



**EFFECTIVE AND LEGAL HIRING PRACTICES
REFERENCE MATERIALS**

**June 22, 2005
1:00 p.m. Eastern time**

Presented by

**Steven Olswang, J.D., Ph.D.
Vice Provost
University of Washington**

**Jennifer Kirkland, J.D.
Staff Attorney
Office of General Counsel
Washington and Lee University**

**D. Frank Vinik, J.D.
Senior Risk Analyst
United Educators**

Table of Contents

Agenda	3
Speaker and Moderator Biographies	4
“A Guide to Successful Personnel Searches: Some Legal Do’s and Don’ts”	5
The Legal “R’s” of Hiring	5
The Basic Employment Laws of Hiring	5
What Position Do You Need to Fill?	6
How Will You Conduct Your Search?	7
Advertising the Position	9
Acknowledging Applications and Initial Eliminations	10
Reference and/or Background Checks	11
Conducting the Interview	13
Communicating the Hiring Decision	14
Recordkeeping and Retention	17
UE Quick Tips: “Conducting Interviews Legally”	18
Disabilities	18
Sex and Family Matters	19
Age	20
National Origin and Citizenship	20
Tips for Interviewing Faculty and Coaches	21
Basic Interview Guidelines Under Federal Law	22
“When Do Attempts to Diversify Faculty Become Reverse Discrimination?”	23
What You Can Do To Diversify Faculty	24
The Risk Spectrum	24
Low Risk Measures	24
Moderate Risk Measures	25
High Risk Measures	26
UE Quick Tips: “Reference and Background Checks on Job Applicants”	28
Recommended Checks	28
Types of Checks and How to Use Them	29
Typical Costs for Common Checks	31
Prohibited Screenings and Use of Information	31
Additional Resources	32
The Hiring Process	32
Interviewing	32
Affirmative Action	33
Background Checks	34

Agenda

Interviewing

- Inappropriate questions
- Unauthorized promises
- Legal implications

Affirmative Action

- Preferences based on race and gender
- Difference between hiring and admissions
- Low risk measures institutions can take to diversify

Background and Reference Checks

- How to check references
- Verification of educational credentials
- Types of background checks
- When to conduct background checks
- Legal requirements for using background check firms

Speaker and Moderator Biographies

Steven Olswang is vice provost for academic affairs at the University of Washington and a member of the faculty in the School of Education. He received his law degree from the University of Illinois and a doctorate in higher education policy from the University of Washington. He teaches and has published more than 30 articles and monographs. In addition, Steve recently served as interim chancellor of the University of Washington's Tacoma campus and will soon serve as interim Chancellor of the University's Bothell campus.

Jennifer Kirkland is a staff attorney in the Office of General Counsel at Washington and Lee University in Lexington, Va, and also practices law with The Education Law Group of the firm of Timberlake, Smith, Thomas, and Moses in Staunton, Va. She specializes in education and employment law. Jennifer co-authored the PowerPoint presentation "A Guide to Successful Personnel Searches: Some Legal Do's and Don'ts," which is included in your resource materials. Jennifer has taught courses in education law for the graduate education programs of the University of Virginia and George Mason University. She has been a panelist and presenter for numerous programs for educators put on by the National Association of College and University Attorneys, the Virginia and National Associations of College Registrars and Admissions Officers, the Council of School Attorneys of the Virginia School Boards Association, and the Commonwealth Educational Policy Institute. Jennifer received her undergraduate degree from the Indiana University School of Music and her law degree from the University of Virginia.

D. Frank Vinik is a senior risk analyst at United Educators where he specializes in faculty and employment issues. Prior to joining United Educators, he practiced employment and education law with a large firm in North Carolina. He has also served as a college administrator developing affirmative action policies. He received his undergraduate degree from the University of California at Berkeley and his law degree from the University of Virginia.

A GUIDE TO SUCCESSFUL PERSONNEL SEARCHES: SOME LEGAL DO'S AND DON'TS

Leanne M. Shank, Esquire
Jennifer E. Kirkland, Esquire
Office of the University Counsel
Washington and Lee University
September, 2001

I. THE LEGAL “R’s” OF HIRING

- RECOGNIZE the legal RISKS
- REDUCE the RISKS by a ROUTINE process used for all searches
- Hiring process should REFLECT and REINFORCE university mission and high performance standards.
- Know and use campus and outside RESOURCES when you need help

II. THE BASIC EMPLOYMENT LAWS OF HIRING

- Title VII of the Civil Rights Act of 1964. Prohibits discrimination in employment, including hiring, on the basis of *race, color, religion, national origin, and sex (including pregnancy)*.
- Age Discrimination in Employment Act (ADEA). Prohibits discrimination in employment because of *age (40 years or older)*.

- Americans with Disabilities Act (ADA). Prohibits discrimination in employment against *qualified applicants or employees with disabilities* and requires reasonable accommodation of such individuals.
- Equal Pay Act. Prohibits employers from paying *unequal wages* to male and female employees who perform *substantially similar jobs*.
- Virginia Human Rights Act. Prohibits discrimination in employment *on all bases covered under Title VII, plus marital status*.
- Other types of claims brought in lawsuits involving hiring: a laundry list. Defamation, interference with contract, breach of contract, intentional infliction of emotional distress, negligent hiring, and others.

III. SO LET'S START AT THE VERY BEGINNING – WHAT POSITION DO YOU NEED TO FILL?

- ❖ THE JOB DESCRIPTION SHOULD DRIVE THE SEARCH, AS A PRACTICAL AND LEGAL MATTER.
 - Primary purpose of job description is to identify the *essential functions and required qualifications* of the position, which then should drive the advertising, interview questions, and determination of whether an applicant is qualified to perform those essential functions, with or without a reasonable accommodation.
 - Use of well-developed job descriptions and criteria inform searchers and applicants of the yardsticks against which applicants will be measured, and may assist in defending against allegations of discriminatory treatment.
 - In identifying *essential functions*, consider first the PURPOSE OF THE JOB and the IMPORTANCE OF ACTUAL JOB FUNCTIONS in achieving this purpose. (Are employees in the position actually required to perform

the function? Would removing that function fundamentally change the job? Are there a limited number of employees available to perform the function? Is the function highly specialized?)

