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ROADMAP FOR COMPLIANT HIRING

Roadmap for Compliant Hiring From the Job Description to the Form I-9

Purpose: This list provides general information/guidance for non-government, non-union, private U.S.-based employers hiring employees in the U.S.

Once an employer decides to hire a new employee, the employer should, generally, take the following steps:

Note: If you have any questions about any portion of this document or would like guidance or advice about how these steps may apply in your specific situation, please [email](#) MEA's Hotline or contact [Member Legal Services](#) for additional information and assistance.

(1) Prepare a job description.

a) **Prepare a written job description that** includes the essential functions of the job that an individual must be able to perform, with or without a reasonable accommodation, to be qualified for the job. Generally, the essential functions of the job are the "fundamental job duties of the employment position"; for example, the reason the position exists is to perform that function. Other factors include the number of other employees who are available to perform the function or among whom the performance of the function can be distributed, and whether the function is highly specialized so that the individual is hired for their expertise or ability to perform the particular function. Marginal duties are not considered essential functions.

- See [Member Tools](#) > Quick Links > Access CCH AnswersNOW > JobDescriptions.com

b) **Review the job description for legal compliance.** Before finalizing a job description, an employment attorney should examine it to ensure it complies with anti-discrimination laws and does not give rise to potential discrimination claims. For example, a job description should never indicate a preference based on a protected characteristic. These are the protected categories under federal law and Pennsylvania state law:

- Race, color, religion, creed, national origin or ancestry, ethnicity, sex (including pregnancy), gender (including gender nonconformity and status as a transgender or transsexual individual), age (40 and over), citizenship, past, current or prospective service in the uniformed services, genetic information, having a diploma based on passing a general educational development test as compared to a high school diploma, physical or mental disability, non-job related handicap or disability, known relationship or association with a person who has a handicap or disability, and use of a guide or support animal because of blindness, deafness or physical handicap.

Note: Local governments may create additional protected characteristics. Contact MEA for more information.

c) **Classify the job as exempt or nonexempt.** Determine whether the position should be classified as exempt or nonexempt from overtime pay requirements under the Fair Labor Standards Act and Pennsylvania law. This employment classification should be communicated to the employee when an offer is made.

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(2) Set the salary range and benefits for the position, considering:

- a) Market data, including reliable salary surveys on what other employers of similar revenue, industry, size, and other relevant factors pay for similar positions;
- b) The employer's pay grades;
- c) Internal pay equity; and
- d) The budget for the position.

[Email](#) the hotline for the median salary for the position.

(3) Recruit for the position, utilizing the appropriate strategy for attracting and hiring the most qualified candidates and, ideally, in a manner that reaches a diverse applicant pool.

Have a complimentary discussion with MEA's Director of [Recruitment](#).

(4) Advertise the position, considering:

- a) Where to advertise the position, ideally attempting to reach a wide and diverse pool of potential candidates.

Consider posting on [MEA.Jobs](#).

b) What to include in job postings. Job postings should:

- Always include a statement that the organization is an equal opportunity employer; and
- Outline the essential functions of the position based on the written job description.

See [Job Posting Sample \(.DOCX\)](#)

c) Job postings should NOT:

- Indicate a preference or limitation based on any protected category (such as race, age 40 or over, religion, gender, or sex).
- Deter older individuals from applying, such as ads seeking recent college graduates or candidates with only a few years of experience. For example:
 - o Do Not: State that you are seeking candidates with three to five years' experience.
 - o Do: State you are seeking individuals who meet a minimum threshold, such as at least three years' experience.

Additionally, ads should exclude these and other words that federal agencies may view as discriminatory based on age: seeking "energetic," "vibrant," or "tech-savvy" employees.

(5) Utilize an interview process that:

- a) Gives employer and applicants the opportunity to learn more about each other and validate information provided to one another.

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- b) Provides the employer with data to evaluate an applicant's skills and abilities.
- c) Helps the employer select quality applicants to build a professional and productive workforce.
- d) Helps the employer comply with relevant laws during the screening, interview, and hiring process.

