25 percent or more of the applications requested potentially inappropriate information on military background, education, arrest records, physical handicaps and age.<sup>8</sup> More recently, Jolly and Frierson examined 283 application forms to determine their compliance with EEOC guidelines, and found that every form contained at least one item that would be considered inappropriate.<sup>9</sup>

Saunders, Leck, and Vitins reviewed the applications used by 75 organizations. They found that the most frequently asked questions on membership in a protected group included items about age (41 percent) and marital status (20 percent). Fewer organizations asked about race, color, religion, or ethnic origin. More than 10 percent of the application forms requested information about criminal records, sex, marital status and number of dependents.<sup>10</sup> In another study, Saunders, Leck, and Marcil examined 349 application blanks and found similar results. Discriminatory information was most likely to be requested about age (32 percent), handicaps (29 percent), marital status (22 percent), criminal records (20 percent) and sex (17 percent). Information about race (three percent) and religion (zero percent) was less frequently requested. Many of the application blanks requested data that would indirectly provide information about protected group membership status (e.g., general education history such as high school name, location, or year of graduation may give information about age, religion, or ethnicity); and seven percent of the organizations requested that job applicants attach a photograph to the application form, and thereby reveal their membership in a number of protected groups.<sup>11</sup>

Vodanovich and Lowe reviewed the application forms of 88 southeastern firms and found an average of 7.4 inadvisable items per form. Among the more frequent inadvisable inquiries were those that requested information about age and relatives.<sup>12</sup> More recently, Wallace, Tye and Vodanovich reviewed 41 Internet-based state application forms, and found that 97.5 percent of the forms included at least one inadvisable question (with an average of 4.2 inadvisable questions per form). The most frequent inadvisable items were those that requested information on sex/gender, race, age, handicaps, birthplace, driver's license, and court and conviction records.<sup>13</sup>

The abovementioned surveys indicate that several public and private sector organizations use application blanks of questionable fairness. Clearly, the potential for selection discrimination litigation exists. To date, however, no research has investigated the actual degree of litigation associated with the use of the application form. Some research has investigated the relative degree of litigation associated with the use of substantive selection tests and devices such as cognitive aptitude tests, personality tests, physical ability tests, work sample tests and assessment centers.<sup>14</sup> Recent research has also examined the relative degree of litigation surrounding screening devices (reference checks, background investigations, medical exams, drug tests and polygraphs) that are used later in the selection process.<sup>15</sup> But no empirical data exists regarding the actual degree of litigation associated with the use of the application blank—the point of first contact where the majority of potential job candidates are eliminated.

The general purpose of the current research was to address the abovementioned informational deficiency. All federal court cases involving discrimination related to the use of the application blank from 1978 to the present were identified and content analyzed. More specifically, the two primary objectives of the current study were as follows: 1) to provide empirical data on the relative frequency and nature of litigation associated with various types of application form questions and inquiries, and 2) to provide data on the court case outcomes (whether the court ruled for the plaintiff or the defendant) of the legal challenges associated with the various application form inquiries. A secondary objective of this study was to investigate possible differences in litigation rates and case outcomes as a function of job type and industry type.

## Methods and Procedures

All federal court cases involving discrimination related to the use of application forms from 1978 to the present that were reported in the *Fair Employment Practices Cases* bulletin were identified. This legal bulletin reports the text and opinions of federal court rulings on employment discrimination cases. The year 1978 served as the starting point for the case search because in August of 1978 the various federal agencies collaboratively published the *Uniform Guidelines on Employee Selection Procedures*. These guidelines created greater consistency in the interpretation of selection standards, practices and potential employment discrimination. Court cases that involved alleged discrimination related to promotions, job assignments, training, transfers, demotions, disciplinary actions, layoffs, etc., were not included in the current study.

Only federal court cases that dealt with alleged discrimination in the hiring or selection process were of interest. Furthermore, the current study was focused specifically on discrimination cases involving the application process and application forms. Thus, cases involving substantive selection methods (e.g., aptitude tests, personality tests, physical ability tests, work sample tests, etc.) and screening devices (e.g., reference checks, background investigations, medical exams, drug tests, polygraphs, etc.) that are used later in the organizational selection process were not included in the current study. Finally, court cases that dealt only with procedural issues were excluded from the sample.

