HIRING FOR THE FUTURE [1]
Employment Law Seminar

By Stacey Mark
Chair, Labor & Employment Group and
Chair, Sustainable Practice Advisory Group
March 15, 2012

Although recent indicators suggest that hiring is on the uptick, high long-term unemployment rates have resulted in increased scrutiny and regulation of hiring practices. Employers are seeing new regulations coming from all levels of government designed to increase and/or maintain employment levels -- from protection for new categories of applicants, such as the unemployed and those with poor credit, to tax incentives and mandates for hiring veterans.

As the business climate continues to improve, employers will step up their hiring to keep pace with the need. But the time to plan for future hiring needs is long before that need is acute. Anticipating the organization's staffing needs well in advance, as opposed to merely reacting to them, is a first step. Understanding the company's goals, its timeframe for achieving those goals, and its internal and external resources is essential to making strategic hiring decisions. While it may seem counterintuitive, considering exit strategies as part of the hiring process is also important to protect the company's future.

In this memorandum, we will examine best practices for selecting the best candidates, hot issues, and also some of the recent legislative changes affecting the hiring process.

I. ANTICIPATE STAFFFING NEEDS

Hiring for the future, or what some call "strategic staffing," is "a systematic approach to anticipating staffing needs and determining what actions should be taken -- *starting now* -- to meet those needs."[2] This requires (1) an understanding of the current workforce, including its demographics, capabilities, attrition rates, and involuntary terminations; (2) anticipating changes to the operating environment (*e.g.*, economic conditions, technological advances, market competition, legislation, and desired internal changes); (3) identifying competencies that will move the company through the anticipated changes and allow it to both thrive and seize new opportunities; and (4) developing strategies and tactics for building an appropriate workforce. Succession planning aids in identifying candidates who could step into a company's key

[1] This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

[2] Christina Morfield, *Workforce Planning: The Strategy Behind "Strategic Staffing,"* The CEO Refresher, http://www.refresher.com/!cmstrategic.html.

positions if needed.[3] These approaches are in stark contrast to a purely reactive staffing approach that deals with the ebb and flow of quits, terminations, and staffing needs on an ad hoc basis.[4]

The company's hiring plan should be linked to the company's overall strategic mission:

> Whenever a company modifies its strategy, it affects every current employee and the company's future hiring needs. I guarantee that someone from engineering is there describing the technology challenges of the strategy shift. Someone from marketing and sales is there describing what needs to be done to ensure market acceptance. Someone from operations is there describing how the product or service will be produced and delivered. Someone from finance and accounting will be there to figure out how to justify and finance the project. Someone should be also there from HR/recruiting, trying to figure out how to staff the program and redeploy the company's current workforce.[5]

Despite the inherent sense of getting the Human Resources department involved in the planning process, a common problem is that companies often fail to advise Human Resources of the company's plans until the staffing need is acute. When "a company doesn't have a well-thought-out hiring strategy that supports its overall business strategy, the recruiting department tends to overreact and under-deliver."[6] It goes without saying that Human Resources will do a far better job of placing a candidate who is well qualified and a good fit if it is afforded the time to plan and implement an appropriate search strategy.

II. CONDUCT APPROPRIATE SCREENING

The first step in identifying the right candidate is screening. Many state and federal laws limit the types of information that may be obtained about prospective employees and/or the manner in which that information is gathered. These laws create tension between the employer's need and ability to obtain information about potential employees. For example, the Americans with Disabilities Act (ADA) prohibits employers from asking applicants certain questions related to their medical condition or history. The Fair Credit Reporting Act (FCRA) and some state laws limit the ability of employers to obtain and use a credit report or criminal background check. Title VII and certain state laws prohibit inquiries that might suggest the employer discriminates against a protected class. In addition, these discrimination laws prohibit employers from using information or standards that tend to adversely impact certain minority groups. It is, therefore, critical to develop hiring procedures that facilitate a fair evaluation of applicants without running afoul of applicable laws.

First and foremost is finding a qualified applicant, but selecting an individual who will be a good fit is equally important. Most employers can find a candidate with the right skills. But the goal is to find the one who will understand, share, and promote the company's vision. By improving

---

[3] Jack Huxtable and Mary Cheddie, *Strategic Staffing Plans*, SHRM White Paper (Aug. 2001, rev. June 2002), http://www.shrm.org/hrresources/whitepapers_published/CMS_000417.asp.
[4] *Id.*
[5] Lou Adler, *Why Your Hiring Strategy Must Map to Your Business Strategy* (Feb. 20, 2004), http://www.adlerconcepts.com/resources/column/recruiting/why_your_hiring_strategy_must.php. .
[6] *Id.*

the overall quality of and cultural fit of the employees hired, employers can reduce turnover and recruiting costs, retain their most successful employees, and improve morale and productivity.

The company's core mission, vision, values, culture, and strategic plans should be considered in formulating a hiring strategy because the selection and hiring process should ideally flow from these constructs. Recruits are often focused on finding a company in which (1) the work environment is congruent with their lifestyle and career aspirations, (2) company values are closely aligned with their own, (3) they have an opportunity to make a meaningful contribution, and (4) they will have opportunities to develop their skills and careers. Being clear and direct about core values allows both parties to compare their goals and expectations and increase the likelihood of a good fit.

A tangible benefit of making good hiring decisions is reducing risk. Careful screening and appropriate hiring practices will not only help to avoid poor performers, it will reduce the likelihood of selecting an employee who will file claims for illegal harassment, discrimination, wrongful discharge, or negligent hiring.[7] Good hiring practices will also reduce the risk of lawsuits from other employers seeking to enforce post-termination restrictions and allow employers to protect their own intellectual property.

A. Use Employment Applications

An employer's first opportunity to obtain information about an applicant is often through the use of a written application. The primary purpose of the application is to solicit information that will enable you to make an initial assessment about whether the applicant possesses the minimum qualifications necessary to perform the job in question. You may also use the application to advise applicants of your policies and core values. However, using an application may prove invaluable for other purposes as well. For example, an application may also be used to obtain detailed information not likely to be disclosed on a resume. Comparing an application to a resume may reveal inconsistencies that reflect on the candidate's honesty and trustworthiness. Applications may also provide you with valuable insight with respect to the candidate's literacy, which you might not otherwise learn until it is too late.[8] Employers should, therefore, require all applicants to fill out an application whether or not they also provide a resume.

An application should be designed to elicit only information related to the applicant's relevant skills, education, experience, availability, and salary requirements. Questions that would require

---

[7] Employment related litigation remains a significant concern for employers as the number of cases filed each year continues to soar. In 2011 alone, the Equal Employment Opportunity Commission (EEOC) obtained compensation and benefits for employees in excess of $91 million through litigation, and an additional $364.7 million through informal resolution of EEOC charges. *See* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (litigation - monetary benefits) and http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (all statutes - monetary benefits). These statistics do not reflect the settlements, judgments, and litigation expenses for employment claims that are not within EEOC jurisdiction.

[8] Candidates may have someone else prepare their resume, but are more likely to complete the application on their own. Employers may also ask for a certification from the applicant that he/she personally completed the application form. An application that is incomplete, or that contains spelling and grammatical errors, will provide meaningful information to consider in the screening process.

the applicant to disclose his or her sex, race, religion, marital status, age, or mental or physical condition are improper.[9]

At a minimum, each applicant should be required to provide his or her complete education and employment history, references, criminal convictions,[10] licenses, and accreditation. However, this information may not reveal everything you want or need to know about the individual applying for work. The applicant may have acquired additional skills through the military, self-teaching, or membership in professional or civic organizations. You may want to ask applicants whether the applicant has previously worked or applied for work with this employer, or has relatives or acquaintances who work for this employer.[11] Most employers want a complete employment history, including every job held, the beginning and ending dates of employment, starting and ending pay, reason for leaving the position, names of supervisors, whether the employer may be contacted and, if not, the reason. The applicant should be required to certify that the information provided on the application is truthful and accurate. The application should also require the applicant to authorize the employer to solicit information about the applicant's previous employment and background from third parties, to verify that the information provided on the application is true.

