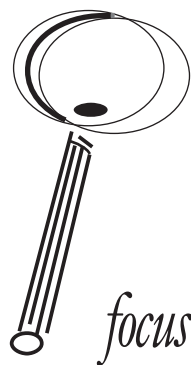


1

Onboarding



Learning Objectives

By the end of this chapter, you should be able to:

- Describe the processes of defining a job position.
- List major steps related to legal, nondiscriminatory recruitment.
- Adhere to major statutes related to recruitment documentation.
- Define major pre-employment issues.
- Recognize the key components of employment interviews, including the role of the Americans with Disabilities Act.
- Engage in the process of drafting competency-based questions, closing, and documenting a job interview.

OVERVIEW

Onboarding involves the entire process of recruiting, interviewing, hiring and orienting new hires—and, ultimately in setting the stage for employee retention. In other words, it's good talent management.

If the onboarding process is founded on policies that comply with federal, state, and local statutes, as well as reflecting the organization's business interests, it also helps you prove that your hiring decisions are based on legitimate, work-related reasons and not on discrimination related to race, religion, age, sex, or any other legally protected characteristic.

Each stage in the onboarding process is essential in establishing and developing a productive and harmonious workforce. The HR department or specialist within an organization is a primary source of guidance to individuals

throughout the organization who must recruit, interview, manage and, if necessary, discipline employees. This guidance comes in the form of drafting, disseminating, and helping to implement the organization's policies of whatever nature and kind related to the employer-employee relationship. HR is often viewed as the definitive source of interpretation as to what a policy actually means and how it is to be carried out.

DEFINING THE POSITION

Before you can successfully recruit and hire the right person you must understand the job you are hiring them to do. This includes defining minimum requirements related to education, specific skills sets, scheduling availability, and more. Your understanding must be reflected in a good job description.

Job Descriptions

A *job description* provides a summary of the tasks to be performed and states specific requirements of the *position*. The job description serves many different functions:

- It lists minimum performance expectations.
- It discourages uninterested and unqualified individuals from applying.
- It serves as a guideline for selecting and interviewing candidates, and in making your decision on which one to hire.
- It forms the basis for training needs.
- It establishes *benchmarks* for performance evaluation.
- It may act as evidence against grievances, wrongful termination lawsuits, or claims of discrimination or retaliation. If all employees in a particular job have been judged by the same job-related criteria, then it is difficult for an unhappy worker to claim that he or she has been treated differently and that the reason must be based on factors such as race, religion, or sex.

The first order of business in developing a good job description is for HR and the individuals that will be managing the position in question to analyze the job in terms of:

- Skills and knowledge required
- How the work is performed
- Typical work settings

Analytic Steps

Job analysis enables you to identify and determine in detail the particular job duties, requirements, and the relative importance of these duties and requirements for a given job by undertaking the following steps:

1. Review existing job description, if any.

An existing job description, even if it's out of date, represents a starting point from which to derive basic technical skills, reporting relationships, and other information.

2. Review public source information and job classification systems.

Examples:

*The Occupational Information Network (O*NET®) System,*
www.onetcenter.org

- Database of occupational requirements and worker attributes
- Comprehensive source of descriptors, with ratings of importance, level, relevance or extent, for more than 900 occupations
- Uses a common language and terminology to describe occupational requirements

The Occupational Outlook Handbook (OOH),
<http://www.bls.gov/oco/home.htm>

- Publication of the United States Department of Labor Bureau of Labor Statistics
- Includes information about the nature of work, working conditions, training and education, earnings, and job outlook for hundreds of different occupations
- Released biennially with its companion publication, the *Career Guide to Industries*

3. Conduct incumbent surveys and interviews.

Find out what the people who have actually been doing the job think. What technical skills do they think are required; to whom do they believe they report (irrespective of what an organization chart says)? A checklist questionnaire can be a helpful way to obtain information for the job description.

4. Conduct supervisor surveys and interviews.

Surveying and interviewing supervisors will provide you the information you need to determine the core competencies required for the specific job in question. See Online Exhibit 1-1 at www.amaselfstudy.org/go/HRPractice for an example of what part of a supervisor job survey of core competencies for a bookkeeping, accounting, or auditing clerk's position looks like.



Exercise 1-1 **Analyzing a Job**

Instructions: Assume that you have been given the task of writing a job description for a customer service position with the organization you are actually currently with.

Where would you go to obtain any existing job description(s) for the position?

Exercise 1-1 continues on next page.

Exercise 1-1 continued from previous page.

Who would you seek information from about how the job has actually been performed in the past?

5. Distill the information into a usable form.

After completing information gathering through Analytic Steps 1 through 4, compile the information into a useable form through the creation of a Job Audit Form and an Essential/Nonessential Tasks Chart. See Online Exhibit 1-2 Job Audit Form and 1-3 Essential/Nonessential Duties and Responsibilities at www.amastudy.org/go/HRPractice.

Writing the Job Description

It takes time to write an effective job description, but defining the duties and skills pertinent to a specific position is essential to hiring a successful candidate in a legally safe manner.

When writing a job description:

- Use gender-neutral language.
- Describe what knowledge, skills, and abilities are required of the applicant.
- List the exact duties the job includes.

A good format to follow is:

- Summary statement—provides a synopsis of the major purpose of a position and its role in the department.
- Duties—major subdivisions of work performed by one individual.
- Tasks—work operations that are logical, essential steps in the performance of a duty. The “Tasks” section of the description defines the methods, procedures, and techniques by which duties are carried out. It should show *what* is done (action), *how* it is done (procedures, materials, tools, or equipment), and *why* it is done (purpose). Begin each task statement with an action verb in the first person present tense: for example, write, calibrate, analyze, coordinate, approve, accept, devise, develop.
- Degree of supervision, given/received.

See Online Exhibit 1-4 at www.amastudy.org/go/HRPractice for an example of a Human Resource Generalist job description.

In order to demonstrate that your hiring practices are directly related to the knowledge, skills, abilities, and experience necessary to perform the functions of the position, it is recommended that job descriptions be reviewed annually.

RECRUITING

Attracting a large pool of qualified applicants must be undertaken in a legally safe manner.

Statutes Requiring Affirmative Action Plans in Recruitment

The following laws mandate affirmative action when recruiting applicants.

Executive Order 11246

For federal contractors and subcontractors, affirmative action must be taken by covered employers to recruit and advance qualified minorities, women, persons with disabilities, and covered veterans. Affirmative actions include training programs, outreach efforts, and other positive steps. These procedures should be incorporated into the company's written personnel policies. Employers with written affirmative action programs must implement them, keep them on file, and update them annually.

Executive Order 11246 (E.O. 11246) prohibits federal contractors and subcontractors and federally-assisted construction contractors and subcontractors that generally have contracts that exceed \$10,000 from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. It also requires covered contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment.

