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Hiring the Best

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How to Hire the Best and Prevent Suits from the Rest

The same hiring techniques that make good legal sense also make good business sense.

The laws on discrimination, wrongful termination and privacy apply to how you select candidates and conduct interviews for hiring and promoting employees. In this section, you will learn the legal requirements for hiring and some practical ideas for finding the best-qualified candidates.

Hiring Checklist

- write a job description
- advertise the opening
- post the job internally
- contact recruiting agencies
- ensure application forms are legal
- accept resumes
- screen applicants
- write out interview questions
- conduct interviews
- give necessary tests
- perform background checks
- call references
- write the offer letter
- contact rejected applicants
- begin employment of the new employee

For all of these steps, always know and follow your company's policy and procedure.

The Job Description

Before you hire someone, decide what knowledge, skills and abilities you need. Yes, it's obvious. It's common sense. But it's rarely done, and when it is, it's often done wrong.

First, get a job description. Not one of those things that some committee wrote years ago, but a real description of the job as it currently is performed. The best person to write it is the one doing the job now.

Have the employee keep a time log for a few weeks to get an accurate picture of the true job functions.

Once you have the incumbent's description, you may want to change it. Perhaps the current employee has been spending more time in one area than you'd like. Perhaps he or she has weaknesses you want to eliminate with the next employee.

You can restructure the job however you like as long as you have a business necessity. Justify in writing your legitimate business reasons for making changes.

Job descriptions not only should be accurate, they also should be comprehensive. The Americans with Disabilities Act requires you to justify hiring decisions based on the essential functions of the job. If those essential functions are written in a job description, they are presumed valid.

Job descriptions should list the physical and mental requirements of the job, including attendance, hours of work, travel and paperwork. What does the employee do? See the box for examples.

Functional Job Descriptions

Position	Requirements
Sales professional	Average week: 15 hours in office, 25 with clients/prospects, 15 travel (must be able to drive and willing to fly). Must regularly read new product literature and industry publications. Must be able to lift and carry laptop computer, LCD projector and samples case, average weight 30 lbs. Write orders and reports. Make presentations, answer questions.
Food Server	From 24 to 32 hours per week, in 8-hour shifts. Must be able to work both shifts (11-7 or 4-12). Constant standing and walking. No sitting while on duty. Must be able to lift 50 pound trays. Restaurant has stairs. Able to read, write and have good oral communication skills.
Manager	60 hours per week, nights and weekends expected. Heavy reading and writing, make presentations, travel (drive and fly).

Hiring Standards

Can your job description include the sex, height or age of the ideal candidate? For example, do you think this real ad found in the newspaper is illegal?

WANTED

3 Santa Barbara Girls between the ages of 18 and 25, for promotional handout and display at local theaters in conjunction with the showing of "Asian Paradise" sponsored by Surfer Magazine. Must be young and athletic with outgoing personalities. Arrive in front of the Yacht Club. Please wear beach attire.

It may surprise you to learn that the ad is completely legal. Yes, it discriminates on the basis of sex and age and probably race, too. But discrimination is allowed if there is a "bona fide occupational qualification" (BFOQ).

A BFOQ says the purpose of the job is to fulfill a stereotype. Most BFOQs are in the entertainment industry. Actors and models are picked because of the way they look. An international restaurant can hire only ethnic employees in keeping with its theme. The costumed characters at an amusement park must be certain heights and weights so they can fit into their outfits.

Another example of a BFOQ is in the making of the radar dish for the AWACS airplane. To build it required people who were shorter than average. Height then was a business necessity.

Similarly, firefighters must be in top physical condition because we want them to be able to carry adults out of burning buildings when the need arises. Peace officers on the front line must be able to run, climb and crawl, even if they rarely actually do it. For those jobs, hiring physically fit applicants is a business necessity. (But if those employees become disabled after they get line experience, the employer may be required to reasonably accommodate them in other jobs.)

An employer can't use hiring standards that exclude disabled people unless the standards are job related. Job related standards must be validated by an industrial psychologist, ergonomist or other expert, or by your observation or experience. Here are some examples of job

requirements that exclude disabled people, and when they may be allowed:

Typing: A person who is hired to type can be required to type. On the other hand, a person being hired for a professional job that requires the use of a computer may not require the same level of typing skills; in fact, although most people in that position type, perhaps there is no reason why a person could not perform those functions in another way. Purchasing a voice recognition program might be a reasonable accommodation.

Lifting Requirements: ("must be able to lift 30 pounds") If the job requires lifting 30 pounds once a year, it hardly seems fair to make it a requirement. But it is legal to have a requirement if in fact lifting is required regularly, say once a week or more. Even then, is it absolutely essential that the person you are hiring do it? Or is there some other way the job could be done? Could another employee do the lifting? Is there a forklift? Consider all the alternatives. If you still need someone who can lift, then you have a legitimate business reason.

The bottom line on hiring standards is this: make sure you have a business necessity.

Customer Preference

Can you not hire people you think your customers will not like? The airlines argued in many early cases that their customers preferred young, slim, unmarried women flight attendants. The courts refused to accept these as BFOQs. The purpose of an airline is to deliver passengers safely, not to sexually titillate them.

The customer preference argument today is sometimes used by companies hiring in the U.S. for employees to work overseas. Many argue they can't hire women to work in Japan, because they won't be accepted by the Japanese. This argument ignores the facts. Women, both native Japanese and U.S.-born, have won acceptance in Japan and do hold positions of responsibility. As one savvy manager said, "A woman from the U.S. is accepted the same as any other gaijin (foreigner) in Japan."

