

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

**WASHINGTON AND LEE UNIVERSITY
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A GUIDE TO SUCCESSFUL PERSONNEL SEARCHES: SOME LEGAL DO'S AND DON'TS

I. THE LEGAL “R’s” OF HIRING

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

II. THE BASIC EMPLOYMENT LAWS OF HIRING

- **Title VII of the Civil Rights Act of 1964.** Prohibits discrimination in employment, including hiring, on the basis of *race, color, religion, national origin, and sex (including pregnancy)*.
- **Age Discrimination in Employment Act (ADEA).** Prohibits discrimination in employment because of *age (40 years or older)*.
- **Americans with Disabilities Act (ADA).** Prohibits discrimination in employment against *qualified applicants or employees with disabilities* and requires reasonable accommodation of such individuals. (See **Appendix A for general guidelines and definition of these important terms under ADA.**)
- **Equal Pay Act.** Prohibits employers from paying *unequal wages* to male and female employees who perform *substantially similar jobs*.
- **Virginia Human Rights Act.** Prohibits discrimination in employment *on all bases covered under Title VII, plus marital status*.
- **Other types of claims brought in lawsuits involving hiring: a laundry list.** Defamation, interference with contract, breach of contract, intentional infliction of emotional distress, negligent hiring, and others.

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

❖ THE JOB DESCRIPTION SHOULD DRIVE THE SEARCH, AS A PRACTICAL AND LEGAL MATTER.

- Primary purpose of job description is to identify the *essential functions and required qualifications* of the position, which then should drive the advertising, interview questions, and determination of whether an applicant is qualified to perform those essential functions, with or without a reasonable accommodation.
- Use of well-developed job descriptions and criteria inform searchers and applicants of the yardsticks against which applicants will be measured, and may assist in defending against allegations of discriminatory treatment.
- In identifying *essential functions*, consider first the PURPOSE OF THE JOB and the IMPORTANCE OF ACTUAL JOB FUNCTIONS in achieving this purpose. (Are employees in the position actually required to perform the function? Would removing that function fundamentally change the job? Are there a limited number of employees available to perform the function? Is the function highly specialized?)
- In defining *essential functions*, it is important to distinguish between *methods* and *results*. For example, is the essential function “moving” a 50-lb. box or “carrying” the box?

❖ WRITING THE JOB DESCRIPTION: REMEMBER, THIS IS AN IMPORTANT TOOL FOR HIRING AND FOR LONG-TERM PERFORMANCE EVALUATION. (See **Appendix B** for a model suggested by W&L University Counsel's Office, and a sample description for a faculty position prepared by United Educators, W&L's insurance carrier. See model www.ruf.rice.edu/~humres/Training/HowToHire/)

- State the overall purpose of the job; then outline essential functions and marginal/infrequent functions; then identify knowledge, skills, degrees, experience, and personal qualifications necessary to perform the job (required and preferred).
- The required knowledge, skills, degrees, experience, and personal qualifications listed on the job description should support the essential functions and serve as the primary criteria for your selection/rejection of applicants.

- Include a section outlining any unusual particulars of the job (work hours, environment, travel, etc.)

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

- ❖ RECOGNIZE THAT A PERSONNEL SEARCH IS AN EXERCISE IN PUBLIC RELATIONS, INVESTIGATION, WRITING, EVALUATION, AND LEGAL RISK MANAGEMENT. Poorly worded or misleading advertisements, improperly handled interviews, or imprecisely worded communications may adversely impact the university's reputation in the local community and in the national/international academic community.
- ❖ ESTABLISH AND CONSISTENTLY USE A SEARCH/SELECTION PROCESS FOR ALL POSITIONS TO BE FILLED, INCLUDING A STANDARD INTERVIEW PROCEDURE.
- ❖ CONSIDER THE FOLLOWING PROCEDURES FOR SEARCHES:

STAFF SEARCHES

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

TENURE TRACK FACULTY SEARCHES

- Makeup of Search Committee and Designation of Contact Person
- Develop Written Job Description and Have Approved by Dean
- Establish Timetables for Steps in Search Process
- Prepare Position Advertisement
- Acknowledgement of Applications
- Screening of Applications and Initial Eliminations
- Schedule Brief Interviews for Discipline Conferences/Job Fairs
- Conduct Brief Interviews at Discipline Conferences/Job Fairs OR Meet Candidates There Whom You Invite to Submit Applications for Consideration
- Further Eliminations and Scheduling of On-Campus Interviews
- Develop Interview Questions and Plan Interviews/Presentations by Candidates
- On-Campus Interviews of Candidates
- Reference Checks for Candidates (*consider confirming candidate's oral agreement to these checks during interview process*)
- Final Evaluations and Hiring Recommendation
- Rejection Letters/Offer Letter
- Pay/Reimburse Interview Expenses as Agreed
- Preserve Applicant Files
- Provide New Faculty Orientation

ADJUNCT/VISITING FACULTY SEARCHES

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

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

- ❖ REMEMBER THE PURPOSE OF THE ADVERTISEMENT: TO REACH THE LARGEST AUDIENCE OF PERSONS QUALIFIED FOR

AND INTERESTED IN THE POSITION (and to discourage those not qualified for the position). CHOOSE YOUR WORDS AND YOUR PUBLICATIONS ACCORDINGLY.

❖ ITEMS TO CONSIDER INCLUDING IN AN ADVERTISEMENT:

- Position Title, Rank, Tenure Status
- Overall Responsibility
- Summary of Essential Duties (as space permits)
- Degrees/Licenses/Certifications Required/Preferred
- Experience and Particular Qualifications Required/Preferred
- Salary Range (or commensurate with qualifications)
- Travel Required
- Description of the University – location, size, mission, student population
- University as Equal Opportunity Employer
- Application Materials to be Sent and to Whom
- Closing Date for Applications and Starting Date
- Particular Recruiting Information? (encouragement of minority applicants)
- (See Appendix D for sample position advertisements)

VI. ACKNOWLEDGING APPLICATIONS AND INITIAL ELIMINATIONS

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

Dear _____:

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

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

Sincerely,

Title

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

Dear _____:

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

Thank you for interest in Washington and Lee University.

Sincerely,

Title

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

Dear _____:

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

Sincerely,

Title

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

- ❖ USE A STANDARD REFERENCE/RECORD CHECKING PROCEDURE. BE SURE YOU HAVE OBTAINED CONSENT AND INDEMNIFICATION FROM APPLICANT. For faculty searches, consider at a minimum verifying orally during interview candidate’s agreement for reference contacts.

- ❖ BEST PRACTICE IS TO SEND A STANDARD WRITTEN REQUEST FOR A WRITTEN REFERENCE (ENCLOSING DESCRIPTION OF JOB SOUGHT) – AT THE LEAST, USE A STANDARD CHECKLIST OF QUESTIONS IF TELEPHONING REFERENCES. Focus on position requirements and applicant’s eligibility, qualifications, and suitability for the position. Verify information applicant has given re: prior employment or relationship with the reference. **(See Appendix E for Suggested Reference Request Letter and Suggested Checklist of Questions for Telephone Reference Check.)**
- ❖ HAVE ONE PERSON HANDLE REFERENCE/BACKGROUND CHECKS TO ASSURE CONSISTENCY.
- ❖ ALWAYS ASK: “WOULD YOU REHIRE THIS PERSON? IF NO, WHY NOT?” IF THE PERSON REFUSES TO ANSWER, THAT SAYS IT ALL.
- ❖ STAY AWAY FROM QUESTIONS ON EXPUNGED CRIMINAL HISTORY, MEDICAL CONDITION, AGE, RACE, RELIGION, MARITAL OR FAMILY STATUS – IF YOU CAN’T ASK THE APPLICANT ABOUT IT, YOU CAN’T ASK A REFERENCE ABOUT IT. *Virginia law gives limited immunity from liability (but not from lawsuits) for employers conducting good faith reference checks into potential employees, but only if the checks involve legitimate, non-discriminatory performance inquiries, and only if the checks are conducted and the information used appropriately and without malice. This limited immunity applies to the person/entity asking the questions and the person/entity providing the reference information.*
- ❖ VERIFY EDUCATIONAL BACKGROUND AND SCHOLARSHIP.
- ❖ CRIMINAL BACKGROUND CHECKS AUTHORIZED BY VIRGINIA LAW FOR PRIVATE COLLEGES/UNIVERSITIES FOR THE PURPOSE OF SCREENING INDIVIDUALS OFFERED OR ACCEPTING EMPLOYMENT. (Va. Code 19.2-389)

VIII. CONDUCTING THE INTERVIEW

- ❖ THE JOB DESCRIPTION (ESSENTIAL FUNCTIONS AND REQUIRED/PREFERRED KNOWLEDGE, SKILLS, AND OTHER QUALIFICATIONS) SHOULD FRAME YOUR INTERVIEW QUESTIONS.
- ❖ PREPARE FOR THE INTERVIEW. All members of the Committee who will be present at the interview should review the cover letter, resume,

application, other application materials (including written reference letters and documentation of reference checks), and the job description.