- In defining *essential functions*, it is important to distinguish between *methods* and *results*. For example, is the essential function “moving” a 50-lb. box or “carrying” the box?

❖ **WRITING THE JOB DESCRIPTION:** Remember, this is an important tool for hiring and for long-term performance evaluation.

- State the overall purpose of the job; then outline essential functions and marginal/infrequent functions; then identify knowledge, skills, degrees, experience, and personal qualifications necessary to perform the job (required and preferred).
- The required knowledge, skills, degrees, experience, and personal qualifications listed on the job description should support the essential functions and serve as the primary criteria for your selection/rejection of applicants.
- Include a section outlining any unusual particulars of the job (work hours, environment, travel, etc.)

IV. SO NOW YOU KNOW WHAT YOU NEED – HOW WILL YOU CONDUCT YOUR SEARCH?

❖ **RECOGNIZE THAT A PERSONNEL SEARCH IS AN EXERCISE IN PUBLIC RELATIONS, INVESTIGATION, WRITING, EVALUATION, AND LEGAL RISK MANAGEMENT.** Poorly worded or misleading advertisements, improperly handled interviews, or imprecisely worded communications may adversely impact the university's reputation in the local community and in the national/international academic community.

❖ **ESTABLISH AND CONSISTENTLY USE A SEARCH/SELECTION PROCESS FOR ALL POSITIONS TO BE FILLED, INCLUDING A STANDARD INTERVIEW PROCEDURE.**

❖ CONSIDER THE FOLLOWING PROCEDURES FOR SEARCHES:

STAFF SEARCHES

- Makeup of Search Committee and Designation of Contact Person
- Develop Written Job Description (consider having University Counsel review)
- Establish Timetables for Steps in Search Process
- Position Advertisement
- Require Written Application (with consent for reference check/indemnification/certification of accuracy)
- Acknowledgement of Applications
- Screening of Applications and Initial Eliminations
- References/Background Checks for Candidates (*obtain written consent/indemnification/certification of accuracy if no written application form*)
- Further Eliminations and Scheduling of On-Campus Interviews
- Develop Interview Questions
- Interviews of Candidates
- Final Evaluations and Hiring Recommendation
- Rejection Letters/Offer Letter
- Pay/Reimburse Interview Expenses as Agreed
- Preserve Applicant Files
- Provide New Employee Orientation

TENURE TRACK FACULTY SEARCHES

- Makeup of Search Committee and Designation of Contact Person
- Develop Written Job Description and Have Approved by Dean
- Establish Timetables for Steps in Search Process
- Prepare Position Advertisement
- Acknowledgement of Applications
- Screening of Applications and Initial Eliminations
- Schedule Brief Interviews for Discipline Conferences/Job Fairs
- Conduct Brief Interviews at Discipline Conferences/Job Fairs OR Meet Candidates There Whom You Invite to Submit Applications for Consideration
- Further Eliminations and Scheduling of On-Campus Interviews
- Develop Interview Questions and Plan Interviews/Presentations by Candidates
- On-Campus Interviews of Candidates

- Reference Checks for Candidates (*consider confirming candidate's oral agreement to these checks during interview process*)
- Final Evaluations and Hiring Recommendation
- Rejection Letters/Offer Letter
- Pay/Reimburse Interview Expenses as Agreed
- Preserve Applicant Files
- Provide New Faculty Orientation

ADJUNCT/VISITING FACULTY SEARCHES

- Begin with Clear Understanding of Position to be Filled, including Whether Position Has Potential to Expand into Tenure Track Position and Duration of Adjunct/Visiting Appointment
- Establish Time Frame for Search
- Contact Colleagues at Other Institutions and Professional Organizations for Recommendations of Suitable Candidates
- Contact Candidates and Obtain Resumes/Dossiers
- Interview Candidates (*consider confirming candidate's oral agreement to have references checked*)
- Conduct Reference Checks
- Rejection Letters/Offer Letter
- Pay/Reimburse Interview Expenses as Agreed
- Preserve Applicant Files
- Provide New Faculty Orientation

V. HEAR YE! HEAR YE! -- ADVERTISING THE POSITION

❖ REMEMBER THE PURPOSE OF THE ADVERTISEMENT: TO REACH THE LARGEST AUDIENCE OF PERSONS QUALIFIED FOR AND INTERESTED IN THE POSITION (and to discourage those not qualified for the position). CHOOSE YOUR WORDS AND YOUR PUBLICATIONS ACCORDINGLY.

❖ ITEMS TO CONSIDER INCLUDING IN AN ADVERTISEMENT:

- Position Title, Rank, Tenure Status
- Overall Responsibility
- Summary of Essential Duties (as space permits)
- Degrees/Licenses/Certifications Required/Preferred

- Experience and Particular Qualifications Required/Preferred
- Salary Range (or commensurate with qualifications)
- Travel Required
- Description of the University – location, size, mission, student population
- University as Equal Opportunity Employer
- Application Materials to be Sent and to Whom
- Closing Date for Applications and Starting Date
- Particular Recruiting Information? (encouragement of minority applicants)

VI. ACKNOWLEDGING APPLICATIONS AND INITIAL ELIMINATIONS

- ❖ EACH APPLICATION SHOULD BE ACKNOWLEDGED PROMPTLY, AND CANDIDATES SHOULD BE NOTIFIED IF ADDITIONAL INFORMATION IS NEEDED TO FULLY EVALUATE THEIR APPLICATION.

Dear _____:

We have received your application for the position of _____. (In order to evaluate your application we need _____.)

We anticipate that the search process will take approximately _____. We will notify you once we have reached a decision on your application.

Sincerely,

Title

- ❖ CANDIDATES REJECTED AFTER INITIAL SCREENING SHOULD RECEIVE PROMPT, BRIEF WRITTEN NOTICE.