E.O. 11246 is administered by the Office of Federal Contract Compliance Programs (OFCCP) within the U.S. Department of Labor.

Section 503, Rehabilitation Act of 1973

Section 503 of the Rehabilitation Act of 1973 (Section 503) prohibits discrimination and requires employers with federal contracts or subcontracts that exceed \$10,000 to take affirmative action to hire, retain, and promote qualified individuals with disabilities. Many of the requirements of Section 503 regarding reasonable accommodations are the same as those of the Americans with Disabilities Act (ADA). All covered contractors and subcontractors must also include an EEO Clause in each of their nonexempt contracts and subcontracts.

This law is enforced by the Employment Standards Administration's Office of OFCCP.

Section 4212, Vietnam Era Veterans Readjustment Assistance Act

The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA or Section 4212) are administered by OFCCP and the Veterans' Employment and Training Service (VETS). Section 4212 generally covers employers with federal contracts or first-tier subcontracts that meet the threshold amount specified in the statute (generally \$100,000).

Uniformed Services Employment and Reemployment Rights Act (USERRA)

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. §§ 4301–4335) is a federal law intended to ensure that persons who serve or have served in the Armed Forces, Reserves, National Guard, or other “uniformed services”:

1. Are not disadvantaged in their civilian careers because of their service.
2. Are promptly reemployed in their civilian jobs upon their return from duty.
3. Are not discriminated against in employment based on past, present, or future military service.

USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.

USERRA’s definition of “service in the uniformed services” covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

USERRA would protect someone from being denied employment because they are going to join the armed forces or have joined the armed forces on a deferred entry basis.

USERRA does not supersede, nullify, or diminish any federal or state law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.



Exercise 1-2 USERRA in the Real world

Instructions: Read each of the following scenarios. Analyze whether or not the employer violated USERRA in each instance.

Scenario 1: Eric approaches his employer, Mr. Doe, and states that he has joined the Army on a delayed entry program and will be leaving in 45 days. Mr. Doe responds that the organization’s busy season will start in 30 days, and that he’ll need to find and train a replacement before the busy season begins. He says he just can’t afford to continue to pay Eric’s salary and a new hire’s salary at the same time. Therefore, he says he’s letting Eric go immediately.

Is Mr. Doe violating USERRA? Does he have an “undue hardship” defense?

Exercise 1-2 continues on next page.

Exercise 1-2 continued from previous page.

Scenario 2: Simon is hired as a high school coach at the start of the nine-month school year. Two weeks into the school year his Reserve unit is activated for 90 days. While he is gone the school hires Shawn as a permanent replacement for Simon. When his reserve unit is deactivated Simon wants his coaching job back. The school refuses and says that the coaching job that Simon left to serve in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that such employment would continue indefinitely or for a significant period.

Is the school violating USSERA? Does it state a valid defense?

Solutions:

Scenario 1: The undue hardship defense under USERRA only applies to reemployment rights, not to the employee's right not to be fired for having enlisted in the armed services. Mr. Doe fired Eric directly because of his enlistment in the armed services and therefore violated USERRA.

Scenario 2: Under USERRA (38 USC 4312), "the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period." Since Simon's contract of employment was for a period far exceeding his unit's activation, the school's argument that his job was "for a brief, nonrecurrent period and there was no reasonable expectation that such employment would continue indefinitely or for a significant period," does not seem persuasive.

LEGAL RECRUITING GENERALLY

Whatever recruiting technique you use, you must always be careful not to give the impression that a hiring decision, whether positive or negative, will be made on other than job-related criteria.

Internal Job Postings

There is no legal requirement to give current employees notice of vacancies or any right of first refusal. However, if an organization does not publicize job openings through internal physical postings on bulletin boards, at meetings or through the organization's website and/or web blog there is a danger that current employees will argue that they have been excluded based on age, race, religion, or other protected characteristic. The argument will be couched in

terms of, “I am in the XYZ protected class. I was qualified for the job. I was not hired for the job. The company hired someone who is not in the XYZ protected class and is no more qualified than I am. I believe it was because I am a member of the XYZ protected class.”

In order to control disruptive internal job transfers, many organizations limit how soon or how often a current employee can apply for any opening. For example, the company policy might state that the “employee must be with the company for at least a year and in their present job for six months in order to become eligible to apply for a vacancy.” As long as these rules apply uniformly to all employees, they are legal.

Employee Referrals

Current employee referrals, especially from good performers, are an effective source of job applicants.

Employee referral programs may be perceived as discriminatory in practice. For example, if an existing work group is fairly homogenous—say, 98 percent of all workers are African American women or white women or Asian men—the company will end up simply hiring more people within the same limited group and having a disproportionately negative impact on all others. That would constitute “disparate impact” discrimination. See Job-Related Ad Language later in this chapter.

DISCRIMINATORY RECRUITMENT

Section 703, Civil Rights Act of 1964 (CRA), other federal laws, and the fair employment practice acts (FEPAs) of almost every state makes it an unlawful employment practice for an employer, employment agency, or labor organization to deprive any individual of employment opportunities because of the applicant’s race, color, religion, sex, national origin, physical disability, or other characteristic protected by law.

Employers covered by these laws cannot fail or refuse to hire because an individual is a member of a protected class. Nor can they print or publish, or cause to be printed or published a job advertisement that may adversely affect a member of a protected class.

Job-Related Ad Language

A discriminatory job advertisement is one which indicates, or which might reasonably be understood as indicating, that an employer intends to commit an act of unlawful discrimination when determining who should be offered employment or promotion. Intent to discriminate is determined from what an employer says or does—not from what it *actually* meant.

An advertisement must be read as a whole and you must be careful of not only the words you use, but also of the pictures it contains. Example: For example, a job ad for a mechanic that features a male mechanic or an ad for a nurse that presents a picture of a female nurse both indicate a preference based on sex (gender).

Disparate impact is a central issue when analyzing any discriminatory intent found in a job advertisement. Disparate impact is an employment practice that appears to be neutral but which, in practice, disproportionately and adversely impacts members of a protected group. It doesn't have to eliminate everyone in the protected group—merely a statistically significant number of that group. For example, a job ad that states a height requirement may have a disparate impact on women or Asians (national origin discrimination).

A *bona fide occupational qualification* (BFOQ) is a narrow exception regarding discriminatory job requirements if there is a characteristic that a candidate must possess to actually do the job in question. The BFOQ must be significantly necessary for the operation of the employer's business. For example, being female is not a BFOQ for working in a women's health club in such positions as a manager or trainer, however, it could be required for an attendant in the women's locker room.

