

Legal Issues in Employment Interviewing

Selection is the process of picking individuals who have relevant qualifications to fill jobs in an organization. The process begins when a manager identifies the need to fill a position, and ends when a person is hired to meet that need. What happens in the middle of the process varies from organization to organization, but generally includes job analysis, position description development, recruitment, testing, screening, corresponding with applicants, credentials verification, background investigations, interviewing, reference checks, physical examinations, and the offer.

There are important economic consequences and public relations dimensions to the selection process. Discriminatory hiring practices have very real and immediate costs for the employer. The Civil Rights Act of 1991 permits jury trials and punitive or compensatory damage awards for victims of intentional discrimination. Individuals acting on behalf of the organization who fail to follow nondiscrimination policies may face personal liability. Poorly designed or executed selection processes will generally fail to identify the right person for the job, resulting in:

- turnover
- missed opportunities
- delays in accomplishing the mission of the organization

Unfavorable impressions of an employer can be caused by:

- impolite or incompetent interviewers
- unnecessarily long waits
- lack of follow-up

The selection process is a vital business practice for any organization. A complete and well-written job description provides the blueprint for data gathering. Intentional and targeted recruitment helps generate a pool of potentially qualified applicants. A comprehensive application form or rating guide enables screeners to eliminate unqualified applicants. Verification checks assist in eliminating individuals who present fraudulent or exaggerated qualifications. General testing may identify characteristics or limitations that would present barriers to successful performance of the job. However, no selection activity has a potentially greater impact than the employment interview.

The Value of an Interview

The interview is more subjective and less scientific than other steps in the selection process. It cannot take the place of a thorough background investigation; it is not a valid predictor of job performance; it is fraught with the perils of subjectivity and interviewer bias; and it is the point at which candidates can perform brilliantly or self-destruct.

Applicant Characteristics That Are Not Easily Determined by an Interview

- More accurately determined through background investigations and reference checks.
 - Philosophy and objectives
 - Ability to solve problems
 - Background
 - Job Performance

- Commitment to job (professionalism)
- Willingness to accept criticism
- Poise under pressure
- Rarely validated by an interview -- a larger sample of behavior is needed to identify these characteristics:
 - Enthusiasm, sincerity
 - Ability to work with others
 - Warmth
 - Humility
 - Loyalty
 - Intelligence
 - Attitude

Despite its imperfections, the personal interview remains a major element of the selection process. Why?

1. The "fit" and sociability of prospective staff are vital to various organizational constituencies. An interview can provide a valid sample of such characteristics as poise, sociability, verbal fluency, and possibly, technical expertise.
2. A personal interview is the best way for a candidate to assess the organization as a potential professional home, and gives the employer a chance to "sell the job."
3. Both parties are provided with the opportunity to clarify information and validate an applicant's "paper claims."
4. Some information can be obtained or observed during an interview, including:
 - The candidate's reason for considering this organization as a potential employer
 - Missing information or explanations for conflicting information from the paper and reference screening
 - General career aspirations
 - Physical appearance
 - Verbal facility
 - Ability to appraise (or rationalize) one's strengths/weaknesses
 - Self-confidence, poise, demeanor
 - Gaps in the candidate's job-related knowledge (or inability to articulate that knowledge)
 - Candidate's ability to establish and maintain eye contact

There are various types of interviews, including structured, nondirective and stress interviews. For more information about the relative strengths and weaknesses of various interviewing techniques, consult the to construct a selection process and interview which has the greatest likelihood of producing the right person for your job.

Role and Responsibilities of the Interviewer

Your primary responsibility is to ; on its behalf, you will help identify the best person for a particular job. You are bound by the principles of nondiscrimination which prescribe that each applicant's qualifications be evaluated without regard to race, color, national origin, religion, sex, age, disability, veteran status, or other protected class.