Dear _____:

The Search Committee for the position of _____ has met and reviewed applications. After deliberation, the Committee determined that other applicants more closely meet the requirements of the position. Therefore, you are no longer under consideration. (If department policy is to maintain applications in an "active file" for a certain time, this should be stated.)

Thank you for interest in Washington and Lee University.

Sincerely,

Title

- ❖ FOR STAFF POSITIONS, CANDIDATES STILL BEING CONSIDERED SHOULD COMPLETE WRITTEN JOB APPLICATION FORM (IF NOT ALREADY) WITH CONSENT AND INDEMNIFICATION FOR REFERENCE CHECKS AND CERTIFICATION OF ACCURACY, AND PROVIDE ANY MATERIALS NEEDED FOR FURTHER REVIEW.

Dear _____:

The Search Committee wishes to inform you that you are still under consideration for the position of _____. At this time we need _____ to continue evaluation of your application. [Include standard W&L job application form, if not already completed, which contains authorization for reference checks and certification of accuracy as to application information. Please provide this information to me by _____.

Sincerely,

Title

VII. REFERENCE AND/OR BACKGROUND CHECKS: AN IMPORTANT STEP.

- ❖ USE A STANDARD REFERENCE/RECORD CHECKING PROCEDURE. BE SURE YOU HAVE OBTAINED CONSENT AND INDEMNIFICATION FROM

APPLICANT. For faculty searches, consider at a minimum verifying orally during interview candidate's agreement for reference contacts.

- ❖ BEST PRACTICE IS TO SEND A STANDARD WRITTEN REQUEST FOR A WRITTEN REFERENCE (ENCLOSING DESCRIPTION OF JOB SOUGHT) – AT THE LEAST, USE A STANDARD CHECKLIST OF QUESTIONS IF TELEPHONING REFERENCES. Focus on position requirements and applicant's eligibility, qualifications, and suitability for the position. Verify information applicant has given re: prior employment or relationship with the reference.

- ❖ HAVE ONE PERSON HANDLE REFERENCE/BACKGROUND CHECKS TO ASSURE CONSISTENCY.

- ❖ ALWAYS ASK: "WOULD YOU REHIRE THIS PERSON? IF NO, WHY NOT?" IF THE PERSON REFUSES TO ANSWER, THAT SAYS IT ALL.

- ❖ STAY AWAY FROM QUESTIONS ON EXPUNGED CRIMINAL HISTORY, MEDICAL CONDITION, AGE, RACE, RELIGION, MARITAL OR FAMILY STATUS – IF YOU CAN'T ASK THE APPLICANT ABOUT IT, YOU CAN'T ASK A REFERENCE ABOUT IT. *Virginia law gives limited immunity from liability (but not from lawsuits) for employers conducting good faith reference checks into potential employees, but only if the checks involve legitimate, non-discriminatory performance inquiries, and only if the checks are conducted and the information used appropriately and without malice. This limited immunity applies to the person/entity asking the questions and the person/entity providing the reference information.*

- ❖ VERIFY EDUCATIONAL BACKGROUND AND SCHOLARSHIP.

- ❖ CRIMINAL BACKGROUND CHECKS AUTHORIZED BY VIRGINIA LAW FOR PRIVATE COLLEGES/UNIVERSITIES FOR THE PURPOSE OF SCREENING INDIVIDUALS OFFERED OR ACCEPTING EMPLOYMENT. (Va. Code 19.2-389)

VIII. CONDUCTING THE INTERVIEW

- ❖ THE JOB DESCRIPTION (ESSENTIAL FUNCTIONS AND REQUIRED/PREFERRED KNOWLEDGE, SKILLS, AND OTHER QUALIFICATIONS) SHOULD FRAME YOUR INTERVIEW QUESTIONS.

- ❖ PREPARE FOR THE INTERVIEW. All members of the Committee who will be present at the interview should review the cover letter, resume, application, other application materials (including written reference letters and documentation of reference checks), and the job description.

- ❖ QUESTIONS SHOULD BE PREPARED IN ADVANCE, AND SHOULD BE STANDARD FOR ALL INTERVIEWEES. Questions should all be position-related. Here are some sample questions:
 - Tell me what you already know about this position. Why does this position interest you?

 - Describe a situation the candidate would encounter in the position, and ask the candidate how he/she would handle the situation.

 - What qualities/skills make you the best person for this position? What qualities/skills would you need to improve to excel in this position?

 - Describe your previous (current) position. What have you learned in that position that would contribute to your success in this position?

- ❖ SHAPE QUESTIONS TO AVOID TOPICS THAT COULD LEAD TO DISCRIMINATION CLAIMS.
 - Remember, although most questions (except disability-related questions) are not per se illegal, the Equal Employment Opportunity Commission (and most courts) will assume that all questions are asked for a reason and that hiring decisions will be based on the answers.

- Twelve General Topics to Eliminate: Race, National Origin, Disability, Gender, Age, Religion, Union Membership, Military Status, Arrest Record, Financial Status, Legal Off-Duty Activities, EEO-related information (prior claims, non-professional clubs and charities).
- Specifically, as to disability-related questions, you cannot ask a candidate whether he/she has a disability or impairment that would prevent performance of the job. Generally, you cannot ask a candidate whether he/she needs assistance or accommodation to perform the job. However, if a candidate VOLUNTEERS THAT HE/SHE HAS A DISABILITY, OR THAT HE/SHE NEEDS AN ACCOMMODATION, YOU MAY INQUIRE AS TO THE TYPE OF ACCOMMODATION NEEDED. YOU MAY ASK ALL APPLICANTS IF THEY CAN PERFORM THE JOB FUNCTIONS WITH OR WITHOUT REASONABLE ACCOMMODATION, AND YOU MAY ASK THEM TO DEMONSTRATE. If an applicant indicates that he/she will need accommodation to complete the job application/interview process, you may inquire as to the accommodation needed and obtain documentation of the disability.

- ❖ DEVELOP A STANDARD FORMAT FOR DOCUMENTING INTERVIEWS AND EVALUATING CANDIDATES (CRITERIA BASED ON JOB DESCRIPTION, CONSISTENT RANKING SYSTEM FOR ALL INTERVIEWERS.)