Other areas where issues related to disparate impact might arise are:

- Educational standards
- Facial hair (may conflict with religious observances or certain races prone to ingrown hairs that make shaving painful)
- Pre-employment testing
- Referrals from current workforce (if current workforce is predominantly of one race or gender, for example)



Exercise 1-3 What's Wrong with This Ad?

Instructions: Read the job ads and then describe which you like better, and why.

Ad A	Ad B
Help Wanted Cocktail Waitress Attractive, friendly, good physical shape—must be 21. Bondable, H.S. grad; able to pass drug screen. Fun lovin' redneck crowd—great tips for the right kind of woman! Call 555-BARN	Help Wanted Cocktail Server Of legal age to serve liquor. Personable, able to carry trays up to 15 lbs. in crowded bar. Bondable. Must pass basic math test and have legible handwriting. Must be able to pass drug test. Fun work atmosphere, great tips. EOE. Call 555-2275

Exercise 1-3 continues on next page.

Exercise 1-3 continued from previous page.

Solution: Problems with Ad A:

- The word “waitress” connotes a preference for one gender over another. Unless the employer can prove that only women can serve cocktails, the ad discriminates against men.
 - “Good physical shape” connotes a preference for workers without disabilities. These words may violate the Americans with Disabilities Act.
 - Stating an age requirement, unless directly related to an essential job requirement (for example, “of legal age to serve liquor”), violates the Age Discrimination in Employment Act.
 - If an educational requirement is listed, it must bear a reasonable relationship to actual job requirements.
 - There is nothing wrong with stating a requirement that applicants be able to pass a drug screen or test so long as all applicants are treated the same.
 - The phrase, “Fun lovin’ redneck crowd—great tips for the right kind of woman!” strongly alludes to sexual stereotyping and may constitute sex discrimination.
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RECRUITMENT DOCUMENTATION

Employers have certain responsibilities regarding retention of resumes and job applications.

Federal Contractors

OFCCP regulations require that federal contractors maintain all job postings and advertisements, applications received, any interview notes, test and test results, records of job offers, and the applications themselves for a period of two years from the date of the record or the personnel action.

Contractors with fewer than 150 employees or a contract of less than \$150,000 need only keep these records for a period of one year. See 41 CFR 60-1.12(a).

Private Sector Retention of Applications and Resumes

The requirements for retaining applications and resumes vary, depending upon the circumstances under which they are submitted.

Applications in Response to Job Advertisements

Resumes or applications you receive in response to job ads you have placed in any media must be retained for one year. Title 29 Code of Federal Regulations Section 1602.14 *Preservation of records made or kept*, says, among other things:

Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the

employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later.

Unless you are going to consistently review previously received applications when a new job opening occurs, it is recommended that you advise applicants that applications/resumes will be retained for one year but will only be kept active for 60 days after they are received; inform them that they must reapply if they have an interest in any job with your company after that time. This will eliminate any argument a potential plaintiff may have that your retention of their application was an implied promise that you would consider them in the future.

Unsolicited Applications/Resumes

You may receive unsolicited applications/resumes either in hard copy (printed on paper) or electronic format. The following sections describe how to handle each.

Hard copy applications/resumes Individuals who send you unsolicited physical applications and resumes are not automatically “applicants for employment.” You may dispose of unsolicited applications and resumes you receive unless it is your organizational practice to keep and use an open file of such materials.

A walk-in applicant whom you allow to fill out and hand you an application form probably is an “applicant for employment”; you should retain his/her application for one year.

Electronic applications/resumes The intensive and extensive use of the internet to recruit and find applicants, together with the blizzard of unsolicited resumes sent to employers, led the Department of Labor (DOL) to define who an applicant is in the context of the internet. In order for an individual to be an applicant in the context of the internet and related electronic data processing technologies, the following must have occurred:

1. The employer acted to fill a particular position.
2. The individual followed the employer’s standard procedures for submitting applications.
3. The individual indicated an interest in the particular position.

If someone is an electronic applicant who has properly responded to an ad you posted on the internet, you must retain their application/resume for one year.

Employer Information Report (EEO-1 Report)

The **Employer Information Report**, generally known as the EEO-1 Report, is a federal government form requiring many employers to provide a count of their employees by job category and then by ethnicity, race, and gender. The EEO-1 report is submitted to the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP).

The following employers must file the EEO-1 Report:

- All employers with 100 or more employees
- All federal government contractors and first-tier subcontractors with 50 or more employees **and** a contract amounting to \$50,000 or more

The EEO-1 report must be filed annually with the EEOC by September 30. It must use employment numbers from any pay period in July through September of that year. A sample copy of the EEO-1 form, Instructions, and the “EEO-1 Job Classification Guide” can be obtained from the following website: <http://www.eeoc.gov/employers/eeo1survey/>.

Many employers have new hires complete a voluntary self-identification form when they are first employed. A sample voluntary self-identification form is shown in Online Exhibit 1-5 at www.amaselfstudy.org/go/HRPractice. If an employee fails or refuses to complete a voluntary self-identification form, you can make a determination using employment records or observer identification.

Employers should retain a copy of the most current EEO-1 report filed.



Exercise 1-4 Deciding What to Keep

Instructions: Decide which of the following applications must be retained for one year.

Note: This decision would be made by the HR department, not a supervisor or line manager.

Facts	Retain Application/ Resume (Y/N)	Why?
1. Debby will graduate from college at the end of the semester. She emails her resume out to 100 companies, including yours, seeking “opportunities.”		
2. Rachel will graduate from college at the end of the semester. She searches the internet for job openings in her field. She applies online to three job postings, including yours.		

Exercise 1-4 continues on next page.

Exercise 1-4 continued from previous page.

3. Noah walks into your place of business. He asks if you are hiring for any job. You respond that you are not and aren't accepting applications at this time. He responds that as long as he's there he'll just leave his resume with you "just in case." He puts his resume on your desk and leaves.		
4. A job candidate fills out your application form for a job you have posted. You review the application and immediately recognize the candidate is completely unqualified for the job.		

Solutions:

Situation 1: You do not have to retain the resume. Debby is not an applicant in the context of the internet since she did not express an interest in a particular position that the employer had sought to fill.

Situation 2: It appears that Rachel is an applicant in the context of the internet since (a) your company acted to fill a particular position; (b) you posted the job on the internet and it is probable that your procedures for submitting applications would allow someone to apply online; and she indicated an interest in the particular position. Therefore, you must retain the application.

Situation 3: You advised the walk-in applicant that you had no openings and were not accepting applications. Therefore, you do not have to retain the resume simply because the individual either mailed the document to you or left it lying on your desk without your concurrence.

Situation 4: Since the application was submitted in response to a job you posted, you must retain the document even if the candidate is unqualified for the position in question.

PRE-EMPLOYMENT ISSUES

The reach of equal employment opportunity laws extends to pre-employment issues including *background checks*, *pre-employment testing*, and interviewing.

