

THE MANAGEMENT FILE

EMPLOYMENT PRACTICES WHILE RECRUITING AND HIRING

Insight for business owners and risk managers provided by Gallagher Franchise Solutions

Like any employer, you want to make sure that your new employees are the best in the business. Searching for the right candidate to fill a crucial position is a time-consuming and difficult process. Your company needs to make sure that every new employee is highly skilled and right for the job—and you only have an application, resume and interview to find that out.

Employers need to be careful, though. The hiring process is one of the most dangerous times for employer liability. If the wrong questions are asked of an applicant, the interviewer, employer or company could be sued. Many times, employers can't tell what makes a question discriminatory or how phrasing can change the suggested intention of a question.

Once considerations for intelligence, performance and medical testing get added to the employment process, finding a new worker becomes a minefield of risks. Business owners, executives and human resource managers need to analyze every step they take through the hiring process. Companies also need to consider employment practices liability (EPL) insurance and how it can protect them while they try to find the best employees for the job.

Application

Risks inherent to the hiring process stem from complaints of discrimination against the applicant. However, the alleged discrimination is often from an employer who simply does not feel the applicant can perform the job adequately. In these instances, the disagreement starts at the application. All too often, employers do not consider all the requirements of a job and what constitutes an essential function of the position.

Failure to list a lifting requirement or computer proficiency level (essential to the work role) can result in numerous applications and interviews with individuals

who believe they are qualified, but lack the skills necessary. If these individuals have any form of disability or are part of a protected class, they may contest that, according to the official requirements, they are proficient and were only not hired because of discrimination.

Employers, therefore, need to first avoid confusing or ambiguous language concerning the minimum requirements of the job. All essential functions of a role should be listed in the job requirements to ensure that all applicants are viable candidates. However, this does not give employers the right to nitpick or limit reasonable applicants. Employers must be careful not to list non-essential skills that screen out protected classes or disabled individuals.

Once clear requirements are prepared and a job listing is ready for posting, an employer must create or certify an official application that is free of discriminatory questions or language. Any questions concerning race, sex, disability or age must be avoided. Any special needs in context to these areas should be listed in the job requirements, though these situations are rare (e.g., requiring a female custodian at an all-girls school). The one major exception to this rule is inquiring if an individual is a legal adult (i.e. at least 18 years old), though age requirements should have been mentioned in the job listing anyway.

Aside from general disability inquires, the Americans with Disabilities Act (ADA) also limits questions concerning an applicant's health history and time spent on workers' compensation at previous jobs. Both of these lines of inquiry can lead to an employer inferring a disability and discriminating against an applicant.

Military service and past criminal records are other sensitive areas that should be considered with extreme caution. Questioning what kind of discharge an individual received from the military is dangerous and

should be avoided. Similarly, requiring an applicant to list his or her arrest record should be avoided. Information gathered about arrest records could put a company at risk for defamation of character if it is leaked to employees. Many states prevent employer access to arrest records while others greatly restrict who is able to view them. Every state has its own rules concerning ex-convicts and discrimination in the workplace. In all cases, a crime (other than a felony) can be a source of a discrimination suit unless it relates to the area of business the individual is applying for.

The final major area of possible discrimination is marital status and family planning. Though not regulated or restricted nationally, certain states consider questions about marital status, children and pregnancy to be grounds for discrimination. This means that even questions concerning preferred title (e.g., Miss, Ms. or Mrs.) can be construed as discriminatory. Questions about children or future plans for children should never be asked.

Applications must be filled out by every employee as a reference if any kind of employee dishonesty comes to light in the future. The combination of a good job description and a solid application can greatly help an employer remain unbiased while determining who would fit a job position.

Interviewing

For the most part, discrimination exposures in an interview are much the same as they are on an application. The major difference is that the interviewer will have to speak carefully to avoid phrasing legitimate questions in a discriminatory manner. For this reason, an interviewer should write down a number of questions prior to meeting with a potential candidate and read them verbatim while doing the interview. The employer should only discuss or take notes on questions directly related to the position.

As stated, phrasing can be difficult in an interview. A seemingly negligible change in subject can be the difference between a question that garners discriminatory information and one that is totally pertinent to the job. For instance, say you want to know whether or not an employee can regularly lift 40 pounds while working. You can ask the following question:

- “Can you lift 40 pounds multiple times during the workday? This job requires regular lifting.”