IX. COMMUNICATING THE HIRING DECISION: OFFERS AND REJECTION LETTERS

- ❖ OFFER LETTERS SHOULD BE CAREFULLY WRITTEN, AS THEY MAY CONSTITUTE LEGALLY BINDING DOCUMENTS.
- ❖ ITEMS OFFER LETTER SHOULD INCLUDE:
 - Offer of Position (specifying Rank and Tenure Status, where applicable)
 - Starting Salary (“at the rate of _____ per hour/per year” – express in terms of rate, instead of promising a salary for a defined period)

- Terms and Conditions/Benefits of Employment (enclose applicable Personnel and/or Faculty Handbook and reference W&L website/Human Resources website for summaries of Campus Security information and other university policies)
 - Starting Date
 - Date by which Written Acceptance Required
 - *Where applicable*, Clear Statement that Offer Contingent upon Satisfactory Completion of Job-Related Physical Examination
 - *Where applicable*, Amount of Moving Expenses to be Paid
- ❖ FOR STAFF AND NON-TENURED FACULTY POSITIONS, IF WASHINGTON AND LEE STANDARD APPLICATION (containing employment-at-will agreement) WAS NOT SIGNED, INCLUDE EMPLOYMENT-AT-WILL LANGUAGE IN LETTER.
- ❖ AVOID TERMS LIKE “PERMANENT” OR “CAREER” OR OTHER TERMS THAT MAY IMPLY FIXED EMPLOYMENT FOR ANY PERIOD, SUCH AS “YOUR FIRST ANNUAL PERFORMANCE REVIEW WILL BE ON _____.”
- ❖ CONSIDER SENDING THE ORIGINAL AND AN EXTRA COPY, WITH A PLACE FOR THE CANDIDATE TO SIGN AND DATE, “I ACCEPT EMPLOYMENT ON THE TERMS OUTLINED ABOVE.” Candidate may sign the extra copy and return it, to avoid the need for a separate letter of acceptance.
- ❖ REJECTION LETTERS SHOULD ALSO BE CAREFULLY WRITTEN, AS THE WAY IN WHICH AN APPLICANT IS REJECTED IS OFTEN THE TRIGGER FOR LITIGATION. Some suggestions to reduce the potential for creating disgruntled applicants:
- Don't set applicants' expectations unnecessarily high during the recruiting process. (E.g., avoid statements to applicants such as, “I'm sure you'll be happy here”)
 - Provide quick responses and get back to everyone who expects an answer one way or the other.

- Give polite, professional responses, but don't go overboard and overly boost the applicant's qualifications in an attempt to make him/her "feel better." (E.g., "Though you were well qualified and made a good impression in your interview, we've hired someone else." *This might send the message that maybe something other than merit was involved in the decision.*)
- Avoid becoming involved in discussing the rejected applicant's qualifications compared with the person selected. This is a no win endeavor. You are NOT obligated to explain your choice.
- Keep the letter brief and factual.

Dear _____:

We have now completed our interviews and evaluations of candidates for the position of _____. After careful consideration, we have selected another candidate to fill the position. *(If you absolutely must say more, say something like "we have selected another candidate, who most closely met our requirements and expectations for the position." But you do NOT NEED to go into even that explanation – and don't do it unless it's true.)*

We thank you for your time in participating in the search process and appreciate your interest in Washington and Lee University. *[If policy/practice is to keep application "active" for a certain period, include such a statement.]*

Sincerely,

Title

- Telling a candidate that he/she was not "suitable" or "qualified" for a position is NOT a good idea, in light of the increase in employment litigation. However, the following list offers some legitimate business reasons for rejecting particular candidates, not requiring a subjective

discussion of the candidate's qualifications or a comparison of qualifications with the person hired:

- ✓ No position available.
- ✓ Failed to complete the application process (e.g., providing required information, appearing for interview).
- ✓ Misrepresented information on application/resume.
- ✓ Did not hold required degree/license/certification.
- ✓ Disqualified by job-related criminal conviction.
- ✓ Could not/will not provide necessary documentation for I-9 form.

X. RECORDKEEPING AND RETENTION

- ❖ ALL PERSONNEL AND EMPLOYMENT RECORDS MUST BE KEPT BY HIGHER EDUCATION INSTITUTIONS FOR TWO (2) YEARS UNDER TITLE VII AND ADA. THIS INCLUDES APPLICATION FORMS/MATERIALS AND OTHER RECORDS HAVING TO DO WITH HIRING. This does not mean the applications for non-hires remain "active" for that entire time; but it does mean that we may not destroy them until two years after the hiring decision. For individuals who are hired, there should be a consistent policy/practice about which of the application materials will be retained in the employee's personnel file after the two-year period. *If a lawsuit is filed, all existing employment records must be maintained until the disposition of the litigation.*

- ❖ UNDER ADA, ALL EMPLOYEE MEDICAL RECORDS SHOULD BE MAINTAINED SEPARATELY FROM THE REST OF THE PERSONNEL FILE AND ACCESS MUST BE STRICTLY ON A "NEED TO KNOW" BASIS. *(E.g., emergency health care providers, personnel responsible for evaluating requested accommodations)*

QUICK TIPS

Issue #1, 2003

Conducting Interviews Legally

Do you know what interview questions you can legally ask a job candidate? What if the individual is pregnant, has a disability, or cannot work on specific days because of religious beliefs? This issue of UE QUICK TIPS provides a concise overview of federal laws on interviewing with particular focus on those with greatest complexity. It also discusses special concerns in the recruiting and hiring of faculty. A handy chart at the end summarizes the guide and covers some additional areas. Remember that this newsletter focuses only on federal laws. Be sure to check with an employment lawyer about state and local laws that may apply in your area.

Do not approach the hiring process with preconceptions about the personal characteristics of the ideal candidate. It is generally unlawful to consider only women, minorities, or native speakers of a language for positions. In well-intentioned but overzealous attempts to diversify, some institutions have committed reverse discrimination by excluding whole classes of people from consideration. Use the interview process to explore the talents that diverse individuals have to offer.

