



Hiring:

Craft Job Postings That Cut Legal Liability



Employment Law *Advisor*

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Introduction: Start the hiring process the legal way

Airplane pilots like to joke that flying is easy—it's the takeoffs and landings that are hard. HR professionals can relate. A huge portion of employee lawsuits are triggered during the hiring process (the takeoffs) and when an employee is terminated (the landings).

This *HR Employment Law Advisor* Deep Dive focuses on taking off safely and hiring in a way that attracts the employees you need without causing legal problems. Most hiring-related lawsuits allege that some part of the hiring process unfairly discriminated against an applicant who didn't get the job.

The hiring process begins by developing a job description that accurately reflects the work you want your new hire to do. Only when you have nailed down those details can you move on to the rest of the process:

- Advertising the job opening
- Sorting through applications and résumés to identify likely candidates
- Arranging and conducting job interviews
- Deciding who to hire
- Extending a job offer.

We are drilling down into the very initial stages of the hiring process: Setting your hiring criteria and advertising job openings. Future Deep Dives will address subsequent hiring steps.

Quiz: Spot the legal errors in this job ad

The EEOC wasn't around in 1860 to hunt down discriminatory hiring practices—it was truly the Wild West in terms of hiring. But what if this Pony Express want ad from the 1860s showed up on an online job board today? See how many contemporary employment-law violations you can spot.

Answers:

“Young.” It is illegal age discrimination to state a preference for younger workers.

“Skinny, wiry.” While very few states prohibit weight discrimination, advertising that only the skinny need apply could raise disability discrimination issues under the federal Americans with Disabilities Act.

“Fellows.” It would be sex discrimination to consider only men for a position unless gender is a bona fide occupational qualification—likely not the case for a Pony Express rider.

“Not over 18.” Child labor violations, anyone?

“Willing to risk death.” It is a good thing for the Pony Express that OSHA did not exist in the 1860s. It would have taken issue with a job that requires its employees to risk death as one of its essential functions.



PONY EXPRESS
St. JOSEPH, MISSOURI to CALIFORNIA
in 10 days or less.

WANTED

YOUNG, SKINNY, WIRY FELLOWS
not over eighteen. Must be expert
riders, willing to risk death daily.
Orphans preferred.
Wages \$25 per week.

APPLY **PONY EXPRESS STABLES**
St. JOSEPH, MISSOURI

“Orphans preferred.” Anti-discrimination statutes do not expressly protect family status. The EEOC, however, considers family status worthy of special protection.

“Wages \$25 per week.” Congress did not enact a minimum wage until 1938. Today's federal minimum wage is \$7.25 per hour. Many states' are higher.

Federal anti-discrimination laws that affect hiring

A host of laws govern what employers may and may not do when hiring. Many address the forms of discrimination that frequently motivate applicants to file lawsuits. Among the federal laws that affect hiring:

- **Title VII of the Civil Rights Act**, which protects workers from discrimination based on race, color, sex (including sexual orientation and gender identity), religion and national origin.
- **Equal Pay Act**, which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.
- **Age Discrimination in Employment Act**, which protects individuals who are 40 or older from employment-related discrimination.
- **Pregnancy Discrimination Act**, which makes it illegal to discriminate on the basis of pregnancy, childbirth or related medical conditions.
- **Pregnant Workers Fairness Act**, which requires employers to reasonably accommodate pregnancy-related conditions.
- **Americans with Disabilities Act**, which protects qualified disabled individuals from discrimination and requires employers to provide reasonable accommodations for their disabilities.
- **Genetic Information Nondiscrimination Act**, which bars employers from using an employee's or applicant's genetic information in any employment decisions.
- **Uniformed Services Employment and Reemployment Rights Act**, which protects individuals who are members of the reserves or National Guard from discrimination based

on their service status and protects their right to be rehired after they have completed their active-duty service.

The Equal Employment Opportunity Commission enforces most federal anti-discrimination laws. In addition, many states and municipalities have their own laws that prohibit discrimination in hiring.

Hiring starts with a good job description

Protecting your organization from lawsuits must start the moment you decide to hire your first employee—and everyone after that.

You must carefully plan out every step in the hiring process, beginning with an accurate and up-to-date job description ready before you place the first recruitment ad or post a hiring notice on your breakroom bulletin board.

