

# How to apply diverse hiring practices to your business



Examining diverse

hiring practices encompasses everything from advertising open positions to hiring the selected candidate. Each step from your advertising copy, to your hiring software and screening tests, carries potential legal pitfalls. But there's also opportunity. Cast your net wide enough and take some risk, and you will attract the best talent. Rely only on word-of-mouth and recommendations, and your workforce will be stuck in the past.

Hiring practices do not exist in a vacuum. In the wake of the #MeToo and Black Lives Matter movements, many companies have launched diversity initiatives. Prominent corporate leaders have signed the [CEO Action Pledge](#), promising to overhaul corporate culture and welcome women and minority candidates. But pledges only do so much. Without scrutinizing your current practices and rooting out those that perpetuate discrimination, change won't happen.

Concepts such as resume bias, systemic discrimination, and pay history bias only recently entered the HR lexicon. They have, however, become weapons in plaintiff attorneys' arsenals. If your hiring practices haven't kept up, you may face thousands in legal fees and settlements. Plus, you won't end up with that diverse, talented workforce you need to compete today.

Hiring is the first company process applicants experience and it tells applicants a lot about your company culture. Is the process welcoming or overly bureaucratic? Do the websites hosting your ads screen out protected employee classes disproportionately? Does the wording in your ads discourage some workers from applying?

Does your equal opportunity statement advertise the opposite by leaving out newly protected classes?

Here's a step-by-step look at the hiring process and what to watch out for when trying to craft a more diversity-friendly approach.

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## **Diverse hiring practices start with job descriptions**

You cannot begin the hiring process without first crafting a job description. It's impossible to comply with the Americans with Disabilities Act (ADA) without a job description that outlines essential and non-essential tasks. Likewise, the Family and Medical Leave Act (FMLA) allows leave for employees with serious health conditions. Serious health conditions are those that prevent an employee from performing essential functions of a job. The job description provides those. Make sure those job descriptions welcome disabled applicants by identifying essential functions and inviting accommodation requests.

While managers can often provide a good base job description, input from employees who have held the position is essential. Include workers whose position interacts with that job as well. Get job description input from as many employees as possible. This makes it less likely you'll omit a key part of the job.

Because duties change over time, you should update job descriptions regularly to ensure they accurately describe what workers do. Job descriptions are the first documents requested by lawyers representing workers, and by the administrative agencies that enforce the law. If you don't have one or it isn't accurate, your case is off to a bad start.

### **Job descriptions should include:**

- 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 the worker supervises.
- Any special training, experience, or education required for the position, including special certifications, degrees, or skills.

If your diversity plan includes wanting to close the skills gap, the job description can help. Is your organization open to training promising applicants? State it here. Highlight any skills gap programs you have or plan on launching. Repeat the information in the job advertisements too.

## **Job advertisements should reflect commitments to diversity**

Once you have a good job description, the next step in implementing more diverse hiring practices is to look at the job listing.

### **The job listing or advertisement should include the following:**

- Job title and number.
- Location of the position.
- Hours of work and whether travel/overtime is required.
- Salary range and a brief explanation of benefits.
- 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.

Note that your equal employment opportunity statement should be up-to-date. Last June, the Supreme Court expanded that Title VII of the Civil Rights Act's ban on sex discrimination. It now includes discrimination based on gender identity and sexual orientation. Leaving this out will subject your company to ridicule and discourage qualified, talented applicants seeking a modern, progressive workplace.

Additionally, consider the wording in your job description and how it may read to different diverse candidates. Encouraging employees with a "good sense of humor" to apply may seem harmless. However, a minority candidate may see that as an indicator of a toxic culture where tolerance of inappropriate jokes and behavior is expected.

## **AI systems may not be all they promise to be**

Several new software programs claim to eliminate employment discrimination by using artificial intelligence (AI). It's tempting to 'outsource' your diversity recruiting to AI. Be forewarned: While a promising field, some programs may suffer from the garbage in, garbage out syndrome. Regardless of how objective AI promises to be, it must still make judgments based on human criteria. If the criteria contain biases, AI merely automates the bias.

Several states have moved to limit or regulate AI in hiring. In January 2020, Illinois passed legislation regulating how businesses can use AI in video job interviews. The law requires companies to notify candidates that the technology will be used to analyze their video interviews. Employers must disclose to candidates how the AI works. The candidate must consent to be evaluated by AI before any interview occurs. Other states are currently considering similar legislation. A New York City proposal goes even farther. It would regulate AI use in hiring, compensation, and other HR-related decisions. It would also require AI developers to validate their products by showing they don't discriminate.

This is a quickly changing field. Before choosing to implement an AI product as part of your diverse hiring practices, consult with counsel to determine what is permitted in your area.

## **Perpetuating discrimination in the hiring process**

Basing job offers on past decisions can create legal jeopardy for employers. That's true even though a different employer is responsible for those decisions. If you're not careful, you inherit them. Recent legal and legislative initiatives have targeted employer's use of salary history as discriminatory. Critics argue the practice affects women disproportionately. Women have traditionally been paid less than men for similar work. Basing current salary on past salary may perpetuate past discrimination. Currently, 19 states and 21 municipalities ban employers from asking applicants for their salary history.

A similar situation happens when employers ask previous employers about absenteeism. This question often triggers a response that reveals protected leave usage. Several federal laws prohibit employers from penalizing employees for taking protected leave, workers' compensation claims, and disability. Employers who inquire about an applicant's attendance record should bear that in mind. It's best not to ask at all.

## **Criminal background and credit checks**

The Ban-the-box movement calls on employers to not ask about criminal convictions on job applications. In locations where the ban has passed, employers must make a conditional job offer before requesting criminal records. The EEOC has long held that criminal background checks disproportionately impact minority applicants.

They argue that even if the applicant has a conviction, the employer should consider the following when hiring:

- The nature and gravity of the offense.
- The amount of time that passed since it was committed.
- The nature of the job held or sought. This analysis is highly fact-specific.

To date, 35 states and over 150 municipalities prohibit public employers from asking job applicants about their criminal history. In fourteen states and 20 municipalities, the prohibition applies to private employers as well.

The EEOC has also long held that using credit scores in hiring disproportionately affects minorities. Following that lead, the City of Philadelphia recently passed an ordinance banning the practice in most cases.

## **Avoiding backlash for diverse hiring practices**

Advances for women and minorities have increased in recent years. During the pandemic, one consequence became apparent. Those last hired were often first laid-off. And that means female and minority workers have once again seen progress erased. Plus, employers may face charges of reverse discrimination if they base hiring decisions on setting diversity goals rather than qualifications. Hiring a less qualified minority candidate violates Title VII. Fortunately, there are several strategies that can legally allow employers to create a diverse workforce.

The first strategy is to look in the mirror. Talk to current minority employees and find out what issues they face. Are minorities represented in management in the same numbers as other company positions? If not, examine promotion policies with an eye to finding discriminatory patterns.

The New York Times recently held focus groups for minority employees to understand the challenges they face. Management at the Times has pledged to address the concerns raised. It's part of an effort to make minority workers comfortable enough to discuss problems. Bottom line — a workplace where minority workers are comfortable may be the best recruiting tool.

Employers may also hold networking events and job fairs in minority areas when health conditions permit. In the meantime, asking minority workers for references to fill vacancies may help guide recruiting efforts.

## **Beyond the diversity initiative**

Diversity initiatives that have pre-determined end dates are doomed to failure. The point is to change workplace culture so that it reflects the workforce. It will continue to evolve. If your organization doesn't keep up, it will miss the best talent.

**Additional Resource:** Read more about the [role managers play](#) in workplace diversity.