

Hiring Days Are Here Again

Brush up on hiring skills in 10 areas.



By Jonathan A. Segal

As the economy slowly improves, we are finally and gratefully seeing new jobs being created. That's the good news. The bad news is that our hiring skills may be rusty. This article provides best practices in 10 areas of the hiring process. Such practices maximize the likelihood of hiring the best talent and minimize legal risks.

Finding Qualified Candidates

Recruitment begins with an understanding of the position to be filled so that the most-qualified applicants can be identified.

Job descriptions. Of course, the first step ideally is to prepare a job description. It can be a painful step, but it is very helpful.

Most job descriptions appropriately include the minimum required education, experience, skills and physical demands. Don't forget to include what I refer to as the stamina requirements, such as the ability to work long hours and to multitask, where applicable. Stamina requirements are often key with regard to whether an employer can accommodate mental disabilities, such as stress disorders.

Job descriptions are often silent on factors that correspond to the legal status

given to the position under certain laws—such as whether an employee is exempt under the Fair Labor Standards Act (FLSA) or is protected by the National Labor Relations Act. Make sure your job descriptions support the classifications that go with them. For example, if you have classified an employee as exempt under the administrative exemption of the FLSA, the job description should include examples of job functions that involve discretion and independent judgment with regard to matters of significance.

Recruiting. Post vacant positions internally so that your employees have the opportunity to apply for them. However, posting alone may not be adequate; external recruiting may be necessary.

To increase the diversity of the applicant pool, employers may wish to supplement, not supplant, general recruiting with targeted recruiting.

Be careful of timing. General and targeted recruiting should occur at the same time. Deferring targeted recruiting until after you have determined the diversity of the applicant pool could carry with it an inference of discrimination, according to *Rudin v. Lincoln Land Community College* (420 F.3d 712 (7th Cir. 2005)).

Interview selections. Employers should interview candidates only if they meet the minimum requirements of the job as employers have defined them. The question becomes what to do when you have too many qualified candidates.

Develop and document a process where you select among those who are qualified

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the applicants you wish to interview. For example, you could decide to interview only qualified applicants who applied on day one. That's a nondiscriminatory criterion for whittling down the size of the applicant pool.

If you apply more-subjective criteria related to experience, be careful that subconscious bias does not result in the exclusion of

people of color or women. There are studies that show that when an individual's name is presumed to belong to someone who is not white, that individual is

less likely to be interviewed than someone with the same resume but a "white-sounding" name. How do you protect your organization from subconscious bias? When circulating cover letters, consider redacting them so names and addresses are not visible. By taking steps like these, you consciously avoid subconscious bias.

Conducting Interviews

Interviews can help narrow the applicant pool, but they must be handled correctly.

Inappropriate interview questions.

Employers know that they generally cannot ask candidates questions that relate to equal employment opportunity status: How old are you? What is your religion? Where were you born?

Employers also know that they legally cannot and practically should not ask questions about a candidate's family life: Are you married? Do you have kids? Are you fertile?

Even if these questions are not unlawful per se under state law, they often correlate to a protected group—for example, they are asked of women and not men or are seen as a way to determine some other protected status such as sexual orientation, pregnancy or even age.

In many organizations, however, not everyone is aware of the rules on prohibited questions.

Increasingly, peers help screen candidates. And employers infrequently train nonmanagerial peers on the do's and don'ts of interviewing.

As a technical matter, an organization may not be liable if a peer asks an inappropriate question at lunch, such as "Who takes care of your kids while you are at work?" But the inappropriate question may push away the talent. Plus, if a manager happens to be at the table and says nothing, her silence may be seen as condoning the question. At a minimum, her knowledge of the answer may be seen as the basis for adverse action.

Minimize the risk by training peer interviewers on what they can and cannot ask candidates, and make it clear that recruiting lunches

and dinners are part of the interview process.

Appropriate interview questions.

Managers complain at times that they feel as if there is nothing they can say. When it comes to interviewing, employers should provide them and peers with sample questions to ask.

Of course, appropriate questions include questions about an applicant's experience, skills and ability to perform the essential job functions. A problem may arise, however, when different applicants are asked different questions.

It is OK to ask whether a candidate can travel as required by a job but problematic if you ask the young woman and not the middle-aged man. It is OK to ask if someone can work up to 70 hours per week as required by the job but problematic if you ask the older and not the younger man.

