

Hiring & Promoting Avoiding Legal **Landmines**

by Danielle Crough, SPHR



If your organization is like most, you are often looking to hire new employees for one or more positions. Not only do you want the best candidates, you also want to hire people who will fit your organizational culture while creating a more diverse workforce. As you sift through your growing list of selection criteria and consider potential applicants, many questions may be going through your head: What selection tools should I utilize to choose a candidate who will likely excel in their given positions? Do I need to use other selection devices to ensure they are compatible with our company's culture? How do I create more diversity in the workplace? While it is important to focus on methods of procuring the best possible new hire, it is also critical to implement hiring practices that won't prompt legal action from a spurned applicant or initiate an audit of your organization's selection system. Hiring and promoting employees in our litigious society can be difficult, but following a few simple guidelines and learning from the mistakes of others will allow you to build a strong, valid selection system. Taking the time to improve your hiring practices *now* can potentially save you time and money *later*.

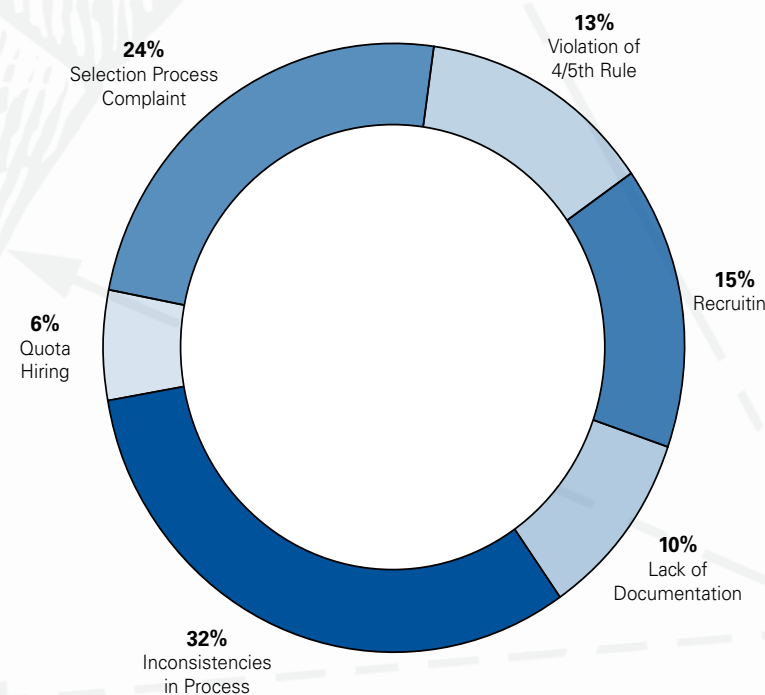
Discriminatory Hiring

A doctoral candidate at Clemson University recently conducted a study entitled, "Legal Risk in Selection: An Analysis of Processes and Tools." The study examined 10 years of litigation research which focused on external hiring to determine which devices are being used most often. It also identified selection processes which hold the highest risk for legal action resulting from unfair employment practices. Of 224 cases examined, 52 included complaints regarding a selection device, 91 included complaints against the overall selection process and 95 were deemed to have insufficient evidence to determine the nature of the complaint.¹ The following are 6 potentially discriminatory selection tools identified in the study and the percentage of legal complaints associated with them:

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| 1. Unstructured interviews | 58% |
| 2. Cognitive ability tests | 18% |
| 3. Physical (psychomotor) tests | 14% |
| 4. Structured interviews | 5% |
| 5. Other tests | 5% |
| 6. Biographical information blanks | 0% |

This list should not dissuade you from utilizing these particular selection tools; instead, it should inform you as to how to use them. For example, cognitive ability tests have actually shown strength in predicting job performance; however, it is important to be aware that they are more likely to demonstrate discrimination against protected classes. Structured interviews are also a useful tool for judging future job performance, but they appear on this list because some applicants do not excel in the formal nature of a structured interview and, therefore, perceive it more negatively. Still, of the structured interview cases that went to court, only 13% were ruled discriminatory, compared to 50% of the unstructured interview cases.