Among your most valuable tools are the position description and an interview guide. Both serve to keep you organized and on track, and help ensure that all subjects are covered with each candidate. You cannot fulfill your role if you fail to understand the position requirements or ask specific, probing, job-related questions which will be used to compare each candidate against pre-determined, job-related

selection criteria. Interviewers must establish their own believability and credibility with candidates. One way to establish credibility is by being prepared -- before the interview, carefully read each candidate's materials and make notes on specific issues that need to be addressed.

Interviewers must also avoid common interview contaminants, some of which might give rise to a claim of discrimination.

- **Feelings:** they frequently carry more clout than fact. If you like a candidate, you may attach attributes to her than don't actually exist.
- **Missing Data:** especially if the candidate isn't encouraged to fill in the gaps
- **Negative Bent:** the tendency to focus on information which will automatically disqualify a candidate, causing you to overlook his strengths in the process
- **Snap Judgments:** gather information during the interview and evaluate it afterwards.
- **Improper Questions:** those that are loaded, confusing, irrelevant or antagonistic
- **Incomplete/Inappropriate Record-Keeping:** unless you carefully document the interview, valuable material will slip through the cracks; avoid recording inappropriate information (i.e., anything not related to the job) or statements based on your own inferences.
- **Stereotyping:** a major problem. Focusing on the job rather than personal traits can offset a tendency to categorize candidates.
- **The Halo Effect:** a tendency to generalize one outstanding feature of a candidate as representative of success in any endeavor, no matter how unrelated.
- **Mind Set:** your background, attitudes, motives, values, aspirations and biases
- **Chemistry:** or rapport between two people can contaminate the interview -- the basis of your personal reaction to a candidate must always be evaluated in terms of the position requirements

Equal Employment and Interviewing

The major source of law governing discrimination in employment is [Title VII of the 1964 Civil Rights Act](#). This statute is only one source that may apply to any given employment problem.

Every statute covers specific discrimination issues or types of employment practices (e.g., pre-employment inquiries, recruiting, selection methods, salaries, promotions, discharge, post-employment referrals) and specific bases of discrimination (e.g., race, ethnic origin, age, sex). There are four major theories of discrimination which provide the causal link between issue and basis:

1. Disparate treatment occurs when some people are treated less favorably or differently than others because of their protected group status (e.g., race, sex, age);
2. Disparate impact occurs when an employment practice which is neutral on its face has significantly more negative impact on one group than on another.
3. Retaliation occurs when an individual is treated negatively solely because s/he filed a discrimination complaint, acted as a witness in a complaint process, or acted as a whistle blower.
4. Failure to provide reasonable accommodation to an individual on the basis of his religion, or to an otherwise qualified person with a disability also constitutes discrimination.

The Equal Employment Opportunity Commission (EEOC) reports that the selection process is responsible for more charges of discrimination than any other area of employment practice. Because the interview is one of the most significant phases of this process, it is crucial that persons involved in interviewing applicants understand the importance of equal opportunity for employment at this level. If the utilization analysis points to an EEO problem and selection decisions are based almost entirely on interviews, sooner or later interviewing procedures may have to be validated.

A major problem in many organizations is that persons conducting selection interviews have had no training in interviewing. From the EEO viewpoint, the main caution to those individuals is to focus interviews on job requirements. This does not necessarily mean the interviewer has to limit consideration to such things as education, skill and experience. Many jobs involve considerable interaction with people and cooperative efforts are essential to the work. These requirements however, should have been indicated in the job announcements, and there should be a definition of the level of social skills needed.

Interview Questions: The Good, the Bad and the Ugly

Good questions:

- are based on the written job description and advertised position requirements
- relate to bona fide job qualifications (e.g., availability, job-related interests, knowledge, skills, ability, experience, educational background, willingness to do the work)
- require more than a yes or no response
- are clear and concise

Poor questions:

- are "pet" questions that are either unrelated to job performance or designed to trip up the interviewee

General Rule: Be consistent and legal in the information you request from each candidate. Information gathered in the selection process must be job-related and the types of inquiries should be addressed to all applicants. Questions asked of a minority or female applicant that are not asked of non-minorities and men seeking the same position may become evidence of discrimination if a complaint is filed.