You can have neutral requirements if they are necessary for you to do business. For example, if you are hiring people to work in Japan, you can

require them to be fluent speakers of Japanese and have extensive work experience in that country.

The only time international customers' preferences have been accepted by the courts is where that preference has the force of law. For example, Saudi Arabian law forbids non-Moslems to enter Mecca on penalty of death. A company that hired helicopter pilots to fly to Mecca required them to be adherents of or convert to the Moslem religion. This was upheld.

Contrast that to a case where a hospital sent doctors to Saudi Arabia. Because of the history of anti-Zionist statements made by officials of the Saudi Arabian government, the hospital refused to send two Jewish doctors there. The court held this was not allowed. There was no evidence that the Saudi government would refuse to give American Jewish doctors work permits. In fact, other hospitals working in Saudi Arabia had negotiated non-discrimination clauses in their agreements with the government.

Can foreign companies doing business in the U.S. reserve top positions for foreign nationals? Yes, in some cases. Although the anti-discrimination laws apply to all companies doing business in the U.S., they are overridden by Friendship, Commerce and Navigation Treaties entered by various countries with the U.S.

For example, the treaties between the U. S. and both Japan and Korea provide, "Nationals and companies of either [country] shall be permitted to engage, within the territories of the other [country] ... executive personnel ... and other specialists of their choice." These treaties have been held to allow foreign companies to save their top positions for people from their own countries.

Advertising the Opening

Once you have the job description completed, you will advertise the position. There are legal requirements for ads, as well as some practical considerations.

You want to reach as many candidates as possible, to increase the chances that top talent will learn about your opening and apply. While for generations the newspaper classified ad has been the quintessential recruiting tool, it is not the only one. Most newspapers now put their

classified ads on their website, as well as in newsprint. The same is true for many trade and professional journals. Many large employers now list job opening on their websites, as well as at on-line job boards.

Depending on your budget, time constraints, and target audience, you may want to consider additional recruitment tools designed to reach a diverse candidate pool, such as local radio or cable TV ads, postings on job boards at local colleges, universities, churches, synagogues and temples, job fairs, ads on buses, trains and subways.

Ads should never state a preference for age, sex, race or other protected classification, unless it is a BFOQ. If you aren't in the entertainment business, the BFOQ probably doesn't apply.

Avoid descriptions of the job or your company that could lead to charges of discrimination, such as:

Don't Use	Use
young (person, company)	high energy
recent grad	up-to-date knowledge
student	part-timer
coat and tie	professional appearance
Girl Friday	administrative (or personal) assistant
couple	two-person job
married	stable
Hispanic	Spanish-speaking
salesman	sales representative

It is illegal to require a college (or high school) degree without also considering experience. All ads should read "degree or equivalent experience." You decide what is "equivalent." Just be reasonable.

Define the amount of experience you want without putting an upper limit on it. For example, "3 - 5 years experience" almost guarantees your applicants will be younger. Instead, say "3+ years." This way you will not exclude older people who have more experience but who have chosen to take less challenging jobs.

So far, we've covered ads from the perspective of preventing discrimination lawsuits. Your job ads also can be used against you in a future wrongful termination case. They should be written carefully to avoid any appearance of offering long-term employment.

Two ads for accountants appeared in *The New York Times*. One offered "partnership potential." The other said, "career position." The first one offers only the hope of long-term employment. The second one virtually promises longevity. It takes a lifetime to have a career. And I can't be fired from a career, can I?

As a practical matter, it's a good idea to put any major negatives about the job in the ad. These negatives might include night, weekend, overtime and shift work, extensive travel and relocation. There is no reason for you to be inundated with resumes if many people wouldn't want the job on your terms.

One manager said all the salaried employees in his area were required to work 60 hours a week. He said, "I don't tell applicants that, because then they wouldn't want to work here!" Yet he expressed surprise about the number of people who quit shortly after he hired them.

Posting Requirements

Postings are essentially internal advertisements. You are recruiting people from within the company rather than from the outside.

Postings are subject to the same rules as advertisements.

Some companies don't post internal openings at all, others post some, and a few post all of them. When are you required to post openings?

Under the Affirmative Action regulations, all government contractors and subcontractors must post all openings internally, if the jobs are "underutilized" for women or minorities.

If your company has a written policy which states jobs are required to be posted, they must be posted. If they aren't, it's a breach of contract.

Management experts say it's a good idea to post openings so people can move up within the organization. This contributes to better employee morale, continuity within the corporation and growing your own management.

Internal candidates must be fairly considered. If the posting is a sham, you will be worse off than if you had no posting at all.

Employee Referrals

Referrals of friends and family by your current employees can be a terrific source of new hires. Many employers encourage these referrals by paying a reward to the referring employee. It's a good idea to make any referral reward payable only after the new employee has completed 90 days or 6 months on the job. That way, the current employee has a personal stake in helping the new co-worker get through orientation, initial on-the-job training, and cultural adjustment to your company.

But be careful that heavy reliance on employee referrals doesn't lead to discrimination. The EEOC has cautioned employers that **word-of-mouth recruitment can result in a violation of federal law if word-of-mouth:" is coupled with a work force from which minorities have been excluded or in which they are grossly underrepresented."**

Recruiting Agencies

Some managers use outside recruiters rather than advertising to find qualified applicants. Recruiters can make the hiring process easier for you. But because they are your agents, you are held responsible for their illegal acts.

