

USING SMART HIRING PRACTICES TO REDUCE EMPLOYER LIABILITY

By Kathy Perkins

The perennial question employers ask is: *HOW CAN WE KEEP FROM GETTING SUED BY AN EMPLOYEE?!* As some employers have discovered, a claim can even come from an unsuccessful applicant. Of course, there is no absolute, foolproof guarantee against becoming a defendant in a lawsuit. But savvy employers know that educating company management about employment laws can reduce the risk of a lawsuit and improve the odds of prevailing if a claim is brought. An excellent foundation for such a program is to establish a solid hiring process.

Many hiring decisions seem to be made with far less thought and analysis than is desirable. They may be based on factors that are irrelevant to potential performance (such as “any friend of Joe’s must be okay”). There is a tendency among interviewers to be unprepared for an interview, developing no more useful information than which applicant is best at small talk.

Why is an improved hiring process so important in preventing employment litigation? Hiring decisions, statements made during interviews and screening practices are frequently offered as evidence in claims for: **1)** discriminatory failure to hire due to the worker’s protected status (age, gender, national origin, race, religion and disability); **2)** discrimination against employees (such as failure to promote or wrongful termination); and **3)** breach of an express or implied contract.

Focusing on hiring practices is also a good idea from an economic perspective. It is expensive to hire, train and then lose an employee, either through a resignation or the termination of an individual who turns out to be unqualified or a poor fit for the job. High turnover takes its toll on managerial time and energy. Many employers have found that increasing their initial investment in employee selection will reduce long-term costs.

Each organization must develop a hiring program that meets its distinctive needs in terms of company culture, types of positions (blue collar vs. white collar, professional vs. clerical), available applicant pool, etc. However, adopting and enforcing the following fundamental principles should improve any employer’s selection process and reduce litigation risks.

TIP #1: Job descriptions should define the essential functions of the job, qualifications required and the expectations of the employer.

The enactment of the American with Disabilities Act (“ADA”) in 1990 prompted most employers to examine and update their job descriptions to distinguish between essential job functions (which determine whether a worker is qualified for the job) and marginal functions (which can be revised as an accommodation for a disability). Litigation under the ADA has reinforced the importance of not only articulating job

requirements, but updating them regularly so that they are credible evidence of current duties and employer expectations. For example, it will be difficult for an employer to defend a decision not to hire a disabled individual based on a job description that identifies heavy lifting as an essential function, when a new piece of machinery has negated that requirement.

Additionally, court decisions suggest that it is important for employers to go beyond stating specific tasks in the job description. Other requirements, such as regular attendance or ability to work in a team, should be identified in the job description.

This is particularly important with the 2008 ADA Amendments Act which overruled a number of employer friendly court decisions and, among other things, dramatically expanded the major life activities considered for purposes of determining whether or not a particular physical or mental condition is protected as a disability.

Beyond evaluating requests for accommodation under the ADA or defending against disability bias claims, the job description can be an important tool for an employer to communicate its expectations to prospective employees. Accurate depiction of the position can help weed out individuals who are not a good fit, and can assist in managing performance issues down the road.

TIP #2: Application forms should be completed by all applicants, request sufficient information to screen applicants, and provide notice of any particular conditions of employment (such as a drug screen or credit check) and of at-will employment status.

A key to defending a discrimination claim based on failure to hire is being able to prove that the employer consistently evaluated all applicants using identifiable criteria. An employer may have difficulty in establishing consistency if some applicants are permitted to provide a resume and others are required to fill out an application. Such an inequality could assist an applicant in proving pretext – that the stated reason for not hiring was false and a cover up for illegal bias. The increased use and functionality of on-line applications helps facilitate consistent development of information.

For example, assume that the employer states that it has selected a male employee because he had “more relative experience.” A female applicant could argue that she had comparable experience, but was not asked to complete the application form that would have elicited this information.

An application form can serve the economical purpose of assisting in screening out unqualified applicants. It is expensive to interview every applicant for a position; decision-makers should spend that time and energy on the top candidates. If the application seeks information that is going to be utilized in selecting the new worker (these are usually general company requirements, so a single or relatively few application forms can be utilized), it will be easier to defend a claim where the applicant

was screened out based on objective information. Of course, if the company does rely on information in the application to screen out prospective employees, caution should be used in waiving any of those requirements in the final selection process.

