Recruiting and Interviewing: Minimizing Legal Risk

by Practical Law Labor & Employment

Maintained • USA

A Note describing legal risks in recruiting and interviewing and how to minimize them. This Note addresses federal law and jurisdiction-neutral considerations. For information on state law requirements, see the State Q&A Tools under Related Content.

Contents

Although employers generally understand that they must avoid making discriminatory employment decisions, not all employers are aware of the significant liability risk the recruitment and interviewing process presents. This Note outlines legal risks during the recruitment and interviewing process, and identifies practical steps employers can take to minimize their risk of liability.

Specifically, this Note:

- Explains how to avoid unintentionally converting an at-will employment relationship into a for-cause employment relationship (see *Risk of Creating For-cause Employment Relationships*).
- Describes the applicable federal anti-discrimination laws and identifies the classes of individuals protected under those laws (see *Protected Classes Under Federal Law*).
- Identifies the risks and potential liability for real or perceived discrimination at various points in the recruitment and interviewing processes (see *Risk of Discrimination Claims*).
- Identifies the exceptions to the prohibitions against employment discrimination (see *Exceptions to Prohibition Against Employment Discrimination*).
- Provides practical steps at each stage of the process to avoid the appearance of discrimination and bolster defenses to any discrimination claim.

Risk of Creating For-cause Employment Relationships

Although employees are generally presumed to be at-will, employers should be wary of unintentionally converting an otherwise intended **at-will employment** relationship to a **for-cause employment** relationship during the interviewing and recruiting process.

An at-will employment relationship means that either the employee or their employer may terminate the employment relationship at any time, for any reason, unless the reason is unlawful (such as a discriminatory reason).

A for-cause employment relationship can only be terminated for a reason specified in an employment contract as grounds for termination. These grounds can include anything lawfully contracted by the parties. For a discussion of possible grounds for termination that may be specified in an employment contract, see *Practice Note, Negotiating and Drafting an Executive Employment Agreement: Termination of Employment*. For a model executive employment agreement, see *Standard Document, Executive Employment Agreement*.

The ease with which an at-will employment relationship can be converted to a for-cause one varies from state to state. An employer can convert an at-will relationship to a for-cause one by making oral or written representations about the nature of the employment relationship to prospective employees during the recruiting and interviewing process. For example, oral or written statements suggesting job security, permanent employment, or that a job will be available provided that the employee performs their job, have been held in some states to convert an at-will employment relationship to a for-cause employment relationship.

Representations regarding an introductory or probationary period can also alter the at-will employment relationship by suggesting heightened security in employment following the introductory period. Therefore, employers should be careful not to imply any guarantee or security related to continued employment in policies describing probationary periods. Employers should be equally careful with statements about progressive discipline policies (that is, policies that outline progressively more severe disciplinary steps for repeat behavior), as these policies can imply that certain steps must be taken before an employee can be terminated, negating the at-will employment relationship. For more information on employee discipline, see *Best Practices for Employee Discipline Checklist*.

Practical Tips

To avoid converting an at-will employment relationship to a for-cause employment relationship, employers should:

- Ensure that all employees involved in recruiting, interviewing and hiring understand the difference between at-will and for-cause employment, and that they are prohibited from making statements that in any way limit or modify the at-will employment relationship.
- Review their written policies, handbooks, offer letters and employment agreements to ensure there is no language that could be misconstrued as making representations about the permanency of the employment relationship. For more information on employee handbooks, see *Practice Note, Employee Handbooks: Best Practices*.
- Decide whether policies or practices creating probationary periods or progressive discipline are truly necessary. If they are, these policies should clearly state that they are not intended to alter the at-will employment relationship.
- Include a stand-alone disclosure at the beginning of the employment handbook stating that the employment relationship is at will.
- Consider making statements regarding the at-will employment relationship as conspicuous as possible, including using bold and underlined text in all written material where they appear (see, for example, *Standard Document, Employee Handbook Acknowledgment*).