The application should notify the applicant of the employer's practices, such as equal opportunity employment, requirements pertaining to pre-employment drug testing or medical examinations, at-will employment, and whether employees are required to agree to post-termination restrictions on employment. The application should also state that omissions and false or misleading information will disqualify the applicant from further consideration and, in the event the applicant is hired, result in termination of employment.

It is important to remember that employers have an affirmative obligation to assist disabled individuals in overcoming barriers to equal employment opportunities that result from the applicants' disabilities. The employer's obligation to provide reasonable accommodation to disabled individuals applies equally to the application and screening process.[12]

Employers may be required to modify application forms, recruiting events, and interview formats to insure that qualified disabled applicants are not screened out. For example, an employer may be required to provide an interpreter to facilitate an interview with a deaf applicant, or provide a test in an alternate format that does not require use of the skill that is impaired (*e.g.*, administering a test to a blind applicant in Braille or allowing the applicant to respond to questions orally). An employer need not modify or eliminate a test applied for the purpose of

---

[9] Employers may request self-disclosure of sex and certain racial and ethnic information for EEO reporting purposes, but it should be done on a form separate from the application.

[10] Some states limit inquiries about criminal convictions to felonies and/or a number of years. *See Part II(B), infra.*

[11] While an employer cannot ordinarily refuse to hire an applicant because he or she has a family member working for the same company, it is permissible to exclude a candidate for a position that would place one family member in a supervisory capacity over the other, or to avoid a conflict of interest or other bona fide occupational qualification. ORS 659A.309.

[12] Employers have an affirmative duty to reasonably accommodate the known disabilities of applicants and employees unless doing so would impose an "undue hardship" on the employer's business. 29 USC §§ 12112(a) and (b); *see* ORS 659A.112(e).

measuring a particular skill for an applicant whose impairment prevents him/her from performing that skill.

B. Conduct Reference and Background Checks

To fully assess the information obtained from an applicant, an employer must know whether or not the information is true. Accordingly, all information obtained from an application and/or resume should be verified. While a criminal conviction, poor credit history, incomplete or false information, a series of short-term employment, or long gaps in employment may be indicative of serious problems, some of this information may be protected by law from consideration for employment purposes.

To check employment references, you may wish to obtain a release from the applicant that authorizes named employers and third parties to release information to your company. Former employers that are not willing to discuss the details of the applicant's performance may nevertheless be willing to say whether or not the employee is eligible for rehire, or provide other insight into the applicant's work history. Employers may also ask applicants for copies of recent employment evaluations.[13] Even if the reference checks result in little or no useful information, the result of the checks should be documented. The fact that the employer tried, but was unable to obtain background information may provide a complete defense to a claim of negligent hiring.

While most employers may not automatically disqualify an applicant with a criminal conviction,[14] they can certainly exclude an applicant with a history of dishonesty or violence from specific jobs that would place the employer or others at risk. Therefore, employers may wish to obtain criminal background checks and, in the limited instances where they are permitted in Oregon, credit histories or consumer credit reports. Unlike an ordinary credit history, a consumer credit report may include information about the applicant's general reputation, personal characteristics, and mode of living. The report may be based on a background investigation that includes personal interviews, not just credit history.

1. Prohibition on Credit Checks

In Oregon, most employers are prohibited from obtaining or using the information in a credit history[15] for employment purposes.[16] Oregon is one of several states that have enacted

---

[13] Most states require employers to furnish an employee a copy of his or her personnel file upon request, with various limitations.

[14] Some states prohibit individuals with certain criminal convictions from working in positions that would place them in contact with persons who are particularly vulnerable, such as children, the elderly, and the infirm.

[15] A "credit history" means any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing or credit capacity. ORS 659A.340(4).

[16] ORS 659A.320. The statute prohibits an employer from *obtaining or using* for employment purposes information contained in the credit history unless an exception applies. Exceptions exist for federally insured banks and credit unions, employers required by law to use credit histories for employment purposes, certain public safety officers responsible for enforcing criminal laws, and when the information is substantially job-related and the employer's reasons for the use of such information are disclosed to the employee or applicant in writing. The regulations narrowly define "substantially job-related" to require

legislation prohibiting the use of credit history in employment decisions,[17] and there is a federal law similarly prohibiting discrimination in employment based on an individual's bankruptcy status.[18] This trend arose largely out of the concern that long-term unemployment, which often results in a tarnished credit history, may render affected individuals unemployable simply because of their credit status.

Employers who have traditionally used credit histories as a screening mechanism will want to make sure that the check is permitted for the position at issue under Oregon law. As the state laws vary widely on this issue, multi-state employers should also be careful to check for exemptions under each jurisdiction's laws.

2. Compliance with the Fair Credit Reporting Act

When hiring a third party to conduct a consumer credit and/or criminal background check, employers must comply with the requirements of the Fair Credit Reporting Act (FCRA).[19] This law requires the employer to notify the applicant in writing that the records will be sought, obtain the applicant's written authorization to obtain the records, and notify the applicant that a poor credit history or conviction will not automatically result in disqualification from employment. Certain other disclosures are required upon the employee's request, and prior to taking any adverse action based on the reports obtained.[20] Some state laws impose similar requirements,[21] which may exceed and/or conflict with FCRA's requirements. It is, therefore, important to always check the law of the state in which the applicant resides and/or is being hired.

---

that " [a]n essential function of the position at issue requires access to financial information not customarily provided in a retail transaction [*i.e.*, information related to the exchange of cash, checks and credit or debit card numbers] that is not a loan or extension of credit" or "[t]he position at issue is one for which an employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond." OAR 839-005-0008(2).

[17] California, Hawaii, Washington, Illinois, Maryland, and Connecticut all have similar legislation. *See generally*, California joins states restricting use of credit reports for employment purposes, http://www.shrm.org/LegalIssues/StateandLocalResources/Pages/CaliforniaJoinsStatesRestricting.aspx (October 13, 2011) .

[18] 11 USC § 525. This statute has been interpreted as inapplicable in the hiring context, although some courts have questioned the propriety of that view. *See* Michael R. Hertz, The Scarlet D: Bankruptcy Filing and Employment Discrimination (Feb. 2011); http://journal.abi.org/sites/default/files/2011/February/Feature2_1.pdf; *Pratt v. Phoenix Home Life Mut. Ins. Co.*, 2001 US Dist LEXIS 22248, 47 Collier Bankr Cas 2d (MB) 1098, 147 Lab Cs (CCH) P59644 (D Or 2001) (allowing case to go forward where employer withdrew job offer after learning of plaintiff's bankruptcy filing).

[19] *See* 15 USC § 1681. The Fair Credit Reporting Act is not applicable when you are obtaining the data directly, instead of from a third party, although other restrictions on the use of the information still apply.

[20] Employers should not assume that their credit agency's forms, notices, or conduct complies with FCRA. Employers should have procedures in place to insure compliance with the act. An employer who willfully fails to comply with the requirements under FCRA is liable to the employee or applicant in the amount of actual damages of not less than $100 or more than $1,000, punitive damages, and attorney fees. 15 USC § 1681(n). An employer who *negligently* fails to comply is liable to the employee or applicant for actual damages and attorney fees. 15 USC § 1681(o).

[21] *See, e.g.*, ORS 181.555(2)(b) (requiring employers to advise an employee or applicant prior to seeking a criminal background check that such information may be sought). California has a similar law.