The application process is an excellent time to give potential workers notice of the conditions of employment. Advance notice will help identify applicants who are not willing to go through those steps earlier rather than later. Some applicants withdraw when they learn, for example, that a credit check will be performed. Also, applicants feel the process is fairer if they are not surprised by a requirement such as a drug screen, even if they have no concerns about taking the test. A trade secret, invention and/or non-competition agreement requirement is another example of information that should be conveyed early in the process.

Finally, an employer should clearly communicate that applicants are hired as at-will employees. In the pre-employment courtship, applicants who want to impress the potential employer are far more willing to accept without question or argument that term of the employment relationship.

TIP #3: Articulate criteria for each position and ensure that the application, background check and interviews elicit the information necessary to make an informed decision.

How will an employer choose between the people who vie for an open position? Subjective factors – such as how the applicant gets along with the anticipated supervisor or co-workers – are relevant and may legally be considered. However, including objective factors will make a hiring decision easier to defend.

If technical skills are necessary, such as word processing proficiency, a company may want to design a test for these skills to be used as part of the evaluation process. If a position involves access to client funds and a bond is required, ensure that the selection process elicits sufficient information to determine if that applicant is bondable.

Subjective criteria may also be enhanced by objective observations. Noting that an applicant for a sales position seemed very nervous when meeting new people and would not look the interviewer in the eye provides solid support for a subjective impression that the candidate would not be a successful marketer.

As with the application process, it is important not to abandon these carefully established selection criteria when making the final decision. More than one employment lawyer has defended a discrimination claim brought by a minority applicant who scored higher on a screening test than the individual ultimately hired. If other facts outweigh objective test results, they should be reviewed before the offer is made to ensure they will withstand an accusation of pretext.

TIP #4: Train all employees who come into contact with applicants during the interview process about acceptable inquiries, and ensure that they understand their role in the process.

Virtually all employers use interviews as part of the employee selection process. There are terrific management related reasons to take the interviewing process seriously, including better employee selection and lower turnover.

Focusing on interviewing practices is also a good idea from a legal perspective. Interviewer comments generally figure prominently in claims brought under federal and state discrimination laws for failure to hire. Asking an applicant about the nature and severity of a disability or failing to reasonably accommodate a disability in the interviewing process are strictly forbidden by the ADA. Yet, an untrained interviewer may inadvertently ask a forbidden question (such as “Do you have any back problems?”) or an inadvisable question that elicits information about the applicant’s protected status.

Comments or promises made during an interview may also become evidence in a subsequent claim brought by a worker. This evidence could include statements indicating bias or prejudice which the worker contends are later borne out. Promises may also form a basis for a claim for breach of contract, fraud or misrepresentation, such as “If you come to work here, with your qualifications, you’d be guaranteed a raise and promotion inside of six months.”

Failure to hire claims are often difficult for employers to defend because the contact with the unsuccessful applicant was so short and the decision-maker may have no memory of him or her. Hiring decisions are often made on the basis of subjective “gut feelings” and many times there is no documentation available to explain the basis for the decision.

However, the interview stands out much more clearly in the applicant’s mind. The applicant may make immediate notes of statements or conduct that are perceived to be inappropriate and is likely to better recall the interview. The memory of the manager who interviewed ten people for the job is generally less clear and it is difficult to refute a strong statement of recall by the applicant. Additionally, more job hunters are becoming sophisticated about their legal rights. Inadvisable inquiries may raise a red flag that is easily recalled when the job offer does not come.

Finally, if a claim is made, the Equal Employment Opportunity Commission or unsuccessful applicant can obtain the identity of others who were interviewed and then compare notes about the process and the questions asked of individuals with different age, gender and racial backgrounds. Inconsistencies in questions can raise an inference of bias. Such questions may include grilling a female worker about family plans or questioning an Hispanic applicant about where he or she was born.

TIP #5: Develop a consistent practice for advertising and internally posting job openings.