The information concerning alleged discrimination related to the use of application forms that was reported in *FEP Cases* was reviewed and coded onto a specifically developed content analysis form. The coding was performed by the two current authors, both of whom have doctoral level training in human resources staffing and selection. The content analysis form included written instructions, coding classes and class definitions for the application form items, outcome of the case (coded as "for defendant," "for plaintiff," or "don't know"), adverse impact type (e.g., race, sex, age, national origin, religion, handicap, etc.), job type, industry type and case date. Data on plaintiff/complainant characteristics such as sex, age and race/ethnicity (African American, White, Hispanic, Asian, American Indian, and "other") was also recorded.

The types of application form questions (or "pre-employment inquiry" questions) chosen for inclusion in the current study were based on a perusal of widely respected selection texts such as those by Heneman, Heneman and Judge, and by Gatewood and Feild.<sup>16</sup> The coding of job type and industry type was based on the U.S. Department of Labor's standard job and industry codes. When coding differences between the two coders occurred, those differences were identified and discussed to arrive at the final coding classifications. The reliability of the coding procedure was estimated by calculating the degree of agreement between the initial classifications of the two coders for a sample of the cases. The computed estimates of the degree of agreement for the application form items, case outcome, adverse impact type, job type, industry type and case date were 92 percent, 96 percent, 98 percent, 97 percent, 96 percent and 100 percent, respectively.

## Results and Discussion

### General Overview of Federal Court Case Data

In the current study, a total of 312 federal court cases were identified that dealt with alleged selection discrimination related to the use of the application form. Of the 312 total cases, 200 were tried at the federal district court level and 112 were tried at the federal appellate court level. Overall, 36 percent of the court rulings favored the plaintiff (complainant). Broken down by court level, the percent of the court rulings that favored the plaintiff at the district and appellate court levels were 37 and 33, respectively. Regarding the general types of adverse impact charges associated with the court

cases, the overall percentages were as follows: sex-37 percent; age-30 percent; race-21 percent; national origin-seven percent; religion-four percent; and handicap/disability-two percent. Information gathered on the general demographic characteristics of the plaintiffs revealed that 50 percent of the filers were female and 50 percent were male. The average age of the plaintiffs was 49.35 years. The racial/ethnic composition of the plaintiffs was as follows: African American-48 percent; White-32 percent; Hispanic-six percent; Asian-four percent; American Indian-zero percent; and "other"-10 percent.

## **Frequency and Nature of Litigation by Inquiry Type**

One of the primary objectives of the current study was to provide empirical data on the relative frequency and nature of litigation associated with different types of application form inquiries. Table 1 presents the relative frequencies and percentages of federal court cases by type of application form inquiry (the percentages of court rulings that favored the plaintiffs are also shown in Table 1; however, these percentages will be discussed later).

Inquiries about applicant sex (28 percent) and age (25 percent) accounted for more than 50 percent of the total court cases involving the use of the application form in the selection process. It was thought to be of interest to take a closer look at the demographic characteristics (sex and race/ethnicity) of the plaintiffs or filers associated with each type of inquiry. A closer examination of the sex inquiry cases found that 89 percent of the filers were female and 11 percent were male. Regarding the race/ethnicity of these filers, 67 percent were white, 22 percent were African American, and one percent was classified as "other." An examination of the age inquiry cases found that 85 percent of the filers were male and 15 percent were female. Regarding the race/ethnicity of these filers, 92 percent were white and eight percent were classified as "other."

Inquiries about applicant race (12 percent), experience requirements (seven percent), and national origin (six percent) accounted for another 25 percent of the total court cases involving the use of the application form. A closer look at the demographic characteristics of the filers associated with the race inquiries found that 70 percent were male and 30 percent were female. Seventy-six percent of these filers were African American, 21 percent were white, and three percent were Hispanic. With regard to the experience requirement inquiries, 76 percent of the filers were female and 24 percent were male. Eighty-six percent of these filers were African American and 14 percent were white. As to the national origin inquiries, 94 percent of the filers were male and six percent were female. In terms of the race/ethnicity of these filers, 60 percent were classified as other, 20 percent as Asian, 13 percent as Hispanic and seven percent as White.