3. Limitations on the Use of Arrests and Convictions

The EEOC has renewed its interest in adverse impact discrimination resulting from employers' use of criminal histories. In 2011, the EEOC issued an opinion letter[22] discussing the use of arrest and conviction records by the Peace Corps in connection with overseas placements. The EEOC reiterated its long-standing view that the use of arrest or conviction records may disproportionately exclude African Americans and Hispanics, thereby creating a disparate impact in employment applications. The EEOC explained:

> A pre-employment inquiry concerning criminal records does not in itself violate Title VII because Title VII does not regulate inquiries by employers. However, an employer's use of criminal record information in its selection process may violate Title VII in certain circumstances. Thus, an employer must not use criminal history information to engage in unlawful disparate treatment (e.g., excluding African American applicants with certain criminal charges while accepting White applicants with the same charges). Moreover, because disproportionate numbers of African Americans and Hispanics are arrested and convicted, the use of conviction and arrest records to make employment decisions is likely to have a substantial disparate impact on those groups. Where there is such an impact, an employer must not use criminal history information in a manner that is not job related and consistent with business necessity. As set forth below, the standard of "job related and consistent with business necessity" is applied differently for a conviction and for an arrest or charge.
>
> ****
>
> For exclusions based on convictions, the legal standard is that the criminal conduct is recent enough and sufficiently job-related to be predictive of performance in the position sought, given its duties and responsibilities.
>
> ****
>
> Arrest records, by their nature, should be treated differently from conviction records. A conviction record will usually serve as a sufficient indication that a person engaged in the reported offense because the criminal justice system requires the highest degree of proof for a conviction ("beyond a reasonable doubt"). However, arrest records are unreliable indicators of guilt for several reasons. First, an arrest record is not persuasive evidence that the person engaged in the conduct alleged. Individuals are presumed innocent until proven guilty in a court of law, and, ultimately, a prosecutor may decide not to press charges or may dismiss the charges after they have been filed, if the circumstances surrounding the arrest do not warrant formal charges. Second, there is evidence that some state criminal record repositories fail to report the final disposition of arrests, which means that an applicant's criminal history information may be incomplete

[22] http://www.eeoc.gov/eeoc/foia/letters/2011/title_vii_criminal_record_peace_corps_application.html.

> and may not reflect that his arrest charges have been modified or dropped. Finally, arrest records may be inaccurate due to a variety of other factors including confusion regarding names and personal identifying information, misspellings, clerical errors, or because the individual provided inaccurate information at the time of arrest.

The EEOC recommended that the Peace Corps rewrite its application to restrict the criminal history inquiry to focus on "convictions that are related to the specific positions in question, and that have taken place in the past seven years ***."

In January of 2012, the EEOC announced a $3.13 million settlement with Pepsi for race discrimination in connection with its practice of denying employment to applicants based upon prior arrests (without subsequent convictions) and convictions for minor offenses.[23] These cases confirm that the blanket disqualification of candidates based upon criminal history, in most contexts, is impermissible. The same holds true with any qualification standard that tends to disproportionately exclude minorities, such as the requirement of a high school diploma.[24] Whatever limitation is imposed must be job related and consistent with business necessity.

C. Prohibitions on Discrimination Based on Unemployment Status

The EEOC has taken an interest in discrimination against the unemployed. At a hearing held in 2011, the EEOC examined the effect of unemployment on job prospects. Witnesses testified that some employers have long considered unemployment as a bar to current employment. "At a moment when we all should be doing whatever we can to open up job opportunities to the unemployed, it is profoundly disturbing that the trend of deliberately excluding the jobless from work opportunities is on the rise," particularly when unemployment is a weak predictor of performance. Moreover, national employment statistics indicate that African-Americans and Hispanics are overrepresented among the unemployed, and excluding the unemployed would be

---

[23] EEOC Press Release, Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans, http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm (1/11/12).

[24] EEOC Opinion Letter, http://www.eeoc.gov/eeoc/foia/letters/2011/ada_qualification_standards.html (11/17/11):

> Thus, if an employer adopts a high school diploma requirement for a job, and that requirement "screens out" an individual who is unable to graduate because of a learning disability that meets the ADA's definition of "disability," the employer may not apply the standard unless it can demonstrate that the diploma requirement is job related and consistent with business necessity. The employer will not be able to make this showing, for example, if the functions in question can easily be performed by someone who does not have a diploma.
>
> Even if the diploma requirement is job related and consistent with business necessity, the employer may still have to determine whether a particular applicant whose learning disability prevents him from meeting it can perform the essential functions of the job, with or without a reasonable accommodation.

more likely to limit opportunities for older and disabled workers.[25] In addition to being frowned upon and seen as unfair, discrimination against the unemployed is likely to result in increased scrutiny from regulatory agencies and exposure to adverse impact claims.[26]

Although it is yet to be signed by the governor as of March 12, 2012, Oregon SB 1548,[27] which was enrolled in the 2012 session, prohibits employers from knowingly publishing on the Internet or in an advertisement for employment in Oregon that (1) a qualification for the job includes current employment, or (2) that the employer will only review or consider an application submitted by an individual who is currently employed. As the statute will become effective upon its signing by the governor, employers should ensure that their hiring practices comply with the new law as soon as possible. The prohibition will be enforced by the Bureau of Labor and Industries, which may assess a fine. There is no private right of action under the statute. Similar laws are under consideration in other jurisdictions and have been introduced in the U.S. Congress.[28]

D. Effect of Veteran and Disability Status

1. Veterans with Disabilities

With so many soldiers returning from active duty, there has been an increased concern about reemployment of veterans. The EEOC recently updated its guidance on reemployment of disabled veterans.[29] The prohibition on discrimination against qualified individuals with disabilities applies equally to veterans:

> That means, for example, that it is illegal for an employer to refuse to hire a veteran because he has PTSD, because he was previously diagnosed with PTSD, or because the employer assumes he has PTSD. Similarly, an employer may not refuse to hire a veteran based on assumptions about a veteran's ability to do a job in light of the fact that the veteran has a disability rating from the U.S. Department of Veterans Affairs (VA). The ADA also limits the medical information employers may obtain and prohibits disability-based harassment and retaliation.
>
> Finally, the ADA provides that, absent undue hardship ("significant difficulty or expense"), applicants and employees with disabilities are entitled to reasonable

---

[25] *Out of Work? Out of Luck, EEOC Examines Employers' Treatment of Unemployed Job Applicants at Hearing*, EEOC Press Release February 16, 2011, http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm.

[26] *Inside Counsel*, Legislators, EEOC scrutinize employment ads (October 2011), http://www.insidecounsel.com/2011/10/04/legislators-eeoc-scrutinize-employment-ads.

[27] *See* http://www.leg.state.or.us/12reg/measpdf/sb1500.dir/sb1548.en.pdf. This is virtually identical to HB 4145.

[28] *See footnote 26, supra; American Jobs Act would ban discrimination against jobless,* http://www.huffingtonpost.com/2011/09/13/american-jobs-act-would-b_n_959139.html?ref=mostpopular#s321678&title=Frankel_Staffing_Entry (October 13, 2011).

