

Do's and Don'ts For A Bias-Free Approach To Hiring

By **Vin Gurrieri**

Law360 (August 2, 2023, 7:43 PM EDT) -- A broad push toward diversity, equity and inclusion and leaps forward in artificial intelligence are adding fresh wrinkles to employers' efforts to make sure discrimination doesn't infect hiring and recruiting.



Implicit bias, or making assumptions based on someone's race or gender, has long vexed employers. Individual employees can make questionable decisions based on their unconscious biases even if a company has robust anti-bias policies in place, experts say. (iStock.com/tadamichi)

Though eradicating bias from hiring and promotions has long been a goal of employers, the issue has received renewed attention following the U.S. Supreme Court's recent decision **striking down** affirmative action in higher education and from increased attention that is being paid on the growing use of automated hiring tools by **federal** and **state** governments.

"It's a pretty complicated topic right now," said Steven Sufas of Holland & Hart LLP, noting that law firms themselves were recently **sent a letter** by Sen. Tom Cotton, R-Ark., cautioning them both about how they advise clients on DEI programs and how they structure their own initiatives.

Here, lawyers identify what to do and what not to do while filling open jobs in 2023.

Do Account For Implicit Bias

Even before looking through one resume, one of the simplest steps employers can take in making sure

their hiring process is fair and legally sound is making sure they clearly spell out exactly what an open job entails and objective criteria for filling it, attorneys say.

Dennis Duffy, a director at Kane Russell Coleman Logan PC, said employers' practices should start with ensuring that they have "an accurate and thorough job description in place."

"That's your best defense against potential employment discrimination claims, and it becomes the guidepost for any consideration of candidates," Duffy said, noting that interview questions can then be crafted based on those job descriptions as opposed to more general characteristics of an applicant.

Aside from serving as a good springboard for filling open jobs, defining objective characteristics to be considered is also one of the best ways to prevent implicit bias from bleeding into the hiring process, according to Zachary Busey of Baker Donelson Bearman Caldwell & Berkowitz PC.

Implicit bias, as opposed to more overt forms of discrimination, occurs when individuals make unconscious assumptions about people based on race, gender or other factors. The issue has long vexed employers since individual employees can make questionable decisions based on their unconscious biases even if a company has robust anti-bias policies in place.

"When we say we want someone who is a leader, well, what does that mean? That's kind of a subjective characteristic, and where we have subjective characteristics we have a higher likelihood that anyone's implicit biases ... inform what they think a leader is," Busey said.

Other examples of common "inherently subjective" criteria, according to Busey, might include seeking an applicant "who is a people person" or someone who can mesh well with clients. Instead, employers can objectively frame the qualifications for a job by, for example, defining a leader as someone who has managed teams of a particular size for a certain number of years.

"As much as an employer can, go into the hiring process with actual tangible objective characteristics for what they're looking for either in an applicant or ... for the position as a whole," Busey said.

Another tool that employers can use to ward off implicit bias is by making sure that more than one person is part of an applicant's evaluation, preferably a group of people with diverse backgrounds.

"The extent to which you can diversify your selection teams, that's also a good way to check against biases creeping in process, including implicit bias," Duffy said. "If you have a mix of men, women, different ethnicities, that might be an additional way of checking against the possibility that selections may be made on preassumed assumptions."

Don't Deploy Loose Language

Although diversity, equity and inclusion programs can look vastly different across businesses, employers should be cognizant of exactly how they operate. But even if a company's DEI program is structured in a legally sound way, some employers can go wrong by publishing statements or materials in connection with it that include vague language or messages, Suflas said.

When it comes to issues associated with corporate DEI programs, companies must "be very careful how public pronouncements regarding these topics are being published," he said.

In his own practice, Suflas said he has seen "very poorly drafted" documents from a corporate client's DEI office leading to so-called reverse discrimination allegations from an older, white male employee who claimed he was unlawfully denied a promotion. Employers broadly should be on the lookout for similar scenarios moving forward.

"I think the one takeaway is, in particular, the legal function has to be paying very close attention to what's being said in terms of a company's DEI initiatives, which are totally appropriate but now, certainly in light of what the Supreme Court just ruled, [have] got to be carefully worded," Suflas said.

Aside from language in internal DEI-related documents, it also behooves employers to make sure the lingo they include on external job advertisements is similarly screened to make sure it doesn't discourage particular groups of people from applying, according to Pankit Doshi, a California-based partner at McDermott Will & Emery LLP.

Even though employers generally strive to craft a neutral process for recruiting new employees, they may subtly evince a preference for certain applicants if they use descriptors and adjectives in their job ads that play into stereotypes. An example might be a job ad that says a position is for a "businessman."