Most agencies are law abiding. But in the early 90's, a number of them were caught engaging in outright discrimination on the basis of sex, age and race. Temporaries, Inc., Interplace and Recruit all were named in EEOC investigations and court cases alleging discrimination,

In one case, recruiters used codes on job order forms to indicate the preference of the hiring manager. For example, "Talk to Adam" was written on the job orders if a male candidate was preferred, "Talk to Eve" if only a female would be considered.

In each of these cases, the agencies were sued by their own employees, who refused to go along with the scheme. But the managers who originally placed the discriminatory orders also would be liable to anyone who was screened out as a result.

On the other extreme, there are executive search and recruiting firms that specialize in finding minority and female candidates. It is not illegal to use these firms as long as you let them know you will consider a person of any group, and you use alternative sources to find non-minority

candidates. Your hiring decision must be based on all qualifications, including Affirmative Action.

On-line Recruiting

On-line recruiting includes the manager going to a job board such as monster.com, and having applicants come to your company's website.

All the rules for posting and screening above apply to on-line recruiting. In addition, if you work for a federal contractor and search an internal or external on-line database for resumes, you **MUST** save the details of the search, including the exact words you used in your search. This is required for Affirmative Action.

Receiving Resumes

Resumes prepared by applicants frequently have information that is illegal for you to consider. Just ignore it.

Resumes sometimes list marital status, number of children and church activities. Many list health condition. They always say, "health: good." Can you imagine someone writing, "health: bad"?

Ignore this irrelevant information, and don't highlight it or ask questions about it in the interview.

On the other hand, a resume often unintentionally reveals the caliber of the person who prepared it. In many cases, it's legitimate for you to reject a resume on the basis of overall appearance, misspellings, grammar and punctuation. If applicants don't present perfect documents to you when looking for employment, what will be the quality of their work after they're hired?

Judging an applicant based on misspellings or similar errors would not be appropriate for jobs that don't require writing. But the overall neatness of the resume probably is relevant to any position that requires attention to detail and quality.

Screening Applicants

Go back to the job description you constructed. List out each job requirement. Weight the requirements to reflect how important each one is. Base the weight on legitimate business reasons. Then rate each

candidate against those requirements. The grid below is one systematic method for screening applicants.

Essential Functions	% Weight	Legitimate Business Reasons	Candidate A	B	C
function 1	25	core requirement	15	20	25
function 2	10	nice to have	10	8	6

This kind of grid system will support your hiring or promotional decisions. Courts love graphs, grids and charts. They want to see that you created a decision system before you interviewed the first candidate. Then you just slotted the applicants into your decision system.

If you use this type of system, in most cases a court will not "disturb your discretion." A court will not second-guess your business judgment.

With this kind of grid system, you can identify the top 5 or 10 candidates. In some cases, you may want to interview them a little by phone. Or you may want to bring them all in for face to face interviews. Either way, you must prepare written questions.

Writing Interview Questions

Before the interview, write out your questions.

Base your questions on the requirements of the job. The job requires technical skills. Technical skills are "what a person does." The job also must be performed in a certain way. Success behaviors are "how a person does it." Success behaviors include:

- creativity
- judgment
- problem solving
- versatility
- assertiveness
- alertness
- planning
- commitment
- interaction

- team building
- friendliness
- thoroughness
- initiative
- foresight

These are sometimes called intangibles, but they're not. In fact, directly or indirectly, you routinely rate your current employees on these skills.

How do you determine if applicants have them? By asking questions about their past behavior.

The best predictor of applicants' future behavior is their past work performance. Applicants will give you accurate information about their past if you ask them for specifics.

Behavior-based interviewing is:

- asking for specific examples ("Tell me about a time when you . . .")
- accepting silence while the applicant thinks of examples
- peeling the onion by asking for dates, places and numbers
- probing for contrary evidence.

After writing out your job questions, write out a few rapport-building questions to begin the interview. These are designed to put the candidate at ease. You can't ask any personal questions. The weather and the traffic are two safe topics of conversation.

You can also write out questions to wrap up the interview in a comfortable and legal way:

- Is there anything about your experience you want to tell me?
- Do you have any questions about the job?
- Do you need more information about the company?

The Interview

Start with your rapport-building questions.

After the candidate relaxes, explain how you will conduct the interview. One recruiter's approach: "A good interview is divided into thirds. The first third, you tell them about the job. The second third, you

ask them questions. The last third, they ask you questions and 'tell' you if they want the job."

If the applicant will be interviewed by peers, either with you or separately, make sure they know and follow all the rules about interviewing. The law applies to coworkers as well as managers.

Stick to your pre-planned questions throughout the interview. Legally, the best interviewer asks everyone the same questions. Make notes of the responses. You need to document the interview like any other major employment event.

You should not refer in your notes to the physical appearance of applicants. Don't document things like: young, old, good-looking, blond, gray hair, athletic, grandma type, etc.

For public contact jobs, you can note if the person is dressed professionally. But the wearing of religious garb, such as a turban or yarmulke, can't be considered.

One of the most subtle forms of discrimination is the short interview. You have an interviewing routine of 30 minutes or an hour. If you break that routine when interviewing certain candidates, you can be accused of discrimination.

Your first impressions of candidates based on their appearance can be very misleading. You owe it to yourself and your company to give every candidate a complete interview. You may find that hidden in an unlikely exterior is a superior employee.

Interview Hotspots

There are some areas in interviews that are hotspots. The questions are job related, but must be asked correctly in order to stay legal. The best guideline is to use the Statement Feeling Question. Make a statement about the job, and then ask the question, "How do you feel about that?" If applicants say they can't meet the job requirements, they've selected themselves out of the hiring process.

Here are some common interview hotspots.

