

TRAINING

MINIMIZING RISK IN EMPLOYMENT INTERVIEWS

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New legal restrictions on what can be considered in hiring decisions seem to arise every day. Additionally, more and more states' employment laws have become so broad that they cover even the smallest ophthalmic practices.

With that in mind, ophthalmologists and ophthalmic administrators must take great care with their hiring procedures. One of the major pieces in the hiring process is the interview, and this article discusses how to minimize the risk of potential legal liability.

TRAINING

The fundamental key to avoiding legal exposure is training. Training on what to ask—and, just as important, what not to ask—must occur prior to interviewing, and must be repeated from time to time.

And that training must be conducted with an eye to essentially two broad issues: (1) “discoverable” evidence, and (2) objectivity. The first is that in a discrimination lawsuit, the entire hiring process is likely to be “discoverable.” The employer's interview questions, notes, and all other materials used in the hiring process will have to be turned over to the applicant and his lawyers. Additionally, interviewers may be called upon to testify under oath about how interviews were conducted—and all of this may become subject to the scrutiny of courts and the media.

So interviewers must be trained on what to ask—but they also must be trained on how to document interviews properly. For example, interviewers must be trained to note only facts and objective observations—as opposed to conclusions or assumptions. In this regard, it is best to

record or summarize applicants' responses to interview questions as closely to “word-for-word” as possible.

The relative “informality” of the medical practice environment can also be problematic for interviewers, especially in situations when interviewing an employee who has applied for a different position within the practice. Medical providers and healing professionals often have close, familial workplaces in which communication tends to be much more open and informal than in other industries. As such, medical providers might find themselves with too much information. Experience has shown that too much knowledge—for example, knowledge about an applicant's family life or medical condition—can be used against the employer as evidence of discrimination. The case of *Davis v. Durham Mental*

Health Center from the Middle District of North Carolina is instructive. In that case, an employee who did not receive a promotion survived a motion to dismiss his lawsuit, which was based on his allegations that he was asked age-related questions in his interview.

Interviewers must also be trained not to doodle, draw, or make stray comments in interview notes. Such irrelevant notations could be interpreted as cavalier, or if racially pictorial in nature, used as evidence of discriminatory bias.

The second training-related issue can be distilled to one word: objectivity. Minimizing legal risk requires objectivity in all aspects of the hiring process, from the phrasing of application questions and job advertisements through the interview and ultimate hiring decision. Objectivity is necessary when making first-time hires and when interviewing internal candidates for promotion. Indeed, objectivity might be much easier when interviewing a potential new hire, because the employer might know little about the applicant. In contrast, it could be much more difficult to make an objective evaluation of an internal candidate whom the interviewer has known for many years. Nevertheless, the law requires an objective basis for promotion decisions involving internal candidates.

WHAT (AND WHAT NOT) TO ASK

Interviews should consist of a list of questions written in advance and uniformly asked of all applicants. Asking all applicants the same questions is the first step in eliminating discrimination. Questions based on application responses are fine, but those questions also should be written in advance and with an eye toward eliminating any appearance of discrimination.

All interview questions should be analyzed to determine whether they relate

to the duties and responsibilities of the job. A well-crafted job description—objectively tailored to the realities of the position—can be an excellent guide in determining whether interview questions are acceptable. Arbitrary and irrelevant requirements must be eliminated from job descriptions—and from consideration in the hiring process.

Courts have made clear that certain interview questions are off-limits. For instance, questions that relate to “family obligations”; other gender-, ethnic-, or disability-based stereotypes; and retirement age can all constitute evidence of unlawful discrimination.

Interviewers should not ask applicants about their children or ability to balance job responsibilities and home life. Instead, interviewers should provide a clear assessment of what the job requires—especially in terms of overnight travel or work on nights and weekends—and ask all applicants if they are willing to take on those obligations.

Interview questions based on gender stereotypes can be extremely problematic. Employers must be aware that traits like “confidence” and “go-getter” have been considered by courts as evidence of gender bias. If the workplace needs “go-getter” and “confident” employees, those terms should be analyzed more closely—and if they mean, for example, “able to take on and adapt to new tasks quickly,” then that concept should guide interviews and hiring. Employers must also eliminate questions that reflect stereotypes and assumptions related to age, disability, and all other protected traits.

Interviewers should also take great care when asking about applicants’ criminal histories. Recent legislation on the state level limits how that information can be used in the hiring process, and the EEOC has taken the position, essentially, that employment decisions

should not be based on criminal convictions unless a conviction is relatively recent and relevant to the duties and responsibilities of the job.

AVOIDING LITIGATION

Like so many issues in employment law, training and serious preparation geared toward avoiding legal liability are critical components of preventing and limiting the adverse financial consequences that litigation may bring. Because the consequences of improper interviews can include legal liability, including punitive damages and awards of attorneys’ fees, employers are well advised to undertake the necessary training and preparation well in advance of any claims of wrongdoing. *AE*



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IN A BLINK

- **Consistency:** Utilize the same, or substantially similar, interview questions for all candidates of the same position.
- **Work-related:** Ask questions that are work-related. Avoid extraneous information relating to protected categories.
- **Teamwork:** If possible, interview in pairs. Two eyes/ears are better than one and offer supporting testimony in the event of litigation.



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