Background Checks

Since the information provided by resumes, applications, and interviews are largely controlled by the applicant, it should be verified. Background checks, the method of authenticating such information, can be very valuable in ensuring that the applicant possesses the education, experience, and skill sets required for the position in question.

Background checks are covered in Chapter 4.

Pre-Employment Tests

The purpose of pre-employment testing is to gauge employment worthiness. Testing job applicants done right helps to gauge an evaluatee's suitability for the position. Done wrong, employers will find themselves embroiled in investigations by either federal or state fair employment practice agencies or locked in costly litigation.

Employers commonly use a range of employment tests and other screening tools to make hiring, promotion, termination, or other employment decisions. For example, many employers use basic literacy tests, personality tests, credit checks, and medical and fitness tests in an attempt to gauge someone's employment worthiness.

The types of tests commonly used by employers include:

- **Cognitive tests** that assess reasoning, memory, perceptual speed, and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job.
- **Physical ability tests** that measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general.
- **Sample job tasks** such as performance tests, simulations, work samples, and realistic job previews—all calculated to assess performance and aptitude on particular tasks.
- **Medical inquiries and physical examinations**, including psychological tests, that assess physical or mental health (subject to the provisions of the Americans with Disabilities Act).
- **Personality tests and integrity tests** that assess the degree to which a person has certain traits or dispositions such as dependability, cooperativeness, and safety, or aim to predict the likelihood that a person will engage in certain conduct like theft or absenteeism.
- **English proficiency tests** that determine English fluency.

All of this testing is governed by a variety of federal and state fair employment acts. Chief among the laws dealing with testing is Title VII of the Civil Rights Act of 1964.

Title VII prohibits employment discrimination based on race, color, religion, sex, national origin, or genetic predisposition. Title VII permits employment tests as long as they are not “designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.”

Since testing is permitted by Title VII, if an applicant refuses to take pre-employment test that is being administered to all applicants, then you can use that as a valid reason for denying them the job in question. Also, if someone already works for you and is injured on the job, and then refuses to submit to a test for drugs or alcohol, that employee may forfeit eligibility for medical and indemnity benefits under either or both your group healthcare coverage and Workers Compensation.

If an employee or job applicant refuses to submit to a drug test, the employer is permitted to discharge or discipline the employee or may refuse to hire the applicant if specified in your company's written Drug-Free Work-

place Policy, since generally a refusal to submit to a drug test is presumed to be a positive test result.

Title VII also imposes restrictions on how to score tests. Employers are not permitted to (1) adjust the scores of, (2) use different cutoff scores for, or (3) otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin.

It is important to understand that pre-employment testing is impacted by the two types of discrimination that Title VII prohibits, namely, “disparate treatment” and “disparate impact” discussed earlier in this chapter.

Disparate treatment occurs when a job applicant or employee is treated less favorably than other workers of equal status, in other words, “similarly situated” employees, because the worker is a member of a protected class. In other words, Title VII prohibits *intentional* discrimination based on race, color, religion, sex, national origin or genetic predisposition. Therefore, Title VII forbids a covered employer from testing the reading ability of African-American applicants or employees but not testing the reading ability of their white counterparts.

Disparate impact occurs when an organization has a policy that seems neutral on its face, that is, it seems to apply equally to everyone irrespective of race, religion, age, sex, or disability. However, when applied, the policy disproportionately impacts members of a protected group. Title VII prohibits employers from using neutral tests or selection procedures that have the *effect* of disproportionately excluding persons in a protected group, where the tests or selection procedures are not “job-related and consistent with business necessity.”

For example, if an employer requires that all applicants pass a test that involves lifting 60-pound loads, it might be asked whether the test disproportionately screens out women. Determining whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.

However, if the selection procedure *does* have a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection procedure is job-related and consistent with business necessity? In the above example, the position being filled may involve repeatedly lifting heavy objects. If so, then the test is acceptable and the employer is legally safe.

Thus an employer can meet the legal requirement by showing that the challenged policy or practice is associated with the skills needed to perform the job safely and efficiently. In other words, before you start pre-employment testing you should make sure that whatever test you choose to administer is testing for skill sets, physical capabilities, educational levels, or other traits that are truly related to the job in question—rather than measuring people in the abstract.

Interviewing

Under Title VII and the EEOC Uniform Guidelines, interviews are considered to be selection procedures on a par with pre-employment tests because they are one means by which an employer disqualifies an applicant from con-

sideration for a job. Therefore, interviewing should be a carefully structured process with interviews focused on objective, job-related criteria.

Employers that use unstructured interviews tend to use subjective, rather than objective, criteria. Interviewers who ask questions or make comments that are not focused on job-related issues can open the employer to charges of discrimination. Your safest legal course is not only to center interview questions and comments on job-related issues, but also, to the greatest extent possible, ask all applicants the same core questions. Exhibit 1-1 is a chart reflecting types of acceptable versus unacceptable interview questions.

E

Exhibit 1-1

Acceptable/Unacceptable Interview Questions

Subject	Acceptable	Unacceptable
Name	Can ask if applicant has ever worked for company under another name.	Have you ever had any other names?
Birthplace	No acceptable questions.	Where were you born? Where were your parents born? Requiring a birth certificate.
Age	Can ask if they meet any age required conditions of the job.	How old are you? Any questions attempting to determine the age of the applicant are unacceptable, unless BFOQ related—such as being of legal age to serve hard liquor in a lounge.
Religion	No acceptable questions unless related to a bona fide occupational qualification (BFOQ)—such as teaching at a parochial school.	Questions about religion generally or about what days they may need off for religious observance. If the applicant raises the issue of days off for religious observances, then you can discuss reasonable accommodations.
Work Schedule	Can ask if they meet the attendance requirements of the position.	Any questions about health conditions that would lead to absences from work.
Race	No acceptable questions.	Any questions seeking to elicit what race the applicant is or other questions indicating race or color.
Photographs	Unacceptable unless BFOQ—such as some sort of acting role.	Please attach a photograph.

Exhibit 1–1 continues on next page.

Exhibit 1-1 continued from previous page.