Hazardous Workplaces

If hazardous materials are used in your work environment, you should inform every applicant. Most people with experience in your industry know if they are likely to be working with toxic chemicals or other dangers. But as a matter of routine, you should say, "You are going to be working with these chemicals. [Hand them a list.] Do you have a problem working with these?"

Asking the Applicant's Plans

You may want to consider an applicant's future goals and plans. You can ask about these areas if you have a business necessity, and if you ask everyone. But you have to be careful about implying long-term employment.

Asking older applicants, "When do you plan to retire?" is illegal. But if you are concerned about how long they plan to stay, you can ask all applicants how long they plan to work for the company.

Keep in mind two problems. If there is any talk of a long-term future with the company, you could later be sued for wrongful termination. So you have to say something like, "I want anyone who I hire to promise they will stay at least a year. Do you have a problem with that?"

Applicant: "No problem. I want to stay here for the rest of my career!"

You: "Well, we're not guaranteeing you will be here for any length of time. Business conditions may change, you may not work out and we're an at-will employer. So I'm not making any promises. Do you have a problem with that?"

Applicant: "No, that's understood. But I'm willing to stay at least a year."

Of course, even assuming the applicant tells the truth, no one can predict the future. If you hire applicants based on their stated plans to stay with your company, and they leave before the time promised, you can't make them stay. That's slavery.

Dependability Requirements

Most employers want their employees to be dependable. For some jobs, it's critical. But some employers still determine dependability by asking applicants the question, "Do you have children?"

Traditionally, men weren't asked that, so this question was originally considered to discriminate on the basis of sex. Today, it also is considered discriminatory against male and female single parents (marital status discrimination).

You can't ask questions about children. Of course some employees say they are unreliable because they have children. But if those employees didn't have kids, they would be unreliable for some other reason.

You can use the Statement Problem Question to determine how reliable the applicant is, without referring to children. For example, if you are worried about parents getting personal phone calls from their kids, say, "We do not allow personal phone calls. Do you have a problem with that?" As long as you apply your no-personal-phone-call policy to everyone equally, you are not illegally discriminating. (However, if the employee has a dependent with a disability under the Americans with Disabilities Act, you may have to allow them personal phone calls from that dependent or health care providers as a reasonable accommodation.)

Time Off Needs

Your need for dependable employees sometimes conflicts with the rights of employees who are religious or disabled. You can use the Statement Problem Question to inform employees of your attendance requirements. But what if employees say they need time off for religious holidays or regular medical treatment?

You must reasonable accommodate the special needs of employees who are religious or disabled, unless it would cause an undue hardship on the company.

Trade Secrets and Intellectual Property

You already know to steer clear of questions about the candidate's disability, age, pregnancy, and other protected characteristics. Another area you should avoid are another employer's trade secrets.

This issue came into sharp focus in a 2000 case battle between Intel and Broadcom. Intel accused Broadcom of trying to steal its trade secrets by raiding its employees and pumping interviewees for information. At an injunction hearing, Intel put on evidence that Broadcom had interviewed an Intel employee for four hours without ever asking about previous work history, salary or benefits, but instead had grilled him about trade secrets. Based on that evidence, the court granted Intel a temporary restraining order, and ordered Broadcom to take specific steps to prevent future disclosures of competitors' confidential information.

Although the case was ultimately settled by the parties, it holds several valuable lessons for employers:

- ✓ Ask the question! Rather take a chance on getting a cease-and-desist letter or a lawsuit from your workers' former companies, ask candidates whether they have signed a confidentiality agreement, a non-compete, non-solicitation or another sort of restrictive covenant agreement, or a patent or invention agreement. These contracts may either bar you from hiring the candidate or severely restrict what he or she can do for you once hired.
- ✓ Be sure to get a copy of any such agreement and have it reviewed by legal counsel before proceeding.
- ✓ Remind candidates not to share any confidential or proprietary information during the interview.
- ✓ Make sure hiring managers know what trade secrets are, so they can avoid asking improper questions. Generally, a trade secret is something unique, different or superior that that gives a company an a competitive advantage over rivals that do not know or use it. These commonly include: customer lists, pricing, cost of goods, manufacturing know-how, lists of vendors, operational formulas, financial data, and source code.

Especially when interviewing candidates in sales or research and development, phrase questions to avoid inadvertent disclosures: "Without telling me anything about the actual formula for Brand X, please tell me about your role in product development at Acme Widget."

Negotiating Salary

Negotiating salary is another hotspot. The law says employees must be paid equally for doing the same job. The only differences in salary should be based on experience and ability. Salaries should not be based on the salary negotiating skills of the person you are trying to hire.

You can pay market value to get a new hire. But the current employees who are equally or better qualified should have their salaries raised so they are paid equally.

You cannot establish pay based on the salary requirements of the applicant. Allstate Insurance Company tried that and lost. The company asked applicants for insurance agent trainee what their salary requirements were.

The women on average gave salary requirements 20% lower than the men. Therefore, the women were paid on average 20% lower than men, even though they were doing the same job and had the same experience.

The court held that was illegal sex discrimination. If paying based on salary requirements resulted in lower pay for other groups, it could be illegal age, race or national origin discrimination.

Another reason managers like to ask about salary requirements is to screen out people whose answer is too high. The assumption is that a person who gives a high number will not be happy with less.

Like other assumptions, this one is illegal if it impacts some groups more than others. Instead of assuming, ask the Statement Problem Question. ("This job pays from ____ to _____. Do you have a problem with that?")

Answering Applicants' Questions

In recent years, some women and minority applicants have asked interviewers tough questions about their company's record of hiring and promoting a diverse workforce.