You need a job description that's accurate, job-related, nondiscriminatory and up-to-date.

Crafting a good job description is harder than it sounds. These days, it's not unusual for a job to change dramatically over just a few months. For example, when someone quits, a remaining employee probably has to pick up the slack. That employee's job description may no longer reflect the job that he or she is performing. The new job may even change the classification of the position from hourly to exempt or from exempt to hourly. And that may mean the employee is no longer eligible for or is newly entitled to overtime pay. Many a Fair Labor Standards Act lawsuit has been born of a job that changed so much that it is no longer reflected in an old, outdated job description.

Why you need good job descriptions

Why are job descriptions so legally important to the hiring process? You need them to determine whether the position is properly classified as either hourly or exempt from overtime under the Fair Labor Standards Act. It's impossible to comply

with the Americans with Disabilities Act without a job description that outlines essential and nonessential tasks and responsibilities—the essential functions of the job. Likewise, the Family and Medical Leave Act allows leave for employees with serious health conditions that prevent them from performing the essential functions of their jobs—which therefore requires job descriptions to list those.

Ultimately, job descriptions are essential hiring tools because they define what you want your new employees to do—the work they will perform, the environment in which they will do that work and how you will know whether they are performing successfully.

Because duties change over time, job descriptions must be updated regularly to ensure they accurately describe what workers actually do. Job descriptions are one of the first documents lawyers representing workers ask for. The same holds true for the administrative agencies like the EEOC that enforce the law. If you don't have a job description or if the one you have doesn't describe the job accurately, your case is already off to a bad start.

Legal risks

An improperly written job description can cost employers a lot. Employers must draft job descriptions with several laws in mind, including the FLSA. Job descriptions should not only indicate whether the position is exempt under the FLSA, but the job's duties should match the exempt/nonexempt status the employer intends to rely on to justify not paying an employee overtime.

The FLSA provides exemptions for administrative, executive, professional and highly compensated employees plus a few more uncommon ones. A job description detailing an administrative position should include administrative duties; otherwise investigators may determine the position is nonexempt and the employee is entitled to overtime pay. Each exemption has specific job duties the employee must perform, and these should be reflected in the job description as essential duties.

If you are unsure whether a position is exempt, consult with your attorney.

Job descriptions took on new importance after the passage of the ADA. That's because the ADA states that disabled workers and applicants are entitled to reasonable accommodations for their disabilities if such accommodations are needed to perform the *essential functions* of a job. Therefore, every job description must identify which functions are essential to the job and which are not.

If you don't have job descriptions or your descriptions don't define what's an essential function and what is not, you risk leaving it to the employee who is suing you for disability discrimination to identify those functions in court. Avoid that problem by including essential functions in your job descriptions. Judges will generally accept those as accurate.

Basic elements

Job descriptions are not “decreed from on high.” They are carefully constructed by obtaining input from the person who holds the job, supervisors of that position and those who regularly interact with and/or report to the person in that position. You'll want to know:

- The job title
- The job's essential functions, such as whether it requires heavy lifting, and if so, how often
- Secondary or infrequent duties
- Job performance standards, such as sales quotas
- Who is responsible for supervision
- Whom, if anyone, the worker supervises
- Any special training, experience or education required for the position, including special certifications, degrees or skills.

7 steps toward writing job descriptions that capture the job

The number of ways in which to craft job descriptions are as varied as the positions for which they're written. There are, however, a series of universal steps that apply to writing a solid job description.

- 1. Identify a title and purpose.** Start by selecting a job title that is self-evident, reflective of rank or worth, free of technical jargon and, as a rule, simple and recognizable. Then, succinctly state the aim of the position. What are the particular contributions of the job toward the accomplishment of the organization's overall objectives?
- 2. Collaborate with managers and employees.** The best sources of information for writing an accurate job description are those who perform the jobs and those who manage them. Writing job descriptions is a collaborative effort—employees and managers should be included in the process, but they should not be left to do it on their own. Use task-centered questionnaires and checklists to find out what skills, physical and mental abilities, level of education, etc. are necessary for performing the job.
- 3. Detail qualifications.** List only those skills that are used on the job. Including a laundry list of nice-to-have (as compared to need-to-have) skills may lead to discrimination complaints if, for example, a lack of those skills takes a minority job applicant out of the running. Identify how much experience is essential and be prepared to back up your assertion. Name any must-have degrees or licenses.
- 4. Describe the setting.** Identify the physical conditions of the work environment (e.g., hot, cold, noisy), as well as the social conditions of the job (e.g., work alone or with the public). Also, note if the use of specific equipment is required.
- 5. Name essential duties.** Arrange duties and responsibilities sequentially by listing predominant duties before those