(6) Pre-screen job applicants

- a) Collect resumes and employment applications to gather standardized information from all applicants.
- b) Based on the information provided/collected, consider whether the applicants:
 - Meet the minimum job requirements for the position; and
 - Can perform the essential functions of the job with or without a reasonable accommodation.
- c) Consider whether to review applicants' social media activity during the screening process and understand the risks of doing so. For example, social media may reveal information that is beyond the scope of permissible inquiry (such as revealing membership in certain protected classes) during the interview process.
- d) Call a narrowed pool of applicants for brief telephone interviews to:
 - Obtain information about an applicant's availability, and relocation needs.
 - Disclose the pay range for the position, essential job skills, and other preliminary information.
 - Gauge an applicant's communication skills and professionalism; and
 - Eliminate time-consuming meetings with applicants who, despite strong resumes, do not meet the company's needs.
- e) Extend in-person interview invitations to a shortlist of applicants who best meet the essential job requirements.

(7) Prepare for Interviews by:

- a) **Determining the:**
 - Interview format (e.g., interviews conducted by a single individual, a panel, or several individuals in successive interviews);
 - Outline and length of each interview;
 - Questions to be asked of all applicants and the weight assigned to each question; and
 - Which questions each interviewer should ask.

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b) Training interviewers. Employees conducting interviews should:

- Be familiar with the recruitment and selection process;
- Not inquire into personal details that might reveal protected class information; and
- Understand the concept of at-will employment.

***Note:** Having several individuals interview applicants ensures that no one person's biases, whether conscious or subconscious, affect the hiring process. In selecting interviewers, consider including at least one individual with a strong understanding of the role and its contribution to the applicable department and including an individual who works closely with the position.*

- c)** Offering reasonable accommodations for the interview if requested (your employment application should state that the Company will provide reasonable accommodations for the interview if needed).
- d)** Thoroughly reviewing the completed applications in advance of the interviews. Use the applications to assess skills and background and ask for clarification if needed.

(8) Interview the candidates, being sure to:

- a) Ask appropriate questions, using** objective criteria and the essential functions of the job in evaluating candidates.
- b) Avoid inappropriate questions.** Limit interview questions to ones that reasonably relate to the job for which the applicant is applying. Ensure questions do not seek information about an applicant's membership in any protected class under applicable federal, state, or local law.
- c) Do not unintentionally create a for-cause employment relationship.** Interviewers should avoid making statements that in any way limit or modify the at-will employment relationship (for example, suggesting job security, permanent employment, or that a job remains available provided that the employee performs the job).

(9) Perform Pre-Offer Background Checks and Drug Testing.

- a)** Conducting background checks on applicants can help an employer: evaluate the accuracy of an applicant's credentials; minimize the risk of employee theft and other crimes such as fraud; minimize the risk of workplace violence; reduce exposure to litigation such as negligent hiring claims.

The employer should determine the appropriate scope of the background checks and ensure background checks, if used, comply with applicable law.

Exercise particular caution when:

- **Using criminal background checks.** Many state laws restrict an employer's inquiry into or utilization of an applicant's criminal history in employment decisions. Pennsylvania employers may generally inquire into any criminal background information. However, **in making hiring decisions, employers may only consider felony and misdemeanor**

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convictions that relate to the individual's suitability for the particular position.

Employers **must** give written notice to any applicants rejected based wholly or partially on criminal records, including persons who are hired subject to the completion of a background check.

Contact [Member Legal Services](#) for help crafting a notice.

- **Obtaining a consumer report for employment purposes.** Employers that use a consumer reporting agency to obtain background information on applicants or employees must comply with the Fair Credit Reporting Act (FCRA) requirements. Employers must:
 - Obtain written permission from the job applicant or employee before any consumer report is requested or obtained.
 - See [FCRA Authorization Sample](#) and [Summary of Rights](#)
 - Provide proper written notice to the job applicant or employee, in a document consisting solely of that disclosure, that the employer may use information in the consumer report for decisions related to employment.
 - See [FCRA Disclosure Sample](#) and [Summary of Rights](#)

***Note:** Employers seeking investigative consumer reports (detailed background checks that may involve, for example, interviews with friends or former colleagues) must comply with additional FCRA requirements. Contact MEA for more information.*

- **Taking adverse action based in whole or in part on information obtained from a consumer reporting agency.**

If you decide not to further consider a candidate, withdraw an offer, or make any other adverse employment decision based in whole or in part on information from a consumer reporting agency, you must provide the candidate with a Pre-Adverse Action Notice, allowing the candidate at least 5 days to remedy the situation if possible. Within three days of making the final adverse decision (which typically occurs after the 5-days has expired), you must provide an Adverse Action Notice.

