



Webinar 2 - February 14, 2024

Hiring and Documentation – Key Tips for Legal Compliance

WEBINAR OUTLINE

Intro/Setting the Stage

- Why is Documentation so Important?
- The Benefits of Quality New Hire Documentation and Paperwork

The Hiring Process

- Hiring Compliance – Understanding Legal Risks
- Pre-Interview: The Employment Application
- The Interview
 - Bias in Interviews/Screening Candidates
 - Tips for Legally Compliant Interviewing
- The Offer Letter

Required Documentation Upon Hire

- Required Notices and Acknowledgements Upon Hire (New York State)
- Required Notices and Acknowledgements Upon Hire (New York City)

HRtelligence TIPS

Intro/Setting the Stage

Why Is Documentation So Important?

- Good documentation is vital to building an employer's defense against complaints such as Equal Employment Opportunity Commission charges, unemployment insurance cases or lawsuits.
- By creating a well-organized and easy-to-follow pre-hire and hiring system, employers can save valuable time and resources, enabling them to identify the most qualified candidates for their organization.
- A structured hiring process allows for better communication, candidate engagement, and decision-making throughout the recruitment journey. As a result, companies can make more informed hiring decisions and build a solid and talented workforce.

The Benefits of Quality New Hire Documentation and Paperwork

- Quality new hire paperwork and documentation is a crucial aspect of hiring and onboarding every employee at your business and for ensuring legal compliance.
- A Gallup study recently revealed that only [29%](#) of respondents felt equipped and supported to excel in their new role after onboarding. With that in mind, ensure your new hire paperwork covers all key information staff members need and explains in detail what they should be able to do after onboarding and training.
- For many employees, the most valuable aspect of their onboarding journey was simply how it was organized and delivered.

Notes: Source: <https://www.gallup.com/workplace/353096/practical-tips-leaders-better-onboarding-process.aspx>; <https://joinhomebase.com/hiring-and-onboarding/new-hire-packet/>

The Hiring Process

Hiring Compliance – Understanding the Legal Risks

What is Unlawful Discrimination in Hiring? A person is denied a job because of a protected characteristic.

- **Title VII of the Civil Rights Act of 1964**
- **The Age Discrimination in Employment Act (ADEA)**
- **The Americans with Disabilities Act (ADA)**
- **The 1978 Pregnancy Discrimination Act**
- **Sexual Orientation and Gender Identity**

- **The Genetic Information Nondiscrimination Act of 2008 (GINA)**
- **The Immigration Reform and Control Act of 1986**

It is illegal to discriminate against a job candidate or applicant in job advertisements, recruiting practices, applications, background checks, job referrals, pre-employment assessments, and virtually every aspect of the employment relationship. Employers must always approach the recruitment process with care and follow a legally defensible hiring process.

Source: <https://hiring.monster.com/resources/recruiting-strategies/talent-acquisition/legal-hiring-process/>

Pre-Interview: The Employment Application

An employment application form provides an opportunity to collect additional information about the person's employment history, work background, contact information, eligibility, and more for human resources purposes.

An employment application can be a very effective tool: The work history and qualification information will help you make a hiring decision. By having all applicants complete the same form, you are effectively able to fairly compare applicants to each other on their skills and qualifications for the job posting. The personal information will help you comply with many federal, state, and local regulations for the [candidates you intend to hire](#).

Employers must avoid certain questions, particularly those that may reveal whether an applicant is a member of a protected class under equal employment opportunity laws.

Covered employers should remove salary history questions from their application form and train hiring managers to avoid these types of questions during the pre-employment process.

The Interview

Bias in Interviews/Screening Candidates

- *What is Unconscious Bias? How Does it Impact the Workplace?* A company's culture is critical in fighting bias, starting with the hiring process. Reviewing this data will help employers understand the extent of bias in their workplace.
- **Bias:** It's just how our brains work. We all make hundreds, if not thousands of decisions every day. Even though we start our days with good intentions, the way our brain is wired, and the context of the decision making can affect how our intention translates into action. Past experiences, how information is presented to us, and the source of such information can influence the way our brain operates and the subsequent choices we make. Plus, the more decisions we make in a day affects our ability to make good choices, so decision fatigue is a real thing. Our brains use shortcuts to make swift assessments of situations, which is when biases come into play.