[29] *Veterans and the Americans with Disabilities Act (ADA): A Guide for Employers,* http://www.eeoc.gov/eeoc/publications/ada_veterans_employers.cfm.

accommodation to apply for jobs, to perform their jobs, and to enjoy equal benefits and privileges of employment (e.g., access to the parts of an employer's facility available to all employees and access to employer-sponsored training and social events).[30]

While disability laws generally prohibit employers from asking for medical information prior to making a job offer, the EEOC emphasizes that employers may ask applicants to voluntarily self-identify as "disabled" or "disabled veterans" to comply with affirmative action requirements, or to benefit individuals with disabilities, including veterans with disabilities. If an employer invites applicants to voluntarily self-identify, the employer must indicate clearly and conspicuously on any written questionnaire used for this purpose or, if no written questionnaire is used, clearly state that the information is being sought for the identified reason, that disclosure is voluntary, the answers will be kept confidential, there will be no adverse treatment of the applicant for refusing to provide the information, and it will be used only in accordance with the ADA.[31]

2. Tax Incentive for Hiring Veterans

To encourage the hiring of veterans, a federal tax credit has been established for employers. The Veterans Opportunity to Work (VOW) to Hire Heroes Act provides varying levels of work opportunity tax credit (WOTC) against the employer's share of social security taxes owed. The credit can be as high as $9,600 per qualified veteran for for-profit employers or up to $6,240 for qualified tax-exempt organizations. The amount of the credit depends on a number of factors, including the length of the veteran's unemployment before hire, the number of hours the veteran works, and the veteran's first-year wages. Employers may claim the WOTC for veterans certified as qualified veterans and who begin work before January 1, 2013.[32]

3. OFCCP – Disability Hiring Mandates

The Department of Labor Office of Federal Contract Compliance Programs ("OFCCP") has proposed regulations that would require covered contractors (those with 50 or more employees and a government contract of $50,000 or more) to attempt to maintain a workforce where 7% of employees are individuals with disabilities.[33] Section 503 of the Rehabilitation Act of 1973 currently contains an affirmative action plan but not a specific percentage goal. The OFCCP is proposing that contractors invite applicants to self-identify as individuals with disabilities in an effort to make the regulations consistent with the ADA's restrictions on making disability-related inquiries prior to employment, discussed above.

---

[30] *Id.at § 1.*
[31] *Id. at §§ 3-4.*
[32] *See generally, Expanded Work Opportunity Tax Credit Available for Hiring Qualified Veterans,* http://www.irs.gov/businesses/small/article/0,,id=253949,00.html*; Tax Benefits for Businesses Who Have Employees with Disabilities,* http://www.irs.gov/businesses/small/article/0,,id=185704,00.html.
[33] 76 FR 77056 (Dec. 9, 2011), http://www.gpo.gov/fdsys/pkg/FR-2011-12-09/pdf/2011-31371.pdf.

4. Mandatory Interviews for Certain Veterans in Public Employment

A new Oregon law effective January 1, 2012, requires public employers to provide interviews to qualified veterans when interviews are a component of the selection process for a civil service position or for an eligibility list for a civil service position. The interview is required for each veteran whom the public employer determines (1) meets the minimum qualifications and special qualifications for the civil service position or eligibility list, and (2) who submits application materials that show sufficient evidence that the veteran has the transferable skills required and requested by the public employer for the civil service position or eligibility list. Failure to comply is an unlawful employment practice for which the veteran has a private right of action under ORS Chapter 659A.

E. Consideration of On-Line Data and Social Media

In addition to the information available from credit reporting agencies, employers may obtain data found in public records through a variety of online sources, including the following:

- OJIN OnLine - Oregon arrests and convictions (not always accurate)
- Computerized Criminal History (CCH) - criminal convictions for all states (available only through Oregon State Police)
- Courtlink - federal criminal and civil records from all federal court districts, including bankruptcy court
- OpenOnline (formerly Commercial Information System or CIS) - criminal and civil records, including Department of Correction records for Oregon and Washington (criminal convictions and probation transfers from other states), identification as officer in corporate filings, dba listings
- Lexis/Nexis - periodical database, Dun & Bradstreet reports, asset and judgment records, business filings, licenses
- Westlaw/People Finder and related services – asset and judgment records, business filings
- Driving records
- Internet – disclosures relating to sexual offenders, licensing information

In addition, there is often a wealth of information available on Facebook, Twitter, Google+, Blogs, LinkedIn, Flickr, and similar social media resources. According to a study conducted by Harris Interactive for CareerBuilder.com, 45 percent of responding employers are using social networks to screen job candidates.[34] The question is whether or not this is a good practice. As

[34] Jenna Wortham, *More Employers Use Social Networks to Check Out Applicants*, http://bits.blogs.nytimes.com/2009/08/20/more-employers-use-social-networks-to-check-out-applicants/ (August 20, 2009).

one might expect, there are advantages and disadvantages to gathering information from these sources.

Access to social media may help an employer obtain the "big picture" about an applicant—does the online information fit with what you know from the more traditional sources of information? Does the applicant exercise good judgment about his or her online disclosures? What is his or her reputation online? Does the applicant spend a great deal of time disparaging former employers or updating online information during work hours? According to the survey referenced above:

> More than half of the employers who participated in the survey said that provocative photos were the biggest factor contributing to a decision not to hire a potential employee, while 44 percent of employers pinpointed references to drinking and drug use as red flags. Other warning signs included bad-mouthing of previous employers and colleagues and poor online communication skills.[35]

Checking an applicant's online activity is prevalent in industries that require their employees to be knowledgeable of, and use, social media, communication, marketing and/or social networking as part of their work. This is why, for example, some companies advertise jobs primarily through Twitter—they want Twitter-savvy employees. The use of social media sources, such as looking up an applicant's blog, Twitter feed, or Facebook page (if done directly by the employer rather than an outside vendor), generally does not require disclosure or authorization by the applicant under the Fair Credit Reporting Act. In addition, unlike reference or background checking firms, which charge a fee, reviewing online profiles is often free.

Some employers have pushed the envelope by requiring candidates to access their Facebook or MySpace site in the employer's presence so that the site could be reviewed with the candidate. Both Montana City and the City of Bozeman, Montana, attracted unwanted negative publicity when it was revealed that they were requiring job candidates to disclose their password and login information for social media sites.[36] Employers should also take note that looking at password-protected information that the applicant has affirmatively attempted to restrict likely violates the terms and conditions of most social networking sites and may constitute an invasion of privacy.

Employers who view personal web pages risk exposure to information about an applicant's protected class. It would not be unusual to learn from a candidate's blog or Facebook page, for example, that the candidate is a minority (which may not be obvious from having met the individual), is of a particular religion, is planning to have children, has a disability, has filed workers' compensation claims, or is a union activist. Even if the employer does not base its hiring decision on these criteria, which would be illegal, simply being aware of such information renders the employer more vulnerable to discrimination claims. An employer who has learned about the candidate by viewing his or her online profile cannot "plead ignorance" about the individual's status or activities. Consequently, employers are struggling with the development of uniform standards by which to review and evaluate online information about job candidates.

---

[35] *Id.*

[36] Declan McCullagh, *Want a job? Give Bozeman your Facebook, Google passwords*, CNET (June 18, 2009); http://news.cnet.com/8301-13578_3-10268282-38.html; Hilton Collins, *Montana City Asks Job Applicants for Social Media Passwords, Draws Controversy*, http://www.govtech.com/gt/732085.

An employer may take steps to screen the hiring decision maker from information about protected class that is embedded in social media. Employers can do this by outsourcing a social media review to a third party with instructions to screen out protected class information (or instructions to just provide information on limited criteria (*e.g.*, evidence of illegal activity).[37] As an alternative, the employer could designate a "neutral" individual internally to research the candidate's social networking information, screen out protected class information, and provide only specified types of data to the decision maker.

Employers that use social networking as a screening tool are well advised to develop a policy to ensure consistent treatment and screen decision makers from information that will be damaging in the event of a discrimination claim. Such a policy should articulate the legitimate business reasons for the inquiry, describe the criteria that will be considered and what will be disregarded, and contain a mechanism for keeping protected class information from being disclosed to the individuals making the hiring decision.