Illegal questions: Prohibited Pre-Employment Inquiries

The following rules apply to job application forms, interviews, or any other type of interrogation of persons seeking to be employed. The rules also apply to inquiries made of persons other than the applicant, and inquiries by third parties on behalf of the employer. The rules do not apply after a person is employed. If one or more of the following conditions apply, the employer may use appropriate inquiries that would otherwise be unfair. Inquiries made under these exceptions must always be accompanied by an explanation of their purpose.

- A "bona fide occupational qualification"
- An affirmative action plan required by a government agency or competent jurisdiction
- A contrary requirement of federal law

The following examples are not exhaustive. All pre-employment inquiries that unnecessarily reveal race, sex, age or membership in other protected classes, whether or not the particular inquiry is covered in this list, are prohibited. Nearly all state governments have nondiscrimination statutes, and some states issue lists of specific prohibited pre-employment inquiries.

| Subject | Fair Pre-Employment Inquiries | Unfair Pre-Employment Inquiries |
|---------|--|--|
| Age | Birthdate and proof of true age when maximum or minimum age limits have been legally established | Any inquiry which implies a preference for persons under 40 years of age |
| Arrests | None except by law enforcement agencies | All inquiries relating to arrests |

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| Citizenship | Whether applicant is prevented from lawfully becoming employed in this country because of visa or immigration status. Whether applicant can provide proof of citizenship, visa, alien registration number after being hired. | Whether applicant is citizen. Pre-hire requirement for birth certificate, naturalization or baptismal record. Any inquiry that could divulge lineage, ancestry, national origin, etc. |
| Convictions (see also arrests) | (1) Specified convictions that reasonably relate to fitness to perform job applied for, provided that date of convictions or prison release, whichever is more recent, is within 7 years of the job application date. (2) General inquiries about all convictions, provided that they are accompanied by a disclaimer that a conviction record will not necessarily bar applicants from hire. | Any inquiry which does not meet the requirements for fair pre-employment inquiries. |
| Disability | No inquiries related to disability. | All inquiries related to disability |
| Family | Whether applicant can meet specified work schedules or has activities, commitments or responsibilities that may prevent him from meeting work attendance requirements. | Specific inquiries concerning spouse, spouse's employment or salary, children, child care arrangements, or dependents |
| Height and Weight | Inquiries about ability to perform actual requirements | Any inquiry which is not based on actual job requirements |
| Marital Status (see also Name and Family) | None | () Mr., () Mrs., () Miss, () Ms. Whether applicant is married, single, divorced, separated, engaged, etc. |
| Military | Inquiries concerning education, training, or work experience in U.S. armed forces | Type/condition of military discharge, service in other than U.S. forces |
| Name | Whether applicant has worked for KUMC under a different name and, if so, what name. Name under which applicant is known to references if marital name different from present name. | Inquiry into original name where it was changed by court order or marriage. Inquiries which would divulge ancestry, national origin or descent. |
| National Origin | Ability to read, write and speak foreign languages, when related to job requirements. | Applicant's ancestry, nat'l origin, birthplace, or mother tongue. Nat'l origin of parents or spouse. |
| Organizations | Inquiry into organization memberships, excluding any organization name which indicates race, color, creed, etc., of its members. | Requirement that applicant list all organizations, clubs, societies, and lodges to which he or she belongs. |
| Photographs | May be requested after hiring for identification purposes. | Mandatory or optional request for photo any time before hiring. |
| Pregnancy (see also Disability) | Inquiries as to a duration of stay on the job or anticipated absences which are made to | All questions about pregnancy, medical history concerning |

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| | males and females alike. | pregnancy and related matters. |
| Race or Color | None | Any inquiry |
| Relatives | Names of applicant's relatives employed by KUMC | Names/addresses of any relative other than those listed as proper. (While the law does not prohibit company policies governing employment of relatives, any policy which has the effect of disadvantaging minorities, women, married couples, or other protected classes violates the law unless it is shown to serve a necessary business purpose.) |
| Religion or Creed | None | None |
| Residence | Inquiries needed to facilitate contacting the applicant | Names of persons with whom applicant resides, whether applicant owns or rents home |
| Sex | None | Any inquiry |

Background Investigations

Nearly 80% of what you need to know about candidates can be learned through good investigative techniques. Although privacy legislation has had an impact on the reliability of reference checks, they remain a viable means of verifying applicant information. Appropriate checks are also necessary to defend against charges of negligent hiring. Keep the following guidelines in mind.