Selective questioning may be the result of subconscious bias. But it's still bias.

It is desirable for each interviewer to have a list of standard questions that he or she uses as a starting point when interviewing candidates for a particular position. Different interviewers can have different standard questions. The key is that each interviewer should be consistent with his or her candidates.

Interview cues. John Lennon wrote, "Life is what happens to you while you're busy making other plans." The same can often be said of the interview. How an applicant will perform as an employee is often foreshadowed by how he or she behaves independent of his or her inter-

view answers. Ignore these cues at your peril.

If the candidate is late for the interview, don't be surprised if she is often late to work. If you take the candidate on a tour and she makes glowing eye contact with those in power but ignores the support staff, don't be surprised if she manages horribly down even though she manages wonderfully up.

If the candidate can't decide what to order for lunch long after everyone else has made their selection, don't be surprised when the person suffers from paralysis analysis at work.

Create opportunities for the person to show his or her true personality, and consider those demonstrations to the extent that they are job-related.

Choosing the One

Consider all the information you have about the candidates, and then extend an offer to your top choice.

Decision-making. We often talk about the at-will principle when it comes to terminations. In fact, it applies equally to the hiring process. Employers can reject someone for a job for any reason, no reason, a good reason or a bad reason, just not an illegal reason.

It is increasingly rare that someone is rejected for a job because of a blatantly unlawful reason. Yet, claims by applicants have increased.

One of the more common—and challenged—reasons for rejection is "bad cultural fit." When it comes to bad cultural fit, there are two extreme views and both are extremely wrong.

On one extreme, there are those who argue that bad cultural fit is almost always a proxy for some sort of unlawful bias.

On the other extreme, there are those who argue that cultural fit is everything. If someone does not fit in, they will fail.

The truth is that cultural fit may be relevant and legitimate because we want to maximize our odds of finding an employee who will do the job well. But we need to make sure that cultural fit is not really cultural bias based on differences among protected groups.

The way to maximize value and minimize risk is to define what cultural values employers are looking for and then determine whether someone has them

Online Resources

For more about hiring, see the online version of this article at www.shrm.org/hrmagazine/0711/Segal. For other resources on employment law, visit www.shrm.org/LegalIssues.

Also, For S.C. - "Employment at will" notice

based on specific behaviors and answers to interview questions.

Verifications. Before extending an offer, certain background information should be verified or obtained. For example, generally you should verify the individual's education from the institutions listed on the application and check work experience at the organizations where he or she claims to have been employed. It is frightening how many candidates are blatantly dishonest in terms of their education and work experience.

When it comes to prior employers, try to get substantive information, too.

Background checks. You may want to consider conducting criminal or credit checks, depending on the position. Of course, if you use a third party to help you with these checks, then you must comply with the federal Fair Credit Reporting Act—as well as certain state laws, such as in California and New York—which may impose additional requirements.

Be careful of per se bars to employment—all felonies or any credit score below a certain number. The U.S. Equal Employment Opportunity Commission is attacking per se exclusions by way of class actions.

Offer letters. Ideally, every applicant should be required to complete an application for employment. Comparing the application with the resume is a good way to test veracity or, at a minimum, carefulness.

Plus, the application includes key questions that you want to make sure all candidates are asked. For example, it is recommended that the application include a question asking whether the candidate is subject to any post-termination agreements with a prior employer. Ignorance is no defense.

The application also includes appropriate representations, including that employment will be at-will.

Even if every candidate completes an application, it is still generally desirable to send each new hire an offer letter. If an

application was not completed, the existence of an offer letter with clear at-will language is even more important.

The offer letter may state the employee's position, responsibilities and reporting relationship. However, the offer letter should state directly or indirectly that these facets of the employment relationship are subject to change at the employer's sole discretion.

When it comes to pay, indicate starting salary or wage only and indicate that the employee may be eligible for increases at the employer's sole discretion.

When it comes to benefits, speak in terms of coverage and make it clear that the plan documents control.

Then, hold your breath. Because no matter how much employers may think otherwise, hiring is more art than science. We all have hired individuals about whom we had some doubts but who turned out to be superstars or candidates who we thought would be superstars but who turned out to be super duds. ■

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