F. Pre-Employment Drug Testing

Drug testing is another way to obtain valuable information about a candidate. Current drug users are not protected under federal and Oregon disability laws and may be excluded from employment based on the results of a drug test.[38] Drug tests may or may not be permitted under other states' laws. Therefore, testing should be conducted only if it is permitted under the law of the state where the employee is being hired.

In contrast to alcohol tests, drug tests are not considered medical *examinations* under the ADA or Oregon law.[39] However, drug testing is a form of medical *inquiry*. Therefore, it should only be conducted post-offer and on a consistent basis.[40]

Unlike private employers, public employers are subject restrictions on drug testing under the Fourth Amendment of the U.S. Constitution, which requires the government to respect "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." This restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion.[41] The "search" is the requirement that the candidate submit to testing, typically by providing a urine sample.[42] For the search to be "reasonable," individualized suspicion is generally required unless the government can show a "special need" that outweighs the individual's privacy interest. The U.S. Supreme Court has upheld random

---

[37] Note that if this screening function is outsourced to a vendor, the employer will need to comply with the Fair Credit Reporting Act. 15 USC § 1681, *et seq.*, 16 CFR Part 601.

[38] The term "qualified individual with a disability" does not include individuals currently engaging in the illegal use of drugs when the employer acts on the basis of such use. 42 CFR § 1630.3(a). Similarly, in Oregon, current drug users are not protected. ORS 659A.124, 659A.130(2)(c).

[39] 42 USC § 12114(d); OAR 839-006-0242(3).

[40] *See* 42 USC § 12112(3); 29 CFR § 1630.14. Note that Oregon law is similar, but addresses only post offer examinations. ORS 659A.133(3); OAR 839-006-0242

[41] *Chandler v. Miller*, 520 US 305, 322, 117 S Ct 1295, 137 Led 2d 513 (1997).

[42] *Id.*, 520 US at 311, 313.

drug testing when it found adequate evidence of sufficiently relevant public health and safety or national security concerns.[43]

Before requiring a drug test, public employers must demonstrate that either (1) it has a special need to drug test, or (2) it has reasonable suspicion of drug use. In other words, public employers must balance the intrusion on the employee's Fourth Amendment interests against the drug test's promotion of legitimate government interests.[44] This is true with respect to existing employees and applicants for employment.

For example, in *Lanier v. City of Woodburn*,[45] the plaintiff applied for a part-time library page position with the City of Woodburn, from which she received conditional offer of employment. However, the City withdrew the offer when Lanier declined to submit to the City's required pre-employment drug screening, which applied to all applicants for all positions. Lanier sued. The Ninth Circuit contrasted the City's generalized concern over drug use to the heightened public safety and national security concerns at issue in U.S. Supreme Court case upholding suspicionless searches, finding such dangers "notably lacking."[46] While the City's policy could be constitutionally applied in some circumstances, it was not valid as applied to Lanier.[47]

G. Pre-Employment Medical Examinations

Employers may conduct pre-employment medical examinations after an offer of employment has been made and prior to the commencement of duties, provided all entering employees are subjected to such an examination.[48] Pre-employment examinations need not be job-related and consistent with business necessity, but they should be no more intrusive than necessary to determine the applicant's fitness to perform the particular tasks that will be required. Obtaining information unrelated to the job may be probative of an employer's knowledge or perception of a disability[49] if the applicant is hired and alleges discrimination at a later time. Therefore, while it is permissible to inquire about an applicant's medical history and condition at the post-offer stage, employers are well advised to limit such inquiries to circumstances in which the employer needs to know for job-related reasons. When the results of the examination are used as a screening mechanism, the employer must be able to show that the exclusionary criteria is job-

---

[43] *See, e.g.*, *Skinner v. Railway Labor Executives' Assn.*, 489 US 602 (1989) (operation of railway cars); *National Treasury Employees Union v. Von Raab*, 489 US 656 *(1989)* (armed interdiction of drugs); *IBEW, Local 1245 v. United States NRC*, 966 F.2d 521 (9th Cir 1992) (work in a nuclear power facility); *AFGE Local 1533 v. Cheney*, 944 F2d 503 (9th Cir 1991) (work involving matters of national security); *IBEW, Local 1245 v. Skinner*, 913 F2d 1454 (9th Cir. 1990) (work involving the operation of natural gas and liquified natural gas pipelines); *Bluestein v. Skinner*, 908 F2d 451 (9th Cir.1990) (work in the aviation industry); *Cf. Int'l Bhd. of Teamsters v. Dep't of Transp.*, 932 F2d 1292 (9th Cir 1991) (work involving the operation of dangerous instrumentalities, such as trucks used to transport hazardous materials or that carry more than fourteen passengers at a time).

[44] *Chandler v. Miller*, 520 US at 313-314.

[45] *Lanier v. City of Woodburn*, 518 F3d 1147, 1151-1152 (9th Cir 2008).

[46] *Id.*, 518 F3d at 1151.

[47] *Id.*, 518 F3d at 1150, 1152

[48] 42 USC § 12112(3) and (4); 29 CFR § 1630.14(b); OAR 839-006-0242(2).

[49] The term disability includes an actual disability, as well as a history or record of impairment, and a perception that the individual is impaired. 29 CFR §1630.2; ORS 659A.104.

related and consistent with business necessity and performance of the essential job functions cannot be accomplished with reasonable accommodation.[50]

H. Genetic Information Nondiscrimination Act (GINA)

GINA is primarily intended to prevent discrimination against individuals who are currently healthy but who face an increased genetic risk of contracting a disease or disability in the future. The EEOC's final regulations implementing GINA prohibit an employer from asking for genetic information, and prohibit discrimination based on an applicant's or employee's genetic information.[51] "Genetic information" is broadly defined to include not only genetic tests,[52] but also an individual's family medical history. An employer may not use such information in deciding whether to hire, promote, fire, or offer health benefits to an individual. Further, employers may not inquire about or request an individual's genetic information. Significantly, this prohibition includes:

> … conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information.[53]

Although employers may require post-offer, pre-employment medical examinations, such examinations must now be conducted with instructions to the healthcare provider not to inquire about, or convey to the employer, the employee's genetic information.

I. Interviewing/Screening Procedures

Federal law prohibits discrimination based on race, color, religion, sex, national origin, age, and disability, and also union or veteran status.[54] States often prohibit discrimination based on other protected categories, such as sexual orientation, off-duty tobacco use, source of income, and use

---

[50] 29 CFR § 1630.14(b)(3).

[51] 29 CFR 1635, *et seq*. Oregon law prohibits employers from seeking to obtain, obtaining or using genetic information to distinguish between or discriminate against an applicant or employee. ORS 659A.303. GINA contains exceptions that apply in the employment, as opposed to the hiring context, under which it permits inquiries in connection with a properly-designed wellness program, pursuant to the Family Medical Leave Act, to verify that an employee needs leave to care for a family member, and when the information is inadvertently obtained (*e.g.*, unintentionally overhearing an employee disclose genetic information).

[52] "Genetic tests" include an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes. 29 CFR 1635.3(f).

[53] 29 CFR §1635.8.

