

**City of Hamilton**  
BUTLER COUNTY OHIO



**The Do's and Don'ts of Hiring:  
Selecting the Best Candidate While  
Avoiding Legal Pitfalls**

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**Presented by:**

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# Hiring Process

- The Importance of an Accurate Job Description
- Job Posting
- Employment Application
- Documenting the Interview and Decision
- Social Media as a Hiring Tool
- The Job Offer Letter
- Post-Offer Contingencies

# Job Description

- **Job descriptions should include:**
  - basic identifying information such as title, location, and supervisor;
  - minimum job qualifications;
  - job duties, including the essential functions of the job;
  - job-specific requirements such as travel or physical lifting requirements;
  - civil service status (classified or unclassified); and
  - Fair Labor Standards Act (FLSA) exempt or nonexempt status.
- **Although wanting a flexible job description seems most efficient, it can create legal risks**

# Job Description



- **Importance of accurate description of duties**
  - Ensures qualified person is hired and “non-qualified” persons are properly rejected;
  - Sets clear expectations for the employee;
  - Used to measure performance;
  - If a duty (such as working evenings) is not listed in a job description, the employer will have a difficult time establishing at a later date that such a duty is an “essential function” of the job; and
  - Documents basis for FLSA exempt status.

# Job Posting



- **Sample Job Posting:** Position open for Director of Marketing and Development. Bachelor's degree in marketing, business, communication, or related field required. Experience in fundraising and supervising staff a must. Must be a fun-loving, energetic person who is on the “cutting edge” of the industry.

# Job Posting

- **You have two applicants to choose from:**
- **Employee #1:** African-American woman, 45-years-old with a degree in Communications. She has 6 years of fundraising experience and has supervisory experience as Assistant Development Director at the American Red Cross.
- **Employee #2:** Caucasian male 32-years-old with a degree in Philosophy. He has 4 years of fundraising experience and has had 3 years of experience in supervising staff. Previous work experience includes being a Development Consultant.

# Job Posting

- **You choose Employee #2.** Even though on paper Employee #1 more closely matches your qualifications, you noted that Employee #1 was unfriendly, and hard to engage in conversation during her interview, while Employee #2 was energetic and enthusiastic about the position.

# Job Posting

- **Stick to the qualification requirements of your job postings.** *Jenkins v. Nashville Public Radio, 106 Fed. Appx. 991 (6th Cir. 2004).* Similar set of facts as hypo. The woman had all the job qualifications but a male was hired instead of her. This male had a degree in philosophy unlike her bachelor's degree in communications. The 6th Circuit reversed the lower court's decision to dismiss her race and gender discrimination claims.
- **DOCUMENT**— If your decision is inconsistent with the posted requirements, document why. If the candidates have similar qualifications, document why you chose one over the other.

- **Avoid postings that contain “code words” of discrimination:**
  - “New ideas” and “energetic” and “latest technology” correspond to stereotypes of age bias that should be avoided
  - Also avoid gender-specific terms, such as waitress or stewardess

# Employment Applications

- **Rule of thumb:** Does the question on the application pertain to the qualifications of the job? If not, err on the side of not including it in the application.
- Same rule of thumb can be applied to other stages of the hiring process, particularly to the interview stage

# Employment Inquiry: “Don’ts”

- **Avoid pre-employment inquiries that are not “job-related”**
  - Identification of applicant’s age, race, sex, religion, national origin
    - Applicant may be asked if he or she is at least 18
  - Whether an applicant has ever been arrested
  - The applicant’s marital status, number and ages of dependents, and family obligations (including pregnancy and childcare arrangements)
  - Whether applicant has ever belonged to a union
  - Whether an applicant has ever filed a workers’ compensation claim
  - Whether an applicant is physically or mentally disabled

# Employment Inquiry: “Don’ts”

- **Pre-employment questions about illness may not be asked, because they may reveal the existence of a disability**
- **Questions that violate the Americans With Disabilities Act, according to the EEOC:**
  - Please list any conditions or diseases for which you have been treated in the past three years.
  - Have you ever been hospitalized? For what condition?
  - Have you ever been treated by a psychiatrist or psychologist?
  - How many days were you absent from work because of illness last year?

# Employment Inquiry: “Do’s”

- **It is permissible for an employer to provide information on its attendance requirements, and inquire as to whether the applicant will be able to meet them**

# Documenting the interview process and hiring decision

- **Such documentation can be powerful evidence if a hiring decision is later challenged by an unsuccessful applicant. Some tips:**
  - Create consistent documentation of all applicants
  - Make specific, job-related observations about applicants
  - Document the reason for the decision clearly and objectively
  - Avoid references to race, sex, religion, national origin, age, or disability
- **Making notes on the resume and/or application (which are probably saved by the employer) can come back to haunt an employer if a charge of discrimination is brought. Even innocent remarks, when viewed in a vacuum, can create inference of discrimination.**

- NeoGov provides:
  - Online Hiring Process Management
  - Tools to assist managers through the hiring process, including the following:
    - Interview Scheduling
    - Rating for Interviews & Notes
    - Sending Offer Letter

**Stay Tuned for NeoGov Training!**

# Job Posting



- **Sample Job Posting:** Position open for Director of Marketing and Development. Bachelor's degree in marketing, business, communication, or related field required. Experience in fundraising and supervising staff a must. Must be a fun-loving, energetic person who is on the “cutting edge” of the industry. **Any issues with this job posting?**




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# **Interview for Sample Job Posting**

# Social Media as a Hiring Tool

**City of Hamilton, Ohio - City Hall**  
Published by Marcos Nichols [?] · May 1 at 7:00pm · 🌐

Did you know we are hiring for the Line Worker II position? Now you do! Are you or someone you know qualified for the position? Deadline to Apply is Friday, May 19, 2017.



