

HR INSIGHTS

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The Hiring Process

To help avoid the expense of hiring an unqualified employee or defending a discrimination claim, employers should have a controlled hiring process. Employers should make sure they have made the best effort to find the most qualified candidate, and 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

Employers tend to jump into recruiting before they know exactly what type of candidate is needed. Employers first need to understand the type of individual who will best fit the job and need to create a job description that outlines the qualifications and skills necessary to meet the needs of that position. 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.

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. One way for employers to help ensure that they are not discriminating when recruiting is to use various recruiting methods—advertising, word-of-mouth, employment agencies, social media and walk-in applications. This helps make sure that recruiting methods do not systematically favor one class of applicants over other qualified applicants or members of a protected class.

Consider 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, religion or sex preference in advertisement.

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- Write your ad to appeal to the required skills and essential functions of the job.
- Include an equal opportunity employment statement—for example, “We are an equal opportunity employer. It is our policy to provide equal employment opportunity to all persons, regardless of race, religion, color, sex, age, national origin, disability, genetic information or any factor that is a prohibited consideration under applicable law.”
- 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 may create legal liability for discriminatory hiring practices if a question puts an applicant at an employment disadvantage.

If an applicant volunteers information on a subject that is not related to the job or otherwise “off limits” (for example, number of children, marital status or pregnancy), it is best not to pursue the subject. The fact that the applicant raised the “off limits” subject is not a defense to a claim of discrimination. Interviewers should let candidates know that they are an equal opportunity employer and do not discriminate on the basis of any prohibited consideration (for example, race, religion, color, sex, age, national origin, disability or genetic information).

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 and gender composition.
- Give interviewers a list of questions not to ask.

Selection Standards and Testing

Employers should 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 the 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 consider whether an applicant needs to meet a standard (for example, college degree, experience and English language ability) 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 Americans with Disabilities Act (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 drug 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 would enable the individual to perform the essential function of the job.

Employers should always check references once they have made a conditional job offer, but they need to be concerned about their legal liability when checking references. Employers may not ask references anything they may not request of the job applicant. In addition, employers who elect to hire a third party to make background inquiries regarding applicants and employees are regulated by the Fair Credit Reporting Act.


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 positions held.
- Attempt to obtain information regarding reliability, dishonesty, insubordination or violent tendencies.
- Check driving record if appropriate.
- Check convictions record if appropriate.
- Ask questions to determine if a potential employee is a risk.
- Advise applicants that falsification, omissions or misrepresentation will result in rejection or termination.
- 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.

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- 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.

Using a step-by-step, controlled process to hire new employees will help employers avoid discrimination lawsuits and make better quality hiring decisions.