Disabilities

As a general rule, employers may not ask questions during job interviews that are likely to elicit information about a disability. It is best to begin with a job description that includes the essential functions of the position. Interview questions should focus on how a candidate would perform the job rather than whether the person has a disability. After an employer makes a job offer, it can ask more specific questions about a disability. However, the scope of questioning during the interview process is strictly limited, as these examples illustrate.

Don't Ask

- What is the nature of your disability and what limitations does it place on you? (if the disability is obvious)
- Do you have a disability? (if no disability is obvious)

- Do you need a reasonable accommodation to perform this job?
- Have you ever been injured on the job?
- Have you ever filed a workers' compensation claim?
- What medications are you currently taking?
- Have you ever been addicted to drugs or treated for drug addiction?

Okay to Ask

- How would you go about performing this job?
- Will you be able to perform all of the job assignments for this position in a safe manner?
- Can you meet the attendance requirements of this job?
- Do you have all of the licenses and certifications required for this job?
- Have you ever used illegal drugs?

Sex and Family Matters

Because of a long history of discrimination against women in the workplace, Congress passed numerous laws that prohibit questions about sex, family status, or pregnancy during the interviewing process. Interviewers should not limit specific questions to male or female candidates only. For example, it is permissible to ask candidates if they are willing to travel for work, but it is illegal to put that question to female applicants only.

Don't Ask

- Are you married?
- How many children do you have?
- What is your child-care arrangement?
- Are you planning to start a family in the near future?
- Do you have a spouse who would need relocation assistance if you are offered this job?

Okay to Ask

- Do you anticipate any absences from work on a regular basis?
- Have you ever used a different last name?
- Do you have any responsibilities or commitments that will prevent you from meeting specified work schedules?

Age

While it is legitimate for an employer to consider job candidates' experience, the employer may not consider age unless there is a legal minimum, such as a position serving alcohol. Legal maximum ages, such as the one for commercial airline pilots, are very rare and seldom apply to educational institutions. In addition, be careful not to make stray comments in an interview such as "we are looking for new blood," which may suggest age bias.

Don't Ask

- What is your date of birth?
- What year did you graduate from high school or college?
- At what age do you plan to retire?

Okay to Ask

- If you were offered this position, could you establish that you meet the legal age minimum?
- How long do you intend to stay in the position you are seeking?

National Origin and Citizenship

An institution may not discriminate in hiring on the basis of national origin. However, it may ask whether a candidate is legally eligible to work in the United States. If English is not an applicant's first language, the institution may consider whether the individual speaks, understands, and reads English well enough to perform the position's essential functions.

Don't Ask

- Where were you born?
- What is the origin of your last name?
- What is your native language?
- Are you a U.S. citizen?

Okay to Ask

- If offered this position, could you provide verification of your right to work in the United States?
- Do you speak languages other than English that might be helpful in performing this job?

Tips for Interviewing Faculty and Coaches

Many faculty and coaches are hired on fixed-term contracts renewable at the end of the academic year. Be careful not to make representations that a candidate could reasonably construe either as a promise that the contract will automatically be renewed or that the term of employment will be different from what is stated in the written contract.

Avoid stereotypes about what kind of candidate is needed to fill a coaching or faculty position. For example, it is illegal to assume that a man could not coach a female athletic team or that a Spanish teacher needs to be of Spanish or Latino descent. Stick to questions based on the individual's ability to perform the job.

In filling regular faculty positions, do not dismiss the qualifications of your own adjuncts and visiting faculty. Declining to give serious consideration to their candidacies can lead to problems. They may argue that the individual ultimately selected had less teaching experience or weaker qualifications. If differences such as gender, race, age, or disability exist, the unsuccessful adjunct or visitor may claim discrimination.

In conclusion, numerous laws regulate the interview process, but a little bit of guidance can go a long way. Remember that this guide covers only federal laws on interviewing, so be sure to check with an employment lawyer in your area about additional laws that may apply. For example, discrimination based on sexual orientation is not illegal under federal law but is prohibited by many states and localities. Overall, we hope these Quick Tips will help you avoid legal pitfalls and find the best candidates to fill positions at your institution.

BASIC INTERVIEW GUIDELINES UNDER FEDERAL LAW

ITEM	AVOID	PERMISSIBLE
AGE	Age, birth certificate, date of high school or college graduation.	Whether candidate meets minimum or maximum age requirement that is a bona fide occupational qualification.
ALCOHOL OR DRUG USE	Whether candidate is an alcoholic or has been addicted to drugs in the past.	Whether candidate currently uses illegal drugs or has used illegal drugs in the past.
ARREST RECORD	Inquiries about arrests.	None (may have a disparate impact on certain minority groups).
CITIZENSHIP	Whether candidate is a U.S. citizen.	Whether candidate is legally eligible to work in the U.S.
CONVICTION RECORD	Inquiries relating to convictions that are not relevant to the job being applied for.	Convictions that reasonably relate to performing the job in question. Consider the nature and number of convictions, facts surrounding each offense, and length of time since the last conviction.
DISABILITIES	Questions designed to elicit information about a disability.	How candidate would perform the job and whether the candidate could perform the job with or without accommodation.
HEIGHT OR WEIGHT REQUIREMENTS	Height or weight requirements not related to job.	Height or weight requirements necessary for the job.
MARITAL AND FAMILY STATUS	Questions about marital status, childcare, number of children, or pregnancy.	Questions about whether candidate can meet work schedule. Ask all questions to candidates of both sexes.
NAME	Inquiries about national origin, ancestry, or prior marital status.	Whether candidate has ever worked under a different name.
NATIONAL ORIGIN	Lineage, ancestry, descent, native language, birthplace, and national origin of spouse or parents.	Whether candidate is legally eligible to work in the U.S. and can communicate well enough to perform the job's essential functions.
RACE OR COLOR	Complexion or color of skin.	None.
RELIGION	Religious preference or affiliation, except at religiously affiliated institutions when hiring faculty or ministerial positions that further the institution's religious mission.	Whether candidate can meet the work schedule with reasonable accommodation, if necessary.
SEX	Candidate's sex, where sex is not a bona fide occupational qualification.	Candidate's sex, where it is a bona fide occupational qualification, such as actor, actress, or locker room attendant.