- We all have prejudices of which we are unaware. The more life experience we have, the more change there is of inherent biases shaping our perception of the world around us. Not all biases are applied with discriminatory intent, either, because we are often drawn to people that are like us. The sooner we all acknowledge that certain biases are a reality of life, both in and outside of work, the better equipped we are to overcome such bias and work towards making workplaces more inclusive, including hiring and providing employee feedback.
- *Different types of implicit bias*
 - Affinity Bias: Being partial to people like us
 - Perception Bias: Applying preconceived notions about a group of persons to a particular individual (stereotyping)
 - Groupthink: When employees hold back from their own thoughts and opinions to fit in with a particular department/group of people
 - Confirmation Bias: Seeking out information in an individual to confirm preexisting beliefs, drawing selectively from available information to align with one's own assumptions
 - Halo Effect: Letting traits positively influence evaluations of a person
 - Horn Effect: Letting traits negatively influence evaluations of a person
 - Variable Questioning Bias: Interviewers change their questions from one person to the next based on conscious or unconscious perceptions.
 - Nonverbal Bias: Using nonverbal cues like body language to prioritize decisions
- *Is it gut instinct or bias?*
 - Identify a prestigious university on a candidate's resume and assume they're intelligent
 - Ruling out qualified persons perceived as different from their potential colleagues on the basis that they may not be the right "culture fit"
 - Assuming an older-than-average jobseeker is less "hungry" and incapable of using the latest technology
 - Allowing candidates who remind us of people we've worked with before to make the decision about whether to hire
 - An interviewee reveals what neighborhood in which an applicant lives and you automatically jump to conclusions about their lifestyle

Tips for Legally Compliant Interviewing

- **Create and/or Update Job Descriptions**

By clearly articulating the requirements of the role, employers can attract the most suitable candidates and make sure they clearly understand what is expected of them. This involves identifying the necessary skills and qualifications and outlining the position's day-to-day

responsibilities. Effectively communicating these details will help you establish expectations and align everyone involved in the hiring process.

Moreover, defining job roles and responsibilities creates a solid foundation for a successful working relationship with employers' new hires. It also allows for a more objective evaluation of candidates, ensuring they possess the necessary skills and experience for the job.

- **Work Towards a Thoughtful, Structured Interview Process**

The interviewer should be provided with a set list of questions and instructions on how to proceed with each candidate, so bias doesn't creep into the interaction. Note that there are different ways to format your questions (i.e., behavioral, opinion, performance-based, etc.), and it doesn't hurt to ask a few of each type to ensure that the interviewee has an opportunity to answer in different ways.

Also, a standardized evaluation form should be used by all interviewers so they can touch base and compare notes. Rather than have the decision made on pure "gut instinct," the goal is to have concrete reasons why a person is qualified for the job that relate to the goals set before the recruiting began. There's a big difference between "I really liked XYZ person..." versus "XYZ person is my top pick because of their background in customer support for the past two years. Plus, their answer to how to handle subscription cancelations demonstrates their ability to handle tough interactions over the phone."

- **Minimize Unrelated Interview Discussion**

- While it seems unreasonable to avoid "chit chat" with candidates, the more one-off conversations you have with one over another can lead to implicit bias. That's not to say hiring managers can't be warm or friendly throughout the interview process but keep it professional and stick to the same process with everyone.
- For example, it's perfectly fine to ask a candidate how their day is going. What's a little less clear is asking a candidate where they grew up or if they're married—the responses could easily cloud your judgment yet should not ultimately matter in hiring the most qualified person for the job.

- **Skills Assessments**

- Not all jobs necessitate a skills assessment, but if it makes sense, use one that's been proven to reflect the essential functions of the job.

Notes: For example, if an administrative position requires a significant amount of typing and correspondence, there are options for an employer to ask candidates to demonstrate their skills. Or, for forklift drivers or semi-truck drivers, demonstrating a special driver's license (where an individual passes a specific test administered by the DMV) is acceptable. What employers want to avoid is any sort of test, written or physical, that does not relate to the job and, as such, interpreted as discriminatory to potential hires.

- **Get a Second Opinion**

- Though hiring personnel are often in a time crunch to fill a position/positions, it is important to involve at least one additional person in the hiring process. This could be the potential candidate's manager or supervisor, a potential teammate who's proven successful in a similar role, or another recruiter at the company.
- **Interview Questions to Avoid:**
- Questions about race, religion or ethnicity
- Questions about age, unless used to verify that applicants meet any age-related legal requirements for the job.
- Questions about an applicant's pregnancy or plans to start a family
- New York law prohibits all employers from asking prospective or current employees about their salary history and compensation.

The Offer Letter

- The existence of an offer letter can be incredibly valuable for employers.
- A well-written offer letter also acts as clear and definitive proof as to the circumstances upon which employment was offered and accepted.