If you are asked how many women are in management, whether opportunities for minorities are good or other sensitive questions, follow these steps.

Tell the truth. Don't guess. Answer specifically to the extent you can. Admit what you don't know. Express the company's policies on EEO and Affirmative Action. Offer to put the applicant in touch with your HR department to get more complete answers.

Then document the questions raised by the applicant, so you can't later be accused of illegally bringing up the subject.

Fraudulent Concealment

Applicants sometimes ask about the financial condition of the company. You can't lie or answer in half-truths designed to conceal the truth. That's called fraudulent concealment.

A Colorado case illustrates this rule. Roberta Berger was recruited to work as a Sales Manager for Recovery Plus, a disaster recovery computer service. At the time, she was living in New Orleans. The job was in Denver.

At the interview, Ms. Berger asked about the company's financial status. The Division President told her the Division had no detailed financial records but that it was a wholly-owned subsidiary of Security Pacific Corporation. He gave her the annual report of Security Pacific, showing it to be a multi-million dollar company. He also gave her a magazine article which said that Recovery Plus had so many customers it was turning away business.

In fact, the company had only two or three regular customers. In fact, the Division President knew at the time of the interview that his job was at risk, and indeed all of Recovery Plus might be shut down. Despite that, he told her his career was just beginning at the company.

Ms. Berger was hired in January and began work in February. In March, Recovery Plus was shut down. As a result of losing her job, Ms. Berger defaulted on her home loan, sold her home at a loss and was

unemployed for two years. She sued for fraudulent concealment and won.

The moral of the story: don't lie about the company's financial condition. In fact, you may have to volunteer bad news.

In Florida, dismissed employees may sue for fraudulent concealment if the company deliberately misleads them by concealing material information about the job. In one case, the employee was not told in the interview that his project was expected to fail. Nor was he told he would be fired when it did. The court said the employer had a duty to disclose these facts.

Promissory Fraud

Closely related to fraudulent concealment is promissory fraud. In a 2005 California appellate case, an employee alleged that he had been fraudulently induced to leave his job by false promises about the commission income to be made at the new job. The jury agreed, finding that he had been promised to make at least \$5,700 per month and never did so. The verdict of more than \$450,000 in future lost income and \$675,000 in punitive damages was all affirmed on appeal.

Be very careful when discussing income potential, especially with sales employees. You don't want to give anyone a wrong impression or invite claims that you guaranteed a certain amount of compensation.

Diversity Considerations

When you interview people from other cultures, there may be differences in style. If misinterpreted, you might not hire someone well qualified for the job.

When we evaluate candidates from other cultures, we should be mindful of stereotypes and assumptions about them.

An example of cultural bias appeared in an article that advocated choosing people for certain jobs based on their handshakes. The author outlined ten different handshake styles. Characteristics such as drive, leadership and the like supposedly were reflected in the way a person shook hands.

But what of people from cultures that don't shake hands as we do in the U.S.? What of men and women who were raised not to shake hands with members of the opposite sex? What of the person with arthritis who can't get a firm grip?

There are plenty of books on cross-cultural communication. Read them. Your purpose is not to replace one set of assumptions with another, but only to learn of the wide diversity of styles. As diversity expert Lenora Billings-Harris says, "The issue is not that we behave a certain way because of the boxes we come in, but that we behave in similar and different ways despite our boxes."

Don't judge applicants by differences in body language, eye contact or other culturally-biased communication habits.

A related issue is getting people from different backgrounds to tell you about their accomplishments. The interview is the place for applicants to sell you on themselves. But some people, especially women, minorities and foreign-born, may be hesitant to make themselves the heroes. They were raised to give credit to the team or the group. If you ask them for examples of their victories, they may be tongue-tied.

Instead of assuming they are incompetent, ask about successes in their departments. Ask about the overall accomplishment, then zero in on the applicant's role in that success.

Another way to get applicants to talk about their accomplishments was suggested by Jim Kennedy and Anna Everest. They ask this question: "If I were able to speak with your managers, what do you suppose they might say about you that would explain how you were able to do that?"

Applicant Fit

Compatibility of team members is a business necessity. But applicant fit must be measured, not assumed. Compatibility also does not mean sameness. You can have a diverse workgroup that is compatible.

Assuming applicants are equally qualified, you can choose among them based on compatibility, as long as you don't exclude people because they don't fit in with an illegal culture. For example, if people in your company tell lots of racist jokes, you can't refuse to hire applicants because they don't go along.

You can't hire or promote based on your "gut feeling." That's a subjective conclusion. Your decision must be based on objective qualifications.

Giving Tests

Before and after interviews, many companies give applicants tests. This area is fraught with danger for the unwary employer. The tests we'll cover here are performance, aptitude, thinking, integrity/lie detector, personality, medical and drug tests.

All of these tests have one danger in common. If the applicants who fail the tests are disproportionately members of one group, you must show a business necessity for using the test. A business necessity is more than a legitimate business reason.

Because of the danger of discrimination, most tests are subject to the federal government Uniform Guidelines on Employee Selection Procedures. These guidelines come into play if a test has a disproportionate impact on minorities, women or other protected group.

How do you determine if a test has a disproportionate impact? The rule of thumb used in the Uniform Guidelines is called the "four-fifths rule." If the pass rate for a protected group is less than 80% (four-fifths) of the pass rate for the majority group, the test is deemed discriminatory.

When there is disproportionate impact, the guidelines require tests to be valid. Validation means the tests accurately measure what they purport to measure. For example, a paper-and-pencil test on decision-making may say more about applicants' reading and test-taking skill than their ability to make decisions.