of lesser importance. Differentiate between essential and nonessential duties, especially in light of the ADA. Use the present tense and begin each statement with an action verb. Use quantitative terms (e.g., “daily,” “weekly,” “monthly”) where possible.

- 6. Outline performance expectations.** Identify the qualitative and quantitative measures that define on-the-job proficiency.
- 7. Determine exempt or nonexempt status.** To qualify for exemption from minimum wage and overtime pay rules, employees must meet certain tests regarding their job duties. Important: Job titles do not determine exempt status. For an executive, administrative, professional, computer employee or outside sales exemption to apply, an employee’s specific job duties and salary must meet certain test requirements as laid out by U.S. Department of Labor regulations. (*Learn more at www.dol.gov/agencies/whd/fact-sheets/17a-overtime.*)

Checklist: Writing job descriptions

A well-written job description is the foundation of the hiring process. Here are eight questions to ask yourself when drafting job descriptions:

1. Does a job description exist for every position?

If applicants complain they were rejected because of their race or gender, you can show a court they were rejected because they didn’t meet all the written qualifications.

2. Is the title accurate?

Titles may seem unimportant, but they carry a lot of weight in the workplace and in court. Titles should always match the level of authority and responsibility.

Cross-check titles against others in the workplace. For example, “administrative assistants” should be doing most tasks that others

with that title do. Inappropriate titles could also factor into discrimination charges. For example, if your “director of distribution” is really a shipping clerk, could you explain to a court why he isn’t being paid the same as other “directors”?

3. Does it cite the correct skills, experience and education needed?

List only skills that are necessary to perform the job. A laundry list of skills that may never be used might be considered discriminatory. Cite the experience needed. Prepare to prove that the “experience” is essential.

Include any education level or credentials needed. Make sure these are essential to job performance. *Example:* Requiring a bachelor’s degree for a forklift operator may not be necessary.

Indicate any unusual working conditions, such as exposure to chemicals.

4. Does it cite essential and nonessential job duties?

The most important part of a job description is an item-by-item list of responsibilities and duties. For legal reasons, identify which are the “essential” job functions and which are nonessential, less-frequent duties.

What’s the risk? Lawsuits filed under the ADA have nearly doubled in the past decade. Disabled employees can only file ADA lawsuits if they can prove they can still perform the “essential functions” of the job. If those essential functions aren’t in writing, they’re left open to a court’s interpretation.

To identify essential functions, look at the frequency of each function and the significance if that function isn’t performed. Categories to include:

- Physical skills (e.g., standing, walking, lifting, bending)
- Learned skills (e.g., equipment proficiency, industry experience)

- Job duties (e.g., travel, hours, shifts)
- Behavioral skills (e.g., communication, leadership, time management)

5. Does it explain the results expected?

Duties are just half of the equation. What do other employees, departments and customers count on this person to do? Include expectations relating to deadlines, customer service and company success. Linking duties to company goals helps employees see how the position fits into the “big picture.”

6. Does the job description identify the supervisor?

Many job descriptions include the title of the employee’s direct supervisor, the department name and other identifying details. Make sure it refers to a supervisor’s *title*, not name.

7. Is it realistic?

The job description must match the reality of the job, not the lofty standards management would like it to entail. Unrealistic job descriptions can trigger all sorts of legal issues.

8. Is the writing clear and specific?

Instead of saying the position “requires heavy lifting,” say it requires the ability to lift 25 pounds repeatedly overhead 10 times per hour. Write with action verbs in the present tense, such as supervise, inspect, produce, organize, motivate and analyze. Avoid gender-based terms, such as “salesman.”

