

Quick Tips for Legally Interviewing and Hiring the Right Candidate

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As the make-up of today's workforce continuously and dramatically changes, many new challenges face employers. Among the challenges is the need to comply with numerous federal, state and local employment-related laws. Employers should be aware of the various rights and protections that these laws afford employees, as well as job applicants, before they undertake any hiring or recruitment.

Employers should first prepare a "pre-hiring assessment" of essential and non-essential job requirements and qualifications for the position, to protect against potential "failure-to-hire" or discrimination claims. To that end, employers should also prepare a detailed job description that includes the following information:

- The duties associated with the position
- The physical requirements of the position
- The essential functions of the position

Any advertisements or job postings should also include this information, as they may serve as further documentation to counter potential claims and should discourage applicants who clearly are not qualified for the position.

Consider the Various Federal and State Employment Laws

When hiring a candidate, employers must be particularly aware of a variety of federal and state laws, including the Americans with Disabilities Act ("ADA"), which prohibits disability discrimination; Title VII of the Civil Rights Act ("Title VII"), which prohibits discrimination based on race, gender, national origin, religion, and a number of other categories; the Age Discrimination in Employment Act ("ADEA"), which of course prohibits age discrimination; and corresponding state laws. Many states also recognize a cause of action for negligent hiring when an employer negligently hires an employee who injures a coworker.



Pre-Hire and Post-Offer Screening

To try to avoid or at least limit their exposure, many employers engage in pre-hiring and post-offer screening practices such as reference checks, background checks, criminal background checks, skills testing, drug testing, and medical examinations. Such testing and information gathering is heavily regulated by federal and state law. Therefore, employers should consult with their legal counsel to ensure compliance with those particular laws before undertaking these processes.

Conducting the Interview

An employer must next determine how to conduct interviews in a manner that allows the employer to choose the most qualified candidate and at the same time comply with the applicable employment laws. Employers should consider the following points when conducting interviews:

- Preparation. The employer should prepare all questions ahead of time, before conducting the interview.
- Consistency. If the employer asks all applicants the same questions, the employer is less likely to be accused of "differential treatment" or favoritism in the hiring process. Consistent questioning also ensures the employer's ability to choose the most qualified candidate by making fair comparisons of the applicants' interviews.
- Interviewing. Employers should focus on the candidate's qualifications for the position. Employers should consider:
 - the technical qualifications for the position.
 - the educational, as well as other, background relevant to the position.
 - the applicant's work experience.
 - the applicant's people skills.
 - the applicant's objectives and goals.

Employers must also be careful to avoid any questions that could be considered illegal under federal or state law. For example, it is illegal to ask a job applicant about protected categories such as age, disability, race, religion, national origin, or in some states, marital status or sexual orientation. More subtle inquiries can also be illegal. For example, consider the following questions:

- Where did you learn to speak Spanish so well?
- Do you and your husband rent or own a home?
- When did you graduate from high school?

While these questions may seem innocent enough, in the job interview context they can be illegal. These "prohibited inquiries" could lead to a presumption of discrimination because their answers could reveal information about a person's national origin, marital status, or age, and in the case of home ownership, could reveal information that seems neutral but could have an unfair impact on certain demographic groups who are statistically less likely to own homes.

The bottom line is that employers who only seek information that is truly relevant to the applicant's ability to do the job are much more likely to avoid legal pitfalls. If you cannot legally use the information, do not ask for it!