When Do Attempts to Diversify Faculty Become Reverse Discrimination?

By D. Frank Vinik

(Originally published in the Summer 2002 issue of "Employment Action")

Introduction

Educational institutions seek faculty diversity for many compelling reasons. Faculty from different backgrounds offer varied perspectives and promote a robust exchange of ideas. They serve as role models to students and counter stereotypes about who should be teaching in certain fields. Unfortunately, institutions may run afoul of the law in their attempts to diversify faculty. The results can be expensive and disruptive litigation, as the following examples illustrate:

A California jury awarded \$2.7 million to a lecturer who was denied a tenure track position at his institution because the college dean refused to consider white males in faculty searches.

A Michigan jury awarded \$1.55 million to a part-time community college instructor who applied twice for full-time positions but lost out both times to women with less experience.

A federal appellate court held that a white male professor of Eastern European descent was entitled to a jury trial on allegations that a university would not appoint him as director of its Spanish language program.

A university paid \$400,000 to settle a claim by a white visiting professor who unsuccessfully applied three times for an open permanent position, but the institution interviewed only minority candidates.

The most common mistake is failing to obtain the advice of legal counsel before taking steps to diversify the faculty. Often, faculty and administrators do what they think is right, without checking whether their actions pass muster under the latest legal tests. Over the past 15 years, courts have significantly restricted the measures employers can take to diversify their workforce. Unfortunately, good intentions and good faith do not constitute a sound legal defense.

What You Can Do To Diversify Faculty

Despite the difficult legal climate, institutions can take a number of measures to help locate and hire minority and female faculty in fields where they are underrepresented. Each institution needs to decide its own risk tolerance for litigation. As a general rule, steps taken in the beginning of the hiring process to promote diversity are lower risk than steps taken during the actual selection and ranking of candidates. The following are some concrete actions listed according to the level of risk and a chart that illustrates the risk spectrum.

The Risk Spectrum

Low Risk	Moderate Risk	High Risk
Outreach	Financial incentives for departments	Deciding to hire a particular type of candidate
Diverse selection committee	Creating a position to lure a candidate of a specific race	Using race or gender as a plus factor in selection
Expanding the pool		Limiting who can apply

Low Risk Measures

Expanding the Pool of Applicants

Enlarging the pool of applicants to include candidates from a wide variety of backgrounds entails little legal risk so long as the actual hiring decision is made according to race- and gender-neutral criteria. Most courts recognize the difference between inclusive affirmative action, which seeks to increase the number of candidates considered for a position, and exclusive affirmative action, which eliminates candidates because of their race or gender.

Outreach in the Academic Community

Academic institutions should locate candidates who will contribute to diversity and encourage them to apply.

- Mail position announcements to groups such as the Consortium for Women in Science, Math and Engineering or the Compact for Faculty Diversity.
- Directly contact institutions that have strong track records of producing minority or female academics in a particular field and encourage them to nominate candidates.
- Earmark money to advertise in trade publications that underrepresented candidates are likely to read.
- Review the Minority and Women Doctoral Directory, which collects the names and contact information of 4,500 employment candidates who have either recently received or will soon receive a doctoral or master's degrees.

Diverse Selection Committees

Many people unconsciously hire people like themselves. A diverse selection committee can help filter out those biases and ensure that candidates are evaluated based on actual job qualifications.

Moderate Risk Measures

Creating Positions Likely to Attract Underrepresented Candidates

Some institutions may create positions in fields such as African-American studies on the theory that African-Americans are more likely to be attracted to such an opportunity. This measure is acceptable so long as the institution does not leap to the assumption that only an African-American could hold such a position. An institution must accept applicants of all races and evaluate candidates' qualifications irrespective of race.

Incentives for Departments to Hire Minority or Female Candidates

The legality of departmental incentives to hire minority candidates often depends on how they are structured. For example, a court upheld a program that gave a department an extra faculty slot if it hired a minority candidate. The court reasoned that the institution did not infringe on the rights of a similarly qualified white candidate because the department used its additional faculty slot to hire the white candidate as well as the minority candidate. In contrast, a court struck down a program that provided additional financial resources to departments hiring minority candidates, reasoning that the prospect of additional resources might induce decision makers to consider factors other than the qualifications of the candidates.

High Risk Measures

Deciding in Advance to Recruit a Candidate of a Particular Race or Gender

One of the most expensive reverse discrimination cases involved a philosophy department that was entirely male and decided it needed a female faculty member. The faculty thought they were doing the right thing, but the college's legal counsel found it virtually impossible to prove that the hiring process was non-discriminatory. Eventually the college paid an unsuccessful male candidate over \$100,000 to drop his case.

Giving a "plus" or extra points to candidates of a particular race or gender

Recent cases suggest that even if two candidates are equally qualified, it is not legal to use race as a tiebreaker. For example a federal appellate court held that a school facing budget cutbacks could not use racial diversity as the reason for laying off a white teacher rather than an equally qualified black teacher in the same department.

Limiting who can apply for a position

An institution may specify qualifications for a position but cannot limit who can apply, even at the request of a donor creating the position. For example, an institution cannot require that a women's studies position endowed by a prominent feminist be filled by a woman, but it can require that the professor be knowledgeable in feminist theory and an activist in women's rights.

Conclusion

The increasing legal restrictions on consideration of race and gender in hiring pose significant challenges for institutions seeking to diversify their faculty. Nevertheless, institutions can engage in a wide array of effective measures to promote faculty diversity. Institutions need to review their current initiatives, decide on which measures to continue and which measures to add, and then coordinate future diversification efforts with legal counsel to maximize effectiveness while minimizing the litigation risks.