**Table 1. Case Frequencies and Outcomes by Inquiry Type**

Application Inquiry	Number of Cases	Percentage of Total Cases	Rulings For Plaintiff
Sex	88	28 %	40 %
Race	36	12 %	36 %
National Origin	19	6 %	28 %
Religion	7	2 %	20 %
Age	79	25 %	40 %
Handicap/Disability	4	1 %	33 %
Medical Record	0	0 %	—
Citizenship	4	1 %	25 %
Residence	5	2 %	40 %
Marital Status	0	0 %	—
Dependent Status	0	0 %	—
Relatives/Friends	0	0 %	—
Military Discharge	0	0 %	—
Arrests	0	0 %	—
Convictions/Criminal Record	3	1 %	0 %
Driving/Traffic Violations	1	0 %	0 %
Credit History/Record	1	0 %	100 %
Height/Weight Requirement	12	4 %	40 %
Physical Ability Requirement	1	0 %	0 %
Education Requirement	15	5 %	20 %
Training Requirement	0	0 %	—
Licensing/Certification	5	2 %	33 %
Experience Requirement	23	7 %	35 %
Work History	9	3 %	22 %

As Table 1 indicates, each of the remaining inquiry types accounted for five percent or less of the total cases involving the use of the application form. Inquires regarding educational requirements accounted for five percent of the cases; inquiries regarding height/weight requirements accounted for four percent of the cases; and inquiries concerning work history requirements accounted for three percent of the total court cases. A closer examination of the demographic characteristics of the filers associated with educational requirements found that 50 percent of these filers were male and 50 percent were female. Sixty-four percent of these plaintiffs were African American, 27 percent were white and nine percent were Hispanic. Regarding height/weight requirements, all of the filers were female African Americans. As to work history requirements, all of the filers were male; 88 percent were African American, while 12 percent were white.

Inquiries concerning religion, licensing/certification requirements and residence each accounted for two percent of the total cases. With regard to inquiries about religion, 67 percent of the filers were male and 33 percent were female. All of these filers were white. With regard to inquiries about licensing/certification requirements, 60 percent of the filers were female and 40 percent were male. Sixty percent of these plaintiffs were African American, and 40 percent were Asian. Regarding inquiries about residence, all of the plaintiffs were male African Americans.

Inquiries concerning citizenship, handicaps/disabilities, and convictions/criminal record each accounted for one percent of the total cases. A closer look at the characteristics of the plaintiffs associated with citizenship inquiries found that all of the filers were male Hispanics. Regarding inquiries about handicaps/disabilities, 67 percent of the filers were male, and 33 percent were female. The race/ethnicity of these filers was unknown. In terms of inquiries about convictions/criminal record, all of the filers were male; and 33 percent of these filers were African American, 33 percent were white, and 33 percent were classified as "other."

Earlier studies have reviewed the application forms of public and private organizations regarding the extent to which they conformed to the EEOC's pre-employment guidelines. These studies identified a number of frequently occurring problems with the types of questions asked. It was not known, however, whether the types of application form problems identified in these earlier studies would translate into actual litigation. Surprisingly, the current litigation findings do not parallel the problems identified in the earlier reviews.

The types and frequencies of problematic questions identified in the earlier reviews do not correspond to the types and frequencies of litigation rates by inquiry type found in the current study. For example, a study by Burrington, as well as a study by Wallace, Tye and Vodanovich found that inquiries about race and handicaps were among the more common types of problematic inquiries on the application forms that they reviewed.<sup>17</sup> Similarly, studies by Lowell and DeLoach and by Saunders, Leck and Marcil found that inquiries about handicaps were among the more common types of inadvisable inquiries on the forms that they reviewed.<sup>18</sup> Inquiries concerning marital status were among the more common types of inadvisable inquiries that were identified in the reviews of application forms conducted by Saunders, Leck and Vitins, and by Saunders, Leck and Marcil.<sup>19</sup> In the current study of actual litigation rates, however, cases involving race inquiries accounted for only 12 percent of the total cases. Furthermore, cases involving handicap inquiries represented only one percent of the total court cases, and there were no cases involving marital status inquiries. The current findings suggest that some types of inadvisable application form inquiries are not very likely to lead to formal charges of employment discrimination. Other types of inquiries, however, such as those involving sex and age, may be more dangerous in terms of their potential to lead to litigation.