[54] *See* Title VII, 42 USC § 2000e, *et seq.*; The Age Discrimination in Employment Act (ADEA) 29 USC § 621, *et seq.*; The Americans with Disabilities Act (ADA), The Rehabilitation Act, 29 USC § 791; 42 USC § 12101, *et seq.;* Executive Order 11246; National Labor Relations Act, 29 USC §151, *et seq.*

of the workers' compensation system, among others.[55] Disability laws prohibit most pre-employment inquiries regarding the applicant's mental or physical condition or history.[56]

Accordingly, employers should tailor their interview questions and screening procedures as follows:

Questions You Should <u>Not</u> Ask:

Do **not** ask questions that would require applicants to disclose their membership in a protected class. For example, do not ask:

- Are you a Miss/Ms./Mrs./Mr.? (sex, marital status)
- Are you single/married/divorced/separated? (marital status)
- What is your date of birth? (age)
- What is your gender? (sex)
- What is hair or eye color/asking for a photograph)? (sex, race, national origin)
- What year did you graduate from High School/College? (age)
- Are you a citizen? (national origin)
- Have you served in the military? (unless limited to U.S. Armed Forces) (national origin)
- Who lives with you? (sex, sexual orientation, marital status, source of income, family medical leave)
- List all organizations to which you belong. (potentially, any protected class unless you exclude those that would reveal the applicant's race, national origin, religion or other protected status)
- What holidays do you observe? (religion)
- Are you able to work Saturdays and Sundays? (religion)
- Have you ever been on welfare? (source of income)
- Do you use tobacco? (off-duty tobacco use if prohibited by state or other local law)

[55] *See, e.g.*, ORS 659A.030 (sexual orientation); 659A.315 (off-duty tobacco use); ORS 659A.040 (applying for benefits or invoking rights under the workers' compensation system); Portland City Code 23.01.050 (source of income).
[56] 42 USC § 12112(2); ORS 659A.133.

- Do you have any current or prior illnesses/injuries? (disability, workers' compensation)
- Do you have any condition that requires regular medical treatments? (disability, workers' compensation, family medical leave)
- Are you currently taking any drugs or medication? (disability)
- Do you have any mental or physical limitations that would limit your ability to do the job? (disability)
- Have you ever had an on-the-job injury or filed a workers' compensation claim? (workers' compensation, disability)
- [With respect to an apparent physical or mental impairment], What is the nature or severity of your impairment, or will you require leave as a result of your impairment? (disability, family medical leave)
- How many absences did you have last year due to illness? (disability, family medical leave)
- Have you ever taken a leave of absence for medical reasons? (family medical leave, disability, workers' compensation)
- Have you ever been a member of a union? (union activity)

Do **not** ask for information typically evaluated differently for men and women:

- Do you have or plan to have any children? (sex/pregnancy, marital status)
- Who takes care of your children while you are at work? (sex, marital status)

Do **not** ask questions that may have an adverse impact on individuals in protected classes:

- Have you ever been arrested? (race, national origin)
- Who will care for your children when you are at work? (sex)
- Are you currently employed? (race, national origin, disability)

Questions You May Ask:

It is permissible to ask questions and conduct screening to determine the applicant's qualifications for the job sought.

- Are you authorized to work in the United States? (this should be asked of all applicants)
- What hours are you available to work? (Note: unless you conduct business around the clock, questions regarding availability should be limited to the hours for which you are hiring or conduct business)
- Are you available to work overtime? (same limitations as availability)
- List all schools attended and degrees obtained.
- Have you ever been convicted of a crime? (some states limit this to a specific number of years or category of crime)
- Have you worked for any employers under a different name?
- Can you speak/read particular language? (only if this is a bona fide occupational requirement)
- Do you possess the licenses, degrees, knowledge and other skills required to perform the job?
- Identify which of the following [specified] functions you can and cannot perform, with or without reasonable accommodation. (Note: this is permitted only if you ask all applicants for the position this question)
- Demonstrate or describe how, with or without accommodation, you would perform the following [specified] job functions. (Note: this is permitted only if you ask all applicants to make such a demonstration)
- Can you meet the following [specified] attendance and performance standards?

Selection criteria must also be job-related. Applicants may challenge qualification standards, tests, or selection criteria that tend to screen out qualified disabled[57] or minority applicants, even if this was not the employer's intent. For example, employers should not require a driver's license or college degree for a job that does not require driving or an advanced education (*e.g.*, janitorial position). Some states prohibit other types of testing. Oregon employers, for example,

[57] *See* 29 CFR § 1630.10.

are prohibited by statute from subjecting applicants to breathalyzer, polygraph, genetic, brainwave, or psychological stress testing.[58]

Employers are often inclined to disqualify applicants who are overqualified on the theory that such employees will be bored, dissatisfied, likely to leave for more challenging or better-paying opportunities, and/or less likely to approach the job with the same enthusiasm as an individual who is appropriately qualified. While rejection of a job applicant based on over-qualification is not overtly discriminatory, it may be viewed as a means of discriminating against older workers.[59] Therefore, when rejecting candidates on that basis, the employer should be prepared to articulate objective criteria used to measure the relative qualifications of the individual against other applicants and the relationship between a worker's subjective traits and the position at issue.[60]

J. Define and Communicate Your Core Values and Goals

To avoid wasting time and money on employees who are not the right fit, it is important to figure out what characteristics you are looking for in every new hire. The first step is always identifying the skill set needed. But it is just as important to define in advance the core values and desired culture of the company, including those that actually drive the organization.[61] This information should be communicated to applicants and employees both directly and in promotional and recruiting materials like brochures, web sites, and job postings. For example, instead of limiting job descriptions to the minimum objective requirements, include behavioral competencies that are essential to the job, such as flexibility, agility, and strategic insight.[62]

---

[58] *See* ORS 659.840 (prohibiting breathalyzer test, polygraph test or any other form of lie detector test as a condition of employment, subject to exceptions), 659A.300 (prohibiting breathalyzer test, polygraph examination, psychological stress test, genetic test or brain-wave test of applicants or employees, subject to exceptions); 29 USC § 2007(b) (prohibiting polygraph or psychological stress test).

[59] *See generally*, Jeff Morneau, *Too Good, Too Bad: "Overqualified" Older Workers (Too Good, Too Bad)*, 22 Western New England L Rev 45 (2000); *but see Taggart v. Time, Inc.*, 924 F2d 43 (2nd Cir 1991) (rejecting older applicants based on over qualification may be mask for age discrimination, therefore, not a legitimate reason for rejection of applicant); *see also, EEOC v. Insurance Co. of North America*, 49 F3d 1418 (9th Cir 1995) (holding that the employer's reason for rejecting employee was objective and non-age related, and that the evidence supported the conclusion that the employer's rejection was not a mask for age discrimination); *Stein v. National City Bank*, 942 F2d 1062 (6th Cir 1991) (employer not liable for age discrimination for refusing to hire all applicants who possessed a college degree);.

[60] Jeff Morneau, *Too Good, Too Bad*, *supra*, at note 22.

[61] *See generally*, David E. Ripley, Strategic HR Analysis (SHRM White Paper) (Nov. 1996, reviewed Dec. 2002) (discussing key questions and actions relating to strategic HR analysis), http://www.shrm.org/hrresources/whitepapers_published/CMS_000279.asp.

[62] Jonathan A. Segal, *Hiring Days Are (Almost) Here Again! Before Rushing Out to Add Scads of New Staff Members Take a Moment to Review Your Hiring Practices (Hiring Days)*, 47 No. 6 HR Magazine (June 2002), http://www.findarticles.com/p/articles/mi_m3495/is_6_47/ai_87461025 (noting that "managerial and professional employees are more likely to be discharged (or selected for layoffs) because of deficiencies in behavioral competencies than because of technical skill deficits. If you let go of a manager with good numbers because he is not a team player, being a team player should be listed on the job description.").

Recruiting and selection procedures should be designed to help the company determine how well the applicant will fit into the company's culture.