Risk of Discrimination Claims

Triggering an employment discrimination claim is one of the biggest legal risks in the recruiting process. For more information about federal employment anti-discrimination laws, see *Practice Note, Discrimination: Overview* and *Federal Employment Anti-discrimination Laws Checklist*. Discrimination claims can arise at any stage of the prospective employment relationship, from advertising and describing a vacancy, to making an offer of employment.

In general, an organization subject to federal employment anti-discrimination laws is liable for the discriminatory conduct of its employees, even when that conduct occurs in the recruitment or interview process. Therefore, employers should pay careful attention to the possibility of discrimination claims and ensure that any employee involved in the recruitment process is trained to spot and avoid potentially discriminatory practices.

In addition, the **Equal Employment Opportunity Commission** (EEOC) regularly sends testers through recruiting and interviewing processes to ensure compliance with federal employment anti-discrimination laws. The EEOC can bring independent claims against an organization it believes has engaged in discriminatory practices.

Protected Classes under Federal Law

Federal employment anti-discrimination laws prohibit discrimination on the following bases:

- Race.
- Color.

- Religion.
- Gender (including pregnancy).
- National origin and citizenship.
- Age (40 and over).
- Disability (including perceived disability).
- Genetic information.
- Veterans, active-duty military service members or individuals who have applied to the uniformed services.

For more information about federal employment anti-discrimination laws, see *Practice Note, Discrimination: Overview* and *Federal Employment Anti-Discrimination Laws Checklist*.

Most states also have their own anti-discrimination laws protecting various combinations of **protected classes**. For information on classes protected under state law, see *Anti-discrimination Laws: State Q&A Tool*. Some state laws are more inclusive than federal laws; for example, some consider marital status, sexual orientation and even smokers protected classes. An employer should familiarize itself with both federal and state (and in some cases, local) anti-discrimination laws to ensure that it complies with the laws and avoids discrimination claims.

Employers with employees in more than one state should consider adopting policies prohibiting discrimination against as many of the generally recognized protected classes as possible, even if not all are protected in each state the employer has employees. This ensures compliance with laws in all relevant states and allows for consistent administration and enforcement of policies (see *Standard Document, Equal Employment Opportunity Policy*).

Disparate Treatment and Disparate Impact

Discrimination can take two basic forms:

- **Disparate treatment:** direct discrimination against an individual because of their membership in a particular protected class or classes.
- **Disparate impact:** discrimination that occurs when a neutral-appearing practice or policy actually has a discriminatory effect on a certain protected class or classes.

Although this Note largely refers to disparate treatment discrimination, a disparate impact discrimination claim can be brought in any area of the recruitment process where a practice or policy has a discriminatory effect on a protected class or classes.

Exceptions to Prohibition Against Employment Discrimination

Bona Fide Occupational Qualification Exception

Title VII of the Civil Rights Act of 1964 (Title VII) provides for a limited exception to the prohibition against discrimination, a **bona fide occupational qualification** (BFOQ). The BFOQ exception

applies where an employer can prove that a preference in employment based on religion, sex, age or national origin is reasonably necessary to the normal operation of that particular business or enterprise (*42 U.S.C. § 2000e-2(e)(1)*). The EEOC and courts construe the BFOQ exception narrowly and are very likely to scrutinize any BFOQ defense. Before using this defense, it is important to consider if the biased trait is indeed necessary to the position or the business's operations. For more information on the BFOQ exception, see *Practice Note, Discrimination under Title VII: Basics: Bona Fide Occupational Qualification (BFOQ)* and *Practice Note, Age Discrimination: Bona Fide Occupational Qualification (BFOQ)*.

Practical Tips

To properly use the BFOQ exception:

- Before deciding that a particular job requirement is a BFOQ, carefully consider whether individuals lacking that particular qualification could perform the job in question.
- Before finalizing a job description, a qualified Human Resources professional or attorney should examine it to ensure that it complies with anti-discrimination laws and does not give rise to potential discrimination claims.
- Consider noting in the job description that the organization considers the particular requirement to be a BFOQ and cite the statutory section on BFOQs in order to minimize risk of discrimination claims.
- Ensure consistent requirement of the BFOQ for the relevant position to minimize risk of discrimination claims.