- See [Pre-Adverse Action Notice Sample](#)
- See [Adverse Action Notice Sample](#)

***Note:** A consumer reporting agency includes any person or company that regularly engages in the practice of assembling or evaluating consumer information about employees or applicants for the purpose of furnishing consumer reports to third parties such as employers.*

- b) If pre-offer drug testing is used, ensure that testing is narrowly-tailored and compliant with the Americans with Disabilities Act. Using an outside drug-testing lab can help reduce your risk of liability. Be sure to use a Medical Review Officer in the process.

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Note: Medical/physical examinations and drug/alcohol tests cannot be required of applicants before a conditional job offer is made.

- (10) Select the successful applicant and make a verbal offer.** As soon as the employer decides to offer the successful applicant a position, it should contact the applicant to make a verbal offer. When making a verbal offer, the employer should:
- a) Contact the applicant without delay, ideally by telephone, to avoid losing the applicant (for example, if the applicant has other job offers to consider).
 - b) Discuss a potential start date, confirm the total compensation package offered (including salary and benefits), and clarify any questions the applicant may have.
 - c) Gauge whether the applicant is likely to accept the offer and agree on a time frame for the applicant to respond to the offer.
 - d) If necessary, negotiate employment terms with the applicant.
 - e) Explain the next stage of the hiring process (for example, a formal offer letter is to be sent and background and reference checks must be conducted).
 - f) Remind the applicant that any agreed terms are subject to the issuance of a formal offer letter, the applicant's return of a signed copy, and satisfactory completion of certain requirements (such as background checks).
- (11) Send the Conditional Offer Letter.** Once the applicant has conditionally accepted a verbal offer, the employer should follow up by sending an offer letter to document the employer's relationship with the prospective employee. The employer may make the offer contingent on the applicant's satisfactory completion of certain requirements, such as: verification of the applicant's right to work in the U.S.; a background investigation; verification of references and professional qualifications; and execution of employment-related agreements.

[See Offer Letter Sample](#)

- (12) Conduct Due Diligence.** Conduct due diligence on successful applicants to confirm that:
- a) Their employment does not cause them to breach any non-compete provision or other restrictive covenant or agreement with their current employers.
 - b) They do not take or use confidential or proprietary information belonging to their prior employers when they leave (whether or not they signed a confidentiality or non-disclosure agreement).
 - c) Hiring a particular applicant does not create an undue liability or litigation risk based on claims by a prior employer of the applicant's breach of an agreement or a fiduciary duty.
- (13) Rejection Notices.** Consider sending rejection notices, depending on the volume of applicants. In preparing rejection notices, the employer should: avoid providing any specifics unless required by

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state law; and review additional obligations (for example, under the FCRA) if rejections are based on background checks or credit reports.

See [Rejection Notice Sample](#)

(14) After the candidate accepts the offer, on or before the first day of employment:

a) Policies and agreements. Provide the candidate with a copy of mandatory policies and agreements/contracts, such as the Employee Handbook, an Employee Non-Disclosure Agreement, and (for key personnel) non-competition/non-solicitation agreements.

- Require the candidate to sign any employment agreements or contracts, such as non-disclosure agreements and restrictive covenant agreements, **prior to the first day of employment.**
- Require the candidate to sign a Handbook Acknowledgement on or before the first day of employment.

o See [Handbook Acknowledgement Form Sample](#)

b) Complete the I-9. Employers must follow the following federal requirements:

- Employers must complete a Form I-9 for each new employee by the first day of work, including confirmation of identification/employment authorization documents and completion of the employer's portion of the form.

Note: *The Form I-9 may be completed as soon as the employer has offered the individual a job and the individual has accepted the offer (but NOT earlier than this). Each newly hired employee must complete and sign Section 1 of Form I-9 no later than his or her first day of employment.*

- The employee may select which of the work authorization documents listed on the I-9 he/she will provide to the employer in connection with the I-9; the employer may NOT request or require specific types of I-9 documentation.
- The employer must review the employee's I-9 work authorization documentation in-person. This is also the case for remote employees. The process may NOT be completed over videoconference, skype, or by mailing or emailing copies of the documents.

Note: *Contact MEA for information on utilizing an agent (a non-employee) to verify work authorization documentation for remote employees.*

- Employers must retain I-9 forms for three years from the date an employee is hired or for one year after the employee is terminated, whichever is later.
- Employers are prohibited from discriminating against employees or applicants on the basis of citizenship or immigration status of individuals authorized to reside or work in the United States or on the basis of national origin.