"You want to make sure that there is no unconscious bias or discriminatory language in job descriptions and job postings that suggests that folks in certain protected groups may not be welcomed as part of the criteria for a specific position," Doshi said. "It always makes sense to take a fresh look at those descriptions and job postings to make sure that they're inclusive, and in particular that they don't prioritize male candidates, for example, over female candidates."

Do Make Accommodations Available

Under the Americans With Disabilities Act and similar state laws, employers can't discriminate against employees or job applicants with disabilities and must make reasonable adjustments to help them absent an undue hardship.

One way a law like the ADA can intersect with employers' use of artificial intelligence is when people with disabilities apply for jobs and they either can't use a specific automated tool or a tool grades them in an unfair way.

Niloy Ray, a shareholder at Littler Mendelson PC, said artificial intelligence is a game changer when it comes to hiring and recruitment by speeding up manual processes and lessening the chance of biased decision-making when the technology is "carefully built and operated."

But he also noted that employers should be cognizant that existing laws, including the ADA, can be used to regulate activity associated with the use of automated tools. That means employers should be prepared to explore alternatives to any AI-infused processes when circumstances dictate it, as they do for workers with disabilities in other contexts.

"Employers are already in the business of accepting and making reasonable accommodations and providing alternatives to those who bring forward a reasonable request based on their disability," Ray said. "So extending that process to these tools is something that employers are already doing or can do."

Don't Let Managers Veer Far Off Script

Even if a company has the right policies on paper it's up to frontline managers and hiring personnel to carry them out — and missteps can occur if an interview becomes too casual.

"Mistakes are being made by [interviewers] being overly familiar," Suflas said. "Sometimes managers feel that before they get into the real meat of the interview that they've got to establish some rapport, and that's where you get all the bad questions. ... I think that's a common fallacy especially among front-line supervisors if they are involved in the hiring process on their own."

Some examples of inappropriate questions, attorneys say, regard whether a person is married, if they have kids, what country they were born or whether they attend church. Those sorts of queries, even if the interviewer never takes the answers into account, still crack open the door for potential discrimination claims if an applicant doesn't get the job.

In some situations, questions regarding sensitive topics could be pertinent, according to Busey of Baker Donelson, but it's important for managers to not ask them in a flippant way.

For example, if an interviewer is trying to suss out whether a job applicant can work on Sundays, they can simply ask the applicant if they can or would be willing to work on weekends as opposed to indirectly broaching the topic by asking if they attend church on Sundays. That is one example, Busey said, when it pays off for an employer to set clear guidelines up front about the requirements for a job, which puts interviewers in a position of effectively having to ask a yes or no question about whether an applicant can meet the expectation.

While not every interview needs to be exactly the same, Duffy said it is incumbent on interviewers to follow a similar script to avoid legal landmines.

"Some employers go as far as to have structured interviews where you're asking exactly the same question for every candidate," Duffy said. "I don't think that that's absolutely necessary in all cases, but

having some consistency in terms of the questions that you ask ... is always advisable."

Don't Let AI Do All The Work

Given the current capabilities of technology that incorporates artificial intelligence and the state of the law relative to that technology, it's a gray area for employers if the tools themselves are making decisions about whether job applicants advance in the process or are hired, Busey said.

"What we mean by making a decision is eliminating or negatively segregating an applicant pool for an employer," Busey said.

While it "tends to be less problematic" if employers use those tools to do things like aggregating or organizing large amounts of information or, for example, screening resumes submitted past a specified deadline, employers should avoid using AI to make even preliminary decisions to automatically screen out people of particular demographics, he said.

"In terms of guidance, what we're telling employers to do [and] what we want them to do is to use AI to help you make a decision, not to make the decision," Busey said. "To automatically prioritize applicants with [specified] characteristics, that is still just a gray area and an issue where right now ... it's unclear [whether] the priorities or the benefits of that outweigh the negatives."

Ray of Littler Mendelson also stressed the importance of keeping human decision-makers in the loop who both understand the technology and can explain the basis for employment decisions.

He said there is a "balance that has to be struck" between "careful, reasoned involvement of human beings," especially when automated tools are being developed, and testing of those tools' results to make sure they aren't discriminatory.

"I think that the absence of ... human involvement across the process will make it harder for a corporation to defend its use of [a] tool," Ray said. "At least starting out, as we're charting these territories, it's important to have that human in the room so that you can explain what you did, show your work, explain how you got there and explain how you were being thoughtful and reasonable about your use of AI tool."

--Editing by Amy Rowe and Emma Brauer.