

## **Some Key Legal Considerations in Hiring Faculty Search Committees Fall 2014**

### **I. Discrimination**

- A. **Rationale:** Various statutes prohibit discrimination on the basis of:
- a. Race,
  - b. Color,
  - c. National origin,
  - d. Sex,
  - e. Age (40 years and older),
  - f. Disability, or
  - g. Veteran's status.
- B. **Legal Issues:**
1. The factual inquiry is normally about the intent of the person making the decision or recommendation. It is unlawful to hire, or not hire, a person because of that person's race, color, national origin, etc.
  2. Evidence of unlawful intent has different forms:
    - a. Direct evidence: "I did not hire you because you are over 40."
    - b. Indirect or circumstantial evidence: Inquiry normally requires employer to state a legitimate, nondiscriminatory reason for its action, then allows applicant to show reasons are not true, or applied in a discriminatory manner. For example, the lack of recent experience disqualified a female candidate, but the male selected for the job also had a lack of recent experience.
- C. **Guidance:**
1. Distinguish among candidates based on legitimate, nondiscriminatory, job-related reasons.
  2. Apply distinctions consistently.
  3. Be confident! The law does not require you to be absolutely right as long as motivation is lawful.

### **II. Baylor's Religious Hiring Preference**

- A. **Rationale:** As a private, religious institution, Baylor has a constitutional right to differentiate among candidates on the basis of religion. Accordingly, Baylor is exempt from any statutory prohibitions on discrimination on the basis of religion.
- B. **Legal Issues:** Baylor must maintain its religious institutional character, including the Baptist/Christian composition of the Board of Regents and the religious composition of its faculty.
- C. **Guidance:** As long as Baylor remains a private, religious institution, the manner of implementing the religious hiring preference is a matter of institutional policy. Therefore, the guidance to be followed is Baylor's stated policy.

### **III. Baylor's Affirmative Action Plan**

- A. **Rationale:** By directive of the President of the United States, some of those who do business with the federal government must:

- a. Not discriminate on the basis of race, color, sex, or national origin, and
- b. Take “affirmative action to insure that such discrimination does not occur.”

The requirements apply as well to the categories of veterans and individuals with disabilities.

B. **Legal Issues:** In essence, the legal requirement is for an open, accessible and competitive application process. However, the hiring decision itself must not violate the prohibitions of discrimination.

C. **Guidance:**

1. Do not be misled by ill-defined social policy discourse.
2. Know areas of under-utilization of minorities/Use AA/EEO.
3. Facilitate application by underutilized minorities.
4. Hire the best qualified applicant to fit Baylor’s mission.

#### IV. Oral Promises

A. **Rationale:** Mutual promises may be legally enforceable as a contract; some unilateral promises that induce action by the other party may also be enforceable. Such promises need not necessarily be in writing to be a legal commitment.

B. **Legal Issues:**

1. As a general rule, only the Vice Presidents and the President have authority to make legal commitments on behalf of Baylor.
2. In the absence of a written agreement, employment at Baylor is normally “at will.” If employment is at will, either party may terminate employment at any time, for no reason or for any lawful reason.
3. Generally, only faculty have written agreements. Others acknowledge at-will status.
4. Oral statements may alter a written agreement or employment at will. Any statement may induce reliance, which can make the statement enforceable at least to some extent.

C. **Guidance:**

1. Say what you mean and mean what you say.
2. Do not make promises you cannot keep--it may be your personal promise, not Baylor’s.
3. Avoid overstatements (even in advertisements) if no present intent or authority to promise. Examples:
  - a. “If you take the lecturer position, we will convert it to tenure track after you complete your doctorate.”
  - b. “You can work here until you retire.”
  - c. “Teaching load will be 2/2.”

#### V. Immigration

A. **Rationale:** The burden is on the employer to verify that an employee is authorized to work in the United States in order to minimize employment of aliens who are not properly in the United States or who are not properly authorized to work in the United States.