Any reputable company selling tests will provide you with validation studies, references to other companies and a way to measure whether the test is valid as used at your company. Employers that give frequent tests, such as government civil service exams, keep industrial psychologists on staff to perform validation studies.

Performance Tests

Performance tests are the most job related of all tests. Their purpose is to judge whether the applicant can actually perform the job.

To ensure a performance test is valid, it should:

- duplicate actual working conditions
- only test the primary job tasks
- have the applicant actually perform the job tasks

A good example is giving a typing test to a clerk typist. You have a business necessity to give the test. Other examples are driving tests for drivers, editing tests for editors, etc.

How much weight you should give to the test depends on the task's significance to the overall job. It doesn't make sense to exclude applicants from jobs that require minimal typing because they're slow typists. Yet that's what we're tempted sometimes to do because it's one of the few objective measures we have.

Aptitude Tests

Aptitude tests are usually multiple-choice exams that are supposed to measure intelligence or ability. Standardized multiple-choice tests are the least related to job performance. We may live in a multiple-choice world, but in reality we aren't given five options to choose from.

The U. S. Supreme Court and the federal courts have found many of these tests to be discriminatory against blacks and Hispanics.

Tests can be wonderful instruments in some contexts, but illegal in others. The tests ruled discriminatory when given to applicants for employment include the Wonderlic Personnel, Bennet Mechanical, General Clerical, Scientific Associates Non-Verbal, and Flanagan Aptitude tests, the Beta Examination and the General Aptitude Test Battery.

In one early case, a company historically had reserved jobs for whites only. After the Civil Rights Act of 1964 passed, the company began requiring an aptitude test in order to be hired or promoted into the previous "white" jobs. Few blacks passed the tests, while many whites did.

The company's managers admitted they didn't notice any improvement in the workforce after the aptitude test was required. And in a validation study, the incumbents who were top performers couldn't pass it.

If you want to use an aptitude test, you first must determine if it has a disproportionate impact on minorities, women or other protected group. If it doesn't, you can use it safely.

Even if the test does have a disproportionate impact, you are allowed to use it under the Civil Rights Act of 1991 if you have a business necessity and there is no less discriminatory alternative.

Whether or not you have a business necessity, look for less discriminatory alternatives for hiring and promoting, such as behavior-based interviewing.

"Thinking" Tests

These brain teaser or puzzle tests have become popular in recent years, and reportedly are given frequently at Microsoft. In these tests, the applicant is given a word problem by the manager and asked to solve it. They say that it is not important if you actually solve it, but your thinking process.

We are not aware of any court cases on these kinds of tests, but it seems unlikely that they would be considered job-related. If these tests are given, managers should not give any weight to the answers.

Integrity/Lie Detector Tests

Employers used to give lie detector tests to applicants, but Congress outlawed that in 1988. Employers then looked to other ways to measure the honesty of applicants. Multiple choice integrity tests became a popular method.

These paper and pencil tests ask applicants a series of questions designed to prove whether or not they lie, cheat or steal. They include questions such as "Should a person be fired if caught stealing \$5?" and "Compared to other people, how honest are you?"

How accurate are these tests? The validity of honesty tests has been measured. The American Psychological Association issued its report on them in 1991.

The psychology professors who led the research task force requested information from dozens of companies that sell honesty tests. Only a few

responded. Of those that did respond, fewer still could prove what they claimed.

The APA report found that some (unidentified) honesty tests were valid. In other words, they had predictive ability. For example, a test was given to convicted thieves and members of the general public. The test scores showed which ones were the convicted thieves.

Employers who use these tests want to do more than screen out convicted felons. You want to know who will cheat on their time cards. Who will use inside information? Who has embezzled without getting caught?

The best honesty tests are able to find those people with reasonable accuracy -- on the order of 30% to 40%. Although it seems like a low correlation, it may be higher than the predictive ability of the alternatives - interviews, background checks and references.

The APA report stresses that an honesty test should be only one of many factors considered in determining the honesty of applicants.

The report strongly urges employers not to use tests if the test company refuses to provide documentation of their claims.

Even if the test meets the APA requirements, using it still can lead to lawsuits if it's used inconsistently. Do you have a legitimate business reason for requiring hourly employees to take honesty tests, but not executives?

Personality Tests

Worse than the integrity tests are the personality tests some employers give to applicants. These attempt to predict job performance by determining the personality type of the applicant. For example, if the position is for a supervisor, a person who scores low on leadership or ambition would not be hired.

Like all tests, these must be validated as having an actual correlation between job performance and score. Validation trials must be performed in the working environment, not in psychological clinical studies.

Even if these tests are a valid predictor of future job performance, they still are subject to legal challenge. That's because many of the questions

asked invade the privacy of the applicants or intrude into illegal areas. If you are not allowed to ask a question in an interview, you should not be able to ask it in a test.

One of the worst abuses of personality testing was practiced by Target Stores, which used a test called the Psyscreen to weed out applicants. The test includes questions about one's religious beliefs and sexual fantasies. Among the more intrusive: "I go to church almost every week. . . I believe in the second coming of Christ. . . I believe my sins are unpardonable."

Other offensive questions: "I am very strongly attracted by members of my own sex . . . I have never indulged in any unusual sex practices. . . Many of my dreams are about sex matters."

In the Target Stores case, the court said that asking these questions violated the California constitution, because they invade applicants' privacy for no compelling reason. Other states' privacy statutes, and the U. S. Constitution, may be interpreted the same way.

In the high tech world, personality tests have been reduced to software packages. Whatever the package, the same two questions must be answered: is it valid? Even if it is, does it invade privacy?

