

Legal Hiring Practices

“I hire people brighter than me and then I get out of their way”

- Bill Gates

Few decisions have a greater impact on the long-term success (or failure) of a business than those that have to do with selecting the right person for the job.

While no applicant is a perfect fit, the right person will bring certain minimum qualifications to the position, such as:

- The knowledge, skills and abilities necessary to hit the ground running,
- People skills necessary to interface with your organization and clientele, and
- Motivation to begin making a valuable contribution without constant supervision.

Of course, finding that person consumes time, energy, and resources. In addition, legal requirements place a number of restrictions on how potential employers go about advertising positions, soliciting applications, interviewing candidates and conducting background checks. A misstep here can create room for a potential complaint or lawsuit around issues like employment discrimination, negligent hiring or invasion of privacy.

The aim of *Legal Hiring Practices* is to assist employers to safely navigate the potential minefield of bringing on an employee. Along the way, this handbook provides helpful guidance, tips and resources on every aspect of the hiring decision, ranging from creating a position description all the way through to conducting a successful new-hire orientation. At the heart of *Legal Hiring Practices*, however, is the idea that creating and following a set of consistently applied legal hiring procedures is the key to:

- Identifying the right person for the job;
- Creating a fair and consistent opportunity for a successful employment relationship; and
- Steering clear of potential legal pitfalls.

Discrimination in hiring

By far the widest of potential legal pitfalls within the hiring process facing employers is liability for discrimination. Employers are generally aware that discrimination in hiring decisions based on factors like race, gender or color is unlawful, but state and federal civil rights laws also protect a host of other factors or “classifications.” Treating an employee (or a potential employee) differently because he or she fits into one or more of these protected classifications will usually result in a violation of civil rights laws and potential liability for the employer. Although it would be odd indeed to see an employer

advertise for “white help only” these days, it remains routine to hear of employers that do not want to hire a pregnant woman or a laid off 58-year old worker.

The chart on the following page summarizes the protected classifications set out under state and federal civil rights laws. A complete discussion on working with protected classes is also available in the 2012 edition of BOLI’s *Civil Rights Laws, A Handbook for Oregon Employers*.

Disparate impact in hiring

In addition to the range of classifications protected by civil rights laws and the legal risk of intentional discrimination, employers also need to be aware of the impact (even if unintentional) that their hiring practices have on protected classifications. In other words, hiring practices that seem neutral, but result in fewer opportunities for members of a protected class may be deemed discriminatory in that they have “disparate” or “adverse” impact on one or more protected class.

Elements of the hiring process

In order to identify the best qualified job candidate for a particular position *and* avoid running afoul of applicable employment laws, employers should consistently proceed through a hiring process that includes some form of each of the following elements:

- Job analysis;
- Written position description;
- Recruitment;
- Applications;
- Interviews;
- Background checks and references; and
- Orientation.

The structure of *Legal Hiring Practices* from this point forward is built around unpacking each of these elements as well as highlighting considerations for minimizing the risk of legal claims.

A Summary of Protected Classifications

FEDERAL LAW	OREGON LAW
<p>TITLE VII OF CIVIL RIGHTS ACT OF 1964 Federal laws apply when an employer has 15 or more employees (except where noted)</p> <p>Race Color National Origin Sex (includes pregnancy-related conditions) Religion Retaliation Association with Protected Class Genetic Information (under Genetic Information Nondiscrimination Act)</p>	<p>OREGON REVISED STATUTES CHAPTER 659A State laws apply when an employer has 1 or more employees (except where noted)</p> <p>Race Color National Origin Sex (includes pregnancy-related conditions) Religion Retaliation Association with Protected Class Prohibition on Genetic Screening and Brain-wave Testing</p>
<p>AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 Age (40 and older in companies with 20+ employees)</p>	<p>OREGON REVISED STATUTES CHAPTER 659A Age (18 and older)</p>
<p>Uniformed Services Employment and Reemployment Rights Act of 1994 and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (all employers)</p> <p>Veteran Status Leave to Serve in the Military Veterans Preference in Hiring and Promotion (Public Employers)</p>	<p>Members of the Uniformed Services (ORS 659A.082) Taking leave to Serve in State-organized Militia (ORS 39.065)</p> <p>Veteran Status Leave to Serve in State-organized Militia Veterans Preference in Hiring and Promotion (Public Employers)</p>
<p>AMERICANS WITH DISABILITIES ACT OF 1990 Physical or Mental Disability</p>	<p>OREGON REVISED STATUTES CHAPTER 659A Physical or Mental Disability (in companies with 6+ employees)</p>
<p>Family and Medical Leave Act of 1993 (in companies with 50+ employees)</p> <p>Protected leave for:</p> <ul style="list-style-type: none"> • Serious health condition of employee (including pregnancy-related conditions) • Serious health condition of employee's family Member (includes spouse, parent, biological or adopted or foster child) • Parental leave for birth or placement of newborn, adopted or newly-placed foster child <p>Leave by Spouse, Son, Daughter or Parent of a Covered Military Service Member on active duty or call to active duty status for a qualifying exigency</p> <p>Leave by Parent, Spouse or Child of Next of Kin to care for a seriously ill or injured service member or veteran (26 weeks)</p>	<p>Oregon Family Leave Act (in companies with 25+ employees)</p> <p>Protected leave for:</p> <ul style="list-style-type: none"> • Serious health condition of employee (including pregnancy-related conditions) • Serious health condition of employee's family Member (includes spouse, parent, biological or adopted or foster child, parent-in-law, grandparent, grandchild, same-sex domestic partner and parent or child of same-sex domestic partner) • Parental leave for birth or placement of newborn, adopted or newly-placed foster child • Non-serious health condition of a child requiring home care <p>Leave by Spouse or Same-sex Domestic Partner of Member of the Armed Forces prior to or during leave from deployment (under the Oregon Military Family Leave Act, ORS 659A.090 to 659A.099 in companies with 25+ employees)</p>