

# Avoid discrimination lawsuits! Beware hiring below minimum job requirements

Employers usually include a long list of desired qualifications when they post a job opening. Then, especially in a job market like the current one, where there are fewer and fewer qualified applicants vying for job openings, employers settle for a candidate who meets some but not all of the posted minimum qualifications.

That may be a practical solution, but some caution is in order.

*Here's the problem:* If you rejected an applicant early in the process because he or she didn't meet your stated minimum requirements, but then hired someone else who also didn't meet them, then the rejected applicant may have a potential discrimination lawsuit.

Let's say, for example, that your job posting said you required a master's degree and rejected a candidate who only had a bachelor's degree. Then, you interviewed and hired another candidate without a master's who didn't belong to the first candidate's protected classification. The first applicant could sue, alleging discrimination.

Ordinarily, if you had hired someone who met all the listed qualifications, this would sink the discrimination lawsuit. The court would dismiss the case because the rejected candidate wasn't qualified for the job since he didn't have that degree. But since you hired someone else without the degree, that defense might not fly. The court might let the case proceed.

**Recent case:** Douglas applied for a position with the Post Office as a criminal investigator. He was over age 40. When he didn't get the job, he sued for age discrimination.

The U.S. Postal Service asked the court to toss out the case because Douglas lacked a qualification for the position that was included in the original announcement. That qualification was prior possession of a criminal investigator certification. The lower court dismissed the case.

Douglas appealed, and the 8th Circuit Court of Appeals reinstated his lawsuit.

Douglas argued he had every other qualification for the job except the special certification—but neither did the person who was hired. The appeals court agreed with Douglas that he was therefore qualified for the position. Plus, the successful applicant was younger than Douglas.

If the chosen candidate also didn't have the special certification then Douglas couldn't be rejected because he didn't either. The case will now proceed. (*McPherson v. Brennan*, 8th Cir., 2018)

## How to set job requirements and retain flexibility to hire the candidate you want

How should employers handle making exceptions in hiring? A better approach is to designate absolute minimum requirements and desired qualifications. Then be as inclusive as possible in granting interviews.

It may be better to interview more candidates than fewer if you think you may have to lower your requirements in order to find someone to fill the position.

Remember to be sensitive to age discrimination claims, too. During the Great Recession, older workers had a harder time finding new jobs after being laid off. As a result, there are still a fair number of potential applicants who were discouraged from even applying for the few open positions there were.

Now, a decade later, those potential applicants are even older. But they have heard the news about how difficult it is for employers to fill jobs and some are dipping their toes back into the labor pool.