Medical and Drug Tests

Medical exams, reports and tests can include only information about the applicant or employee, and cannot include any family history. Under the Americans with Disabilities Act, medical tests can be given only after a decision has been made to hire an individual, and must be given to all entering employees in that same job classification. Any decision based on any pre-employment physical must be job-related.

Drug testing is a complex subject that can't be dealt with here. Suffice to say that companies must drug test only under legal supervision.

Application Forms

At some point, usually after the interview, the applicant must be given an application form. Many managers and applicants resist this, because they say all the information they need is on the resume. But the application form has many legally required questions, notices and waivers.

As you know, most employees are considered "at will." That means they can be fired for any reason or no reason. Wrongful termination cases arise when the company does something that leads employees to believe the company is promising them long-term employment.

Companies try to insure employees don't get this erroneous belief by including at-will language on their employment applications. This is sometimes referred to as a waiver or disclaimer. The employees are signing a waiver of their rights, if any, to long-term employment.

A simple form of waiver is, "I understand my employment is at will, and can be terminated at any time, for any reason or for no reason. I understand that any change in my at-will status can only be in a writing signed by the President of the company."

Another way your application form can protect you from lawsuits is by including a release signed by the applicant. This release authorizes you to do a background check on the applicant. This way, you can't be accused of invading privacy. It also releases the former employers of the applicant to give you information, without fear of being sued for giving negative references.

Such a release might read: "I hereby authorize you to investigate the accuracy of the information submitted on this application, my resume, or any other information I provide. I release you and all persons and organizations from all claims and liabilities of any nature arising from such investigation or information given."

One other piece of the application form for Affirmative Action employers is the applicant flow data sheet. This is usually a tear-off section attached to the form. It asks for the applicant's sex, race, disability and veteran status.

It is mandatory for federal government contractors and some other employers to request this information from the applicant, but voluntary for the applicant to provide it. Applicants are allowed to self-identify. Even if you don't think they are minority, if they identify themselves as minority, they are for this purpose.

Finally, the application form asks questions required for immigration control and under the Americans with Disabilities Act.

Background Checks

After the interview and the testing process, you have one more step before making an offer: the background check.

As a practical matter, you should confirm the educational background, work experience and criminal record of potential new hires. According to Business Week, one convenience store chain reduced worker turnover from 300% a year to 97%, and theft was cut in half, after background checks were instituted.

At a minimum, you are allowed to verify any information relevant to the job given to you by applicants.

Credit Checks

A check on the credit of new hires is essential in some instances, illegal in others.

If you are hiring employees to handle your own or other people's money or valuables, you can run a credit check. A good credit rating decreases the likelihood of theft. Credit checks also have been allowed for police officers, who frequently are exposed to the temptations of bribes.

The U.S. Fair Credit Reporting Act requires employers who request credit reports to inform applicants of that fact. The notification must be given in writing within three days of requesting the credit information. If the applicant is not hired based on the credit report, the applicant must be informed of that fact and given the name of the agency that gave the unfavorable credit information. The applicant has the right to have a response to the unfavorable information put on the credit report, but the employer does not have to change its hiring decision.

Employers who are found guilty of willful violations of the act can be sued for actual damages, attorneys fees and punitive damages.

Employees who are not responsible for handling money or using a corporate credit card may be able to claim a credit check is an invasion of their privacy.

Criminal and Driving Records

There are legal restrictions on investigating criminal and driving records. As mentioned earlier, you can't ask applicants about arrest records, because it's race discrimination. Some state laws also prohibit asking questions about arrests, except for certain professions such as doctors and peace officers.

Generally, you can refuse to hire people convicted of felonies or misdemeanors, but there are some exceptions under state laws. In California, you can't even ask about misdemeanors for minor marijuana convictions.

Poor driving record can't be used to exclude people who won't be driving on the job. Driving record is relevant for any person whose job requires driving, including sales people, executives and professionals.

A history of drunk driving arrests or drug possession offenses that led to diversion rather than conviction may not be used to exclude recovered alcoholics or drug users. You need current evidence that they are not rehabilitated. That's because under the Americans with Disabilities Act, a rehabilitated alcoholic or drug user is protected.

Not only will background checks help you weed out the liars and the cheaters, they also will help you defend against claims for negligent hiring.

Negligent Hiring and Retention

Negligent hiring lawsuits are not brought by your employees. Instead, they're filed by your customers, clients or third parties who are injured by your employees. A typical negligent hiring case would be brought by parents of a child abused in a day care center. They would claim you did not properly check the background of your employee. If you had, you would have discovered the past record of the employee for abusing children.

The negligent hiring claim can be won if:

- you had a duty to your clients or others to check employees' backgrounds, and
- employees had past records that you would have discovered, and
- as a result, someone was injured by them.

When do you have a duty to check the background of new hires? In a couple of states, courts have held that the employer's duty to use reasonable care in hiring, supervising and retaining employees includes, background investigations. But in the vast majority of states, an employer has a duty to investigate only under two circumstances: when the employer know or should have known about something in the employees' background that warranted an investigation; or, when they are being hired for jobs that put them in positions of power, trust or confidence. Jobs with children are the most obvious. Police, corrections officers and security guards have positions of power, which in the wrong hands could be abused.

Any person responsible for handling other people's money or valuables should have a background check. Bank tellers, hotel employees, apartment managers, delivery persons, real estate agents, night janitors and the like, are held to a high standard. Personal attendants who live or work in private homes should be screened.

