



Management Communication Systems, Inc.
4000 Bridgeway, Suite 404
Sausalito, CA 94965
Tel: (415) 339-2990 Fax: (415) 339-2999

Legal and Effective Interviewing

The hiring process, when handled incorrectly, can be extremely costly for employers. The hard dollar expenses associated with turnover of a position are over 40 percent of the annual salary, and the potential legal outlays which can result from an improper interview can be tremendous. The selection interview is the most important step in the hiring process. Properly trained managers and supervisors play a critical role in effective, successful and legal interviewing.

Everyone knows that companies have freedom of choice in hiring, managing and terminating employees—at least that's what the law says. However, in the past 10 to 15 years, this freedom has been steadily eroded by some laws and court decisions that have created significant exceptions to *employment-at-will*. Extreme caution is required of managers to keep their companies out of legal trouble with prospective, existing or former employees.

What's Changed

Here is a summary of the key legal changes that have occurred in recent years. Managers in all companies must be aware of these changes—and must adhere to them in order to avoid lawsuits based on discrimination.

Title VII of the Civil Rights Act prohibits discrimination in employment based on race, color, sex, religion or national origin. It is an all-encompassing law covering hiring, discharging, classifying, limiting or otherwise discriminating against individuals in matters of compensation or conditions or privileges of employment. While not new—it was enacted in 1964—the law has been the source of sizable judgments against employers in recent years.

Title VII also prohibits retaliation against an employee for filing a charge of discrimination, taking part in Equal Employment Opportunity Commission (EEOC) proceedings or opposing any practice made unlawful by Title VII.

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against employees and job applicants who are 40 years of age or older, unless age is a bona fide occupational qualification that is necessary to the normal operation of the employer's business.

Example: An employer who refuses to hire older workers to work in a warehouse because she believes that the job would be too difficult violates ADEA. Each worker must be evaluated on the basis of his abilities, regardless of age.

(This law also prohibits mandatory retirement on the basis of age except in very limited circumstances and imposes specific requirements before a waiver and release of claims under the law can be effective.)

As growing numbers of the baby-boom workforce enter their late 40s and early 50s, companies must be increasingly cautious about the risks of discriminating against people on the basis of age. Consult

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an employment attorney before implementing any personnel policy that could in any way be interpreted as disadvantageous to older employees.

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against a "qualified individual with a disability" with regard to the terms and conditions of employment.

This law requires that employers no longer screen out individuals with disabilities during the hiring process. Organizations may no longer conduct pre-employment medical screenings (except drug testing) or make pre-employment inquiries into the nature of an applicant's disability. Employers must become aware of physical barriers in the work environment and should provide current and relevant job descriptions.

A qualified individual with a disability is an individual with a disability who can, with or without "reasonable accommodation," perform the "essential functions" of the job. An *essential function* is one that is important to the employment position and a *reasonable accommodation* can be "any change in the work environment or the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities," so long as the accommodation does not pose an undue hardship upon the employer.

The law does state that an employer is not required to provide a reasonable accommodation if the accommodation would cause undue hardship. Whether an accommodation poses an undue hardship depends on several factors—including the cost of the item and the employer's resources.

Beyond Hiring and Firing

These important federal laws— along with a long list of state and local employment rules—govern not only the hiring and firing of employees. Failure to comply with them can also create legal problems for employers who misstep in their decisions on promotions, demotions and transfers.

Decisions about hiring are no longer easy—on the basis of the employment-at-will standard. Despite the complex legal constraints on employment decisions, it still is possible to run a company efficiently—without falling into costly legal traps. Companies that consistently make well-thought-out decisions—as opposed to impulsive acts—greatly reduce their legal risks by pinpointing and solving potential problems before those decisions become final.

The Interview Process

Interviewing, once simply a tiresome burden to managers, has now become a perilous endeavor. The cost of "mis-hires" is higher than ever – and a myriad of subtle, legal issues seem to lie in wait for the unwary. Doing a good job of conducting employment interviews and evaluating applicants takes more than having a pleasant, informal conversation. It requires training in the skills, techniques and requirements of successful interviewing.

Preparing for the Interview

Organize your time so that you are prepared for the interview. The following steps should be taken:

Schedule a time and location for the interview. You need a private area, free

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from interruptions where you can talk with applicants. Decide in advance of the interview how long it should take to interview for a particular position and allocate enough time.

Make sure you have read all the paperwork on the applicant – including cover letter, resume or completed application. Make notes, and based on the paperwork, decide what questions, related to the position, you need to ask the applicant regarding his or her credentials. For example, has the applicant earned a degree or received special training that would be beneficial to your organization's needs?

Review the current position description and update it if necessary. This will help you discuss the requirements, qualifications, and specific responsibilities of the job. It is important that you represent the position fairly and accurately to applicants. This will help the applicant understand what the position requires and help you match the right person to the job.