Considerations in formulating a recruitment and selection strategy might include:

- Your company's mission/values/goals
- Concepts and values that drive your organization
- Your company's central focus
- The market sector your company serves
- Who your primary clients are
- Your expected growth or reduction plans
- Your priorities and how you achieve them
- How your company's work is performed
- The kind of culture you have/want
- The kind of people do you want to work with
- The personal attributes of employees that further your company's values and goals
- The characteristics of your top performers
- Whether your company has diversity or AAP requirements
- What makes your company attractive to the candidates you want
- The personal needs of your applicant pool
- How the staffing and selection process can support your company's strategic plans

Example: Hotwire created a strategic hiring manual that detailed the attributes they were looking for before interviewing their first candidate. These included:

- Passion: high energy, enthusiastic people who express a passion for work
- Communication: ability to articulate thoughts clearly and concisely
- Flexibility: ability to thrive in changing, unstructured environments
- Proactive: ability to get things done; life-long learners
- Team Oriented: effective listeners; productive collaborators
- Competitive: strong desire to compete and win in the marketplace
- Integrity: strong internal value system
- Dedication: demonstrated commitment to help company succeed
- Empathy: respect the differences and capabilities of others
- Fun: positive, outgoing and enjoyable to be around[63]

[63] Fred Lange, *Building a Great Company: Identify Strategic Employee Character Traits to Make Your Business a Success*, http://www.refresher.com/!flgreat.html.

K. Make Your Interviews Count

Many companies base hiring decisions on interviews. Unfortunately, those assigned the responsibility of interviewing candidates often have no training for the task. Aside from the obvious legal implications associated with asking improper questions, managers asked to participate in an interview often do so without adequate planning or preparation, without knowing what skills or traits are required for the candidate to be successful, how to formulate meaningful questions, take useful notes, ferret out applicants who are lying about work experience or skills, or compare candidates.[64]

Identifying desired attributes is the primary consideration in an interview. Interviewers should avoid close-ended questions that will enable the candidate to say what the interviewer obviously wants to hear, such as:

- Did you get along well with your co-workers?
- Tell me about your customer service skills.
- Are you an effective leader [supervisor, time manager, trainer, etc.]?

It is far more useful to choose interview questions that identify skills and behaviors necessary for the candidate to be successful in the position. This type of question should better reflect whether a person will fit into your company's culture.[65] Ask the candidate to provide examples of situations that reveal the candidate's attitudes toward work and co-workers, and how the candidate demonstrated desired skills and handled situations likely to arise in your workplace, such as:

- Describe your best boss and worst boss. How were they different?
- What are the most important attributes you look for in the employees who work for you?
- In what way do you think this job will be a challenge for you?
- What feedback have you gotten during the course of your career and how has it improved your effectiveness?
- Tell me about the last time you went the extra mile to help a customer.
- Describe a situation in which your subordinate disagreed with your instructions or refused to perform an assigned task.

---

[64] Michael Mercer, Ph.D., *Interviewing Job Applicants Can Be Hazardous to Your Wealth,* http://www.businesshighlight.org/business/human-resources/interviewing-job-applicants-can-be-hazardous-to-your-wealth.html.

[65] Pat Curry, *Staying Power: The Key to Finding and Keeping the Best Employees is to Develop a Human Resources Culture that Makes People Feel Appreciated and Connected to the Company,* 8/1/04 Prosales 42, http://www.findarticles.com/p/articles/mi_m0NTC/is_8_16/ai_n6168423.

- Describe a situation in which you were asked to conform to a policy with which you did not agree.

- Were you ever assigned more work than you could do in the time afforded? Tell me how you handled the situation.

- Give me an example of your willingness to help a co-worker.

Note that it is far more difficult for candidates to say what they think the interviewer wants to hear when relaying a past experience than it is when responding to a hypothetical.

While answers to such questions should provide insight regarding a candidate's appropriateness for the position, a rating system is necessary to enable the company to meaningfully compare candidates. Prior to the first interview, the company should devise a customized interview guide for the position to be used by every interviewer. It may also be helpful to interview in teams of two or more, so that one person can ask questions, another can take notes, and the interviewers can discuss the candidates' responses after the interview.[66]

L. Tests and Assessments

In addition to background screening of applicants, tests and assessments[67] can be useful tools for selecting qualified candidates, placing them within the organization, identifying needed training, and predicting future success. Tests and assessments can also help employers determine whether existing employees have mastered training, identify employees who might benefit from training opportunities, identify candidates for promotion, and evaluate current training and development programs. However, it is important to understand that no test can measure a personal trait or ability or predict future performance with perfect accuracy for every person. Absent proof that the test reliably measures the legitimate job-related trait it is supposed to measure, the test is subject to challenge on a variety of grounds.[68]

The Uniform Guidelines on Employee Selection Procedures (*Guidelines*), which apply to employers covered by Title VII of the 1964 Civil Rights Act and/or Executive Order 11246,[69] prohibit the use of any test or selection procedure that creates an adverse impact on a protected class unless the procedure is shown to be job-related for the position in question and its continued use is justified by business necessity.[70] The *Guidelines* apply to selection procedures used to make employment decisions (*e.g.*, hiring, promotion, disciplinary action, opportunity for training or advancement, certification and licensing, termination). Adverse impact occurs when

---

[66] *See footnote 64, supra.*

[67] Tests are most often used for jobs requiring a particular skill or ability (*e.g.*, typing for a clerical position, physical agility for firefighting, physical strength for a laborer position). Assessment centers are more often used to measure a wider range of abilities needed for a higher level or managerial position. *See generally*, Onet, *Testing and Assessment: An Employer's Guide to Good Practices*, http://www.onetcenter.org/dl_files/empTestAsse.pdf.

[68] *See* EEOC Fact Sheet on Employment Tests and Selection Procedures, http://www.eeoc.gov/policy/docs/factemployment_procedures.html.

[69] 29 CFR § 1607.2.

[70] 29 CFR §§ 1603, 1611. *See also* http://www.eeoc.gov/policy/docs/factemployment_procedures.html (2010).

there is a substantially different selection rate that disadvantages a particular protected group. Adverse impact is typically indicated when the selection rate for a particular group is less than 80% or four-fifths that of the group with the highest rate (the "four-fifths rule").[71]

Tests and assessments should not be used unless they are both reliable and valid. Reliability refers to the extent to which a test consistently measures a characteristic.[72] Test validity refers to how well the test measures the particular characteristic the test was designed to measure. It is permissible under the *Guidelines* to rely on validity studies conducted by others only when evidence from available studies meets certain specified criteria.[73] There must be some proof (1) of a correlation between test performance and job performance ("criterion-related validation"), (2) that test items measure important requirements and qualifications for the job ("content-related validation"), and/or (3) that the test measures what it claims to measure and this characteristic is important to successful performance on the job.

Assessment centers are often used as a means of evaluating managerial potential, promotability, problem-solving skills, and decision-making skills. This approach typically uses multiple evaluative methods that might include interviews, ability and personality measures, management activities, and role-play exercises.[74]

M. Confidential Information and Restraints on Competition

Many employers take steps to keep confidential matters (such as research, development, trade secret, pricing, marketing, financial, customer, and personnel information) strictly confidential. To protect their confidential information, customer contacts, and trade secrets, employers may have their employees sign agreements in which they promise not to use or disclose the employer's confidential information during or after the termination of employment. Employers may also require new hires to sign agreements that prohibit competition and solicitation of the employer's customers and/or employees,[75] and require the employee to assign his or her rights to all inventions developed, both during and after the termination of employment.

Given the statutory protection afforded to trade secrets and the widespread use of agreements protecting confidential information and customer contacts, employers should be extremely wary of applicants who promise in the event they are hired to bring valuable information, materials, and/or contacts acquired in the course of prior employment. Hiring an individual subject to post-

---

[71] 29 CFR § 1607.4.

[72] Factors such as the test-taker's psychological state at the time of testing, environmental factors (*e.g.*, comfort, distractions), test form, and multiple raters may affect an individual's test scores. Test manuals typically report a statistic called the "standard error of measurement" that is the margin of error you should expect in an individual test score due to the imperfect reliability of the test.

[73] 29 CFR § 1614B.