Every offer letter should include information such as:

- the position title
- hire date
- orientation date
- employment status
- exemption status
- compensation amount
- pay schedule

Organizations should include an acknowledgment that the offer letter supersedes and replaces prior oral or written understandings or agreements regarding the matters addressed in the letter, including anything that may have been discussed during the interview process.

Source: <https://www.jdsupra.com/legalnews/the-employment-offer-letter-practical-3631846/#:~:text=Every%20offer%20letter%20should%20include,compensation%20amount%2C%20and%20pay%20schedule.>

Required Documentation Upon Hire

Required Notices and Acknowledgements Upon Hire (New York State)

- Employee Handbook
- Wage Theft Prevention Act

At the time of hiring, employers must provide new employees with a notice in writing in English and the employee's primary language that sets forth:

- The rate and basis of pay, whether by the hour, by the week, by the shift, by the piece, etc.
- Allowances, if any, including tip, meal, and lodging allowances
- The regular pay day
- The name of the employer and any doing-business-as names
- The physical address of the employer's main office and a mailing address, if different
- The telephone number of the employer –and–
- Any other information the Commissioner of Labor deems necessary

At the time the employer provides the notice, the employee should sign and date a written acknowledgement in English and the employee's primary language, which the employer must preserve and maintain for six years.

Note: Notices are available in English and several other languages at the [New York Department of Labor, Employment Laws/Labor Standards, Wage Theft Prevention Act Forms](#).

Potential Penalties - Wage Theft Prevention Act

- Employees who are not provided with the required notice within 10 days of their first day of employment may file a civil action and recover \$50 a day for each work day that the violations occurred or continue to occur up to \$5,000 along with reasonable costs, attorney's fees.
 - The Commissioner of Labor may also bring an action on behalf of an employee who did not receive the required notice, and the Commissioner may assess damages of \$50 a day up to \$5,000 for every day the violation continued.
 - New York State recently enacted legislation that makes wage theft a form of larceny.
 - The legislation adds a new subsection to the New York Penal Law's larceny statute to include wage theft, which it describes as when a person is hired "to perform services and the person performs such services and the [employer] does not pay wages, at the minimum wage rate and overtime . . . to said person for work performed." In such a case, the prosecution is permitted to aggregate multiple non-payments or underpayments from an individual or workforce, even if such incidents occurred in multiple counties.
- Sexual Harassment Prevention Policy

Employers are required to provide employees, at the time of hire and at every annual sexual harassment prevention training, a written notice in English and the primary language of the employee that includes the employer's sexual harassment prevention policy and the information presented at the employer's sexual harassment training program.

- Sexual Harassment Prevention Policy Receipt

- Lactation Accommodation Policy

Employers are required to provide a policy developed by the New York State Department of Labor regarding the rights of employees to express breast milk in the workplace to employees at hire, annually, and when an employee returns to work after the birth of a child.

The policy should:

- Inform employees of their rights under the law
- Specify how a request may be submitted to the employer for a location for employees to express breast milk –and–
- Require the employer to respond to the request within a reasonable timeframe that does not exceed five business days

Note: Employers may choose to provide a written policy that meets or exceeds the standards of that policy.

- Leave and Work Hours Policies

Employers must notify their employees in writing or by publicly posting their policies on sick leave (including any paid sick leave that employees are entitled to under state or local law), vacation, personal leave, holidays, and hours.

- New York Paid Family Leave Notice

Employers should provide employees with a notice of their rights under NYS Paid Family Leave law if such information is not contained in the Company's employee handbook.

- Electronic Monitoring

All private employers, regardless of size, that monitor or intercept employees' telephone conversations, electronic mail, or internet access/usage must notify those employees, at the time of hire, that their communications are subject to electronic monitoring.

Note: The law excludes monitoring done solely for computer maintenance and protection.

- The required notice must be given by the employer and acknowledged by the employee either in writing or electronically.
- The notice must inform employees that any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means.

- Whistleblower Notice

The New York State Whistleblower Labor Law prohibits an employer from taking retaliatory personnel action against employees because the employee made a complaint of employer violations. The New York State Department of Labor released a model Notice of Employee Rights, Protections and Obligations Under Labor Law Section 740. Employers must post the notice in a conspicuous, easily accessible, and well-lighted place customarily frequented by employees and applicants for employment. It is advisable that this notice also be accessible electronically to employees who are working remotely.

- Form I-9

The Immigration Reform and Control Act of 1986 (“IRCA”) prohibits employers from hiring any individual, including a U.S. citizen, for employment in the U.S. without verifying their identity and employment authorization on Form I-9.

Employers also are prohibited from continuing to employ an individual knowing that they are unauthorized for employment.

