

## The Hiring Process

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In order to avoid the inconvenience and expense of hiring an unqualified employee or a claim of negligent hiring or discrimination, employers must have a controlled hiring process. Employers should make sure that they have made the best effort to find the most qualified candidate, and that they have complied with both state and federal anti-discrimination laws during each stage of the hiring process. The hiring process consists of a needs assessment, recruiting, screening, selecting and finally, hiring.

### Needs Assessment

Often there is a tendency to jump into recruiting before employers know what they are looking for. Employers first need to understand the type of individual who will meet their needs and create a job description that outlines the qualifications and skills necessary to meet those needs. Analyzing the job will help determine the functions, skills, credentials and personal attributes required to successfully perform the job. Job descriptions should include: position title, purpose, description, working hours, managerial responsibilities, essential job functions, nonessential job functions, travel requirements and other special working conditions, desirable personal qualifications, and pre-employment or educational requirements. Ask your broker for the article entitled *Job Descriptions* for more information on crafting job descriptions that are in compliance with the ADA.

### Recruiting

Employers can set qualifications and use any hiring method as long as they do not use arbitrary, artificial or discriminatory standards and practices that restrict the employment opportunities of protected groups. The best way for employers to ensure that they are not discriminating when recruiting is to use various recruiting methods – advertising, word-of-mouth, employment agencies, and walk-in applications. By using a variety of recruiting methods, employers assure that their recruiting methods do not systematically favor one class of applicants over other qualified applicants or members of a protected class.

Follow these guidelines when recruiting:

- Select media that reaches beyond a single racial community.
- Do not hire solely on the basis of referrals or walk-ins.
- Do not state age, religious, or sexual preference in advertisement.
- Write your ad to appeal to the required skills and essential functions of the job.
- Per the Equal Employment Opportunity Commission (EEOC) include the following language: "We are an Equal Opportunity Employer. We do not discriminate on the basis of race, religion, color, sex, age, national origin or disability."

Who is considered an applicant depends upon the recruitment and selection process of the employer. According to the EEOC, in order for an individual who applies for a job via the internet to qualify as an applicant, the employer must have acted to fill a position; the applicant must have followed the employer's standard procedure for submitting an application; and the individual must have stated an interest in the specific position. Employers should retain all resumes and applications considered for at least a year.

## Screening

Inappropriate application and interview questions may expose employers to discrimination and privacy claims. Pre-employment inquiries should be limited to information that is necessary to evaluate a candidate's suitability to perform a particular job.

Conducting interviews requires a skilled and trained interviewer. To minimize the risk of legal liability, all interviewers should be trained in proper interviewing techniques. Interviewers should remain neutral and conduct interviews solely to obtain a work history and to determine whether the applicant has the basic qualifications, skills and interests to successfully perform the job. What is said or asked by the interviewer on an employment application may create legal liability for discriminatory hiring practices if a question asked puts an applicant at an employment disadvantage. Ask your broker for the article entitled *Interview Questions – What's Illegal to Ask* for a more in depth discussion on what not to ask during an interview. If an applicant volunteers information on a subject that is not related to the job or otherwise "illegal" (e.g. children, divorce etc.), it is best not to pursue the subject. The fact that the applicant raised the "illegal" subject is not a defense to a claim of discrimination. Interviewers should deny any accusation of discrimination and let candidates know that they are an Equal Opportunity Employer and do not discriminate on the basis of race, religion, color, sex, age, national origin, or disability.

When formulating an interviewing policy or procedure employers should:

- Make sure unbiased individuals do the interviewing.
- Provide interview training to those individuals involved in the process.
- Try to limit interview questions to those determining technical competence. Make sure that interviewers are given a job description, a standard set of questions, a list of things to look for, and an interviewer rating form.
- If more than one interviewer is used, balance the racial, sexual, and religious composition.
- Give interviewers a list of questions not to ask.

## Selection Standards and Testing

Employers must ensure that there is no discriminatory bias in their selection standards. Federal law does not preclude the use of testing or measuring as a means of selecting employees provided that such tests do not discriminate. If an ability test or standard has a disproportionate impact on minorities or protected classes, it must be job-related and justified by business necessity. As a rule of thumb, employers should always ask whether an applicant needs to meet a standard (e.g. college degree, experience, English language ability etc.) in order to perform the job.

Use of physical screening is subject to the same anti-discrimination guidelines as mental and ability testing. There must be a relationship between the job and the results of the examination. The routine physical is the most common screening test utilized by employers. Under the ADA, employers may not require pre-offer physicals, but may condition a job offer upon an applicant successfully passing a post-offer physical provided it is a requirement of all prospective applicants within that job category. Drug tests are exempt from the ADA, and may be required at the pre-offer stage, but since such tests may reveal other medical information about an applicant, it is best to require drug tests after the job offer is made.

If an employer withdraws a job offer because the medical examination reveals that the employee does not meet certain criteria, the employer must show that these criteria are job-related and are essential to certain job functions. Employers must also show that there is no reasonable accommodation that will enable the individual with a disability to perform the essential function of the job.

In order to avoid the inconvenience and expense of hiring an unqualified employee or a claim of negligent hiring, employers should always check references once they have made a conditional job offer. Employers need to be concerned about their legal liability when providing or checking references. Employers may not ask references anything they may not request of the job applicant. Employers who elect to hire a third party to make background inquiries regarding applicants and/or employees are regulated by the Fair Credit Reporting Act. Ask your broker for the article entitled *Consumer Reports and the Fair Credit Reporting Act* for a detailed discussion of employer's responsibilities under the FCRA.

Before hiring an employee, employers should make sure they:

- Are aware of state and federal discrimination laws.
- Investigate all job applications including those for temporary or part-time positions.
- Ask applicants about employment gaps, and inquire why any past employer contact is denied.
- Verify employment dates and position held.
- Attempt to obtain information regarding reliability, dishonesty, insubordination or violent tendencies.
- Check driving record if appropriate.
- Check conviction and pending arrest record.
- Ask questions to determine if a potential employee is a risk.
- Advise applicants that falsification, omissions or misrepresentation will result in rejection or termination.
- Application should contain a release from liability for the employer who makes use of any information obtained in the investigation process and for anyone providing information to the employer.
- Document all attempts to obtain information.

## Hiring

Business necessity should be the key to all decisions relating to hiring, placement, and promotion. The same concern for neutrality in recruitment and selection language attaches to offer language. When making your offer of employment, consider the following:

- Avoid comments that could imply a discriminatory bias.
- Avoid verbal and written assurances of employment security or longevity.
- Avoid language in an offer of employment that may suggest an implied contract of employment.
- Avoid statements that may limit your right to terminate an employee.
- Provide personnel an offer "script."
- Make all offers in writing using a standard format.
- Review the employee handbook and make sure that it contains a disclaimer that it is not a contract. Remove any statements that could be interpreted to imply contractual rights.
- Make sure that jobs that require equal skill, effort and responsibility and are performed under similar working conditions are equal in pay.

By using a step-by-step, controlled process to hire new employees, employers are likely to avoid the inconvenience and expense associated with making a bad hire or a discrimination or negligent hiring claim.

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