

How to hire in a legally safe way: Your FAQs, answered

If it goes well, hiring a new employee is the beginning of a fruitful working relationship. But hiring can also be a legal minefield in which one wrong step can lead to a costly lawsuit. This Q&A is designed to keep you on the right hiring path.

Are employers required to run background checks?

Not generally. However, many employers do conduct background checks on applicants to learn about their work histories, verify claimed education and check their criminal records and financial history.

There are three big considerations for employers that conduct background checks or outsource the task.

The first is that any background check should be for a legitimate business reason. If you do conduct a background investigation, you must treat everyone equally. You cannot ask some applicants about their background but not others. Also, you cannot ask for genetic information or require a medical check until after you've made a conditional job offer.

The second consideration is whether your workplace is located in a jurisdiction that limits when you can ask about criminal history. Many cities and states now prohibit asking about an applicant's criminal history before an interview or conditional job offer. Others limit the kinds of criminal convictions you can consider.

Finally, you must determine if the Fair Credit Reporting Act applies to the type of background check you want to conduct.

The FCRA applies every time you outsource a background check. You must notify the applicant in a separate written notice, not the application. Then get the applicant's written consent. If the report you are obtaining includes personal interviews, you must also tell the applicant. Then, if you decide not to hire the applicant based on the background check, you must first let him know. The notice must include the report you relied on and information on how to challenge it. Then, once you have made the decision not to hire, you must let the individual know who provided the information.

How many questions should I prepare to ask in an interview?

It's not so much how many questions you should prepare as what types of questions you may use.

First, all questions must be job-related. Second, you cannot ask questions about protected characteristics like race, age, sex, religion, disability or pregnancy and child-bearing plans. If you do, a disappointed applicant may sue, alleging failure to hire based on questions you asked.

Third, to avoid discrimination lawsuits, you must ask each applicant you interview the same questions. If you use a hiring committee, each member must adhere to those rules.

Everyone participating in the interview should keep their notes and provide a copy to HR.

What is wrongful hiring?

Wrongful hiring refers to a claim alleging that a job turned out to be other than promised. An engineer recently won \$1.9 million after he was hired allegedly just to make the employer look good for an upcoming merger.

If an employer hires someone and knows the new employee will probably lose the job soon, that's wrongful hiring. Prevent this by making no promises of continued employment. If the position is temporary, say so. If it's grant-funded, discuss the risk that funding won't be renewed. This is a case where honesty is essential.

What is negligent hiring?

Negligent hiring is a legal term describing liability for not performing due diligence when making a hire. For example, a nursing home that ignores a required state background check could be liable for negligent hiring.

Employers must make sure they know which positions require verification of credentials such as mandatory licenses.

Consider conducting a thorough background check for any hire who will enter customers' homes alone.

Why are accurate and complete job descriptions so important?

Job descriptions must be accurate and represent the job as it actually exists. That is, the description must match what the employee holding or who will hold the job does or will do.

To comply with the ADA, job descriptions must list essential and nonessential functions. This will also help you properly administer FMLA leave.

That's because the ADA requires you to accommodate essential functions and omit nonessential functions for disabled employees. The FMLA allows leave for serious health conditions that prevent the employee from performing her job's essential functions. If you don't list essential functions, a judge will decide which ones are and are not essential. If you do list them, that same judge is likely to accept your assessment of what's essential.

Job descriptions are also a tool for properly classifying workers as exempt or hourly under the Fair Labor Standards Act. Your job description should state whether the job is exempt or hourly. If exempt, list job duties and responsibilities that line up with one of the exemptions, such as administrative, executive or professional.