Job descriptions done right: Start with a clean sheet of paper

Properly done, the task of writing a job description gets the hiring process off to a good start. Here's some advice that can help:

Define the job, not the candidate

Too often, HR pros and managers wade into the hiring process by trying to envision the ideal candidate—a rock-star coder, a real sales go-getter.

Not so fast. Before you go there, you need to compile a complete list of specific, recurring job tasks that would be the primary responsibility of the new hire. The task list may show you that the job you need to fill is quite different than what you first imagined.

Define skills and qualifications

Now carefully consider the skills necessary to perform those tasks. You should be able to define skills and capabilities (for example, being able to lift 20 pounds) to go with each job task.

These are the essential criteria that will determine how you differentiate between candidates.

Skills and qualifications aren't the same thing. Skills are more important. Don't overemphasize a laundry list of qualifications—years of education and experience, professional certifications, and so on. Would a new hire need a college degree and five years of experience to adequately perform all the tasks on your list? If not, don't pretend otherwise.

Be clear and honest about the importance of each task and its associated skills. For example, if a customer service rep will also sometimes have to rearrange merchandise and make deliveries, weigh the relative frequency and importance of those tasks.

Move toward the ideal

Once you've thoroughly defined what your new hire must be able to do and the skills that will be required, you can move on to define the desired attributes of the ideal candidate.

Again, don't pretend that advanced skills or extensive experience are essential if they're just nice to have. You may want to hire someone who you can groom for management, but unless you can guarantee that prospect, don't risk being forced to hire someone now who's overqualified.

Remember that people can and do acquire advanced skills and training along the way.

Get started on advertising your job opening

The act of writing a job announcement is much simpler once you have written a good job description. Many of the job description's elements can be plugged directly into the announcement or advertisement. Whether you are posting your ad online or on the break-room bulletin board, be sure to include the following:

- Job title and location of position
- Hours of work and whether travel/overtime is required
- Salary range and a brief explanation of benefits (if you do not routinely include salary, make sure you aren't in a jurisdiction that requires you to do so. Recently, many states and cities have begun requiring salary or salary ranges in all job announcements and recruiting materials. See "Prepare to be transparent about pay" on page 23 for more on this topic)
- Description of essential functions of the job, and experience and educational qualifications required
- Instructions and deadline for submitting applications
- An equal employment opportunity statement and a notice to disabled applicants about accommodation requests.

Accommodations, accessibility

Some employers have gone so far as to list known disability accommodations for specific positions. This goes beyond what the law requires but shows that employers are genuinely interested in hiring disabled workers. *One caveat:* When listing accommodations, make it clear the list is not exclusive or exhaustive. New accommodations come along all the time.

More than likely, the job will be advertised online. Just as with buildings, websites have accessibility rules. Website accessibility issues include providing alternate text to describe graphics so that

Clean up job ads to eliminate traces of bias

Writing employment ads seems like a fairly straightforward task. However, a handful of poorly chosen words could expose your company to liability for discrimination.

See if you can recognize the three problems here:

Waiters/busboys. Looking for energetic, recent H.S. grad to work midnight shift at 24-hour restaurant. Apply to Ms. Willis, 100 Columbia Way. EOE.

Referencing age as a hiring criterion (“recent H.S. grad”) violates the Age Discrimination in Employment Act. While age can sometimes be a bona fide occupational qualification, as in the case of airline pilots, no court would agree that age is a BFOQ for such a restaurant job.

Specifying gender. The terms “waiter” and “busboy” are not gender-neutral and could be viewed as discriminatory. Instead, use “waitstaff” or “servers” and “buspersons.”

Requiring a diploma. That might be seen as discriminatory because it could easily be argued that a diploma is not a BFOQ for this job.

Here is a safer version of the ad:

Restaurant night crew. 24-hour restaurant looking for waitstaff and buspersons to work midnight shift. Apply to Ms. Willis, 100 Columbia Way. EOE.

screen-reading programs can read the page to a visually impaired user or the availability of a large-text site. In addition, employers should provide alternative methods of contact, such as TTY phone services for hearing-impaired applicants.

Language to avoid

Job ads should not refer to age, gender, race or any other protected characteristic.

