



COUNSEL TO GREAT COMPANIES

## The Hiring Process

Avoiding the Legal Hazards That  
Can Haunt Employers

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# Prologue

## Throughout the Hiring Process:

- Maintain Appropriate Documentation
  - Applicant group
  - Records retention
  - Avoid stray notes
  
- Provide Accommodations



# Act One: Recruiting Phase

## Avoiding Discriminatory Decisions

*You may hire whomever you desire, as long as the decision is not discriminatory on the basis of a protected characteristic.*

Ensure non-discrimination in:

- Hiring Systems
- Decision-Makers
- Selection Criteria



# Act One: Recruiting Phase (continued)

## Creating Appropriate Recruiting Materials

- Advertising: avoid wording that constitutes evidence of impermissible bias
- Employment Applications: ask job-related questions and consider problem areas
  - Age
  - Education
  - Criminal record
  - Citizenship



# Act One: Recruiting Phase (continued)

## Increasing Workplace Diversity

1. Prioritize diversity
2. Assess particular needs
3. Review hiring policies
4. Broaden the search
5. Attract applicants
6. Collaborate
7. Provide diversity training
8. Foster diversity at all levels



# Act Two: Interviewing Phase

## Asking Appropriate Questions

- Race, religion, and national origin
- Physical abilities
- Sex and gender identity
- Marital and family status
- Military experience



# Act Two: Interviewing Phase (continued)

## Avoiding Promises

- Don't over-sell
- Don't promise permanent employment
- Don't promise termination only for just cause
- Do advise applicants of "at will" employment



**CAUTION CAUTION**

# Act Three: Screening Phase

## Conducting Background Investigations

- Negligent Hiring
- Fair Credit Reporting Act
  - Pre-investigation notice and release
  - Pre- and post-adverse action notice





# Act Three: Screening Phase (continued)

## Criminal Background Checks

- Arrests
  - in past 10 years
  - include status of charges
  - behavior will negatively impact job performance
- Convictions
  - in past 10 years
  - relates to job duties
- Or required by law, i.e. sensitive job



# Act Three: Screening Phase (continued)

## Credit Checks

- Substantially job-related and written notice of reason for obtaining it
- Or required by law



## Reference Checks

- Avoid discriminatory questions
- Avoid prior protected activity
- Document all efforts

# Act Three: Screening Phase (continued)

## Drug Tests

- May prohibit the use of illegal drugs (including marijuana) in the workplace
- May test for drug use, if otherwise lawful
- Obtain consent on the application form

## Aptitude Tests

- Job-related
- Non-discriminatory



# Act Three: Screening Phase (continued)

## Medical Examinations

- Only post-offer
- Only if required of all new employees in same job classification
- May condition offer on examination results
  - If not hired, must show the reason was job-related and consistent with business necessity



# Act Three: Screening Phase (continued)

## Social Media

- Who: HR professional
- What: candidate's posts
- When: after interview
- How:
  - screen all candidates
  - review only public content
  - keep documentation
  - provide an opportunity to respond



# Act Four: Setting Compensation

## Determine an appropriate salary

- Remember all parts of compensation
- Consider excluding pay history
- Don't low-ball
- Rely on and document variety of factors
- Ensure non-discriminatory pay decisions