Neither do the current findings fit with earlier research that investigated the relative degree of litigation associated with the use of substantive selection tests (such as cognitive aptitude tests, personality tests, physical ability tests, work sample tests,



and assessment centers).<sup>20</sup> Nor do the current findings fit with research that has examined the relative degree of litigation surrounding screening devices (reference checks, background investigations, medical exams, drug tests, and polygraphs) that are used later in the selection process.<sup>21</sup> In both of the aforementioned studies, race emerged as the dominant type of adverse impact associated with selection discrimination litigation. Employment discrimination charge statistics gathered by the EEOC for the 1992-2001 period also show race to be the dominant type of charge.<sup>22</sup> Perhaps substantive selection tests and screening devices have a relatively greater degree of adverse impact against racial/ethnic minorities than do application forms.

Since the current study found that sex and age inquiries led to the most litigation associated with the use of the application form, one is tempted to speculate that the relative frequency of litigation is simply based on the general demographics of the population in the U.S. For example, the most recent census figures indicate that 51 percent of U.S. residents are female (the majority of sex discrimination charges are filed by women); and those census figures also indicate that approximately 40 percent of U.S. residents are 40 years of age or older (those over age 40 can avail themselves of the protection offered by the Age Discrimination Act). Those same census figures indicate that a relatively smaller percentage of the U.S. population can be classified as a racial minority.<sup>23</sup> Even smaller percentages of the population could be classified as devoutly religious, or handicapped/disabled.

The current study of court cases associated with the use of the application form found that sex inquiries led to the most cases (28 percent), closely followed by age inquiries (25 percent). Race inquiries led to 12 percent of the cases, and the percentages associated with national origin, religion and handicap/disability inquiries were even smaller. Thus it would appear that application form litigation loosely corresponds to the demographic composition of U.S. residents. If this interpretation is correct, it could be said that the application form discriminates against all protected groups equally.

## **Court Case Outcomes by Inquiry Type**

Another primary objective of the current study was to provide empirical data on the court case outcomes (whether the court ruled for the plaintiff or the defendant) of the legal challenges associated with the various application form inquiries. Table 1 (which was referred to earlier) also presents the percentages of the case rulings that favored the plaintiff, by application form inquiry type. Overall, 36 percent of the cases favored the plaintiffs, but there were some rather substantial differences in the odds of winning associated with different types of application form inquiries. For example, the odds for the plaintiffs were quite high (40 percent) for cases that involved sex and age inquiries. (Cases involving sex and age inquiries were also the most frequently occurring types of court cases, accounting for more than 50 percent of the total charges.) The plaintiffs' odds were also high (40 percent) for cases involving inquiries regarding height/weight requirements. The plaintiffs' odds of winning cases that

involved race inquiries (36 percent) and experience requirement inquiries (35 percent) were close to the overall mean of 36 percent.

The plaintiffs' odds were quite low, however, for court cases that involved inquiries about national origin (28 percent), education requirements (20 percent), work history (22 percent), and religion (20 percent). The estimates of the odds for the remaining types of inquiries may be unreliable, given the small frequencies associated with those cases. The low odds (for the plaintiffs) associated with national origin and religion cases are not surprising. Previous research has also found that the plaintiffs' odds were very low for national origin and religion cases.<sup>24</sup> Cases involving national origin and religion charges appear to be difficult for the plaintiff to win. The current study also found that the plaintiffs' odds of winning cases involving inquiries about education requirements and work history requirements were low. One suspects that it may be easier for employers to defend themselves in these cases by pointing to and demonstrating the relevance and job-related nature of such inquiries.

## **Differences by Job Type and Industry Type**

A secondary objective of this study was to investigate possible differences in litigation rates and court case outcomes as a function of job type and industry type.

### **Litigation By Job Type**

Table 2 presents the relative number of cases, court case outcomes (percentage of the rulings that favored the plaintiff), and information on the types of inquiries by job class.

As is evident from the data presented in Table 2, more than half (51 percent) of the total cases involved service (29 percent) or professional jobs (22 percent). The remaining job types were associated with far fewer legal challenges.