- Ads that say “Perfect for college students” may discourage older workers and violate the Age Discrimination in Employment Act.
- “Ideal for working mothers” may violate Title VII because it discourages men from applying.
- “Person in good health” may violate the ADA or the Genetic Information Nondiscrimination Act by discouraging disabled workers or those affected by genetic disorders.
- Requiring U.S. citizenship in job ads or job descriptions is illegal unless the job requires a security clearance limited to U.S. citizens.

Be aware that the U.S. Department of Justice has been cracking down on employers and recruiters who turn away non-citizens with appropriate work permissions such as valid visas or work authorization documents and assessing large fines and penalties for violations.

Job announcements: Can more details = fewer lawsuits?

Once upon a time, jobseekers had to make the “Should I apply?” decision based on only a few lines in a newspaper want ad. Now, information about open positions is just a click away via a multitude of online job boards such as Indeed and

Glassdoor. Yet many employers provide skimpy details on the web about job openings.

The legal problem: Less information can lead to a higher number of unqualified applicants. And when applicants have to speculate on the reasons they didn't get a job, they're more likely to sue.

That's why your job announcements should include specific information about the minimum requirements of the job. For example, if a particular performance review score is required for promotion, say so. Don't pull out that score later as a reason the applicant wasn't hired.

Case in point: Peter, a patient-care associate, was interested in a job opening at the Texas hospital where he worked. But according to Peter, his supervisor told him he was "too old" for that job.

Two substantially younger co-workers were promoted to the position Peter sought. Weeks later, Peter was fired after he was arrested and missed work due to his legal troubles. Still, Peter sued, alleging age discrimination was the true reason.

The hospital countered, saying the alleged ageist conversation never took place. The hospital said Peter was passed over for the promotion because he failed to meet the minimum score on his latest performance review. The two younger co-workers each achieved the required score.

The trouble with the hospital's argument? It had never listed a minimum review score in its job description or announcement.

Result: Peter eventually lost his lawsuit—but only after more than eight years of litigation! Imagine how much money, time and energy the hospital could have saved if it had explicitly addressed minimum scores in its job description and announcement.
(*Obasogie v. Harris County Hospital District*, SD TX)

3 lessons learned ... without going to court

1. Create accurate job descriptions that reflect the job as it actually is performed. Set careful requirements for promotions,

including exact minimum standards for eligibility. Publicize those requirements so there is no question about them.

2. Consistency is your friend. Your best legal protection is to treat every employment decision seriously and consistently. Follow the DITO-DITA rule: Do It to One, Do It to All.

3. Don't try to justify decisions after the fact. Document the process as it unfolds, beginning with the job description and announcement. Don't wait until someone sues to justify a hiring or promotion decision.

Why HR must preview all job postings

Do you check your organization's job postings for inaccurate, inappropriate or illegal language? If not, you're opening up your organization to legal battles.

Recent case: Arthur Grand Technologies provides IT services to the federal government. It posts job ads on a variety of online recruiting sites, including Indeed.

According to the Department of Justice, a job listing on Indeed included parenthetical comments apparently prepared by someone at Arthur Grand. The ad limited eligible candidates to "Only Born US Citizens [White] who are local within 60 miles from Dallas, TX [Don't share with candidates]".

A total of 31 people who saw the ad contacted the DOJ and the Department of Labor stating the obvious—federal law does not allow employers to screen for white candidates. Perhaps not quite as obvious is that screening for only native-born U.S. citizens is also illegal under the Immigration and Nationalization Act.

The DOJ and DOL investigated and levied a fine of \$7,500 for the posting, plus \$31,000 to be distributed among the 31 people who reported the ad. The company had argued that it did not post the ad, but that a former employee altered and reposted it. It also pointed out that it is a minority-owned firm. That did not persuade the federal agencies to lift the penalties.

Advice: Assign someone in HR to review all job ads. The extra time spent is well worth the effort. And while you may not uncover something as egregious as the above, it's always a good idea to review what your managers are posting.

Pay attention to essential functions in job postings

From using inclusive language to touting company culture, much thought goes into creating a modern job posting. Be certain to give ample attention to an evergreen element—identifying essential functions.

Essential functions are core responsibilities that an employee must be able to perform to hold a given position. For instance, a pilot must be able to fly a plane. Not all essential functions, though, are as obvious. Company ABC may consider the ability to take good photographs essential for its internal communications specialist position. The same job title at Company XYZ may not require that skill because someone else performs it or the employer relies mostly on stock images.