Religious Exceptions and Exemptions

Title VII recognizes a number of exceptions and exemptions to the prohibitions on religious discrimination that apply to ministers, religious organizations and religious educational organizations. For more information, see:

- *Religious Discrimination and Accommodation under Title VII: Ministerial Exception*.
- *Religious Discrimination and Accommodation under Title VII: Religious Organization Exemption*.
- *Religious Discrimination and Accommodation under Title VII: Religious Educational Institutions Exemption*.

Practical Tips

To properly use the religious exemptions:

- Consider which positions require hiring a person of the organization's faith, keeping in mind the strong scrutiny that courts will give those justifications.
- Include a committee of individuals in these decisions to ensure a thoughtful and accurate assessment.

- When claiming the religious organization exception, state in the job description that the organization gives employment preference to members of its faith and cite to the religious organization exception in order to minimize claims of discrimination.

Where Discrimination Can Occur

Location of Advertisements

Advertisement spaces are generally targeted to particular audiences, and so the choice of where to advertise can exclude certain groups. Therefore, limited or targeted advertisement placement can form the basis of a discrimination claim, particularly if the same limitation continues over time. For example, if an employer only advertises its positions in publications whose audiences are mostly of one protected class or a few protected classes, such as a particular race or age group, the employer can leave itself vulnerable to a claim from a person from another protected class alleging that her class is disproportionately excluded. Such a person could file a disparate impact discrimination claim against the employer.

Similarly, an employer that only advertises its position by word of mouth can be vulnerable to a discrimination claim where its current workforce is predominantly or exclusively of one class or another. In this case, a plaintiff could bring a discrimination claim alleging that the employer is intentionally perpetuating the current limited makeup of the workforce by only advertising the position by word of mouth.

Practical Tips

To avoid discriminatory advertisement placement, employers should:

- Consider the methods and locations of their advertisements to ensure that the employer has attempted to reach potential candidates across protected classes.
- Request statistics from the advertisement administrators about the target audience and actual audience they typically reach to ensure no protected classes are excluded.
- Advertise positions in at least two completely separate media, designed to reach separate audiences.
- Consider whether they employ a homogenous work force, and if so, not limit advertisement of a position to word of mouth by their current workforce whenever possible.

Language of Job Description

Pay strict attention to the language of a job description. A thoughtfully worded job description will minimize risk of a discrimination claim.

Job descriptions should always include a statement that the employer is an equal opportunity employer. Employers should think carefully about the required skills and experience truly needed for the job to

ensure that it can defend every requirement. For example, a job description requiring that a person be able to lift heavy objects of up to 50 pounds may have a disparate impact on women. Where a job requirement tends to discriminate against, or be biased in favor of a particular protected class, an employer should ensure it can justify that requirement as a BFOQ (see *Bona Fide Occupational Qualification Exception*).

A job description should never suggest a non-BFOQ preference for or bias against any particular protected class, whether overt or implicit. For example, an employer should not use only "he" or "she" in a job description. Similarly, a job description should not use gender-specific terms such as "waiter" or "waitress," or express a preference for a characteristic that may indicate a violation of any other protected class, such as "young and energetic."

A job description should outline the essential functions of the position. These are the basic duties that an individual must be able to perform, with or without **reasonable accommodation**, to be qualified for the job. In the face of a disability discrimination claim, the EEOC and courts will consider these written requirements as evidence of the actual essential functions of the job. These requirements will protect an employer from a discrimination claim from an individual who cannot perform these job duties even with reasonable accommodation. When outlining these essential functions, an employer should make sure that they are truly required to perform the job, to defend against any challenge to their legitimacy. For more information on essential job functions, see *Disability Accommodation under the ADA: Essential Functions*. For more information on disability discrimination generally, see *Practice Note, Disability Discrimination under the ADA*.

Application Forms

Employers should always use employment application forms in the recruitment process. For a model employment application, see *Standard Document, Application for Employment*. These forms not only allow employers to gather important information about an individual but they allow prospective employees to present their skills and qualifications on a level playing field with one another. They also create consistency in hiring practices, which helps deter discrimination claims.

