

DEFINE “UNQUALIFIED”

JOB DESCRIPTIONS, INTERVIEWS AND BACKGROUND CHECKS WILL BE INTENSIVELY SCRUTINIZED IN HIRING PRACTICES CLAIMS.

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Recruiting and hiring the right people is one of the most critical decisions facing employers of all sizes. Qualifications and skills listed on an electronic résumé, however, are oftentimes insufficient or inaccurate indicators of the potential long-term success of candidates for employment. Moreover, without having the appropriate policies, procedures and protocols in place, significant potential legal liability lies just around the corner for unsuspecting employers who approach the recruitment and hiring process in an inappropriate manner.

Employers must be conscientious and deliberate in the methods and practices utilized when recruiting, evaluating and selecting candidates for employment. Issues of particular importance that have an impact on the outcome of employers' hiring efforts and the likelihood of success in finding the best person for the job include written job descriptions, hiring for cultural fit and employee background checks.



Job Descriptions Are More Than Hiring Tools

Effective job descriptions can enable companies to significantly focus their efforts on recruiting and selecting top talent to fill the ranks at all levels of an organization. Not only do they assist in reducing the number of résumés fielded by an employer from unqualified candidates; they also allow employers to make more educated, accurate hiring decisions.

Beyond hiring, job descriptions that precisely and accurately articulate the essential duties, responsibilities, objectives and performance standards of a given position allow employers to effectively manage and evaluate employees once they've joined the organization. In many instances, written job descriptions can be translated into numeric evaluation scorecards that can be utilized as an objective assessment tool to evaluate whether an employee is performing in accordance with the company's expectations and performance standards.

Importantly, written job descriptions also operate as a noteworthy tool in the defense of a range of different types of legal claims and lawsuits. In this respect, the written job description has become one of the most vital—if not the most vital—pieces of written documentation that an employer possesses to defend itself against the risk and potential liability that may arise from claims of alleged unlawful employment practices. With that in mind, job descriptions should contain the following elements.

Job Summary: Every job description should begin with a concise narrative that lays out the essence of the job and a brief overview of the position's most important essential functions. This section can also include a brief discussion of the relationship of the position to other positions within the company, including supervisory roles and other relationships.

Essential Functions: Employers must ensure that the position is fully analyzed and that the job description accurately describes the employee's essen-

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tial duties and responsibilities—and not secondary or ancillary functions. This section of a job description serves as the basis for a wide range of critical employment and workforce planning decisions. Under the Americans with Disabilities Act, essential functions are “the fundamental job duties of the employment position the individual with a disability holds or desires” and do not include the marginal functions of the position. From a general perspective, a job function is essential if the job exists specifically to perform that particular function or if individuals are specifically employed to perform the function.

Moreover, where a description includes categories, employers should list the essential functions under the proper category. Employers should focus on the required outcomes of the job's tasks, as opposed to the tasks themselves. Finally, in addition to the actual functions of the job, this section should also involve a list of key expected behaviors, which are especially important in the context of ADA claims due to a court's willingness to treat these behaviors as essential job functions. Examples of appropriate behaviors to list in this section are “daily attendance at employer's physical office” and “collaborate cooperatively with third-party vendors.”

Job Qualifications: Qualifications and other characteristics that potential new hires must minimally possess

in order to successfully carry out the essential functions of the job must also be included. In particular, this section should articulate the education, experience and/or skills required for the position. In addition, this section should also include a list of “preferred” or “specialized” qualifications that candidates are not required to possess but which the company desires in the individual hired to fill the position. It is critical that all job qualifications are specific, realistic and defensible and that employers avoid qualifications that are inflated or arbitrary. Qualifications that are unnecessarily stringent may not only dissuade people who are qualified from seeking the position but may also disproportionately impact certain classes of individuals, thus exposing companies to disparate-impact discrimination claims.