The value of listing essential functions

Job candidates rely on a list of essential functions to better comprehend what a role entails. This upfront information helps them determine if their abilities and interests align with employer expectations for the given position. For example, an aspiring customer-service rep who does not want to answer phones would likely bypass a posting where this task makes up the majority of the day in favor of a different role centered on email communication. Honesty about core duties builds positive relationships.

The list also benefits employers, as a manager can point to it if a worker ever claims that a certain duty is not part of her job.

Defining essential functions offers some legal protection, too. Essential job functions—tasks a person holding the job absolutely must be able to do—are used to determine the rights of an employee with a disability under the ADA. An employee who can't perform the essential job functions, even with a reasonable accommodation, isn't considered qualified for the job and isn't protected from discrimination.

EEOC guidance on essential functions

How are essential functions determined? EEOC guidance on factors to consider in determining if a function is essential includes:

- Whether the reason for the position to exist is to perform that function
- The number of other employees available to perform the function or among whom the performance of the function can be distributed

Essential job skills list is a lawsuit shield

Here's a tip that can help you streamline the hiring process if you reasonably believe you will have a large number of applicants. Instead of listing preferred qualifications, include a longer list of required ones. That way, you should be able to whittle down the applicant list to those closest to your ideal candidates.

And don't forget that this phase should be a blind one with the hiring manager not knowing the age, sex or other protected classification of any of the candidates.

Recent case: Valerie was 51 years old when she applied for a position as a dental hygienist at a community dental clinic. All applicants filled out the same form, which was submitted blind for review for meeting minimum qualifications.

The clinic received 25 applications and excluded everyone who didn't identify as bilingual—which was a “preferred” qualification according to the job posting. That left just three candidates, and excluded Valerie. The hygienist hired was a current employee who had Spanish language skills.

Valerie sued, alleging age discrimination. She got through the initial phase of the lawsuit because she had been screened out from consideration on bilingual skills—something that had been listed as a preferred and not an essential qualification—and because someone substantially younger got the job.

Fortunately for the clinic, it was able to win the case by showing that the hiring manager didn't know Valerie's age and she had hired the other candidate because she could communicate with clients who were increasingly Spanish speakers. (*George v. Hennepin County*, DC MN)

Final note: Valerie's case would have been dismissed much earlier if bilingual ability had been designated an essential requirement rather than a preferred one.

- The degree of expertise or skill required to perform the function.

EEOC guidance goes on to state, “[The employer’s] judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job, will be considered by EEOC as evidence of essential functions.” Other kinds of evidence that EEOC will consider include:

- The actual work experience of present or past employees in the job
- The time spent performing a function
- The consequences of not requiring an employee to perform a function
- The terms of any collective bargaining agreement that may apply.

To comply with the ADA, you must have up-to-date job descriptions for every position, so be sure to regularly review essential functions. Such revisions are particularly smart when working conditions change. This especially hit home after the COVID-19 pandemic as legal challenges arose as to the role of physical presence in essential functions. With courts likely to defer to the employer’s criteria as long as the employer identifies what it considers essential in job postings and job descriptions, accuracy and careful wording are musts.

Is illegal bias lurking in your online job ad?

These days, most HR professionals know to avoid putting blatantly discriminatory requests—such as “recent college grad” or “busboy”—into their job advertisements. But that doesn’t mean want-ad bias is dead.

Some employers are trying to use subtle online recruiting practices that have the same unlawful effect. But the courts, EEOC and legal watchdog groups are catching on.

In 2018, the American Civil Liberties Union filed an EEOC complaint against Facebook—plus 10 employers that used Facebook to post job ads—saying the social media giant used its ad-targeting features to exclusively target men in online ads for police officers, construction workers, truck drivers and sales staff.

“This type of targeting is as illegal now as it was in 1964 when the Civil Rights Act was passed,” an ACLU statement said. Facebook “essentially acts as a recruiter connecting employers with prospective employees. In this context, it should be legally accountable for both creating and delivering these discriminatory ad campaigns.”