Get permission from candidates

Inform candidates that reference checks and validation of credentials will be part of the selection process. A candidate may have valid reasons for setting some limits, and these limitations should be respected. The bottom line is that the candidate must allow you some access to people familiar with their work, or withdraw their candidacy. If access is significantly candidate-controlled, s/he must understand that you will have to make less restricted checks before any offer is extended.

Who Should Be Contacted?

- Call any of the references identified by the candidate
- Consider calling persons who should know the candidate (current department chair, vice president, colleagues, former institutions, etc.)
- Complete enough calls for a full picture of the candidate to emerge

Check the accuracy of claimed degrees, jobs, titles, awards. Resume faking and fraud turns up 15-25% of the time in the corporate world; although less frequently, it certainly occurs in higher education.

What Inquiries Are Appropriate?

All information considered in the selection process must be related to job performance, and the same information must be required of all applicants. Questions asked in a reference check must be related to the applicant's previous performance, and the persons contacted should be the people who would legitimately possess that knowledge.

Prohibited pre-employment inquiries cannot be asked of references, just as they cannot be asked directly of candidates.

Focus on gaining information about the knowledge, abilities, skills and work behaviors identified as being important to the position. Address significant gaps or missing elements in the candidate's materials. Avoid being put off by scattered "negative" comments from references. Look for patterns of strength and limitations, and for indications of fit between the person and the position. Not every comment should be given equal weight. Attempt to evaluate the respondent's perspective, how credible they may be, and how recently or how well they know candidate.

Probe. Get beyond strings of adjectives to specific incidents and how they were handled. Reports of critical events add depth to the picture you're trying to build.

Solicit references on all candidates.

Recipe For Success

- Develop a written job description which clearly articulates the essential elements of the job.
- Establish valid, job-related criteria which are as objective and measurable as possible.
- Find qualified and diverse applicants by casting your recruitment net as far and wide as possible.
- Evaluate all applicants by the same criteria.
- Never make prohibited pre-employment inquiries.
- Safe questions are those which are clearly job-related.
- Establish and retain documentation which supports the selection or rejection of every applicant.

Test Your Interviewing IQ: Answers

1. Every applicant is a potential complainant, regardless of his or her sex or race.

True. Equal opportunity laws protect everyone against discrimination based on their race, color, national origin, sex, age, religion, ancestry, disability, and veteran status. The initial burden of proof for disparate treatment claims in hiring is minimal. If a qualified 45 year old white male Vietnam-era Veteran is not hired, he has a cause of action if someone younger, female, not a veteran, or not white is hired OR if he is not hired and the employer continues to recruit for the position.

2. Interviewers must ask exactly the same questions of every applicant.

False. No law prevents interviewers from asking different questions of each applicant. Interviews should be structured in a way that gives the interviewer access to the same depth and breadth of job-related information on each applicant. The more consistent the interview questions, the greater the opportunity to compare applicants with the job requirements, and the less likely a claim of disparate treatment can be proven.

3. You may ask an applicant's references about his national origin or ancestry.

False. Questions about national origin are prohibited by federal law, and questions about ancestry are illegal in many states.

4. If an applicant comes to the interview in a wheelchair, you may ask her questions about her disability.

False. Pre-employment inquiries about an applicant's disability are illegal. However, you may ask all applicants about their ability to perform specific job-related duties that are essential to the position.

5. An applicant need not meet the required qualifications for a job as long as he meets the preferred qualifications.

False. Minimum qualifications constitute the initial threshold over which all applicants must pass, regardless of whether or not they possess the preferred qualifications.