Citizenship	The only acceptable question is whether the applicant will be able to prove that they are employable in the event they are offered the job. Employment authorization and identity must be verified and an Form I-9 completed within 3 days of when the individual begins employment.	Any questions asking or seeking to learn the applicant's nationality—such as, "Where are you from?"
National Origin	Languages that the applicant can read, write, or speak and their level of fluency.	Any questions about the applicant's national lineage or their date of entry into the U.S. Any questions concerning the national origin of the applicant's spouse or mother. Any questions such as, "What is your mother tongue?"
Education	Applicant's educational background.	When did you graduate from high school? When did you receive your college degree?
Experience	Can ask questions like: What is your work experience? Why did you leave your last job?	What type of discharge did you receive from the military?
Arrests	In many states, no acceptable questions.	Have you ever been arrested?
Felony Convictions	Can ask about felony convictions in all states. In many states, this may only disqualify applicant for a job-related reason—not just because of the conviction itself.	Have you ever been indicted for a crime?
Relatives	Can ask for names of any relatives employed by the company.	Are you married? What relatives live with you? With whom do you reside?
Physical Condition	Can you perform the essential functions of the position for which you are interviewing with or without a reasonable accommodation?	Are you disabled? Are you healthy? Any pre-job offer questions concerning worker's compensation.
Miscellaneous	A statement that any material misstatements made by the applicant may result in immediate dismissal.	Any questions that are not related to the position or necessary to evaluate the applicant's capability to perform the job.

If you don't need to know the answer to a question in order to make a hiring decision, don't ask the question.

In preparing to interview you should:

- Define, as objectively as possible, the qualifications of the job in question.
- Devise questions that are job-related. (See Competency-Based Questions later in this chapter.)
- Ask questions in a consistent, objective manner.



Exercise 1-5 Anything Wrong?

Instructions: Read the scenarios and answer the questions.

Scenario 1: You are observing Debby being interviewed by Mary for a job that involves 30 percent travel away from the city. Debby volunteers that she has young children. Mary asks, "What do you do with your kids when you travel?"

You are observing Eric being interviewed by Mary for the same job she has interviewed Debby for. Eric volunteers that he has young children. Mary says, "That's nice," and completes the interview.

Mary tells you she wants to hire Eric. She feels he's more qualified.

1. Write down every issue that concerns you regarding how Mary handled these interviews.

2. What primary suggestion would you make to Mary regarding future interview techniques?

Scenario 2: You are interviewing Jaime for a job. You say to her, "Tell me about yourself." She replies, "Well, as you can see I'm over 40 and it's hard to get a job at my age. And, I'll tell you something. I don't know if you noticed but I have Parkinson's and my hand shakes a lot which puts a lot of people off. I really need this job. You know, the last person I worked for didn't like strong women like me. I guess he thought I was gay or something. I am, but I didn't think it was any of his business. Well, anyway, I really need this job." What should you say now?

Solutions:

Scenario 1: Mary asked different applicants different core questions. She should advise applicants of the essential job functions and then ask all applicants if they can perform those functions. In other words, she should have both Debby and Eric if they were able to travel 30 percent of the time. By asking Debby—a woman—about child care and not asking Eric—a man—the same ques-

Exercise 1-5 continues on next page.

Exercise 1-5 continued from previous page.

tion, it raises the presumption that the company stereotypes women as caregivers who must stay home with children. It would then logically follow that the company will favor men over women for these types of jobs, and will therefore base the hiring decision on gender rather than job-related qualifications.

Scenario 2: As a general rule of thumb, do not ask open-ended, non-job-related questions. If an applicant volunteers information related to protected class status (“I’m over 40,” “I have a special needs child,” or “I’m a Muslim”) openly state that your organization is an equal opportunity employer and makes hiring decisions based on job-related qualifications without regard to race, religion, age, sex, national origin, physical disability, or other legally protected characteristics.

INTERVIEWS AND THE AMERICANS WITH DISABILITIES ACT

In this section we will examine the key issues relating to the interview process and the Americans with Disabilities Act.

Overview of the Americans with Disabilities Act (ADA) and the Amendments to the Americans with Disabilities Act (ADAAA)

The Americans with Disabilities Act (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, state, and local government services, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the U.S. Congress. To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability.

The ADA’s protection applies primarily, but not exclusively, to individuals with disabilities. Other individuals who are protected in certain circumstances include:

1. Those, such as parents, who have an association with an individual known to have a disability.
2. Those who are coerced or subjected to retaliation for assisting people with disabilities in asserting their rights under the ADA.

While the employment provisions of the ADA apply to employers of fifteen employees or more, its public accommodations provisions apply to all sizes of business, regardless of number of employees. State and local governments are covered regardless of size.

Title I of the ADA deals with the hiring, treatment, and accommodation of applicants and employees with disabilities. The ADA prohibits employment discrimination against “qualified individuals with disabilities.” A qualified individual with a disability is an individual with a disability who meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of a job.

Protected are *qualified* individuals who meet one or more of the following tests:

- a. Those having a physical or mental impairment that substantially limits one or more major life activities
- b. Those with a record of such impairment
- c. Those who are regarded as having such an impairment, who are able to perform the essential functions of a job with or without reasonable accommodation

The ADA Amendments Act of 2008 (ADAAA) made important changes to the definition of the term “disability” by rejecting the holdings in several Supreme Court decisions and portions of EEOC) ADA regulations. See Online Exhibit 1-6 at www.amaselfstudy.org/go/HRPractice for an explanation of significant ADAAA changes.

Identifying the Essential Functions of a Job

Because the ADAAA has broadened the population of individuals who may ask for accommodations during the hiring process (and after they are hired), it is necessary to identify the essential functions of a job in order to know whether an individual with a disability is “qualified” to do the job. You should undertake a job analysis and identify job functions that are truly essential.

The regulations list several reasons why a function could be considered essential:

1. The position exists to perform the function.
2. There are a limited number of other employees available to perform the function, or among whom the function can be distributed.
3. A function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.

The regulations also list several types of evidence to be considered in determining whether a function is essential. Evidence to be considered includes:

- The employer’s judgment
- A written job description prepared before advertising or interviewing applicants
- The amount of time spent performing the function.
- The consequences of not requiring a person in this job to perform a function
- The terms of a collective bargaining agreement
- Work experience of people who have performed a job in the past and work experience of people who currently perform similar jobs
- Other relevant factors

Perform Essential Functions “With or Without Reasonable Accommodation”

An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability *unless* it can show that the accommodation would impose an undue hardship on the business.

If a particular accommodation would impose an undue hardship, the employer must consider whether there are alternative accommodations that would not impose such hardship.

An undue hardship is an action that requires “significant difficulty or expense” in relation to the size of the employer, the resources available, and the nature of the operation.

Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity.

The ADA Prohibits any Pre-Employment Inquiries about a Disability

The prohibition on pre-employment inquiries about disability does not prevent you from obtaining necessary information regarding an applicant’s qualifications, including medical information necessary to assess qualifications and assure health and safety on the job. The ADA requires only that such inquiries be made in two separate stages of the hiring process:

1. Before making a job offer the employer:
 - May ask questions about an applicant’s ability to perform specific job functions
 - May not make an inquiry about a disability
 - May make a job offer that is conditioned on satisfactory results of a post-offer medical examination or inquiry
2. After making a conditional job offer and before an individual starts work the employer:
 - May conduct a medical examination or ask health-related questions, providing that all candidates who receive a conditional job offer in the same job category are required to take the same examination and/or respond to the same inquiries

Basic Requirements Regarding Pre-Offer Inquiries

Exhibit 1-2 sets out some general ADA dos and don’ts regarding pre-offer inquiries.