- B. **Legal Issues:** The employer must verify appropriate proof of:
- a. Identity of employee, and
  - b. His or her legal status which permits working for Baylor.
- Lawful presence in the United States does NOT equate to a right to work! Right to work for one employer does NOT necessarily mean a right to work for Baylor!
- C. **Guidance:**
1. Do not ask about national origin or citizenship (See Discrimination).
  2. Do ask applicant if he or she is or will be authorized to work in the United States when employment begins.
  3. Do keep in mind that it can take months to obtain proper work authorization, if it can be obtained at all.

**NOTES:** In addition, the employment conditions of a foreign national are regulated by both the state and federal government. There may be limitations on salary, duties, and hours of work.

**In particular, the working conditions of a foreign national authorized to work under H-1B status cannot be materially changed without obtaining new government approval. Failure to obtain such approval puts the individual and Baylor at risk. The risks may include loss of approved status for the individual and loss of Baylor's ability to sponsor H-1B beneficiaries, as well as civil and criminal penalties.**

**The salary level of a foreign national in H-1B status is mandated by federal law, which can skew salary levels within an academic department.**

**Termination of employment of a foreign national before expiration of the approved work authorization period obligates Baylor to pay transportation costs for the foreign national to return to his or her foreign country.**

**"Special processing" to obtain a green card for faculty may be available if the process is begun within 18 months after the offer letter. This is an important process as it permits the issuance of a green card to the best qualified applicant without proof that no U.S. citizen is available for the position. To ensure the availability of this process, placement of the job advertisement should be placed in the hard copy or online copy of the Chronicle of Higher Education.**

## **VI. Confidentiality**

- A. **Rationale:** Some candidates insist that their application be held in confidence to protect their current employment or relationships with the current employer.
- B. **Legal issues:** Such requests may create manifestations of intent not to contact a current employer or hamper Baylor's ability to perform due diligence.
- C. **Guidance:**
1. Provide confidentiality to a point.
  2. Ensure ability to contact directed and non-directed references before decision to hire.
  3. Eliminate any candidate who is not willing to permit you to contact directed or non-directed references.

4. Control access to files (and list of applicants) and authority to contact references. See Access to Applicant Files below.

## VII. Negligent Hiring

- A. **Rationale:** Under some circumstances, individuals in the hiring process and Baylor can be legally responsible for harm to others caused by an employee who should not have been hired.
- B. **Legal issues:** The legal issue may focus on whether a screening process should have identified facts in an applicant's background that could create a foreseeable risk to others in the work setting.
- C. **Guidance:** Use the tools available to the search committees and Baylor to ensure adequate background checks are conducted. These include:
  1. Routine Screening (all new hires; can include reference checks [both directed and non-directed references], interview, educational verification, social security number verification, and review of performance history and work product)
  2. Criminal Background Checks (all new hires)
  3. Sex Offender Registry Checks (if duties include working with minors)
  4. Driving Record Checks (if duties include driving)
  5. Research-related Screening (select agents, import/export limitations, security clearance, grant debarment lists)

## VIII. Access to Applicant Files

- A. **Rationale:** Privacy, confidentiality, and administrative efficiency may provide rationale to limit access to the files of applicants.
- B. **Legal issues:** Personal information typically is protected by statutory or common law principles of privacy. See also Confidentiality above.
- C. **Guidance:**
  1. Design a process that makes sense for your department.
  2. Provide access only to those persons who have a need to know in accordance with the process.

## IX. Recordkeeping

- A. **Rationale:** To permit enforcement of legal requirements, the law requires employers to maintain their own records to permit plaintiffs and the government to ensure compliance with the law.
- B. **Legal issues:** Records relating to applicants not hired must be kept for a minimum of one year after the date of the personnel action to which the records relate. If a decision is challenged legally while records are retained, the records must then be maintained for the duration of the legal proceedings. Premature destruction may result in adverse factual findings.
- C. **Guidance:**
  1. Save your notes.
  2. Do not make observations related to prohibited considerations.
  3. Consider how your notes may appear to someone several years later.

**X. In-processing**

- A. **Rationale:** Federal and state laws regulate parts of the employment relationship once established.
- B. **Legal issues:** All employees must provide appropriate proof of identity and authorization to work at Baylor before employment commences (I-9 completion). Any employee who is permitted to work must be paid in a timely manner (Payday laws).
- C. **Guidance:**
  - 1. Ensure contracts are in place before work begins to ensure timely payment.
  - 2. Ensure employee completes I-9 before permitted to work.