Create BEHAVIOR-BASED interview questions that will help determine the information you need in order to make a decision. Ask these questions consistently as you conduct your interviews. This will be helpful as you compare and evaluate candidates.

Approximately 95% of the interview questions suggested by standard "how-to-interview" guides are *opinion-based* questions. That is, they elicit candidates' opinions about themselves or a hypothetical situation.

For example, "Why should we hire you?"; "What is your greatest weakness?"; "What did you like most about your last job?"; and "How would you handle an upset customer?" are all very popular *opinion-*

based questions. The trouble is that the answers to these questions provide very little information which can help the interviewer make an intelligent, scientific selection decision.

Research has demonstrated that traditional interviewing techniques are less effective as an aid to selection decision-making than a simple coin toss. That's right – as a predictor of future job performance, the standard interview and its opinion-based questions are worse than no help at all.

The best predictor of what a person will do in the future is what that person has done in the past – this statement is an iron law of the behavioral sciences and the foundation of Behavior-Based Interviewing. Behavior-Based interview questions provide concrete data on past job performance, enabling the interviewer to evaluate accurately and objectively an individual candidate's suitability for a given position.

Some examples of Behavior-Based interview questions are: "Tell me about your most difficult sales call last year. What did you do? How did you prepare? What were the results?"; "Tell me about a time when you were unable to deliver a product to a customer as promised."; "Imago, Inc. represents a many powerful clients in influential positions and your job would involve interacting with them. Tell me about a time when you dealt with top-level executives on a regular basis."

As you can see, Behavior-Based interview questions are more complex than opinion-based questions, and less easy to create – but the results they deliver are worth the effort. You will elicit meaningful examples of past performance – and you will be doing so in an unbiased, legally defensible manner.

Setting the Tone

Relate information about the company. Discuss your background with the company or what caused you to join the company. Remember, don't "oversell" the organization or a particular job. And, don't use too much time giving information.

Once you have scheduled the interview, the following tips can help make it successful:

Make the applicant feel at ease.

Introduce yourself. Learn his or her name and use it. Be enthusiastic that the applicant is there. Give the impression that you are ready for the interview and looking forward to the conversation.

Establish rapport with a friendly attitude.

Take a few minutes to "break the ice" by mentioning either an interesting item from the applicant's resume, something you may have in common or a more general topic. An icebreaker topic related in some way to the particular applicant is a positive beginning to an interview session. Establish rapport with the applicant.

Make the applicant aware of what you do and how your job relates to the position for which he or she is interviewing. Answer the following for the applicant:

- Does the position report directly to you?
- Who will be making the hiring decision? What is the time-frame for the decision?
- What is the interviewing process? Are there other individuals in the organization with whom the applicant will need to interview?
- Who is responsible for discussing pay and benefits with the applicant?

Let the applicant know about the organization.

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job. And, don't use too much time giving information.

Don't allow the pleasant banter to take the place of the actual interview. Using a structured statement, inform the candidate that the interview is beginning and that you will be asking questions that you will be asking questions that are different from those they may be accustomed to.

Example: "My name is Ken Feld and I'm the V.P. for Sales here at MCS. We're interviewing today for a new Director of Marketing. The questions I'll be asking today may be a bit different from what you're used to, but we find that they help us get to know you better. Is that O.K. with you?"

Because Behavior-Based questions are so different from the pat, "hit 'em-out-of-the-park" questions most job applicants have prepared for and are familiar with, the interviewer will usually encounter some resistance. The resistance comes in three forms: The Silence; The Bluff; and The Slip.

The Silence is just that, silence. The shock of hearing an interview question which demands a specific example of past behavior temporarily stuns the candidate. Wait 5-7 seconds and reassure him or her by saying, "That's O.K., it takes most people a little while to think of an example."

A typical Bluff response to the Behavior-Based question "Tell me about a time when you dealt with an upset customer" is "Well, it happens all the time." Counter the Bluff with "O.K., then just tell me about the *last* time it happened."

The Slip occurs when the candidate "slips" into giving the interviewer an opinion instead of an example of past behavior. The interviewer must be on guard for this,

and gently but firmly keep the candidate on track: "That's very interesting. But could you give me an example of a time when your ability to adapt helped you close a difficult sale?"

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1. What was the **S**ituation?
 2. What were your **A**ctions?
 3. What were the **R**esults?
- and then:
4. **G**et references, and
 5. **E**valuate the candidate

Avoiding Discrimination

During the interview session, the applicant's answers to your questions are a valuable source of information. You must be aware that Equal Employment Opportunity (EEO) laws and regulations, as well as many individual state laws, prohibit discrimination against the applicants on the basis of age, race, color, religion, sex, disability or national origin. You should ask Behavior-Based questions so that the answers given will help determine the suitability of the applicant to a particular job. Your questions should be designed to help you establish the applicant's qualifications for the job.