- An employer may not make any pre-employment inquiry about a disability, or about the nature or severity of a disability:
 1. on application forms.
 2. in job interviews.
 3. in background or reference checks.
- An employer may not make any medical inquiry or conduct any medical examination prior to making a conditional offer of employment.
- An employer may ask a job applicant questions about ability to perform specific job functions, tasks, or duties, as long as these questions are not phrased in terms of a disability. Questions need not be limited to the “essential” functions of the job.
- An employer may ask all applicants to describe or demonstrate how they will perform a job, with or without an accommodation.

E**Exhibit 1-2
ADA and Pre-Offer Inquiries**

Job Performance	
Do Ask	Don't Ask
Are you able to perform the essential function of the job you are seeking, with or without accommodations?	Do you have any physical or mental impairment that would keep you from performing the job you seek? What physical or mental impairments do you have that would affect your job performance?
Attendance Requirements	
Do Ask	Don't Ask
Can you meet our attendance requirements? How many days were you absent from your last job? How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?	How many days were you sick during your last job?
History of Injury	
Do Ask	Don't Ask
How did you break your leg?	Do you break bones easily? Do you expect the leg to heal normally?
Drug Use	
Do Ask	Don't Ask
Are you currently using illegal drugs? Have you ever used illegal drugs?	What medications are you currently taking? How often did you use illegal drugs in the past? Have you ever been addicted to drugs? Have you ever been treated for drug addiction? Have you ever been treated for drug abuse?
Alcohol Use	
Do Ask	Don't Ask
Do you drink alcohol? Have you ever been arrested for driving under the influence of alcohol?	How much alcohol do you drink? Have you ever participated in an alcohol rehabilitation program?

Source: Job Accommodation Network. Updated 8/18/08.

If an individual has a known disability that might interfere with or prevent performance of job functions, s/he may be asked to describe or demonstrate how these functions will be performed, with or without an accommodation, even if other applicants are not asked to do so; however, if a known disability would not interfere with performance of job functions, an individual may only be required to describe or demonstrate how s/he will perform a job if this is required of all applicants for the position.

An employer may condition a job offer on the results of a medical examination or on the responses to medical inquiries if such an examination or inquiry is required of all entering employees in the same job category, regardless of disability; information obtained from such inquiries or examinations must be handled according to the strict confidentiality requirements of the ADA.

The Interactive ADA Accommodation Process

According to the regulations implementing the ADA, reasonable accommodations are to be determined by what is termed an “interactive process.”

The EEOC, in a description uniformly adopted by the courts, defines the interactive process as “an informal, interactive process . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” The EEOC’s interpretive guidelines also state: “Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.” That process is outlined in the following table.

<i>First</i>	The employer should analyze the particular job involved to determine its purpose and essential functions.
<i>Second</i>	The employer and the individual with the disability should work together to identify what barriers exist to that individual’s performance of a particular job function. Include: <ol style="list-style-type: none"> 1. A review of the individual’s abilities and limitations 2. A determination as to which factors in the work environment or job tasks pose difficulties.
<i>Third</i>	The employer, working with the individual with a disability, should identify a range of possible accommodations that have the potential to remove the difficulties, either in the work environment or job tasks, and which would allow the individual to perform the essential functions of the job.
<i>Fourth</i>	The employer should: <ul style="list-style-type: none"> • Assess the effectiveness of each accommodation and the preference of the individual to be accommodated. • Determine whether the various accommodations would pose an undue hardship upon the employer.

The Direct Threat Exception – Chevron Oil, Inc. v. Echazabal, 536 U.S. 73 (2002)

You do not have to accommodate anyone who poses a “direct threat” to him/herself or to others. Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

Although the actual law uses the words, “of others,” regulations to ADA Title I issued by the EEOC permit an employer to refuse to hire a person with a disability if the individual would “pose a direct threat to the health or safety of *the individual*.” (Emphasis added.)

In 2002, the Supreme Court decided *Chevron v. Echazabal*, a case in which Chevron refused to hire an individual with asymptomatic hepatitis C on the grounds that the workplace might exacerbate his condition. The Court ruled in favor of Chevron, endorsing the EEOC’s definition of “direct threat,” which includes a threat to one’s own health or safety.

In determining whether an individual poses a direct threat to the health or safety of others, you must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

The Occupational Safety and Health Administration (OSHA) has also weighed in on the reasonable accommodation issue. In a Letter of Interpretation dated January 26, 1998, among other things, OSHA said:

As you are aware, section 5(a)(1) of the OSH Act, usually referred to as the “general duty clause,” requires each employer to provide employment and a place of employment which are free from recognized hazards.

In general, OSHA believes an employer’s duties under the general duty clause are consistent with his duties under the ADA. The OSH Act requires employers to enforce medical qualification requirements when the failure to do so would create a “recognized hazard causing or likely to cause death or serious physical harm,” while the ADA specifies that an employer is allowed to implement such requirements when failure to do so would pose a “direct threat” to health or safety. OSHA will make every effort to be consistent with ADA nondiscrimination principles in enforcing the general duty clause, and in particular, OSHA would encourage employers to explore reasonable accommodations that will allow otherwise qualified individuals to remain on the job while eliminating threats to the health or safety of others in the workplace.



Exercise 1-6 Direct Threat

Instructions: Read the scenario and answer the questions.

Scenario: Doe, a licensed dental hygienist, was employed by Dr. Smith for more than one year. Dr. Jones purchased and took over Dr. Smith's practice. Under the purchase agreement, Dr. Smith and his employees became Dr. Jones' employees. Doe's primary responsibility as a dental hygienist for both Smith and Jones was the performance of routine cleaning of teeth.

Dr. Jones had all of his employees who worked on patients' teeth take a test to determine whether anyone carried the human immunodeficiency virus (HIV). Doe's test results indicated that he was HIV-positive.

Dr. Jones called Doe to inform him that he was being put on paid leave until the practice could decide what action should be taken. After discussions with Doe and conducting research, Dr. Jones met with Doe again and told him that he could no longer treat patients because of his HIV-positive status. Dr. Jones offered Doe a clerical job at the front desk at roughly half of the salary he had made as a dental hygienist. Doe took another week off to consider the proposition, and when he ultimately refused to accept the offered job at the offered rate of pay, Dr. Jones terminated his employment.

Doe sued, claiming that he (1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of his disability.