Age bias also targeted

Facebook and other online forums have also come under fire for using age-filtering tools to restrict their job announcements to target younger candidates. *Example:* A Verizon job ad allegedly appeared only in news feeds for people in the Washington, D.C. area who were 25 to 36 years old and had demonstrated an interest in finance. Other large employers such as Amazon, Goldman Sachs and Target allegedly used similar online screening tactics.

AARP recently complained that dropdown forms on some online job applications don’t allow applicants to enter information prior to the 1980s. Other forms asked for age and don’t allow applicants to skip the question.

In one experiment, Tulane University researchers applied for 13,000 positions in 12 cities that were advertised online. Three identical résumés were submitted for each job, differing only by the age of the applicants. The results? Identically skilled older candidates received significantly fewer calls for interviews than younger candidates.

Advice: These days, overt bias is the exception, not the rule. Regularly audit your online recruiting systems for problems that unintentionally screen out applicants based on protected characteristics (age, sex, race, national origin, religion and disability).

Prepare to be transparent about pay

In the past few years, we have seen a surge in new state and local laws requiring employers to be upfront about pay and benefits for both applicants and current employees. These laws are meant to mitigate pay inequities, given the previously common practice of offering new hires starting pay based on prior pay.

That practice worked to perpetuate past pay discrimination when employees moved from one job to another. And without knowing what co-workers are earning, employees couldn't be sure they were fairly paid, especially since it was also a common practice to prohibit sharing pay information.

Cite starting pay to gain a competitive edge

Pay transparency provides a hiring advantage, according to the Robert Half outplacement firm's 2024 Salary Guide. Sixty-three percent of hiring managers said that including salary information in job postings helps attract qualified candidates, and 60% said pay transparency provides a hiring edge against competitors.

Workers also want pay transparency. In fact, 57% of likely job-changers said they would take themselves out of consideration for a job if salary ranges weren't provided upon request.

Pay transparency legislation

Laws in a growing number of jurisdictions now require some form of pay transparency from employers. Some laws require employers to post pay ranges in all job advertisements. Others prohibit employers from asking about or using past pay to set salary. And at the federal level, there may be new pay transparency laws coming. In 2024, the House of Representatives saw the introduction of the Pay Transparency Act, which would amend the FLSA. It is liable to be reintroduced in coming congressional sessions.

If passed, the bill would require employers to provide pay ranges for all public and internal job postings, tell applicants what pay

range their job is in and give them updated information once a year or whenever they request the information.

Employer response

In light of a confusing patchwork of legislation and the prospect of new federal laws, many employers are now embracing pay transparency. According to a recent survey, a majority of the 500 employers surveyed now have pay transparency rules in place.

The 2024 Pay Transparency Survey concluded that several factors influenced the decision to be open about pay. These include new laws and a desire to get ahead of regulatory requirements. But the employers also cited factors like preventing employee speculation about discrimination and a desire to retain and attract workers who increasingly want to know how pay is set before even applying to an open position.

What pay transparency strategies did the surveyed employers use before providing information? They reviewed their pay policies, conducted pay gap and pay equity audits and came up with communications plans for sharing the information.

Takeaways: If your organization isn't open about pay, consider creating a plan to change that. Start with an internal review to make sure your current pay policies don't disparately impact a protected class. If there are clear differences between, for example, what men and women make, fix that before you go transparent. You don't want your new transparency to trigger lawsuits.

The fix should include pay raises to end the disparate impact. But don't cut pay for those who were making more. That's illegal under the Equal Pay Act.

4 questions to ask before posting your next job ad

Avoiding legal liability when hiring is important. However, just staying out of court is a low bar.

You want your job ads to attract the very best applicants. Today's job seekers quickly dismiss poorly written, uninspiring job postings in favor of better-sounding opportunities. Compelling copy tells readers what they need to know while helping them envision being a part of your staff.

How does your ad stack up? Before posting, ponder these four questions:

1. How clear is this job ad?

Leave no doubt about the basics. People want to know if your opportunity matches their needs and qualifications. Are you seeking a certain level of experience or a particular degree? Is the job remote, on-site or hybrid? What are the work hours, and are they set in stone or flexible?

Stick with a no-nonsense job title. Applicants search for “administrative assistant,” not “dynamic office jack-of-all-trades.” Similarly, avoid confusing acronyms and internal jargon within text.