The specific classes of jobs that fall under the general service heading and the frequencies associated with these specific classes are: protective service jobs (police, firefighters, guards, etc.), 63 cases; food service jobs, four; health services, five; cleaning services, two; and "other" service jobs, 11. Protective service jobs accounted for 74 percent (63 of 85) of the court cases under the general heading of service jobs. Thus, the relative litigation rate for protective service workers seems to be substantially overrepresented. As Table 2 shows, the majority of the cases involved age-related inquiries (33) and sex-related inquiries (18).

The specific categories under the professional heading, and the associated frequencies are: engineers, scientists, architects, etc., 10 cases; health-related (physicians, dentists, nurses, etc.), five; teachers (at all levels), 35; and "other" professional-related jobs, 14. The data indicate that 55 percent (35 of 64) of the court cases under the professional heading involved teaching jobs. Thus, teachers seem to be significantly overrepresented in terms of relative litigation rates. Many of these cases involved sex (20) and age-related inquiries (13).

**Table 2. Case Frequencies and Outcomes by Job Type**

Job Type	Number of Cases	Percentage of Total Cases	Rulings for Plaintiff	Type of Inquiry <sup>a</sup>
Executive/ Administrative/ Managerial	38	13 %	29 %	S=18/A=7/R=5/EX=2/ N=4/W=1/C=1/
Professional	64	22 %	31 %	S=20/A=13/R=7/EX=6/ N=4/ED=4/W=1/RL=4/ L=4/H=1/
Technicians	20	7 %	24 %	S=3/A=8/R=5/N=1/ RL=1/L=1/H=1/
Administrative Support/Clerical	30	10 %	19 %	S=6/A=7/R=3/EX=4/ N=2/ED=3/W=2/RS=1/ D=1/P=1/
Sales/Marketing Service	14	5 %	29 %	S=4/A=1/R=3/EX=1/ ED=2/W=1/RL=1/ CC=1/
Occupations	85	29 %	42 %	S=18/A=33/R=4/EX=2/N=3/ ED=4/HW=8/ W=3/RL=1/RS=3/C=3/ CC=2/CH=1/
Precision Production/ Craft/Repair	7	2 %	71%	S=2/A=2/R=1/EX=1/ ED=1/
Operators/Fabricators/ Laborers	38	13 %	46 %	S=12/A=7/R=5=EX=5/N=3/ HW=3/W=1/H=2/

<sup>a</sup> S = sex; A = age; R = race; EX = experience requirement; N = national origin; ED = education requirement; HW = height/weight; W = work history; RL = religion; RS = residence; L = licensing/certification; H = handicap/disability; C = citizenship; CC = convictions/criminal record; CH = credit history; D = driving/traffic violations; and P = physical ability.

The job class of operators/fabricators/laborers was associated with 38 cases, or 13 percent of the total cases. The specific categories under this heading and the associated frequencies are: machine operators, two cases; fabricators (welders, cutters, assemblers, etc.), two; production inspectors, testers, etc, two; transportation/vehicle operators (drivers, operators, etc.), 13; construction helpers, laborers, etc., one; freight, stock, and material handlers, two; laborers, except construction, nine; and "other" operators, fabricators, and laborers, seven. Transportation/vehicle operators were associated with the most legal charges (13 of 38, or 34 percent) under this general job type. Many of the cases under this general job heading involved sex (12) or age-related inquiries (7).

Executive/administrative/managerial jobs were also associated with 38 cases, or 13 percent of the total court cases. The three specific categories under this heading, and the associated frequencies are as follows: executive, administrative, and manage-

rial, 12 cases; officials and administrators in public administration, 14; and "other" managerial-related jobs, 12. As Table 2 indicates, many of these cases (18) involved sex-related inquiries.

Each of the remaining job types was associated with a relatively small percentage of the total court cases. Administrative support/clerical jobs accounted for 30 cases, or 10 percent of the total court cases in the current study. The specific categories under the administrative support/clerical job class heading, and the associated case frequencies are: secretaries, typist, four; clerical, bookkeeping, 11; office supervisors, three; computer operators, data entry, zero; and "other" support jobs, 12.

Technicians accounted for 20 cases (seven percent). The specific categories under this heading, and the associated case frequencies are: health, engineering, and science technicians, eight; computer programmers and legal assistants, three; and "other" technician-related jobs, nine.

Sales and marketing jobs accounted for only 14 cases (five percent). The specific categories under this heading, and the associated case frequencies are: retail sales workers, six; cashiers and counter clerks, one; sales representatives, six; sales supervisor, zero; marketing jobs, one; and "other" sales job, zero.