Selected Court Cases on Affirmative Action in Educational Hiring

Stern v. Trustees of Columbia University, 131 F.3d 305 (2d Cir. 1997) (a professor alleging he was denied the directorship of a Spanish program because of his national origin was entitled to a jury trial)

Taxman v. Board of Education of Township of Piscataway, 91 F.3d 1457 (3d Cir. 1996) (striking down consideration of race as a factor in deciding which of two equally qualified teachers to lay off)

University and Community College System of Nevada v. Farmer, 930 P.2d 730 (Nev. S. Ct. 1997) (upholding a plan that gave an extra faculty position to departments that hired a minority candidate)

Honadle v. University of Vermont, 56 F.Supp.2d 419 (D. Vt. 1999) (finding that financial incentives to departments to hire minority candidates were unconstitutional)

Shuford v. Alabama State Board of Education, 897 F. Supp. 1535 (M.D.Ala. 1995) (efforts to broaden the pool of qualified applicants for faculty positions are constitutional)



December 2004

Reference and Background Checks on Job Applicants

Do you really know whom you are hiring? Approximately 10 percent to 20 percent of job applicants lie on some portion of their application. What would a jury think if it learned that your institution could easily have discovered the criminal background of a child molester before it hired that person? Shouldn't your institution know that a potential accountant has declared personal bankruptcy, a student counselor has a phony degree, or a campus bus driver was convicted of driving while intoxicated?

New electronic databases allow quicker and cheaper employee screening. Even the most diligent screening cannot eliminate all problem employees. However, background checks provide an invaluable defense in lawsuits alleging the institution failed to exercise adequate care before hiring an employee. This issue of Quick Tips recommends which checks to conduct, reviews the different types of checks, and provides information on major vendors in the field.

RECOMMENDED CHECKS

For all job applicants, United Educators recommends that you check references, confirm academic credentials, and verify licenses needed to perform the job. UE recommends additional checks for employees in the following critical positions:

POSITION	CHECKS
Access to children and the developmentally disabled	Social Security tracer Address history for last 20 years State sex offender registries Federal, state, and county criminal records for all jurisdictions in past 7 years Fingerprinting (if allowed by state law) State law requirements for care of minors

Operation of motor vehicles	Drug and alcohol testing Motor vehicle history report Requirements for commercial license
Campus security or any position allowing use of a firearm	Social Security tracer Drug test Federal, state, and county criminal records
Access to funds	Social Security tracer Credit history report Federal, state, and county criminal records
Master key access to residence	Social Security tracer Federal, state, and county criminal records

TYPES OF CHECKS AND HOW TO USE THEM

Academic Credentials

More applicants lie about academic credentials than about any other information on their resumes. Dishonesty is not restricted to any particular type of position. One university found that a tenured English professor never even earned a B.A. A state postsecondary system found that its chancellor never earned the doctorate listed on his resume. Many academic institutions now check the credentials of all new faculty and staff.

Credit History Report

UE recommends credit history checks for any position with access to significant institutional funds. Be sure to comply with the requirements of the Fair Credit Reporting Act. A good overview of those requirements is available at <http://www.ftc.gov/bcp/online/pubs/buspubs/credempl.htm>.

Federal, State, and County Criminal Records

Unfortunately, there is no centralized system to check all criminal databases. Consequently, employers may need to check the federal, state, and county systems in each place an applicant has lived. States vary in the quality and type of records they keep, as do counties. Furthermore, each of the almost 100 federal judicial districts in the United States keeps its own records.

Drug and Alcohol Testing

Federal law requires drug and alcohol testing of individuals with Commercial Driver's Licenses. In addition, UE recommends drug testing for those whose position allows use of a firearm.

Motor Vehicle Records

UE recommends motor-vehicle-record checks for all employees who operate vehicles in the course of their employment. A single check can review records in all 50 states and reveal violations, suspensions, and revocations.

Professional Licenses

Be sure to verify that professional licenses are up-to-date and valid for practice in your local jurisdiction. In addition, check for any prior suspensions of a license or disciplinary action against a candidate.

Sexual Offender Registry

Federal law requires each state to keep a registry of sex offenders. However, 15 states do not make that information available online, and so local law enforcement offices must be contacted in those states to determine if an individual is on the registry. For a listing of states that offer online access to their registries, go to <http://www.fbi.gov/hq/cid/cac/states.htm>. For a summary of the type of information available from each state, go to <http://www.doj.state.wi.us/dles/cib/sclist.asp>.

Social Security Number Tracer

A trace of an applicant's Social Security number is often the first indication that an applicant is being dishonest. The trace will confirm that the applicant is using a valid Social Security number. In addition it can provide a listing of prior addresses for the applicant, typically for up to 7 years.

TYPICAL COSTS FOR COMMON CHECKS

Social Security Trace	\$7-\$14
Federal Criminal Background	\$20-\$25
State Criminal Background	\$15-\$50 depending on state (except N.Y.)
County Criminal Background	\$15-\$25 depending on county
Motor Vehicle Records	\$10-\$30 depending on state
Credit Report	\$12-\$18
Educational credentials	\$10-\$20

Note: Many firms give discounts to clients ordering multiple checks.

PROHIBITED SCREENINGS AND USE OF INFORMATION

Federal law prohibits the use of lie detector tests in most situations. Many states limit drug testing. In addition, some states impose guidelines on the use of information about criminal convictions or charges that were dropped. Be sure to check with counsel in your jurisdiction about state guidelines on the use of drug testing or prior criminal information in hiring decisions.

ADDITIONAL RESOURCES

The Hiring Process

“A Supervisor’s Guide to Hiring”

This excellent resource with detailed guidelines is published by the University of Richmond’s Office of Human Resources.

<http://hr.richmond.edu/managers/guide.htm>

“How to Hire Handbook”

Rice University developed this in-depth guide that includes checklists, sample forms, and step-by-step instructions.

