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## Coates' Canons Blog: Do We Have to Advertise This Position?

By Robert Joyce

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North Carolina governmental employers regularly have this question when they are hiring: do we have to advertise this position? Maybe they already have in mind someone for the job, perhaps someone already working within the organization. Must they go through an advertising process when they have in fact already decided who they want to hire?

Here's the short answer. If the employer is covered by the State Personnel Act (the "SPA," Chapter 126 of the North Carolina General Statutes), then it must advertise position openings before making a hiring decision. For all other North Carolina governmental employers—cities, counties (except county agencies covered by the SPA), public school systems, community colleges, water and sewer authorities and many others—there is no requirement of advertising unless the governing body has imposed the requirement on itself by ordinance or policy.

### Most North Carolina Government Employers—No Requirement to Advertise

Let's think first about employers not covered by the SPA—cities and counties and the others. They have great latitude in deciding how they will recruit for and fill vacancies. There are no statutes or regulations directing that they must advertise vacancies, that they must post notices of vacancies, that they must interview a certain number of candidates, or that they must conduct their interviews in a certain way. These employers are free to design policies covering hiring procedures as they see fit. They must be greatly concerned, however, with the possibility that their procedures, if poorly constructed or improperly applied, may run afoul of federal statutes outlawing discrimination on account of race, color, religion, sex, national origin, age, or disability.

Two excellent tools for recruiting able candidates for employment and for preserving a sense of openness in the operation of the government as employer are posting notices of vacancies within the workplace and advertising vacancies. For non-SPA employers those tools are not required by law, but there are some very good reasons for using them.

**Posting.** The practice of posting notices of vacancies within the workplace is designed to get the information to people within the workforce. Posting achieves three main goals. First, like advertising, it increases the possibility of identifying outstanding candidates who might otherwise be missed. Second, it can serve to increase employee morale by stimulating upward mobility within the ranks of employment in the workforce. And, third, it can increase the motivation for employees to enhance their skills in their current jobs so that they may become more promotable.

A policy of posting vacancies is not nearly as effective, however, in dealing with the dangers of unlawful discrimination, discussed below, as is a policy of advertising. In fact, where the work force is overwhelmingly white, posting vacancies may only increase the likelihood of an adverse impact against non-white minorities if it is not combined with advertising. That's the lesson of the *Thomas* case, discussed below.

**Advertising.** The greatest advantage to a policy that requires advertising the existence of job openings is the possibility of identifying outstanding candidates who would otherwise go unknown. Advertising can enrich the workforce. A second great advantage is the perception of fairness that is promoted in the community. People who see that vacancies are advertised are more likely to have faith that the government's employment practices are aboveboard. For these reasons alone, governmental employers may wish to adopt policies requiring that vacancies be advertised even though they are under no direct legal requirement to do so.

The greatest danger in not advertising vacancies is the likelihood that alternative methods of identifying candidates—personal knowledge by governmental officials of candidates in the workforce or in the community,

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word-of-mouth communication between people inside the government and those outside—may act as a barrier to employment opportunities to members of groups underrepresented or not represented in the workforce. Even if the reasons for relying on methods other than advertising have nothing to do with an intention to discriminate on account of race, the effect of such reliance may nonetheless constitute a violation of Title VII of the Civil Rights Act. This will be especially true where the governmental workforce is already disproportionately white compared to the population in the community. Communication through informal channels other than advertising in such a situation is much more likely to reach white candidates than minorities, constituting an unlawful adverse impact on the basis of race. This was exactly the finding in a 1990 decision by the federal appeals court that has jurisdiction over North Carolina, in a case arising from a Virginia public school system. *Thomas v. Washington County Sch. Bd.*, 915 F.2d 922 (4th Cir. 1990). In that case the court found a violation of Title VII where the work force was overwhelmingly white, black candidates were overlooked (even unintentionally), and only informal communication of vacancies existed.

The insurance against such an adverse impact on account of race is open, public advertising of job openings in the government's workforce.

### **North Carolina SPA Employers—State Law Requires Advertising**

In state government employment, and in county agencies covered by the SPA (that is, most county social services and public health departments), the rules are a bit different. There, by statute and by administrative code provisions, employers are under a positive obligation to publicize vacancies.

The relevant statutory provisions are GS 96-29 and GS 126-7.1. The administrative code provisions are 25 NCAC 1H.0631 and 25 NCAC 1I.1902.

Here's how these requirements work. First, if the agency is merely reallocating or reclassifying the position held by a current employee and there has existed no vacancy into which the employee is moving, then no posting or advertising is required. Second, if the agency is filling a vacancy from within, considering only current employees of the agency, notice must be posted, but no outside advertising is required. But third, if the agency is open to considering applicants from outside its own workforce, then it must advertise the vacancy with the Office of State Personnel and with the Division of Employment Security. There is no literal requirement of newspaper or other commercial advertising.

These requirements do not apply to the legislative or judicial branch of state government as employers.

## **Links**

- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=96-29](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=96-29)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=126-7.1](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=126-7.1)
- [reports.oah.state.nc.us/ncac/title%2025%20-%20state%20human%20resources/chapter%2001%20-%20office%20of%20state%20human%20resources/subchapter%20h/25%20ncac%2001h%20.0631.pdf%22](http://reports.oah.state.nc.us/ncac/title%2025%20-%20state%20human%20resources/chapter%2001%20-%20office%20of%20state%20human%20resources/subchapter%20h/25%20ncac%2001h%20.0631.pdf%22)