Precision production/craft/repair jobs accounted for only seven cases, or two percent of the total cases. The specific categories under this general job class, and the associated case frequencies are as follows: mechanics and repairers, one; construction trades (carpenters, painters, plumbers, electricians, etc.), three; precision production (metalworking, electronics assemblers, etc.), one; and "other" precision production, craft, and repair jobs, two.

The outcomes of the court cases broken down by type of job are also shown in Table 2. Overall, 36 percent of the court rulings favored the plaintiff. The results of Table 2, however, show that the plaintiffs' odds of winning their cases varied by type of job. For example, the plaintiffs' odds of winning ranged from a low of 19 percent in the administrative support/clerical job class to a high of 71 percent in the precision production/craft/repair job class. Some of these percentage figures should be interpreted with caution, however, due to unreliability associated with small sample sizes.

## Litigation by Industry Type

Table 3 presents the relative number of cases, court case outcomes (percentage of the rulings that favored the plaintiff) and information on the types of inquiries by industry type.

As can be seen from Table 3, the public administration/government (37 percent) and service (28 percent) industries accounted for 65 percent of the total court cases involving the application form. The public administration/government sector includes five more specific categories. These specific categories, and the frequencies of cases associated with them are as follows: federal government, 25 cases; state government, 21; county government, 17; city government, 43; and "other" public administration, eight. The city government category is noteworthy, as 43 of the 114 cases (3 percent) associated with the government sector were at the city level. As to the types of

charges, Table 3 indicates that many of the cases in the public administration/government sector involved either age (41) or sex-related inquiries (25).

**Table 3. Case Frequencies and Outcomes by Industry Type**

Industry Type	Number of Cases	Percentage of Total Cases	Rulings for Plaintiff	Type of Inquiry <sup>a</sup>
Agriculture/Forestry/ Fishing	0	0 %	—	—
Mining	3	1 %	0 %	S=1/A=1/EX=1/
Construction	5	2 %	60 %	S=2/R=1/N=1/ED=1/
Manufacturing	38	12 %	40 %	S=12/A=10/R=7/EX=4/ N=1/ED=2/HW=1/RL=1/
Transportation	31	10 %	35 %	S=5/A=11/R=3/EX=4/ HW=4/W=1/L=1/H=1/ CC=1/
Communications/ Public Utilities	5	2 %	20 %	A=2/R=3/
Wholesale/ Retail Trades	16	5 %	54 %	S=5/A=3/R=2/N=2/ RL=2/H=1/W=1/
Finance/Insurance/ Real Estate	7	2 %	43 %	S=2/R=1/EX=1/ED=2/ W=1/
Services	87	28 %	26 %	S=35/A=9/R=10/EX=9/ N=7/ED=4/W=3/RL=3/ RS=1/L=4/H=1/P=1/
Public Adm./ Government	114	37 %	39 %	S=25/A=41/R=9/EX=4/ N=6/ED=6/HW=7/W=2/ RL=1/RS=4/H=1/C=4/ CC=2/CH=1/D=1/

<sup>a</sup> S = sex; A = age; R = race; EX = experience requirement; N = national origin; ED = education requirement; HW = height/weight; W = work history; RL = religion; RS = residence; L = licensing/certification; H = handicap/disability; C = citizenship; CC = convictions/criminal record; CH = credit history; D = driving/traffic violations; and P = physical ability.

Seven specific categories are included under the service heading. The specific categories, and the frequencies of cases associated with them are: business services, five cases; personnel services, two; entertainment services, four; professional service, 16; educational services, 51; social services, three; and "other" services, six. The educational category (schools, colleges, libraries, etc.), alone, accounted for 51 of the 87 cases (59 percent) associated with the general service industry sector. Within the service industry, many of the litigation charges (35) involved sex-related inquiries.

The manufacturing industry was associated with 38 cases, or 12 percent of the total court cases. Nine specific classes are subsumed under the general manufacturing industry heading, and the frequencies associated with these classes are as follows:

lumber, wood products, and furniture, one case; metal industries, eight; machinery, seven; transportation equipment, three; food manufacturing, five; textiles and apparel, two; printing and publishing, two; chemicals, petroleum, and rubber, eight; and "other" manufacturing, two.

