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Interviewing Guidelines - A Review for Employers

By: Bethany McCurdy, Esq.

The job interview - it is an important and necessary process for any employer, no matter what kind or size of business. It is the first time your company has contact with a potential employee and, if done well, can put the company in a favorable position, regardless if the employee is hired or not. But when an interview is done poorly, it can set the stage for a rejected applicant to make a discrimination claim and expose the employer to significant liability.

While some companies use sophisticated testing methods and ask applicants questions specifically designed to elicit certain answers from which particular personality traits or the like can be ascertained, many employers fail to focus on the most basic and most important part of the interview process - training the interviewer.

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Most employers today have an understanding that certain topics are off limits during an interview, yet in many cases, this is not communicated effectively to the interviewer. Certainly most people would think that employees know well enough not to ask applicants about their health or whether they are married, yet these topics come up all the time.

One of the misconceptions about conducting interviews is that the *employer* is forbidden from raising an off-limits topic, but if the applicant brings it up, it is then an open book. This is simply not the case. For example, it is not uncommon for an applicant to make small talk with the interviewer at some point; the applicant might mention that his daughter loves school or another might talk about her upcoming wedding. Just because the applicant opens the door, does not mean the interviewer should go through. A little bit of small talk, especially when conducted during the formal interview itself, can come back to haunt an employer in a discrimination complaint.

Employers should make sure any employees who conduct interviews are aware of this and know not only how to recognize a topic that should not be discussed, but also how to redirect the conversation to the interview and job at hand. This does not mean the interviewer has to be rude or robotic; a quick "congratulations" to the applicant who mentioned her engagement is acceptable, but any additional discussion, no matter how benign it might seem at the time, could be problematic and should be avoided.

Employers should look at each interview not only as a tool to select new employees, but also as an opportunity to put the company in a safe position should a rejected applicant decide to file a claim. Failure to hire cases can be quite difficult to defend for several reasons. In many cases the employer seems to be in a position of disproving the allegation of discrimination, e.g. establish that its decision was not based upon protected class standing. While legally the burden is on the complainant to prove the case, the employer still is put in the position of explaining its decision. This is where the interview comes into play. The casual conversation about the daycare center an applicant takes her children to, in the context of a discrimination complaint, may appear as if the fact that the applicant had young children was a factor in the hiring decision.

One of the most effective ways an employer can combat failure to hire charges is to have well-trained employees conducting the interviews. All interviews should include some form of written notes or documentation. An established set of interview questions can be particularly useful so that there are some objective guidelines by which the hiring decisions are made. It also allows the potential for a meaningful comparison between an applicant who is rejected and one who is hired.

However, the written questions can only serve a useful purpose if the interviewer knows not only what should not be discussed, but also what should not be committed to writing. For example, it is not unusual for applicant to explain that he or she left a former job due to some medical or health issue and in many cases interviewers will note the reason verbatim. In situations such as this, the

interviewer should note a more neutral reason such as "personal reasons" instead of detailing a medical reason. This is honest and accurate, but much less risky.

The flip side of the coin is the need to train interviewers to accurately note their honest impressions of an applicant. This is especially important when the reasons for rejecting an applicant are subjective. For example, if during an interview an applicant is rude and distracted and this influenced the interviewer's decision, then those facts should be included in any interview notes. There is nothing in the fair employment laws that expressly prohibits employers from making subjective hiring decisions; however, they are always more difficult to defend and often hinge upon credibility. This is where an interview that has been accurately documented can be especially helpful.

While some employers might think, why I would want to note that we did not hire someone because he picked his teeth or she was distracted and did not make any eye contact? Because if these are the true reasons for rejecting an applicant, then an employer is better off being straightforward and having that information out there right away, rather than getting into an investigation and having the interviewer testify that it really wasn't the applicant's job history or answer to question X, but rather it was because he picked his teeth during the interview.

So what can employers do to help limit exposure to failure to hire claims?

1. Training, training, training. Make sure interviewers are well-trained not only in the basics, but also in the nuances of an interview. They need to know what to say and note, along with knowing what not to say and note.
2. Make sure that interviewers note the specifics of the interview in an accurate and understandable way. When an interviewer rushes through one of what may be many interviews in a single day, the notes may be minimal. Interviewers should document an interview well enough so, at a minimum, if those notes are looked at six months later, the reason for the failure to hire should be apparent.
3. Not only make sure that the obviously "off limits" topics are not explicitly noted, interviewers should also make sure they do not use language that has racial, gender or other types of undertones, i.e. describing a woman's voice as shrill. Also avoid statements such as stating an applicant would not "fit in with the group" or other such exclusionary language.
4. The mantra of human resources - consistency, consistency, consistency. Make sure that all interviewers agree and understand what qualifications the company is seeking in potential hires and that all interviews are conducted in a similar manner.
5. Do not underestimate the importance and potential liability of the interview process. Interviews should not be taken lightly and should not be conducted by just anyone who happens to be

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available. Any employee who conducts an interview should have specific and detailed training in that process.

6. Big picture - make sure that whatever questions or process you use to screen potential hires, they have relevance to the job. If you just download a form on-line that is designed for a manufacturing facility and you run a service-based business, the information sought from applicants may not be relevant to the business at all. In the end, that does not help the company select employees anyway.

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