1. What other arguments do you think Doe can make to support his demand to be rehired and for damages?

2. What counter-arguments do you believe Dr. Jones can make to Doe's claims?

3. Who do you think would win this type of case? (See *Spencer Waddell v. Valley Forge Dental Associates, Inc.* 276 F. 3d 1275 [2001])

Solutions:

Doe can argue:

1. Dr. Jones admitted that his decision to remove Doe from his position was based solely on his HIV-positive status.
2. He is a licensed hygienist and knows how to be careful.

Exercise 1-6 continues on next page.

Exercise 1-6 continued from previous page.

Jones can argue: Doe is a direct threat to others because several factors, when taken together, indicate that Doe poses a significant risk to others in the workplace: the use of sharp instruments by dental hygienists; routine patient bleeding during dental work; the risk that hygienists will be stuck or pricked while using an instrument; there is some risk, even if theoretical and small, that blood-to-blood contact between hygienist and patient can occur; and the possibility of an inadvertent bite or other accident during a dental cleaning. These “particularized facts” provide “the best available objective evidence” that Doe, because he is infected with the fatal, contagious disease of HIV, is a direct threat to his workplace, and therefore not a qualified individual under the ADA.

In the *Spencer Waddell v. Valley Forge Dental Associates* case, the dentist won.

Post-Offer Stage

After making a job offer, you may ask disability-related questions and conduct medical examinations directly related to the job in question as long as you do this for everybody in the same job category.

The job offer may be conditioned on the results of post-offer disability-related questions or medical examinations. You may withdraw an offer from an applicant with a disability only if it becomes clear that he cannot do the essential functions of the job or would pose a direct threat—in other words, a significant risk of substantial harm to the health or safety of him or others. For example:

- If you want to give a medical examination to someone who has been offered a job that involves heavy labor, you must give the same exam to anyone who is offered the same kind of job.
- You may withdraw an offer of a manufacturing job involving the use of dangerous machinery if you learn during a post-offer medical exam that the applicant has frequent and unpredictable seizures.

COMPETENCY-BASED QUESTIONS

Modern human resource management practices suggest that the core of an interview be comprised of competency-based questions. This type of question focuses on relating past job performance to probable on-the-job behavior. Answers are indicators, not predictors, of future performance.

Competency-based questions are derived from your having done a job analysis that identifies the specific job-related skills, abilities, and traits required for successful performance of the job in question. This type of question seeks specific examples from the applicant’s past that will allow you project how this person will perform in similar circumstances or conditions at your organization.

Competency-based interviews do not, of course, consist solely of competency-based questions. Although the core of the interview will be made up of these types of questions, there will also be closed-end “yes/no” questions to confirm information given, confirming questions to address answers the applicant gives, and open-ended follow-up questions to other answers provided.

Common competency-based question lead-ins are:

“Describe a time when you...”

“Describe the circumstances under which you most recently...”

“Tell me about a time when you...”

“Give an example of a time in which you...”

“Tell me about a specific job experience in which you...”

“Give me an example of a specific occasion when you...”

“Describe a situation in which you were called upon to...”

“Describe the most significant...”

“What did you do in your last job in order to...”

“How often in the past year were you called upon to...”

“Tell me about a time when you didn’t want to _____; what happened?”

“Describe a situation in which you felt _____; what was the result?”

“Identify [number] of your [greatest] [best] [weakest] [worst] _____ ...”

“Which of your _____ do you apply when faced with _____?”



Exercise 1-7 **Writing Competency-Based Questions**

Instructions: Read the job duties for a customer service representative and then write six competency-based questions to ask applicants during an interview.

Tasks — Customer Service Representatives

- Confer with customers by telephone or in person to provide information about products and services, to take or enter orders, cancel accounts, or to obtain details of complaints.
- Keep records of customer interactions and transactions, recording details of inquiries, complaints, and comments, as well as actions taken.
- Check to ensure that appropriate changes were made to resolve customers’ problems.
- Determine charges for services requested, collect deposits or payments, or arrange for billing.
- Refer unresolved customer grievances to designated departments for further investigation.
- Review insurance policy terms to determine whether a particular loss is covered by insurance.
- Contact customers to respond to inquiries or to notify them of claim investigation results and any planned adjustments.

Exercise 1-7 continues on next page.

Exercise 1-7 continued from previous page.

- Resolve customers' service or billing complaints by performing activities such as exchanging merchandise, refunding money, and adjusting bills.
- Compare disputed merchandise with original requisitions and information from invoices, and prepare invoices for returned goods.
- Obtain and examine all relevant information to assess validity of complaints and to determine possible causes, such as extreme weather conditions that could increase utility bills.

Competency-based interview questions:

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____

Solutions: The following questions might be asked to the individuals who appear for customer service interviews.

1. How would you handle negative feedback from a client? How, specifically, have you handled negative feedback from a client?
 2. How would you handle a situation where a customer has asked for some service or product that is in violation of the company's policies and is against the interests of the company? How have you handled a situation where a customer asked for some service or product that was in violation of the company's policies and against the interests of the company?
 3. What do you believe is the most important service skill that you need to have in your day-to-day business?
 4. Tell me about a time when you turned down a request from a valued customer.
 5. Tell me about a time when you had a customer who was repeatedly using abusive language, but had a valid point.
 6. Describe any ugly situation with a co-worker and how you handled it.
-
-

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. Also, give the applicant an opportunity to ask you any further questions about your organization or the position.

Make the applicant aware of the next steps, if any. Finally, thank the applicant for his or her time.

DOCUMENTING THE INTERVIEW

It is a good idea to take brief notes during the interview. Let the applicant know from the start that you will be taking notes. Your notes can be helpful in reflecting on individual applicants and in discussions with others who interviewed the same candidates.

Post-Interview Notes

When writing interview and post-interview notes it is important to:

- Avoid subjective language, such as “fake,” “sharp,” “money-hungry,” “full of himself”
- Avoid unsubstantiated opinions

Example:

Don't say: “I believe s/he would make an excellent lab assistant.”

Do say: “I believe s/he would make an excellent lab assistant because of his/her recent experience in an operating environment very much like our own.”

- Prepare note-taking charts

You may find it helpful to prepare a chart from your job description that lists out both essential and nonessential skills you are looking for in a particular job. Then use the chart to take notes on during and after an interview. (See Exhibit 1-3.)

E

Exhibit 1-3 Note-Taking Chart

Essential/ Nonessential	Task	This Candidate
E	Provide reference assistance and educational services	<i>Has performed these services for the past 6 years.</i>
E	Perform research or process records	<i>Has 1 year's experience using different software from ours.</i>
N	Restore and install exhibits	<i>Has limited experience (maybe even none).</i>
E	Work with the public	<i>Has a lot of good, direct experience.</i>

EMPLOYMENT ELIGIBILITY—FORM I-9

The Immigration Reform and Control Act made all U.S. employers responsible to verify the employment eligibility and identity of all employees hired to work in the United States after November 6, 1986. To implement the law, employers are required to complete Employment Eligibility Verification forms (Form I-9) for all employees, including U.S. citizens.