6. Materials that document the selection process, including applications and interview notes, may be discarded as soon as the hire is finalized.

False. Most organizations have specific retention requirements for all records related to the search, selection and hiring of employees. Federal agencies require covered institutions to retain records for at least three years.

7. The interviewer should not pursue questions about marital status or childcare issues even if the applicant herself has introduced the topics.

True. The dangers associated with making prohibited pre-employment inquiries outweigh any need for pursuing such information, even if it is offered by the applicant. An interviewer should be prepared to offer information about relocation, schools, daycare, and other issues of interest to potential employees.

8. Selecting an individual because of his ethnic background is legal if the employer can show client preference as the reason for the selection.

False. Client preference is not a defense for making employment decisions based on race, age, sex, disability, or other class protected by discrimination laws.

9. Discrimination claims can only be based on failure to treat applicants the same, regardless of race or sex.

False. There are four discrimination theories, all of which constitute a cause of action: disparate treatment, disparate impact, failure to provide reasonable accommodation, and retaliation.

10. The most defensible selection process is based upon job-related criteria, which are as objective and measurable as possible, and applied consistently to each applicant.

True. An employer is in the best position to defend its selection decisions when they are based on valid selection criteria that are uniformly applied to all applicants.

11. If an applicant contacts you prior to the interview to request that you provide a sign language interpreter, you may eliminate him from further consideration if you do not believe a deaf person could succeed in the position.

False. It is illegal to reject an otherwise qualified person simply because of their disability. A qualified person with a disability is one who can perform the essential elements of the position, with or without reasonable accommodation. Employers must provide reasonable accommodation during the application process, which may include the provision of sign language interpreters.

12. It is acceptable to reject a 55-year old candidate because she is "over-qualified" for the position.
- False. It is acceptable to reject any candidate for valid, job-related reasons. Although candidates who are "over-qualified" may not be suitable for the position, the reasons for rejecting the applicant should be related to the position requirements. Rejecting an applicant who is over 40 simply because she is overqualified may be seen as a pretext for age discrimination.
13. Ultimately, the employer may be called upon to articulate legitimate nondiscriminatory reasons for the selection or nonselection of every person who applies for a given position, regardless of whether or not they were interviewed.
- True. The employer can satisfy its initial burden of proof in responding to a discrimination claim by simply articulating a legitimate, nondiscriminatory reason for rejecting or selecting each person who applies for a position. That burden of proof is most easily satisfied when the criteria are job-related and valid (to the extent that they predict successful performance on the job), and when the selection documentation shows that they have been consistently applied to each applicant (typically shown by rating guides or other written screening instruments).
14. Depending upon the size of the organization, a single discrimination suit could cost the employer \$300,000 in compensatory and punitive damages.
- True. Since passage of the 1991 Civil Rights Act, persons suing under federal discrimination laws may receive jury trials and seek punitive or compensatory damages. The cap on damages depends on the size of the organization, and does not include other awards the court may make.
15. Reference checks are legally required before a hire is made.
- False. There are no legal requirements for conducting reference checks. However, employers are advised to validate the credentials of candidates under serious consideration for employment. Resumé fraud and misrepresentation are not uncommon. Furthermore, employers are liable for "negligent hiring" if they fail to conduct a reasonable investigation of an individual's background, and that individual commits certain crimes after becoming employed.
16. Individuals who are responsible for interviewing and hiring are always legally protected against personal liability by their organization.
- False. The indemnification of organizational agents usually rests on several factors: first, that the individual was not acting outside the scope of his function; second, that the individual was aware of and adhered to institutional policies and procedures; and third, that the individual did not commit any intentionally criminal or discriminatory acts while acting in the scope of her job.
17. Current job descriptions, which clearly identify essential functions, are an excellent defense against disability discrimination claims.
- True. Although not expressly required by the ADA, current position descriptions which clearly identify essential and marginal functions, support the employer's defense against claims of discrimination from persons with disabilities who cannot perform the essential functions, with or without reasonable accommodation.

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