Working Conditions: This section should articulate the physical requirements and occupational hazards of the position. If a position requires any special requirements or physical duties, such as the ability to sit for long periods of time, the job description should outline all such requirements. In addition, this section should also include any unusual conditions, such as hazards or loud noises.

Performance Expectations & Standards: This section should discuss the employee's required level of performance and what the employee is

expected to accomplish while working in a given position. Employers should discuss both the immediate and long-term objectives and goals for the position and articulate what constitutes outstanding performance. This section is particularly important to employers because it can be leveraged to support an employer's defense that a worker was disciplined or terminated for legitimate, non-discriminatory business reasons and that dismissal was not due to discrimination on the part of the employer.

Avoiding Discrimination Claims

To effectively guard against discrimination claims, job descriptions should be written in a completely objective manner with specific, neutral, non-discriminatory criteria. This will assist those in charge of hiring from making subjective decisions founded upon impermissible personal stereotypes or hidden biases. In particular, employers should establish objective, job-related qualification standards based on the actual duties, functions and responsibilities of the position in question. To guard against claims of discriminatory disparate treatment, employers must carefully and accurately articulate the employee's job duties and performance requirements, which can assist the employer in demonstrating that a worker was fired for non-discriminatory, performance-related reasons—and not because of the worker's protected characteristic—in the event that a worker pursues a discrimination claim following disciplinary action taken by the employer. Moreover, to avoid potential disparate-impact discrimination claims, employers must also ensure that the qualifications and criteria listed in the job description do not disproportionately preclude members of a certain protected class from employment unless the qualifications and criteria are necessary for successful job performance.

Similarly, job descriptions must be crafted with an eye toward minimizing the risk of potential ADA disability discrimination claims. Under the ADA, it is unlawful to discriminate against

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a qualified worker with a disability in any aspect of the worker's employment. Therefore, job descriptions should provide a basis from which the company can ascertain whether a disabled applicant or employee is otherwise qualified for a position and, if so, enable the company to determine what accommodation(s) might be required to allow the individual to be able to perform the essential functions of the position. Significantly, both the Equal Employment Opportunity Commission and the courts give substantial deference and weight to detailed, written job descriptions addressing essential functions in resolving disputes that arise in connection with disability discrimination claims and the issue of whether a function is essential.

Cultural Fit

A company must know where it wants to go before it can reach its destination of staffing the organization with employees who fit its cultural mold. To target individuals who align with the company's culture, employers must clearly understand and define the organization's core

ethos, which will enable it to identify the specific ideals, motivations and beliefs that should be targeted during the hiring process. Linking company culture to core competencies can serve as a robust defense to claims of discrimination in the hiring process by demonstrating that the targeted cultural values and motivations are necessary for a candidate to carry out his job responsibilities.

Well crafted job descriptions focusing on key organizational values and ideals allow candidates to screen themselves out when they see keywords and phrases that don't mesh with their own personal values, motivations and lifestyle, allowing employers to significantly streamline the hiring process.

To properly assess cultural fit, employers should design a structured interview process that enables the company to make educated assessments as to whether a particular candidate's key motivations, values and principles align with the organization's ethos and philosophy. For example, inquiries such as whether a candidate is a team player and examples of instances in which a candidate was faced with dilemmas or problems and how they successfully overcame them are effective, objective ways to measure a candidate's personal makeup and his compatibility with the company's culture while steering clear of any potentially discriminatory hiring practices. In doing so, however, employers must ensure that the interview process is carried out in a uniform fashion so that all candidates are asked the same questions specifically designed by the employer to assess whether a candidate is personally aligned with the culture of the organization.

Pre-Employment Background Checks and Criminal History

Pre-employment background checks are another important tool utilized by employers to ensure smart hiring decisions, but they can also open the door to potential legal liability. The benefits of employing background checks in the hiring process are that

they may shield employers from hiring potentially risky individuals, and they aid in shielding employers from being on the receiving end of negligent hiring and negligent supervision claims. Yet they can be costly endeavors and can expose employers to legal liability, such as being the target of disparate-impact discrimination claims arising from the unlawful consideration of certain protected characteristics.