- Employment Contract/Job Description

New hires may review and sign a contract that outlines their job responsibilities, obligations and what an employer expects of them.

If there is no employment contract, a job description should be provided outlining employment details such as the term of employment and roles/responsibilities.

- Background Check Authorization

Before obtaining a consumer report, employers must comply with the Fair Credit Reporting Act (FCRA) by notifying the applicant or employee (using an easy-to-read document) that the employer may obtain a consumer report and obtaining the applicant or employee's written consent.

Employers must also certify to the consumer reporting agency that they:

- (1) have complied with the disclosure requirements and will continue to comply with disclosure requirements if the applicant or employee requests additional information;
- (2) will comply with the adverse action requirements, if applicable; and
- (3) will not use the information provided by the consumer reporting agency to violate equal employment requirements.

- Copy of Article 23-A

- A copy of Article 23-A to the applicant or employee when requesting consent to conduct the background check

- A second copy of Article 23-A to the applicant or employee if the background check discloses a criminal conviction
 - A written statement of the reasons for a denial of employment if requested by an individual denied employment because of a criminal conviction
- Drug Testing Authorization

This is a consent form providing an employee or prospective employee's consent to a test for illegal drugs or alcohol. It releases the employer and other parties from liability and discusses testing methods and confidentiality requirements. It should be provided to an employee before administering a drug test.

Required Notices and Acknowledgements (New York City)

- Pregnancy, Childbirth, and Related Conditions

The New York City Human Rights Law (NYCHRL) requires employers with four or more employees to provide new employees with written notice of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions at the commencement of employment.

- Sexual Harassment

The NYCHRL requires all employers to provide new hires with an information sheet about sexual harassment developed by the human rights commission. The information sheet may be included in the employee handbook

- New York City Earned Safe and Sick Time Act

The New York City Earned Safe and Sick Time Act requires all employers to provide new employees with written notice of their right to sick and safe time at the commencement of employment. The notice must include:

- How sick and safe time is accrued and may be used
- The calendar year of the employer –and–
- The right to bring a complaint and be free from retaliation for exercising rights under the ESSTA

- New York City Fair Workweek Law

This law fast food employersto provide fast food employees with written notice of an initial work schedule containing regular shifts and on-call shifts on or before the first day of work. Along with their first schedule, fast food employees must receive a good-faith estimate in writing of the number of hours the employee can expect to work per week and the expected dates, times, and

locations of those hours. At the time of hire, fast food employees also must receive notice in writing of the method by which additional available shifts will be posted.

Retail employers must provide retail employees with a written work schedule no later than 72 hours before the first shift of the work schedule.

- Temporary Schedule Change Law

New York City's Fair Workweek Law has a provision that requires employers to allow most employees to make a temporary change to their work schedule to accommodate a personal event. Employers must post the [You Have a Right to Temporary Changes to Your Work Schedule](#) notice prominently in the workplace.

- NYC Pregnancy Accommodation Notice
- NYC Worker's Bill of Rights

Beginning July 1, 2024, New York City employers will be required to post and distribute a Workers' Bill of Rights which would contain information on the rights and protections under federal, state, and local laws that apply to all workers in the City, regardless of immigration status.

The Department of Consumer and Worker Protection (DCWP), in coordination with the Mayor's Office of Immigrant Affairs (MOIA), the New York City Commission on Human Rights, and community and labor organizations, will create and publish the workers' bill of rights. The notice is scheduled to be published on the City's website by March 1, 2024.

Employers will be required to post the workers' bill of rights in a conspicuous location in the workplace, and to provide a copy to employees upon hiring.



Proper hiring processes and documentation are vital to building an employer’s defense against complaints such as Equal Employment Opportunity Commission charges, unemployment insurance cases or lawsuits.

In addition, by creating a well-organized and easy-to-follow hiring and onboarding system, employers can save valuable time and resources, enabling them to identify the most qualified candidates for their organization. A structured hiring process allows for better communication, candidate engagement, and decision-making throughout the recruitment journey. As a result, companies can make more informed hiring decisions and build a solid and talented workforce. Some helpful tips for a structured hiring process are as follows:

- Use Structured Interviews
- **Evaluate all candidates in the same manner** (e.g., asking the same questions of every candidate applying to the same role) **to mitigate bias**. A documented process helps to ensure team members/interviewers follow the same process every time.
- **Maintain accurate records**. A documented process ensures that all members who participate in the recruiting process are aware of company policies.
- Ensure documents are updated and maintained as processes change.
- Ensure all employees, including new hires, are aware of updated processes and documentation.
- Have Secure Storage for Candidate Information

By following these tips, you can ensure that your interviewing process and documentation are compliant.