In addition to identifying hiring tools that are more likely to result in legal backlash, the study also recognized 6 selection process flaws which were challenged legally. Following are the percentage of legal cases associated with them:



These findings demonstrate the importance of a carefully scrutinized selection process. The study found that the majority of legal complaints were a result of inconsistent hiring processes. Complaints filed against recruiting practices included unfairly used word-of-mouth sourcing and failure to provide appropriate documentation to applicants, as well as other practices that prevented members of protected classes from applying. When

structuring a hiring process, an important rule of thumb to keep in mind is the "four/fifths rule." Sometimes referred to as the "80% rule," this equation is used by courts to determine the statistical disparity that occurs between protected classes due to the organization's selection procedures. In other words, organizations are in violation of the rule when a protected group comprises less than 80% of the acceptance rate of the remaining group. Although using a quota system to hire (reserving a certain number of positions for minority candidates) was only challenged in 6% of cases, all cases were found in favor of the plaintiff. Remember this rule and use it to your advantage.

Averting the Crisis

The most important question to consider when preparing to hire or promote someone is "How do these selection instruments and selection processes help predict job performance?" For example, a receptionist who spends 95% of his or her time answering the phone and typing would likely never need to lift or pull 100 pounds. Based on this information, there is no need to give a receptionist applicant a weight lifting test. It would not help predict job performance and, consequently, would not serve your purpose. Furthermore, it could potentially be discriminatory as males typically possess more physical strength than females.

Next, it is imperative to develop a company manual that thoroughly outlines your organization's hiring practices. This should be available to every interviewer and updated as necessary. Be thorough and consistent, and consider having a lawyer review the manual. This is a simple way to create awareness of workplace expectations. Developing a manual also ensures that each applicant is meticulously interviewed, which will hopefully lead to the most suitable hire – an obvious benefit in addition to avoiding a lawsuit.

It is also important that each individual involved in the hiring process is thoroughly trained, especially hiring managers. One wrong question by a friendly hiring manager, such as "Tell me about your family... are you married?" or "When did you graduate college?" could potentially lead to a lawsuit. Set aside time for a hiring workshop and cover all relevant information. It may be beneficial to have the company lawyer on hand to answer any questions.

Cost is another element worth considering when constructing your hiring procedures. Sometimes organizations believe that investing in a quality selection system is too expensive; however, failing to do so could be financially devastating. First, consider how much it costs to replace an employee—that figure could run upwards of \$50,000 for an employee earning \$40,000 annually. This price tag is due to a number of expenses, some of which include recruiting, interviewing and training.² Next, consider that the average fee per Equal Employment Opportunity Commission (EEOC) case is \$590,266, and the average fee for the US Labor Department's Office of Federal Contract Compliance Program (OFCCP) case is \$668,785. Moreover, when an individual plaintiff settles a case, the average cost is \$12,292,492. When cases actually go to trial and are ruled in favor of the plaintiff, the average cost to the organization is \$13,306,346. These startling figures help to put the cost of a quality hiring system into perspective.

Be Informed and Keep Investing

The above data shows that it is in the employer's best financial interest to invest in the creation and implementation of a solid hiring system. More importantly, it is in the employer's best personal and moral interest to be informed about the competing needs of their selection programs to ensure that they are not only legally safe, but also predictive of job performance. Following these guidelines and legalities will help avoid a lawsuit and serve as the best route to finding a good addition to your organization.

¹ Williams, Kate. "Legal Risk in Selection: An Analysis of Processes and Tools." April, 2011. Presented at the Society for Industrial Organizational Psychology in Chicago, IL.

² Ross, Blake. *Employee retention: What employee turnover really costs a company.* July 24, 2006. Accessed on November 3, 2011 at www.webpronews.com/employee-retention-what-employee-turnover-really-costs-your-company-2006-07

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