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Hiring Doesn't Take 20/20 Vision

It does require an understanding of the 2020 requirements and legal pitfalls.

By Daniel A. Schwartz

While the uncertainty of the pandemic may make law firms defer some hiring decisions, eventually, your law firm will be hiring. But you've realized that hiring now seems harder than ever. There are the legal rules, and then there are the practical considerations. Plus, with a low overall unemployment rate, competition for talent is tighter than it's been in a generation.

It's enough to make you think you can make do with what you have. But as anyone involved in a law firm knows, change is a constant. Rather than being overwhelmed with the process and making mistakes, take time for preparation before starting the hiring process.

Determine Your Needs and Write a Job Description

Hiring without knowing precisely what you are hiring for may seem like a small mistake. But there are many legal requirements that flow from having a job description. For example, what if a candidate expresses a need for a reasonable accommodation if hired? You need to know the essential functions of the job so you can have a conversation with the candidate about the job duties.

Similarly, what are the attributes of a successful candidate, and are they legally supportable? If you hire someone to fill an office manager role, how will you evaluate their performance without a job description? Worse, if you criticize an employee for job duties that they didn't know they were supposed to do, you leave yourself open to criticism that you are being arbitrary, or worse, discriminatory.

Job descriptions that list requirements (such as degrees or certification) are crucial when it comes to the prescreening process. But be careful that the requirements are not a proxy for a protected characteristic or do not set the bar too high. For example, if you list a staff position as requiring the person to be capable of lifting 25 pounds, you need to be sure that this is essential to the position because it will exclude individuals with physical limitations.

Place an Ad or Use Online Services ... Carefully

One of the new challenges of hiring is *how* to seek out candidates. Not that long ago, the best way was to advertise in a local legal newspaper or with law schools. But with newspaper circulation a fraction of what it used to be, employers are seeking out online services. This may even involve placing an advertisement on social media. Easy, right?

But there are legal and practical complications to these new hiring tactics. In an effort to refine search results, online job boards and social media sites use advertising preferences and algorithms to allow employers to locate candidates who match desired qualities. Recently, the Equal Employment Opportunity Commission issued a "reasonable cause" finding concluding that it believed seven U.S. companies violated federal discrimination law by using

Facebook's advertising capabilities to exclude older workers or women from seeing certain postings.

Use of artificial intelligence can also result in unintended bias. For example, a few years ago, news reports detailed that Amazon scrapped a hiring tool that showed preference for male candidates. A 2019 *Harvard Business Review* article noted that algorithms "can replicate institutional and historical biases, amplifying disadvantages lurking in data points like university attendance or performance evaluation scores. Even if algorithms remove some subjectivity from the hiring process, humans are still very much involved in final hiring decisions."

What does this mean for your law firm? Understanding the risks that new technology brings to the hiring process is important. If you are viewing these online sources as a panacea to your hiring woes, think again.

Pitfalls in Screening Candidates Online

The ability to seek out information online is sometimes too easy for employers to pass up.

But employers need to be mindful of two sets of laws before doing so. First, the Fair Credit Reporting Act will apply in situations where an employer is using a third party to conduct background checks. While the requirements of the law are far too detailed to get into in this overview article, employers should be sure to get consent of the applicant before doing such checks. And if you use that information in your hiring decisions, there are additional notice requirements as well.

In the last few years, nearly half the states have also added laws that limit employers' use of social media sites in the hiring process. For example, California implemented a new state law that prevents employers from requiring or requesting that job applicants disclose a username or password to access personal social media, access personal social media in the presence of the employer, or divulge personal social media, unless subject to an exception.

Using online sources to screen applicants can also lead to claims of bias if these searches aren't done in a professional and predetermined matter. So rather than just ignore what's online, decide two things upfront: 1) Who will do such searching and how? 2) When in the process will it be done?