Each of the remaining industry types was associated with a relatively small percentage of the total cases. The transportation industry (rail, trucking, bus, cabs, and air) was associated with 31 cases, or 10 percent of the total cases. Many of these cases (11) involved age-related inquiries.

The wholesale/retail industry accounted for only 16 cases, or five percent of the total court cases. The specific classes included under the general wholesale/retail industry heading, and the frequencies associated with these classes are as follows: wholesale, durable goods, zero; wholesale, nondurable good, zero; wholesale, not specified, zero; retail, department and grocery store, nine; retail, eating and drinking places, four; retail, not specified, zero; and "other" wholesale and retail trades, three.

The finance/insurance/real estate sector accounted for only seven cases (two percent of the total cases). The communications/public utilities sector accounted for only five cases (two percent). Similarly, the construction industry accounted for only five cases. The mining industry accounted for only three cases (one percent of the total cases). No cases were associated with the agriculture/forestry/fishing industry sector.

The outcomes of the court cases were also broken down by industry type, and Table 3 presents the results of this analysis. The data show that the plaintiffs' odds of winning their cases differ substantially by industry type. The plaintiffs' odds range from a low of zero percent in the mining industry to a high of 60 percent in the construction industry. Once again, the case frequencies associated with some of the industry types are too small to reliably interpret.

## **Relative Risk by Job and Industry Type**

The data suggest that certain jobs and industries seem to be at greater risk of litigation related to the use of the application form than other jobs and industries. The government sector (especially city government) appears to have a relatively high degree of exposure to litigation. Nearly 40 percent of the total cases in the current study come from the government sector; and a perusal of the job data suggests that many of the cases within the government sector involved police and firefighter positions. Also, nearly 30 percent of the total cases come from the service sector. Within the service industry, most of the cases were concentrated in educational settings (schools, colleges, etc.); and an examination of the job data suggests that many of these cases involved teaching positions.

The current findings are similar to the findings of earlier research that found that specific job and industry types are exposed to a relatively greater degree of legal risk than others. For example, one study investigated the degree of legal risk associated with five pre-selection or screening devices (reference checks, background investigations, medical exams, drug tests, and polygraph tests).<sup>25</sup> That study suggested that the government and service sectors were problematic from a legal perspective, and that

police, firefighter and teaching job classes were especially prone to discrimination litigation. Another study investigated the degree of legal risk associated with the use of substantive selection devices (interviews, job knowledge tests, cognitive aptitude tests, personality tests, physical aptitude tests, work sample tests and assessment centers), and found significant differences by job and industry type.<sup>26</sup> Once again, police and firefighter jobs within the government sector, and teaching jobs within the service sector, were overrepresented in terms of litigation.

Future research may determine the reasons underlying these differing litigation rates. The observed differences may be due to differing labor markets or differing workforce demographics associated with specific jobs and specific industries. It is also possible that certain jobs and industries are perceived as more desirable than others. For example, government jobs and teaching positions may be viewed as offering relatively more in the way of job security and benefits than other types of jobs. Jobs that are perceived as desirable may attract greater numbers of applicants. Furthermore, rejected applicants may be more willing to fight (even to the point of filing suit) for these desirable jobs.

Alternatively, the application forms that are used for jobs such as police, firefighters, and teachers may be different than the application forms that are used for other types of jobs; and these forms may ask for more detailed background information about the applicants due to public safety issues. It is also possible that the applicant information gathered for jobs involving public safety is subjected to relatively greater scrutiny and verification efforts. If this is true, it could lead to a greater risk of litigation.

## Summary and Recommendations

The completion of the application form is typically the initial stage in an organization's selection process. The quality and fairness of the application form is very important because the greatest number of individuals are screened out during this stage. Since relatively large numbers of applicants are rejected in this stage, there exists the greatest potential for employment discrimination litigation. Surprisingly, no previous empirical research has been conducted regarding the features of application blanks that are most likely to give rise to litigation. The current study attempted to remedy this existing lack of critical research information. In the current study, empirical data was provided on the relative frequency of litigation associated with different types of application form questions and inquiries, and on the court case outcomes associated with each of the different types of inquiries. Data was also provided on the differences in litigation rates and case outcomes as a function of job and industry type. The empirical data yielded by this study could be used by organizations to review and modify their existing application forms in order to make them less discriminatory and less prone to litigation. As noted previously, the most striking finding in the current study was the fact that more than 50 percent of the court cases involved charges related to inquiries about applicant sex and age. In addition to being the most frequently occurring types of cases, the odds for the plaintiffs were also the highest (40 percent) in

cases that involved sex and age inquiries. Thus, special attention should be placed on designing or modifying application forms to eliminate any unnecessary inquiries that might serve to identify an applicant's sex or age.