As with job advertisements, application forms should be accessible in a variety of media and locations to avoid claims of disparate impact. For example, forms should not only be available on the internet, as this may appear to discriminate against older or visually impaired individuals. On request, reasonable accommodation in the form of alternate applications should be offered for disabled individuals, such as large print, audio tape, braille or assistance in filling out the application.

Federal law and most states prohibit the use of application forms that express a preference or limitation with regard to any protected class, unless based on a BFOQ or religious organization exception. Employers should carefully review all application forms to ensure that they do not express an unlawful preference or limitation, or request information about a protected category. Questions on application forms should instead be limited to those that reasonably relate to the job for which the applicant is applying. For information on job application requirements under state law, see *Hiring Requirements: State Q&A Tool*.

For example, employers should avoid the following areas of inquiry on an application form:

- Religion.
- National origin.
- Marital status.
- Information about arrests.
- Criminal convictions when unrelated to the job (see *Criminal History Records in Employment: EEOC Guidance*).
- US citizenship as opposed to the right to work legally in the US.
- Childcare plans and plans to have children in the future.
- Health history, including the existence of any disability.
- Medications.
- Workers' compensation history.
- Bankruptcy.
- Physical or mental impairments.

In addition, basic, commonly requested information about a person, such as their sex, birth date and dates of school attendance, could be interpreted to imply a bias in favor of or against persons of a particular gender or age. Therefore, all application forms should also include a statement that the employer is an equal opportunity employer and that any information collected is solely to:

- Determine suitability for the position.
- Verify identity.
- Maintain employment statistics of applicants.

Employers should ensure they do not review any application forms in the presence of applicants (see *Conducting an Effective Interview Checklist*). Employers should also be careful about the notes they make on a person's application form. Notations on a person's application form or resumé that indicate any bias or preference toward a protected class characteristic should be avoided to prevent any suggestion that the characteristic was considered in the hiring decision.

Federal contractors and sub-contractors are also required by the **Office of Federal Contract Compliance Programs** (OFCCP) to solicit and report information about the race, gender and ethnicity of "internet applicants." Because the definition of "internet applicants" is vague and applicants generally access the internet at some point in their recruitment process with any organization, federal contractors and sub-contractors should consider soliciting this information from all applicants. Federal contractors and sub-contractors should also note on the application form that the information is being solicited for the purpose of compliance with the OFCCP rule.

The following statements should be included on the application form:

- That the employer is an equal employment opportunity employer.
- That any information collected about equal employment opportunity characteristics is for the purpose of monitoring employment statistics only.
- An authorization by the applicant allowing the employer to obtain information from the applicant's former employer, academic institution, and so on.
- That the applicant acknowledges that all information provided is true and complete.

For more information on the internet recordkeeping rule for federal contractors, see *Office of Federal Contract Compliance Programs: Internet Applicant Recordkeeping Rule*. Coverage of the affirmative action obligations of federal contractors is beyond the scope of this Note, but see *Practice Note, Affirmative Action: Overview* for more information.

Selecting Interviewees

To avoid actual or perceived discrimination in the selection of interviewees, ensure that only those individuals whose qualifications are best matched to the written job requirements are selected for interviews. Consider documenting the reasons for selection of the chosen individuals in order to minimize the risk of discrimination claims. It is also helpful to have more than one individual making these decisions to ensure that no one person's biases, whether conscious or subconscious, are allowed to affect the hiring process.

Location and Timing of the Interview

Employers should ensure that interview locations are accessible to all individuals, including those needing wheelchair access or accommodation of various disabilities, such as sight or hearing impairments. When a prospective candidate indicates the need for reasonable accommodation of childcare schedules or other protected class issues, employers should make every effort to accommodate the request unless it imposes an **undue hardship** on the employer. Courts will not consider an "inconvenient" request an undue hardship. The threshold for meeting the undue hardship defense is high (for more information, see *Practice Note, Disability Accommodation under the ADA: Undue Hardship*).

Interview Questions

The use of inappropriate interview questions is one of the easiest ways for an employer to subject itself to possible discrimination claims. Interview questions should be limited to those that reasonably relate to the job for which the applicant is applying (see *Avoiding Discriminatory Questions in Interviews Checklist*).