Job Interviews Done the Right Way

Getting to know the candidate is often thought of as the best way to hire good candidates. Of course, the problem with this theory is that those who are doing the hiring may not be doing it the best way.

One of the most well-known examples of a highly biased job interview is from the pilot of "The Mary Tyler Moore Show." Lou Grant's first question in the interview for Mary Tyler Moore is, "How old are you?" As if that weren't wrong enough, he asks Mary if she is married.

Needless to say, don't do that. But there are other questions that can seemingly fall within the same trap.

For example, suppose you ask: "Do you belong to a club or social organization?" Seems innocuous enough, right? However, the answer could

reveal information about a person's religious affiliation or sexual orientation. What can you ask instead? How about: "Are there any professional or trade association groups you belong to?"

Here's another question that should be avoided: "Do you have or plan to have children?" For some, this might just be an attempt to make conversation. But this question could obviously be viewed quite differently and may be considered discriminatory. And so long as the applicant does the job, their family obligations should not be a hiring consideration.

Instead, consider asking: "Can you work overtime? Have you worked overtime in the past? And if the job requires travel, are you comfortable with traveling several days a month for business?"

And this only touches the surface. A quick search online will list all the types of questions that you shouldn't ask.

So what *should* you ask? In some ways, it depends on the position. Sure, there are the standard questions (for better and worse): "Tell me about yourself. How would you describe your ideal job? What was your favorite class in law school and why?"

But companies are moving beyond the standard questions, realizing that the job interview provides a unique opportunity to find out more. Some are conducting "behavioral" interviews, designed to seek out the qualities that a résumé can't address. For example, consider questions like: "When was the last time you 'broke the rules'? What was the situation, and what did you do?"

Overall, think about writing down the questions you intend to ask. And while it's handy to have those questions nearby try to maintain eye contact with the candidate. Remember too that you're trying to show the candidate that your firm is where they should want to work.

Be Mindful of Other Requirements When Making an Offer

Recent state laws have introduced two new considerations in the interview and job offer process. The first are so-called ban the box laws. More than 100 cities and counties and dozens of states have prohibited questions about criminal conviction history on job applications. Initially, the "box" referred to the box on a job application where candidates would indicate whether they had criminal histories. But the laws have developed differently in each jurisdiction, so be mindful of the restrictions in place. Some states even ban employers from asking about a criminal history until after a conditional job offer is made.

Second, various states have also begun to bar employers from asking job applicants about their salary history. For example, since early 2020, New York employers are prohibited from seeking an applicant's pay history. An employer may only confirm pay history when an offer of employment is made and when the applicant responds to the offer by showing a pay history higher than being offered to the applicant. These laws suggest that employers should do market analyses to get a better idea what similar employers are paying employees in a particular job position.

Once you have determined that you want to offer a position to an applicant, consider the form of the offer: Will it be in an offer letter or a contract? Will

it be an at-will employment, or will there be certain protections that will be sought or promised?

For legal hires, there are additional considerations. Conducting an extensive conflicts check will be crucial before the offer is made to understand what restrictions will need to be put in place if the candidate is hired. For example, Model Rule 1.10 addresses Imputation of Conflicts of Interests and situations where an attorney's representation of a client at a prior firm may lead to a conflict of interest for the new firm.

Final Tips

A recent article in the ABA's *Litigation* magazine offered this advice for associates: "There will be doctor's appointments, school performances, dates and other things that need to be done. Those things are important, and if you're unhappy because you're missing them, you won't be doing a good job here." It's an interesting insight into the author's perspective, but it is not one shared at all workplaces. Hiring should be a two-way street. You want to find good candidates, but you also want candidates to find your office an attractive place to work. Sharing the honest expectations for what is needed to succeed at your law firm may be the best way to find candidates who match your expectations.

Legal pitfalls exist along the way, but they should not be barriers to hiring. Be mindful of those requirements, but still keep in mind the broader perspective that there are many ways to hire the right people the right way.

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