The most current copy of Form I-9, together with detailed instructions for completing it, entitled “*M-274 Handbook for Employers; Instructions for Completing Form I-9 (Employment Eligibility Verification Form)*” can be found at www.uscis.gov.

On March 1, 2003, the authorities of the former Immigration and Naturalization Service (INS) were transferred to three new agencies in the U.S. Department of Homeland Security (DHS):

- U.S. Citizenship and Immigration Services (USCIS)
- U.S. Customs and Border Protection (CBP)
- U.S. Immigration and Customs Enforcement (ICE)

The two DHS immigration components most involved with the Form I-9 are USCIS and ICE.

- USCIS is responsible for most documentation of alien employment authorization, for Form I-9 itself, and for the E-Verify employment eligibility verification program. See E-Verify later in this chapter.
- ICE is responsible for enforcement of the penalty provisions of section 274A of the Immigration Naturalization Act (INA) [the employer sanction laws], and for other immigration enforcement within the United States.

Form I-9 Basic Requirements

Every U.S. employer with four or more workers must have a Form I-9 in its files for each employee, unless the employee was hired before November 7, 1986, and has been continuously employed by the same employer.

Form I-9 need not be completed for those individuals who provide:

- Domestic services in a private household that are sporadic, irregular, or intermittent.
- Services for the employer as an independent contractor.
- Services for the employer, under a contract, subcontract, or exchange entered into after November 6, 1986. (In such cases, the contractor is the employer for I-9 purposes; for example, a temporary employment agency.)

Because significant penalties can be levied by the ICE if you do not have an I-9 for current employees or if I-9s contain material omissions such as missing signatures or dates, you should show good faith and reduce your liability by taking the following steps:

1. Audit your I-9 files.
2. Identify missing or materially incorrect I-9s regarding current employees.
3. Immediately work with appropriate employees to complete new I-9s.

- a. Suggestion: Complete new forms; do not merely change existing forms.
- b. Retain old, incorrect form with new form.

E-Verify

USCIS operates an electronic employment verification system called *E-Verify*. E-Verify is an internet-based system that allows employers to verify the employment eligibility of their employees, regardless of citizenship.

E-Verify is free to employers and is available in all 50 states, as well as U.S. territories except for American Samoa and the Commonwealth of the Northern Mariana Islands. The E-Verify program is voluntary, except:

- Federal contractors must participate in the E-Verify program.
- Some states, such as Arizona, Mississippi, South Carolina, and Utah, require all employers to participate in the E-Verify program.
- Some states require public sector entities and/or contractors to participate in E-Verify.

Employers who participate in the E-Verify program sign a Memorandum of Understanding with DHS and the Social Security Administration (SSA).



In this chapter you learned the importance of the onboarding process in an organization, which involves the key functions of recruiting, interviewing, hiring, and orienting new employees. Done properly, onboarding ensures compliance with federal, state, and local statutes; reflects the organization's business interests; and helps you prove that your hiring decisions are based on legitimate, work-related reasons and not on discrimination related to race, religion, age, sex, or any other legally protected characteristic.

You learned the importance of job descriptions in the hiring process and the basic elements all job descriptions must have: the skills and knowledge required, how the work is to be performed, and typical work settings. You learned the four analytic steps to follow in creating a job description: review existing job description, if any; review public source information and job classification systems; conduct incumbent surveys and interviews; and conduct supervisor surveys and interviews.

In addition, you learned the primary steps to take in recruiting employees, including those statutes requiring affirmative action plans in recruiting, and how important it is to comply with the pre-job offer requirements of the Americans with Disabilities Act (ADA). You learned the importance of internal postings and employee referrals in practicing safe, legal recruitment.

You learned the critical pre-employment necessity of making effective hiring decisions based on job-related criteria and not for discriminatory rea-

sons related to protected characteristics such as age, sex, religion, or national origin.

You learned the importance of careful, accurate, and complete documentation of all steps in the recruitment process.

The pre-employment issues of background checks, pre-employment testing, and interviewing were examined. The requirements related to interviewing and the Americans with Disability Act were covered in detail.

You also learned how to structure behavior-based interview questions that serve to bring out past actions that can indicate future performance in similar, job-related situations. The steps of closing the interview and documenting the interview were also described.



Review Questions

INSTRUCTIONS: Here is the first set of review questions in this course. Answering the questions following each chapter will give you a chance to check your comprehension of the concepts as they are presented and will reinforce your understanding of them.

As you can see below, the answer to each numbered question is printed to the side of the question. Before beginning, you should conceal the answers by placing a sheet of paper over the answers as you work down the page. Then read and answer each question. Compare your answers with those given. For any questions you answer incorrectly, make an effort to understand why the answer given is the correct one. You may find it helpful to turn back to the appropriate section of the chapter and review the material of which you were unsure. At any rate, be sure you understand all the review questions before going on to the next chapter.

1. You don't have to hire someone to serve as a close combat martial arts instructor if: 1. (b)
 - (a) he or she is violent.
 - (b) he or she poses a direct threat to others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.
 - (c) he or she has hurt anyone in the past.
 - (d) he or she only has one arm.

2. The E-Verify program is: 2. (b)
 - (a) an internet-based system operated by the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) that allows employers to verify a new hire's citizenship.
 - (b) an internet-based system operated by the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) that allows employers to verify the employment eligibility of their employees, regardless of citizenship.
 - (c) an internet-based system operated by the Department of Defense (DoD) that allows employers to verify the employment eligibility of their employees, regardless of citizenship.
 - (d) a pay-as-you-use-it, internet-based system operated by the Department of Defense (DoD) that allows employers to verify the employment eligibility of their employees, regardless of citizenship.

3. Answers to competency-based questions are _____ of future performance. 3. (d)
 - (a) not really helpful when looking at the nature
 - (b) predictors
 - (c) generally vague and aren't demonstrative
 - (d) indicators

4. An existing job description: 4. (c)
- (a) should never be used if it's out of date.
 - (b) isn't particularly helpful when reviewing a future worker's skills.
 - (c) even if it's out of date, represents a starting point from which to derive basic technical skills, reporting relationships, and other information.
 - (d) limits an employer's decision making.
5. An employer may ask all pre-job offer applicants: 5. (a)
- (a) to describe or demonstrate how they will perform a job, with or without an accommodation.
 - (b) if they need a reasonable accommodation to do a job.
 - (c) if they have ever filed a workers' compensation claim.
 - (d) why they have missed days of work at a previous job.