However, you cannot ask the following question:

- “Do you have any physical issues that restrict you from lifting 40 pounds multiple times during the workday?”

Any question that requires an applicant to specifically disclose a disability cannot be asked in an interview; questions can only ask if the applicant can accomplish the requirements of the job. These restrictions include asking any questions about previous illnesses, medications or long-term diseases.

Addressing issues of reasonable accommodation is delicate. Under the ADA, disabled applicants who can perform the requirements of a job with or without reasonable accommodation are not to be discriminated against. Applicants are allowed to request reasonable accommodation for the interview (e.g., wheelchair access to the interview room). However, an employer is not allowed to ask if an individual requires any form of reasonable accommodation to fulfill essential job functions unless the employer has a legitimate reason to believe accommodation will be necessary or the applicant willingly divulged information about a disability.

The central goal behind interview questions should be to gain positive information from the applicant concerning job functions. Employers should never ask about limitations, hindrances or disabilities. They need to keep

the focus on whether an applicant can do something, not what's keeping them from doing it.

Checks and Testing

Medical testing of applicants is permissible if necessary for job functionality. General medical testing can be done as a condition of employment, but is not allowed to be done prior to the applicant being offered a job. The exceptions to this rule are tests for illegal drug use and basic fitness tests. In the case of the latter, only skills and abilities can be tested, not medical conditions; an employer is free to make an applicant perform a physical function of a job, but cannot collect any medical data that might indicate disability or condition (e.g., blood pressure, pulse)

Performing background checks is a highly restricted area of the hiring process. The applicant, or employee, needs to give written consent to allow an employer to get information on his or her background. Additionally, if the report is considered an "investigative" report (i.e. a report that will interview personal associates of the applicant) then the employer must also get consent for the type of information that will be collected.

Though not a consumer report background check, applicant reference checks can still be a point of liability. Employers should require consent that frees them from any form of liability when going through the applicant's references. Since slander or defamation of character suits can be brought against previous and potential employers, some companies require applicants to waive liability for their referrers' testimonies. In either case, information gathered from reference checks should be available only to those involved in the hiring process.

Employers collecting information from references should also be careful of speculative or opinionated descriptions that cast a dark light on the applicant. Detrimental references can be a dangerous source of liability, with or without consent. A referrer must not make blanket statements like "she never tried to do her

tasks well" or uninvestigated claims like "I think he stole from me." Dismiss such testimonies and pay attention only to facts. Employers are required to provide references in good faith and are not to try to convince a new employer to dismiss an applicant. References, like any other test of job fitness, should only be done in terms of positive skills, never negative judgments.

Former employers contacted for a reference should only confirm job position and the time period an employee was with the company. If asked, employers can also divulge whether the employee left in good standing. Details of employment history are sometimes permissible, but should be avoided altogether to prevent possible claims of defamation. Never disclose information about the employee's personal life or disabilities.

Any detailed medical test records or background checks should be closely guarded by a company's HR department and only divulged to managers when absolutely necessary. A breach of confidentiality, and an applicant or employee can easily make a case for defamation of character or illegitimate public disclosure of information.

Negligent Hiring

The biggest problem with hiring new employees isn't always overstepping boundaries with the applicants that are not hired; it's making certain that the ones that are hired are not a danger to the company. Negligence in employment is an employer liability that can put tremendous stress on an HR department or employer. If an employee harms or harasses a co-worker, the employer can be held responsible for negligence in employment if it is determined that the employer knew, or should have known, that such an event could happen. Employers who hire without investigating applicant backgrounds or properly testing skills put themselves at great risk for negligence liability.

Since punitive and reputational damages from hiring a dangerous employee can be large, employers must try and find out as much about an applicant as they can before extending an offer for a job. However, information gained through investigation may make an employer liable for invasion of privacy or discrimination when it is discovered. This forces employers to walk a fine line and exposes a company to several risks during the hiring process.

The challenges of finding new employees for your company should not be taken lightly. Despite every effort to be fair, unbiased and respectful of an applicant's privacy, there will always be cases where discrimination is perceived and challenges are brought against a company. Fortunately, insurance coverage is available to the officers and departments that put themselves in the danger zone to recruit and hire the best workers available. Contact Gallagher Risk Management - Tulsa to find out more about hiring risks and what you can do to protect your company from the liabilities brought to your door.