- ❖ **QUESTIONS SHOULD BE PREPARED IN ADVANCE, AND SHOULD BE STANDARD FOR ALL INTERVIEWEES.** Questions should all be position-related. Here are some sample questions:
 - Tell me what you already know about this position. Why does this position interest you?
 - Describe a situation the candidate would encounter in the position, and ask the candidate how he/she would handle the situation.
 - What qualities/skills make you the best person for this position? What qualities/skills would you need to improve to excel in this position?
 - Describe your previous (current) position. What have you learned in that position that would contribute to your success in this position?

- ❖ **SHAPE QUESTIONS TO AVOID TOPICS THAT COULD LEAD TO DISCRIMINATION CLAIMS.**
 - Remember, although most questions (except disability-related questions) are not per se illegal, the Equal Employment Opportunity Commission (and most courts) will assume that all questions are asked for a reason and that hiring decisions will be based on the answers.
 - Twelve General Topics to Eliminate: Race, National Origin, Disability, Gender, Age, Religion, Union Membership, Military Status, Arrest Record, Financial Status, Legal Off-Duty Activities, EEO-related information (prior claims, non-professional clubs and charities). **(See Appendix F for Chart of Prohibited and Allowable Interview Questions, including Explanations and Clarifications of the Above Topics.)**
 - Specifically, as to disability-related questions, you cannot ask a candidate whether he/she has a disability or impairment that would prevent performance of the job. Generally, you cannot ask a candidate whether he/she needs assistance or accommodation to perform the job. However, if a candidate **VOLUNTEERS THAT HE/SHE HAS A DISABILITY, OR THAT HE/SHE NEEDS AN ACCOMMODATION, YOU MAY INQUIRE AS TO THE TYPE OF ACCOMMODATION NEEDED. YOU MAY ASK ALL**

APPLICANTS IF THEY CAN PERFORM THE JOB FUNCTIONS WITH OR WITHOUT REASONABLE ACCOMMODATION, AND YOU MAY ASK THEM TO DEMONSTRATE. If an applicant indicates that he/she will need accommodation to complete the job application/interview process, you may inquire as to the accommodation needed and obtain documentation of the disability.

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

IX. COMMUNICATING THE HIRING DECISION: OFFERS AND REJECTION LETTERS

- ❖ OFFER LETTERS SHOULD BE CAREFULLY WRITTEN, AS THEY MAY CONSTITUTE LEGALLY BINDING DOCUMENTS.
- ❖ ITEMS OFFER LETTER SHOULD INCLUDE:
 - Offer of Position (specifying Rank and Tenure Status, where applicable)
 - Starting Salary (“at the rate of _____ per hour/per year” – express in terms of rate, instead of promising a salary for a defined period)
 - Terms and Conditions/Benefits of Employment (enclose applicable Personnel and/or Faculty Handbook and reference W&L website/Human Resources website for summaries of Campus Security information and other university policies)
 - Starting Date
 - Date by which Written Acceptance Required
 - *Where applicable*, Clear Statement that Offer Contingent upon Satisfactory Completion of Job-Related Physical Examination
 - *Where applicable*, Amount of Moving Expenses to be Paid
- ❖ FOR STAFF AND NON-TENURED FACULTY POSITIONS, IF WASHINGTON AND LEE STANDARD APPLICATION (containing employment-at-will agreement) WAS NOT SIGNED, INCLUDE EMPLOYMENT-AT-WILL LANGUAGE IN LETTER.
- ❖ AVOID TERMS LIKE “PERMANENT” OR “CAREER” OR OTHER TERMS THAT MAY IMPLY FIXED EMPLOYMENT FOR ANY PERIOD, SUCH AS “YOUR FIRST ANNUAL PERFORMANCE REVIEW WILL BE ON _____.”