Although polite non-job-specific conversation often accompanies an interview, what seems to one person like a polite chat about an applicant's personal life may appear to have a discriminatory bias if the conversation reveals information related to the applicant's protected class. Employers must train staff to avoid any potentially discriminatory questions. For example, a woman should not be asked if or when she expects to have children. Similarly, interviewers should not ask an applicant if they miss work to attend services on holidays.

Pre-Employment Tests

Many employers require applicants to take various aptitude **tests** to demonstrate typing, computer or other skills relevant to the job they are applying for. However, an employment **test** that gives some classes an advantage or disadvantage over others exposes an employer to disparate impact discrimination claim liability. Before using a pre-employment **test**, an employer should analyze any

disparate impact on protected classes or hire an outside consultant to do so. Pre-employment **tests** make employers particularly vulnerable to **Americans with Disabilities Act** (ADA) claims.

Different jurisdictions use a variety of standards to measure the validity of various testing measures. The EEOC has developed a set of guidelines (the ***Uniform Guidelines on Employee Selection Procedures*** (UGESP)) to assist employers in compliance with Title VII and federal equal employment opportunity requirements. The UGESP do not apply to the prohibition against age or disability discrimination, but only those protected classes recognized under Title VII: race, color, religion, sex and national origin. The guidelines are quite complicated: they essentially divide testing into three different categories (criterion-related, content-validation and construct), and outline validation studies for each.

Employers are not strictly bound to comply with the UGESP, but courts give the guidelines weight in assessing the validity of various employment **tests**. However, courts are also mindful of the cost that can be associated with UGESP compliance, and have suggested that derivations from the guidelines may be acceptable for valid reasons, including the cost of strict compliance. The employer has the burden to demonstrate validity of a **test**, however, and may not solely rely on vendors' assurances to demonstrate validity. Because of the complexity of the guidelines, employers should consider hiring an expert to assist in measuring the validity of any pre-employment **test**.

An employer using pre-employment **tests** should carefully consider at the outset whether the **test** is truly necessary for evaluation of candidates, and if so, whether the **test** accurately measures the particular skill in question. An employer should have proof that the **test** is valid readily available in case of inquiry by the EEOC. Finally, the **test** should be applied uniformly. For example, an employer may **test** language skills where proficiency in a certain language is an objectively-justified job requirement. Where this is the case, however, employers should be sure they are testing candidates uniformly and not making assumptions based on national origin or citizenship. Employers should also keep in mind that polygraph pre-employment **tests** are strictly prohibited.

Before using **tests** that measure a person's **personality** or intelligence, employers should consider:

- Whether these **tests** are absolutely necessary.
- Whether they are fairly crafted.
- Whether the **tests** involve any invasion of privacy.
- How feedback will be given.
- How instrumental their results will be in any hiring decision.
- How the data will be stored.

Medical examinations and alcohol and drug **tests** also present potential discrimination issues. For more information, see *Medical Examinations and Inquiries in Employment Checklist* and *Employee Drug and Alcohol Testing under the Americans with Disabilities Act Checklist*.

When using any pre-employment **test**, an employer should provide reasonable accommodation for disabled individuals (see *Practice Note, Disability Accommodation under the ADA*).

Practical Tips

To prevent discrimination claims arising from employment testing:

- Before performing any kind of employment testing, carefully consider whether it is absolutely necessary to use the **test** to evaluate candidates. Where it is not, consider eliminating the testing to avoid the associated potential liability.
- When using a pre-employment **test**, consider and evaluate its potential for disparate impact.
- When using a pre-employment **test**, ensure that accurate validity studies are available to support the testing should it be questioned by the EEOC or other enforcement authorities.
- Apply the testing uniformly to all applicants for the relevant position.
- Consider whether the **tests** will invade applicant privacy, how feedback will be given and how data will be stored.

Final Selection

The final selection of candidates is the most obvious area where potential discrimination claims could arise. Accordingly, employers must not allow discriminatory bias, whether obvious or not, to influence any final decision. To avoid the possibility of unlawful bias, final selection decisions should ideally be made by committee. An employer should record the reasons for the final hiring decision in writing so that they can be defended later, if necessary.