2. Is the job posting accurate and honest?

Consider an old job ad as a starting point at best. More than likely, the position has evolved since the original description. Recraft the ad to reflect what the role entails now. Conveying what you truly seek boosts the odds of generating an applicant pool of solid matches.

Resist the temptation to embellish the truth or withhold information. A new hire who later learns that “providing customers with an outstanding environment throughout the store” actually

means mopping up the bathroom every hour may feel misled and resentful. Dishonesty gets the relationship off on the wrong foot—and increases the possibility that you'll soon be back to square one of the hiring process.

3. Does this job ad excite or scare?

A good post describes the main duties, so candidates understand what a prospective workday looks like. Likewise, it talks about what the employer desires in terms of skills, experience and credentials such as education. However, be careful to avoid creating an off-putting laundry list. Presenting an overwhelming number of responsibilities or qualifications generates reader panic about the inability to live up to expectations.

Home in on key tasks. Use active verbs to paint an interesting picture. The person hired won't simply be sitting around doing any old job; he or she will be “coordinating,” “investigating,” “initiating,” “verifying” and the like as an important part of the team.

Figure out core requirements, too. Present essential qualifications as “must-haves.” If other highly desirable attributes exist but are not mandatory, group them under a heading such as “Bonus points for ...”

4. Will readers walk away knowing what is in it for them?

People need to earn a living. Providing a salary range enables candidates to consider whether the two of you are in the same ballpark in terms of compensation.

But go beyond payment. Tout notable benefits, from an outstanding health plan to a generous PTO policy. Talk about professional development opportunities. Point out what makes your company culture unique and your organization a great place to work. Establish a sense that employees here feel welcome, important and connected to the big picture.

Beware bias that can creep into hiring decisions

A huge percentage of employment-related lawsuits are filed by applicants who claim they weren't hired because of some discriminatory action on the part of an employer. Making sure job postings are free of bias is a great start to avoiding legal liability, but it's only one part of the hiring equation.

Numerous studies show how easily discrimination can creep into hiring decisions—possibly without the decision-maker even realizing it.

Whether the participants in the following studies consciously or unconsciously discriminated is difficult to determine, but they are good examples of how HR professionals and hiring managers—who may never consciously think, “I don't want to hire a woman (or minority)” —may allow gender, race or another protected characteristic to unconsciously influence them.

- A study of orchestral auditions showed that female musicians had a better chance of being hired when the process was blind (i.e., the musicians performed behind a screen) than when the judges could see the performers.
- A study conducted by the Massachusetts Institute of Technology and the University of Chicago involved sending 5,000 résumés with similar qualifications in response to job ads placed in Boston and Chicago newspapers. The résumés were randomly assigned stereotypically Caucasian-sounding names, such as Emily, and stereotypically African American-sounding names, such as Lakisha. *Result:* The “Caucasian applicants” received 50% more callback interviews than the “African American applicants.”

Here are four tips to help HR professionals and hiring managers maintain objectivity and reduce the effect of unconscious biases:

1. Establish hiring criteria that specify the qualifications needed for each job. Managers must be able to articulate court-worthy reasons for rejecting/accepting applicants based on the established standards.

2. Use a blind applicant-review system. Have all résumés sent to HR, which then makes copies with the identifying information blacked out. The copies get passed on to the appropriate managers to decide whom to call for an interview. With names and addresses taken out of the picture, it will be easier to argue in court that the managers based their decisions on qualifications alone.

Of course, once the managers see or speak to the applicants, it will be more difficult to keep the process objective. The next two steps can help.

3. Ask applicants the same questions. Give everyone the same shot to win the job. If allowed to wing it, an interviewer's biases may unwittingly affect the course of the interview. For example, an interviewer finds out that an applicant lives in a neighborhood that the interviewer associates with drug dealers. This may result in the interviewer holding the applicant to higher standards by asking more demanding questions and judging the applicant with a more critical eye.

4. Use diverse interviewers. There is a tendency to favor people who are like oneself. Eliminate this potential bias by placing diverse managers on an interview panel, requiring multiple rounds of interviews with different managers, etc.

Best practice: Create a checklist to stay focused during interviews—and retain it to document the hiring process in the event a spurned candidate decides to sue.

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