- ❖ CONSIDER SENDING THE ORIGINAL AND AN EXTRA COPY, WITH A PLACE FOR THE CANDIDATE TO SIGN AND DATE, “I ACCEPT EMPLOYMENT ON THE TERMS OUTLINED ABOVE.” Candidate may sign the extra copy and return it, to avoid the need for a separate letter of acceptance.

- ❖ REJECTION LETTERS SHOULD ALSO BE CAREFULLY WRITTEN, AS THE WAY IN WHICH AN APPLICANT IS REJECTED IS OFTEN THE TRIGGER FOR LITIGATION. Some suggestions to reduce the potential for creating disgruntled applicants:
 - Don’t set applicants’ expectations unnecessarily high during the recruiting process. (E.g., avoid statements to applicants such as, “I’m sure you’ll be happy here”)
 - Provide quick responses and get back to everyone who expects an answer one way or the other.
 - Give polite, professional responses, but don’t go overboard and overly boost the applicant’s qualifications in an attempt to make him/her “feel better.” (E.g., “Though you were well qualified and made a good impression in your interview, we’ve hired someone else.” *This might send the message that maybe something other than merit was involved in the decision.*)
 - Avoid becoming involved in discussing the rejected applicant’s qualifications compared with the person selected. This is a no win endeavor. You are NOT obligated to explain your choice.
 - Keep the letter brief and factual.

Dear _____:

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

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

Sincerely,

Title

- Telling a candidate that he/she was not “suitable” or “qualified” for a position is NOT a good idea, in light of the increase in employment litigation. However, the following list offers some legitimate business reasons for rejecting particular candidates, not requiring a subjective discussion of the candidate’s qualifications or a comparison of qualifications with the person hired:
 - ✓ No position available.
 - ✓ Failed to complete the application process (e.g., providing required information, appearing for interview).
 - ✓ Misrepresented information on application/resume.
 - ✓ Did not hold required degree/license/certification.
 - ✓ Disqualified by job-related criminal conviction.
 - ✓ Could not/will not provide necessary documentation for I-9 form.

X. RECORDKEEPING AND RETENTION

- ❖ ALL PERSONNEL AND EMPLOYMENT RECORDS MUST BE KEPT BY HIGHER EDUCATION INSTITUTIONS FOR TWO (2) YEARS UNDER TITLE VII AND ADA. THIS INCLUDES APPLICATION FORMS/MATERIALS AND OTHER RECORDS HAVING TO DO WITH HIRING. This does not mean the applications for non-hires remain “active” for that entire time; but it does mean that we may not destroy them until two years after the hiring decision. For individuals who are hired, there should be a consistent policy/practice about which of the application materials will be retained in the employee’s personnel file after the two-year period. *If a lawsuit is filed, all existing employment records must be maintained until the disposition of the litigation.*
- ❖ UNDER ADA, ALL EMPLOYEE MEDICAL RECORDS SHOULD BE MAINTAINED SEPARATELY FROM THE REST OF THE PERSONNEL FILE AND ACCESS MUST BE STRICTLY ON A “NEED TO KNOW” BASIS. *(E.g., emergency health care providers, personnel responsible for evaluating requested accommodations)*

XI. RESOURCES FOR HIRING QUESTIONS

- ❖ BOB FOX, DIRECTOR OF PERSONNEL
HOWARD HOUSE, 463-8920, EMAIL = rfox@wlu.edu
- ❖ LEANNE SHANK, UNIVERSITY COUNSEL
HILL HOUSE, 463-8941, EMAIL = lshank@wlu.edu
- ❖ CATHOLIC UNIVERSITY COUNSEL WEBSITE
<http://counsel.cua.edu>
(Legal Info by Topic – choose ADA and EMPLOYMENT topics)
- ❖ RICE UNIVERSITY HUMAN RESOURCES WEBSITE
www.ruf.rice.edu/~humres/Training/HowToHire/
(How to Hire Handbook online)
- ❖ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
www.eeoc.gov
(Specific site for guidance on pre-employment disability-related questions and medical examinations = www.eeoc.gov/docs/preemp.html)
- ❖ COLLEGE & UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES
<http://cupahr.org>

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