[74] *See, e.g., Strategic Hiring System Pays Off in Reservation Call Center*, Employer's Advantage Newsletter (Nov. 2004), http://www.ldgrp.net/pinewsnovember04.htm, describing reduction in turnover by use of an honesty-integrity and job-fit assessment that might include personality testing, cognitive ability tests, job knowledge tests, performance tests and work samples, integrity tests, and interest, values and preference inventories. Note that the use of any such tests requires compliance with the *Guidelines* and a disparate impact analysis.

[75] Many states have placed statutory restrictions on these types of agreements; some, such as California, have largely prohibited them.

termination restraints on employment, or inducing or accepting the benefits of such a violation may subject the hiring employer to claims for inducing or aiding and abetting a breach of fiduciary duty, misappropriation, intentional interference with contract or business relations, and/or violations of the Federal Economic Espionage Act. Using copyrighted or patented information may also subject the hiring employer to claims for infringement. Accordingly, prior to hiring, employers should determine whether prospective employees are subject to any contractual obligations to former employers or owners of intellectual property. Employers should obtain certifications from new employees that all such obligations have been, and will continue to be, honored.

N. I-9 and Immigration Compliance

It is unlawful to hire an individual who is not authorized to work in the United States.[76] Consequently, all employers are required to complete and retain a Form I-9 verifying such authorization for each individual they hire for employment in the United States, including both citizens and noncitizens.[77]

Employers may not begin the I-9 process until the applicant accepts an offer of employment. Section 1 of the Form I-9 (employee name, address, date of birth, and signed certification of authorization to work in the United States) must be completed by the employee on or before the employee's first day of work for pay. Section 2, which requires the employer to certify its review of specified types of identification, must be completed within three days after the individual starts work. The employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and relate to the individual, and record the document information on the Form I-9. The list of acceptable documents is on the last page of the form.[78]

In addition to the I-9 process, employers should be aware of wage and hour requirements applicable to employees working pursuant to particular visa programs. For example, professional employees working in the U.S. on H-1B, H-1B1 and E-3 visas have the following rights: [79]

- They must be paid the higher of the prevailing wage (average wage paid to similarly employed workers in the occupation in the geographic area) or the actual wage paid by the firm to workers with similar skills and qualifications. [80]
- The employer must pay for non-productive time caused by the employer or by the worker's lack of a license or permit.

---

[76] 8 USC 1324a.
[77] 8 USC 1324b.
[78] For a step-by-step guide to completing the I-9 process, *see Handbook for Employers: Instructions for Completing Form I-9*, http://www.uscis.gov/files/form/m-274.pdf.
[79] *See* Work Authorization for non-U.S. Citizens: Workers in Professional and Specialty Occupations (H-1B, H-1B1, and E-3 Visas), http://www.dol.gov/compliance/guide/h1b.htm; *see generally*, http://www.dol.gov/compliance/topics/wages-foreign-workers.htm. Some states may have similar requirements.
[80] 20 CFR 655.731.

- The employer must offer the worker fringe benefits on the same basis as its other employees. [81]

- The employer may not require the worker to pay a penalty for leaving employment prior to any agreed date. However, this restriction does not preclude the employer from seeking "liquidated damages" pursuant to relevant state law. Liquidated damages are generally estimates stated in a contract of the anticipated damages to the employer caused by the worker's breach of contract.

- In the event of a reduction in force, the employer must offer to employees in H-1B (professional) or O-1 (extraordinary ability or achievement) status paid transportation to the employee's last place of residence before coming to the United States.[82]

The foregoing requirements prevent the visa programs from becoming a resource for "cheap labor" and to ensure that the hiring of a foreign worker will not adversely affect the wages of comparable U.S. workers.

Additional rules apply to employers who are dependent upon H-1B workers or are willful violators of the H-1B rules. An H-1B dependent employer is, generally, one whose H-1B workers comprise 15 percent or more of the employer's total workforce. Different thresholds apply to smaller employers.[83] H-1B dependent employers who wish to hire only H-1B workers who are paid at least $60,000 per year or have a master's degree or higher in a specialty related to the employment, can be exempted from these additional rules.[84]

The hiring of employee under the H-1B programs also affords U.S. employees and applicants to certain rights:

- U.S. workers employed by an H-1B dependent or willful violator employer may not be laid off within 90 days before or after the employer files a USCIS petition to employ an H-1B worker in an essentially equivalent job. In addition, an H-1B dependent employer or willful violator must offer the job to any U.S. worker who applies and is equally or better qualified for the job than the H-1B alien worker.[85]

- The employer must inform U.S. workers of the intent to hire a foreign worker by providing notice of the filing of the Labor Condition Application to the bargaining representative if there is one, or, if there is no bargaining representative, by posting notice of filing in two conspicuous locations at the employer's establishments, or by providing electronic notice. The notice must be provided on or within the 30-day period before the date that the labor condition application is submitted to DOL.[86]

---

[81] 20 CFR 655.732.
[82] Employers are also required to notify the Immigration and Naturalization Service (INS) that the employment described in the visa petition has ended.
[83] 29 CFR 655.736.
[84] 20 CFR 655.737.
[85] 20 CFR 655.738.
[86] 20 CFR 655.734.

III. DISPUTE AVOIDANCE AND RESOLUTION

Employers and candidates often make promises beyond what they initially intend to close the deal. However, problems often arise when the parties decide to part ways, especially when the relationship is short-lived. Anticipating how to handle common problems that arise when parting ways may eliminate disputes down the road. The following issues are often disputed when an employee leaves the company:

- Does the employee get to keep signing bonuses, reimbursed relocation expenses, and the cost of training and/or licensing the employer paid up front?[87]

- Is the employee's work subject to negligence or malpractice claims by third parties? Will either party be required to pay for tail insurance?

- Have the parties agreed who owns the intellectual property, social media,[88] and other work product created during the employment relationship?

- What if the employee leaves to start a competing business? Have you effectively limited the employee's ability to use your confidential and proprietary information? Have you effectively imposed restrictions on the employee's ability to solicit your customers or compete with your company?

- Is the employee leaving the company under circumstances that would entitle him or her to severance or other benefits?

- If the employee sues you, do you want to risk having his or her claim tried by a jury? Would you be better off in arbitration or with a non-jury trial?

- Do you want to limit the period of time

All of these issues can and should be resolved in an offer letter or employment contract before employment begins. Loans should be documented and can be secured with a promissory note. If the employer wishes to insure that it owns intellectual property and other work product created by the employee in connection with his or her employment, or seeks to impose post-termination restrictions through confidentiality, nonsolicitation or noncompete agreements, such an agreement should be signed no later than the employee's first day of work.[89] Similarly,

---

[87] Note that most states prohibit employers from making deductions from pay to recoup money owing to the employer. *See* ORS 652.610 (prohibiting employers from making deductions from employees' pay except in limited circumstances).

[88] Ownership of social media is currently a hot topic. *See, e.g.*, Sheri Qualters, *Who owns your Twitter account? #itmaynotbeyou*, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202541598653 (2/6/12); Marshall Kirkpatrick, CNN's social media pioneer gets fired: what happens to Rick Sanchez on Twitter?, http://www.readwriteweb.com/archives/cnns_social_media_pioneer_gets_fired_what_happens.php (10/1/10).

[89] Note that noncompetes are not permissible in all states. Oregon permits the use of noncompetes in limited circumstances, but a noncompete will not be enforceable unless the employee had notice that it would be required as a condition of employment at least *two weeks* prior to starting work. *See* ORS 653.295.

agreements governing dispute resolution should be entered into before the employee starts work.[90]

[90] Effective January 1, 2012, a written arbitration agreement between an employer and employee is valid only if the employee has received and signed at least 72 hours before starting employment a written notice that includes the following language, in boldface type: "I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court." ORS 36.620(5)(a).