In addition, it is a good practice to have more than one person interview the applicant. This will help you to better evaluate individuals and may, together with a

consistent interview format, help prevent charges of discrimination.

Gathering Information

Remember, job-related questions are the only legal means to help you determine skills and qualifications. You may safely use inquiries and your own observations regarding an applicant's:

- Personality traits
- Interest in your business
- Interpersonal skills
- Level of maturity
- Willingness to accept responsibility.

Applicants with Disabilities

- Make the interview accessible to people with disabilities.
- Do not automatically assume that the applicant needs assistance.
- Ask all questions in a straightforward manner.

Questions cannot be asked about:

- The nature of a disability
- The severity of a disability
- The condition causing a disability
- Any prognosis or expectation regarding a disability
- Whether or not the person will need treatment or special leave because of a disability.

After reviewing the job description with the applicant, ask questions about an applicant's ability to perform job-related functions.

When interviewing applicants with disabilities, make the most of your interview by:

- Asking whether the person knows of any reason that he or she cannot perform the essential functions of the job.

- Describing or demonstrating an essential job function and asking applicants whether or not they can perform the functions with or without reasonable accommodation.

It is a good idea to have a structured format for interviewing applicants. This helps to ensure consistency and comparability of your information on each candidate. It is also helpful in maintaining control of the interview and turning an overly talkative applicant back to the "interview track." Using your time efficiently is very important.

- Asking questions regarding ability to perform all job functions, not just those that are essential to the job—however, an applicant cannot be screened out because of his or her inability to perform marginal job functions.

- Providing information on the company's regular work hours, leave policies, absence policy and any special attendance standards for the job—then asking the applicant if those work-attendance requirements can be met.

The Interview Format

It is a good idea to have a structured format for interviewing applicants. This helps to ensure consistency and comparability of your information on each candidate. It is also helpful in maintaining control of the interview and turning an overly talkative applicant back to the "interview track." Using your time efficiently is very important.

You will be able to use a recently updated job description as an effective tool in describing the position's tasks, responsibilities and requirements. In addition, you will need to use legally defensible, Behavior-Based interview questions to encourage applicants to supply more in-depth information.

A consistent interviewing format will help you to more accurately evaluate individuals and guard against discrimination and unfair hiring practices.

Closing the Interview

When ending the interview, give the applicant a chance to add anything else he or

she thinks may be important for you to know in making your decision.

Give the applicant an opportunity to ask you any further questions about your organization or the job. Find out what level of interest the applicant has in the job you have discussed.

Make the applicant aware of the next steps:

- Will the applicant be asked to attend other interviews? If so, with whom and when?

- Who will next contact the applicant and in what time-frame?

Thank the applicant for his or her time.

Let the applicant know who to contact with questions and how to follow up the interview process.

Documenting the Interview

Your company may have a standard form to use in documenting your evaluation of a candidate. If so, review the form prior to the interview. If you have questions or find the form doesn't meet your needs, discuss this with a human resources manager or the appropriate individual. Complete the form immediately after the interview session.

It is a good idea to take brief notes during the interview. Let the applicant know from the start that you will be making notes as you talk together. This communicates to the applicant that you are serious about gathering as much information as possible on his or her skill level and suitability for the job. Your notes can be helpful in completing an evaluation form, in reflecting on individual applicants and in discussions with others who interviewed the same candidates.

TOPIC	LEGAL QUESTIONS	DISCRIMINATORY QUESTIONS
Family Status	Do you have any responsibilities that conflict with the job attendance or travel requirements?	Are you married? What is your spouse's name? What is your maiden name? Do you have any children? Are you pregnant? What are your childcare arrangements?
Race	None.	What is your race?
Religion	None. (<i>You may inquire about availability for weekend work.</i>)	What is your religion? Which church do you attend? What are your religious holidays?
Residence	What is your address?	Do you own or rent your home? Who resides with you?
Sex	None.	Are you male or female?
Age	If hired, can you offer proof that you are at least 18 years of age?	How old are you? What is your birthdate?
Arrests or Convictions of a Crime	Have you ever been convicted of a crime? (<i>You must state that a conviction will be considered only if it relates to fitness to perform the job being sought.</i>)	Have you ever been arrested?
Citizenship or Nationality	Can you show proof of your eligibility to work in the U.S.? Are you fluent in any languages other than English? (<i>You may ask the second question only if it relates to the job being sought.</i>)	Are you a U.S. citizen? Where were you born?
Disability	Are you able to perform the essential functions of this job with or without reasonable accommodation? (<i>Show the applicant the position description so he or she can give an informed answer.</i>)	Are you disabled? What is the nature or severity of your disability?