**We're Hiring For: Line Worker II**  
HAMILTON-CITY.ORG

6,053 people reached Boost Post

👍 Like    💬 Comment    ➦ Share

👤 Carolyn Allen, Ed Sparks and 2 others    Top Comments ▾

39 shares


Posted by Marcos Nichols · 4/26/2017 · 📈 Sponsor now    ⋮

**City of Hamilton, Ohio**  
2w

Did you know the City of Hamilton owns and operates it's own electric utility? Now you do!

We're Hiring!  
Do you or someone you know have experience as a Line Worker? We are recruiting for a Line Worker II!

<https://lnkd.in/emP3Jum>



11 Likes

👍 Like    💬 Comment

**Organic Reach** Hide stats ^  
Targeted to: All followers

1,373 Impressions	1.24% Engagement	Sponsoring an update allows your company to reach non-followers. <a href="#">Learn More</a>
6 Clicks	11 Social Actions	

# Social Media as a Hiring Tool

- In a recent survey by Deloitte LLP, 53% of employees said their social networking pages are **none of their employers' business.**
- 61% of employees said that even if their employers were monitoring their social networking profiles and activities, **they won't change what they're doing online.**
- 27% of employees surveyed said they **don't consider the ethical consequences** of posting comments, photos, or videos online.

Source: Deloitte LLP 2009 Ethics & Workplace Survey results.

# Social Media as a Hiring Tool

- In a 2009 Poll conducted by SHRM, 25% of HR professionals said their organization used social networking sites to look up candidates before inviting them for an interview.
- Over 85% of employers said they would be at least somewhat less likely to hire a candidate if the candidate's social networking profile or tweets showed evidence of unprofessional behavior, i.e. drunken party pictures, sexually suggestive content, indiscreet comments about a former employer or boss.

Source: SHRM: Interviewing Dos and Don'ts for Job Seekers, November 2009.

# Social Media Risks

You may learn more about the candidate than you are entitled to know.

# Social Media Risks

- Potential Failure to Hire Discrimination Claims
  - Profiles may reveal information regarding protected classifications, making it difficult to demonstrate that information did not factor into the hiring process.
- Potential Disparate Treatment Claims
  - Relying too heavily on information available through social networking sites may lead to disparate impact in hiring practices since it's possible that some groups may be more likely to have profile pages than others.

# Social Media Benefit

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Allows you to screen for unprofessional behavior and bad judgment.

# Social Media as a Hiring Tool



The Joy of Tech™

by Nitrozac & Snaggy



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joyoftech.com

Signs of the social networking times.

After receiving a job offer from Cisco, a candidate pursuing her master's degree in information management at University of California, Berkeley, tweeted:

“Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.”

The reply tweet from a Cisco manager:

“Who is the hiring manager. I'm sure they would love to know that you will hate the work. We here at Cisco are versed in the web.”

# Social Media as a Hiring Tool

- Tips when using Social Media as a hiring tool:
  - Always be consistent. If you check one profile, check them all.
  - Make sure there is a legitimate job-related reason for viewing a candidate's online profile.
  - Online information may not always be accurate – cross reference with the candidate's submitted application materials.
  - Consider using a person who will not be making the hiring decision to check an applicant's Social Media page.

- **In writing, clearly spelling out the nature of the relationship**
  - This will help to avoid later wrongful discharge claims based on written and/or oral statements during the offer stage
- **Job offers should include:**
  - the terms and conditions of employment, such as job title, duties, and the supervisors identity;
  - a description of benefits; and
  - acknowledgment/signature line for employees to sign, with instructions to return a copy to the employer.

# Job Offer

- Do not specify a “yearly” salary.
- Do not specify term of employment.
- Refrain from making promises you can’t keep to employees – this applies to all stages of the hiring process.
  - Why? You run the risk of a court interpreting the promise as an implied-contract. If the employee takes the job in part because of what you promised and relies on that promise, the employee can sue if you do not make good on your promise.
  - Examples:
    - Promises to relocate an employee to a state of his or her choice when you cannot guarantee where or even if the employee can be relocated; promises of frequent and significant pay increases when you are uncertain about the payment for those raises.

# Post-Offer Contingencies

- Medical Exam – ADA provides that an employment entrance medical examination can be required only after an offer of employment has been made and under the following conditions:
  - All entering employees are subjected to the examination;
  - Information regarding the medical condition or history of the applicant must be maintained on separate forms and in separate files and treated as confidential;
  - The medical inquiries and examination do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out candidates, the exclusionary criteria must be job-related and consistent with business necessity.

# Post-Offer Contingencies

- Drug Tests – ADA specifically provides that tests for the use of illegal drugs are **NOT** considered medical examinations. Thus, employers may prohibit the use of drugs in the workplace, and may test for illegal drugs to the extent that such a test would be otherwise lawful.
  - Be sure the procedure by which the test is applied is **CONSISTENT**.
  - Employers must distinguish between present and past drug use under ADA.
  - Current users who cannot safely perform their jobs are not protected.
  - Alcoholics, rehabilitated drug users and those erroneously regarded as engaging in the use of illegal drugs may be protected.

# Key Points to Remember

- **Document! Document! Document!**
- **If a question does not pertain to the qualification of the job, do not ask it.**
- **Stick to the hiring requirements you posted in the advertisement. If not, document why a person lacking in some of the posted requirements was selected.**
- **Provide a written job offer.**



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# Questions?



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# Final Thoughts