Filling positions through word of mouth can perpetuate a practice of hiring people who are similar to current employees. It may be difficult to defend a discrimination claim brought by an individual who is a racial minority if the vast majority of current employees are white and the successful applicant was a school friend of the supervisor.

Companies will be well served to advertise positions in a manner aimed at reaching all potential workers in the applicable market area. Recruiting at a career fair held at a predominately white high school while ignoring a local minority recruiting fair could be evidence of discriminatory motive in a failure to hire claim.

Similarly, identifying “superstar” employees early in their careers and providing enhanced opportunities for advancement can support a claim of discrimination by similarly situated workers who were not provided these extra benefits. Employers should exercise caution in selecting workers for advancement without notifying other qualified workers of the opening. If all qualified employees were invited to apply, then those who did not choose to do so may later be precluded from bringing a claim.

TIP #6: Make an informed choice in designating employees to make hiring decisions and to represent the company in the hiring process.

Job interviews may provide an applicant with his or her first impression of a company and its managers. A company representative who is rude, is untrained in employment laws and interviewing techniques, or makes allusions to discriminatory stereotypes can exude a negative impression. If a failure to hire claim does not result, then certainly the new worker will be very suspicious in future dealings with this individual.

Companies should also be sensitive to how the interviewees will perceive the company as a whole by its selected representatives. A team of athletic young males serving as the selection committee for a position may send a signal to applicants that there are barriers to employment for individuals who are female, over age 40 or disable.

TIP #7: Consider in advance measures that may be required to accommodate an applicant’s disability.

Often a request for accommodation is presented in a setting where a quick response must be given. Advance preparation can prevent an applicant from perceiving that the employer is unwilling to consider accommodation. For example, plan for wheelchair access to the human resource office where applications are completed. Such advance consideration can also given an interviewer more confidence in telling an applicant, “We have considered whether we could reasonably alter that job to remove the driving requirement, but we have decided that driving – and holding a commercial driver’s license – is an essential function of the job.”

Keep in mind that disability accommodation must be evaluated on a case-by-case basis. Always be prepared to listen to an applicant's request for an accommodation and do not be afraid to think creatively.

TIP #8: Zealously perform background and reference checks.

Why ask the questions if you don't intend to use them? Unfortunately, some people do falsify their credentials on the assumption that many employers do not bother checking up. If the employee later causes harm in a way that might have been predicted through a careful background check, the employer could be held liable for negligent hiring. For example, a criminal records check could reveal that a day care worker had been convicted of child molestation.

Employers that conduct background checks (including obtaining credit reports or criminal histories) utilizing third parties should be aware of and comply with the requirements of the federal Fair Credit Reporting Act (FCRA) regarding disclosures to employees and applicants.

However, FCRA disclosure is not necessary for those employers that simply call educational institutions, former employers and listed references to verify information provided. Furthermore, many states – including Kansas - have enacted legislation to provide immunity for disclosing certain reference information, which should encourage former employers to be more willing to assist. Despite company policies which limit the information to be provided, experienced reference checkers claim that they can obtain substantial amounts of information if they take the time to call.

TIP #9: Require that decision-makers articulate a legitimate, nondiscriminatory reason for their selection.

It is bad business for managers to make hiring decisions they cannot explain. Articulating the reason for a hiring selection to a superior or the Human Resource Department (and defending the decision against their questions), will help ensure that it holds up in a lawsuit where the employee contends the stated reason is pretextual.

TIP #10: Develop a consistent policy of record creation and retention.

Creating comparable records of all hiring decisions and keeping them according to a defined policy is a key factor to defending a failure to hire claim (or establishing that background checks were made in defense of a negligent hiring claim). However, records that are missing after six months (despite a policy which requires retention for two years) or incomplete forms evaluating candidates, can create an inference that something other than the established criteria was used.

It is neither necessary nor desirable for an employer to keep every scribbled note made in an interview. However, decision-makers should be required to state in writing the legitimate, objective reasons for the decision, supporting factors and the reasons other candidates were not selected.

CONCLUSION

An investment of time and resources in organizational hiring practices will yield significant returns through better hiring decisions and reduced risks of legal liability.