While employers are generally permitted to obtain background checks on candidates, in recent years employers have had to become increasingly aware of “ban-the-box” laws in effect in various jurisdictions that control when an employer is permitted to ask about a candidate’s criminal history. Those laws vary across jurisdictions: some permit criminal history inquiries any time after the initial application, while others prevent inquiry until after a candidate is selected for an interview or after a conditional offer of employment is made. Likewise, some ban-the-box laws restrict the type of criminal-related information that an employer may seek about a candidate. For instance, some prohibit employers from asking about non-conviction arrests or expunged records, while others permit inquiry into only certain convictions.

In addition, special rules and requirements apply to employers that obtain background reports from third parties who are hired to compile background information. To ensure compliance with state and federal rules and regulations regarding the use of background reports, employers must fully inform all candidates that the company may utilize background checks as part of the hiring process and that information from background checks may be used as part of the candidate evaluation process. All candidates should receive a written, stand-alone notice informing the prospective new hires of the employer’s right to utilize background reports as part of the pre-employment process.

Second, the employer must obtain a

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candidate’s written approval to perform a background check prior to the time that a company commences any form of investigation of the candidate. This written consent can be a part of the notice document that is provided by the employer to inform the candidate of the use of background checks during the pre-employment process.

Third, the employer must ensure that the process for conducting background checks is consistent across all candidates. While different job types or classifications may necessitate different types or levels of investigation, the same searches and investigations should be conducted on all applicants who are applying for the same position.

Fourth, employers must avoid implementing a comprehensive, blanket policy pertaining to the impact of a candidate’s criminal history on hiring by the employer. Employers should steer clear of adopting policies such as an absolute ban on the hiring of felons or those with prior criminal records. Employers should never automatically eliminate a candidate from consideration based solely on a solitary concern arising from a candidate’s background check, because in most instances that practice will run afoul of laws against discrimination. Rather, employers should evaluate the candidate from a more holistic standpoint and employ an individualized analysis of each candi-

date’s situation to determine, first, that the criminal record is accurate and, then, whether the conviction at issue is substantially related to the job opportunity or presents serious public safety concerns. An employer’s policy that demonstrates job-relatedness and business necessity in the use and consideration of information obtained from criminal background checks is most likely one to be upheld if challenged.

Fifth, when utilizing information obtained from a criminal background check, employers must apply the same standards to all candidates, regardless of their status in a protected class. Importantly, employers should proceed with extra caution when engaging in employment decisions in connection with background checks that substantially disadvantage candidates of a particular class, because such decisions could form the basis for disparate-impact discrimination claims.

Finally, when information learned from a background report is used as the basis for an adverse employment decision regarding a candidate for employment, certain notification requirements are triggered on the part of the employer, depending on the jurisdiction in which the employer conducts its operations. In particular, before taking any adverse employment action based on information learned in a criminal background report—including choosing not to hire

the candidate—the employer must notify the candidate of his right to challenge the report, supply a copy of the report in question, and provide the candidate with the opportunity to review the report and explain any negative information. Furthermore, after the adverse employment decision is executed, the employer must also notify the candidate that the company's rejection of him for employment was due to information contained in the criminal background report and that the candidate is entitled to dispute the accuracy or completeness of the report.

The Final Word

The importance of finding and retaining quality employees cannot be overstated when it comes to long-term business success. However, hiring and maintaining a workforce of highly qualified and culturally compatible individuals for employment is becoming increasingly

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difficult in today's ultra-competitive business environment. Armed with the right talent management strategies and proper candidate evaluation tools, companies can make smart hiring decisions that yield a powerful return on investment for the organization for years to come while at the same time minimizing the risk of running afoul of the ream of employment laws applicable

to the pre-employment recruitment and hiring process. ■

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