Inquiries about applicant race accounted for an additional 12 percent of the total cases, and the plaintiffs' odds of winning these types of cases were also substantial (36 percent). Inquiries about national origin only accounted for another six percent of the total court cases involving the use of the application form, but it is possible that these types of charges may dramatically increase in the future, due to recent international events and the resulting climate of suspicion. As such, attention should also be focused on designing and modifying application forms to reduce the potential risk of litigation arising from inappropriate inquiries related to race and national origin.

Many organizations may not need to modify or redesign their existing application forms. Some organization, however, may wish to review and redesign their forms to reduce the risk of future litigation. For example, the current findings indicate that some job and industry types are at greater risk of litigation than other types. For those organizations interested in developing more legally sound application forms, the logical first step would be to peruse the relevant federal and state laws, regulations, and guidelines that pertain to employee selection and pre-employment inquiries. The EEOC has published the *Guide to Pre-Employment Inquiries*. These are merely guidelines, not laws. There are no direct legal penalties for failing to comply with these guidelines. Still, attention to these guidelines may help an organization avoid future legal problems. The EEOC's guidelines stress, in general, that all application form inquiries should be job related and essential for evaluating an applicant's qualifications for the job in question. Furthermore, these guidelines generally caution against using inquiries that directly or indirectly lead to adverse impact for members of protected classes. The EEOC's *Guide to Pre-Employment Inquiries* also provides specific "dos" and "don'ts," and examples of advisable and inadvisable types of application form inquiries.

At the state level there are a variety of laws, regulations and guidelines that apply to pre-employment inquiries as well. There is a great deal of variance between the states in terms of the regulation of pre-employment inquiries. Some states have no laws or regulations governing pre-employment inquiries but the majority of states do. In states that do regulate pre-employment inquires, their laws and regulations are generally more strict than the federal laws and regulations. Additionally, state laws and regulations are typically given more legal weight than corresponding federal laws and regulations regarding pre-employment inquiries. As such, it is critical for an organization to familiarize itself with the relevant state laws, regulations and guidelines when designing or modifying its application form. Many of the states' "pre-employment guides" also provide concrete advice and specific examples of "good" and "bad" application form questions.

A thorough review of federal and state laws and regulations dealing with pre-employment inquires is very important in designing a nondiscriminatory application form. Equally important is the fact that the types of questions or inquiries should be



job related, and absolutely essential for evaluating the applicants' required qualifications. The job analysis process is, perhaps, the best way to identify the types of questions that need to be included on an organization's application form. It should also be noted that different types of jobs typically require different types of qualifications, and different sets of knowledge, skills, and abilities. Thus, organizations should consider employing different versions of their application form for different types of jobs.

There are some excellent educational resources available that organizations can consult for help in designing and developing application forms. For example, selection texts by Heneman, Heneman and Judge, and by Heneman and Judge describe the job analysis process, review the laws and regulations governing pre-employment inquiries, and provide specific and concrete guidance for constructing application forms.<sup>27</sup> Another selection text by Gatewood and Feild also offers excellent advice for developing application forms.<sup>28</sup>

A well-designed and legally sound application form can benefit an organization in a number of important ways. The overall quality of an organization's human resources will be higher if fewer superior individuals are screened out on irrelevant and unfair bases. A legally sound application form should also significantly reduce the risk of exposure to expensive employment discrimination litigation. A firm with an established reputation for fairness (and a record free of publicized discrimination lawsuits) should also be able to more easily recruit and retain the best human resources available. An organization with a good reputation for fairness may even see demand for its goods or services increase. A well-designed application form is also very important from the perspective of the individual job applicant. An individual job seeker should not be screened out on the basis of irrelevant and/or discriminatory factors. Ideally, an applicant should be evaluated for a job strictly on the basis of his or her actual job related qualifications.

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