Hospitals must report to the National Practitioner Data Bank on doctors, dentists and other health care professionals who have had malpractice claims, adverse licensing actions or clinical privileges suspended or revoked. A hospital also must check the Data Bank every two years for information about its staff. In many states, both employees and volunteers at adult care facilities must be fingerprinted and be subjected to criminal background checks.

Some states allow negligent hiring suits if the employee has any contact with the public. In one New York case, the employee was hired to work in a bowling alley. One night, he punched several patrons. They sued for negligent hiring.

The court held the bowling alley liable because it didn't do an investigation when the employee was hired. Also, the employee had made "irrational remarks" to his manager on several occasions before the assault. The court said these comments should have alerted the manager to the employee's dangerous propensities. By retaining the employee after these remarks were made, without closely supervising him, the employer also was liable for negligent retention.

Even if you don't do a background check, if you would not have discovered the past record anyway, you can't be sued for negligent hiring. For example, if the employee quit while under investigation for

theft, the former employer may not have enough evidence to justify giving you a negative reference. In that case, you would not have been told even if you asked.

Checking References

Getting references is essential for preventing negligent hiring suits. It also makes good practical sense. But these days, it's almost impossible to get references. Why? Because giving references for former employees can get you into trouble. Nonetheless, you have to at least make the effort, and document that you did.

Here are three techniques that may help you get more information.

Ask the applicant to bring copies of performance appraisals, letters of recommendation, completed projects and other proof of good performance. Make sure these materials don't reveal any trade secrets.

Ask the applicant for the names of former coworkers and subordinates. They probably have not been told about the dangers of giving references. They are more likely to give you information. Since they aren't acting as managers, their comments generally do not bind their companies. And in many ways, their assessments may be more accurate than the supervisors.

AT&T's Harry B. Thayer said, "It is easy to fool yourself. It is possible to fool the people you work for. It is more difficult to fool the people you work with. But it is almost impossible to fool the people who work under you."

The Offer Letter

After all this, you finally are ready to make an offer to the candidate. The offer should be in writing, and like all legal documents, it should be written carefully.

Yes, an offer letter is a legal document. It can help you or harm you in any later case brought for wrongful termination.

An offer letter should not promise or imply long-term employment, unless that is your intention. Such statements as "we look forward to you having a long and successful career with the company" can lead to a later lawsuit if the employee is terminated.

After you make offers of employment, it's reasonable to expect your new hires to make changes in their lives. They are relying on their reasonable expectation of employment. They certainly will quit their old jobs. Perhaps they will move, make major purchases or get engaged.

Once they've done all that, can you revoke your offers? Are you allowed to call them up and say, "Sorry!"? Yes, in two situations:

--If your company announces a layoff after you made the offer, you may decide to eliminate the position or redeploy current employees. You are not forced to get rid of an experienced employee to bring in a new person.

--Even though you did a thorough background check, you may later discover the employee gave you false information. Employers routinely fire employees when they learn about lies on the application, even months after hiring them.

If you would have good cause to terminate employees after they're hired, you also have good cause to revoke their employment offers. But make sure you haven't violated any other contracts you've made.

In one case, the manager called the applicant and told him he could start work the next week if he quit his job and moved his home by then. The employee quit and moved. Then the company decided not to hire him.

The court held that the offer could be revoked since he was an at-will employee. He was not entitled to a job, therefore he was not entitled to front pay damages.

However, the court said the telephone call created an oral contract that if the employee moved, he would be allowed to work at least one day. By quitting and moving, he relied on the offer to his detriment. So he could sue for his losses as a result of quitting his old job and moving to a new house.

Obviously, revoking an offer is a very serious matter. It will be terrible public relations for your company. It should be done only as a last resort.

Rejecting Applicants

After you decide who to hire, you should document the reasons why you rejected the other applicants. "Not as qualified" is not a reason. Be specific. "Less relevant experience." "No background leading teams." "Fired from last 3 jobs."

Do you have to tell applicants you're rejecting them? Or can you ignore them and hope they'll go away?

At some point, you will stop looking for candidates. That point in time should be documented. A good way to do that is to send brief letters to applicants thanking them for applying and saying, "Your qualifications do not match out current needs." Then invite them to reapply in the future.

Do not say that the application will be held for future openings unless it is true.

In most states, you are not legally required to send a rejection letter, as long as you can prove when you stopped accepting applications and when the application in question was received.

But management experts recommend sending rejection letters if only for the good public relations. As a matter of common courtesy, at least call people you interviewed.

Do you have to give them the specific reason they weren't hired? No statutes require this. You can be vague. Just remember, what you say can be used against you. For example, in one case the company told the rejected applicant for promotion that the successful candidate "had the best overall qualifications to lead the group." After the case started, the company said the real reason was because the successful person had more computer experience.

The court said the computer explanation "would have been such a straightforward answer to [the rejected candidate's] inquiries that one might expect that [her managers] would have mentioned it if it really was the explanation. That they instead gave vague explanations about 'overall qualifications' might suggest that the computer explanation was a later fabrication."

After Hiring

You've hired the best qualified people. On the first day of work, have them fill out all legal documents, including W-2s and form I-9. They should read and sign for the employee handbook.

Hiring the best is only the beginning. You have to manage and train them to be the best employees for your company.

You, as an employee, have the right to be managed. That means you, as a manager, have the duty to manage your subordinates.

Hire the Best

You have the right to hire the best people.

To attract the best people to your company, treat applicants with respect and dignity.

As plaintiff's lawyer Cliff Palefsky said to an HR group, "You give applicants a psychological test, an integrity test and a drug test, make them sign an at-will statement, and then say, 'Welcome to our great company!' It doesn't work that way."