<http://www.ruf.rice.edu/~people//Training/HowToHire/>

Interviewing

Interview Guide for Supervisors, 5th Edition, edited by Mary Ann Wersch

This detailed guide is the most popular publication sold by the College and University Professional Association for Human Resources (CUPA-HR). It costs \$9 for members and \$16 for nonmembers. For more information, go to

<http://www.cupahrstore.org/catalog/index.php>

“Legal Guidelines for Interviewing”

Boston College has provided a thorough eight-page chart for employees on what they may or may not ask during job interviews. For a copy of the chart, go to

www.bc.edu/bc_org/hvp/e/job_fair/legal_guidelines_chart.html.

Employees with Disabilities: A Plain English Guide to Rights and Responsibilities in the Education Workplace, by D. Frank Vinik

This guide includes an overview of the hiring process for individuals with disabilities including interviews, applicant testing, post-offer questions, and medical exams. United Educators members may download a free copy from the Members Only Library of the UE website at www.ue.org/membersonly/GetDocument.asp?id=384. The website gives instructions on how to register for the Members Only section.

Update on Legal and Illegal Interview Questions, by Art Bell

This well-written article with lots of practical advice is by a faculty member at the University of San Francisco. To obtain a copy, go to www.usfca.edu/fac-staff/bell/article18.html.

Affirmative Action

“Faculty Recruitment Toolkit”

http://www.washington.edu/admin/eoo/forms/ftk_01.html#intro

This is an excellent guide for search committees on how to diversify the pool of applicants for a position. It was developed as a campus-wide resource by the University of Washington after its College of Engineering and College of Arts and Sciences experienced unprecedented success using informal toolkits created by their deans.

“Lessons From *Bakke*: The Effect of *Grutter* on Affirmative Action in Employment,” by Eric A. Tilles, 6 *University of Pennsylvania Journal of Labor and Employment Law* 451 (Winter 2004).

“The Effect of the University of Michigan Cases on Affirmative Action in Employment,” by Monique Lillard, et al., 8 *Employee Rights and Employment Policy Journal* 127 (2004).

“Affirmative Action in Faculty Hiring,” by Victor A. Bolden.

A detailed summary of the law developed for a March 2002 conference of the National Association of College and University Attorneys (NACUA) and available through NACUA at www.nacua.org.

“Diversifying the Faculty: A Guidebook for Search Committees,” by Caroline Sotello Viernes Turner. Available from the Association of American Colleges & Universities <http://www.aacu-edu.org/publications/divfacintro.cfm>

The guidebook provides practical advice on conducting the search process, includes a checklist of best practices, and provides helpful listings of institutions that produce large number of minority and female doctoral candidates.

“Minority and Women Doctoral Directory”

www.mwdd.com/

This registry maintains up-to-date information on employment candidates who have recently received, or are soon to receive, a doctoral or master's degree

Background Checks

- Telephone Reference Check Sample Questions
<http://www.acadweb.wvu.edu/hr/employment/InfoForHiringOfficials/HiringPersonnel/tele.pdf>

http://www.hr.duke.edu/utilities/managers/samples/reference_check_questions.doc

These helpful lists of questions for conducting reference checks were developed by Western Washington University and Duke University.

- “Policy Guidance: Preventing Molestation in Schools”
<http://www.ue.org/membersonly/GetDocument.asp?id=625>

This UE publication provides detailed information on background checks, warning signs for molestation, and providing references. This publication is available in the “Members Only Library” of the UE Web site. If you do not have a password, register at <http://www.ue.org/>

- *Staff Screening Tool Kit: Third Edition*

This 137-page book published by the Non-Profit Risk Management Center is a bargain at only \$30. It covers the full array of screening techniques and provides handy checklists at the beginning of each chapter. For ordering information, go to http://nonprofitrisk.org/pubs/scrn_s.htm.

- *Employment Screening*, by Lex K. Larson

This definitive but expensive legal guide costs \$249. To order, go to http://bookstore.lexis.com/bookstore/catalog?action=product&prod_id=10314&cat_id=T&pcat_id=117&pub_id.

- “No Surprises, Please,” by Scott Smallwood, *Chronicle of Higher Education*, July 30, 2004

This article examines the increased use of background checks at institutions of higher education.

- “Should Colleges Check on Professors?” by Scott Smallwood, *Chronicle of Higher Education*, September 12, 2003

This article summarizes the debate over whether faculty should be subject to background checks.

- “Spotting Lies,” by Pamela Babcock, *HR Magazine*, October 2003
<http://www.shrm.org/hrmagazine/articles/1003/1003babcock.asp>

“Spotting Lies” provides statistics on resume fraud and practical advice to human resource professionals for detecting false information.

Major Providers of Background Checks

Hundreds of companies can conduct background checks. The following list contains some of the largest firms that provide services to educational clients. Many smaller providers also give good service. Members should inquire as to where the provider obtains its information and how often its databases are updated. Members should be particularly wary of providers whose prices appear significantly below the industry norms.

- **ADP Screening and Selection Services** conducted almost 4 million employee background checks last years. For a list of its services, please visit <http://www.adphire.com/services.htm>.

ADP provides a 20 percent discount to UE members on criminal background checks. To take advantage of this discount, call 888-606-7869 or go to <http://www.adphire.com/affiliates/unitedEd.htm> and request more information. Be sure to identify your institution as a UE member to receive the special pricing.

- **Acxiom** is more than 35 years old and has offices around the world. A list of services is available at the company’s website at http://www.acxiom.com/default.aspx?ID=2150&Country_Code=USA. The company provides a sample background report at <http://www.acxiom.com/subimages/913200492014bgerber.doc>.
- **Choice Point** has more than 4,000 employees in 50 locations. For a list of some of its employment screening services, go to http://www.choicepoint.com/business/pre_employ/pre_employ_3.html.
- **Hire Right** is a privately held company founded in 1995 that has quickly grown to more than 300 employees. To view a list of the services it provides, go to <http://www.hireright.com/services1a.html>.

- **Kroll Background America** has been conducting employee background investigations for more than 30 years. It was acquired in July 2004 by the Marsh & McLennan Company, which owns the world's largest insurance brokerage. For a list of its services, go to http://www.krollworldwide.com/services/screening/background_investigation/.