Legal Support Contacts at 710-3821:

- Felicia Cruz: Immigration
- Doug Welch: All other questions

## QUICK REFERENCE GUIDE ON HIRING ISSUES

### Final Decision

1. DO hire the best qualified to fulfill Baylor's needs.
2. DO remember that need includes more than the immediate tasks; it includes manageability, fit with Baylor's mission, religious character and departmental identity, and risk to the institution or individuals.
3. DO concentrate on legitimate, nondiscriminatory, job-related reasons for your decisions, even if reasons are subjective.
4. DO be consistent in the application of your reasons for your decisions.
5. DO consult with Human Resources if a competitive candidate has a felony record.
6. DO ensure verification of immigration employment authorization. Also, watch your timeline in the event the candidate is not currently authorized to work in the U.S. for Baylor. Contact the Office of General Counsel if Baylor must obtain authorization.
7. DO provide the Dean and Provost a summary of the background information obtained through Routine Screening and the Criminal Background Check.

### Information Evaluation

1. DO carefully review indicators of past performance, including not only knowledge, skills and abilities, but productivity and manageability.
2. DO be mindful of potential red flags in past performance history.
3. DO resolve doubts in favor of Baylor.

### Interviews

1. DO prepare for the interview.
2. DO collect information relating to a fit between the applicant and Baylor. Permissible areas may include religious affiliation, education, prior job duties, documentation issues, knowledge, skills and abilities, productivity, manageability, and support of mission. Focus on whether job can be done, not on why job cannot be done.
3. DO remember that nothing is off the record.
4. DO ask a candidate what the current or former employer would say about the candidate's past performance.
5. DO consider asking if the candidate has any felony convictions and informing the candidate that a felony conviction does not automatically disqualify the candidate.
6. DON'T ask questions or make statements or make notes relating to prohibited, discriminatory considerations:
  - Our department needs a young tiger.
  - You should stay at home and take care of your children.

How would you feel working for someone younger?

Have you ever consulted a psychiatrist?

Some other areas to avoid:

Miss, Mr. Or Ms., maiden name, plans for marriage (sex)

Emergency notification (national origin)

Date of birth (age)

State or country of birth (national origin)

Medical history, anatomical losses or weight (disability)

Number and ages of children, and child care responsibilities (sex)

Arrest records (race, national origin)

Credit issues (sex, race, national origin)

Associations (other than professional, job related) (sex, race, national origin)

Foreign language ability (unless job related) (national origin)

Citizenship/national origin (national origin) [But it is permissible to ask if applicant is authorized to work in the United States.]

7. *DON'T make statements that could raise issues about oral promises*, such as:

This lecturer position will become tenure track.

You can work here until you retire.

#### **Notice to Candidates on Short List or Those Selected for Interviews**

1. DO notify candidates that Baylor conducts background checks it deems appropriate for the position, including routine criminal background checks.

#### **Information Collection**

1. DO verify credentials, or have transcripts sent directly from the institutions.

2. DO develop other references who are not provided by the applicant.

3. DO obtain available employment records and work examples from top candidates.

4. DO use a consent and release form to facilitate the collection of information.

5. DO use Routine Screening tools appropriate to the hiring decision. The Routine Screening includes:

An Application Form (if used)

The Interview

Employment Verification

Prior Employment Records

Directed References

Undirected References

Public Records Searches

6. *DON'T mix the Affirmative Action information with the applications.*

#### **Applicant Pool**

1. DO make a good faith effort to foster applications by any likely candidates.

2. DO make a special effort to foster applications by underrepresented classes, if any.

### **Position Announcement**

**NOTE: Place at least one advertisement in the paper or on-line copy of the Chronicle of Higher Education. This is advisable to take advantage of “special handling” that provides an easier route to lawful permanent residence in the event that a foreign national is hired.**

1. DO provide consistent information to applicants.
2. DO include major criteria for decision, including subjective considerations such as interpersonal skills.
3. DO include minimum requirements to be considered as an applicant, such as curriculum vitae, transcripts, letters of reference, writing sample, and the deadline for receipt of applications. (Current policy permits a statement as follows: “Position open until filled; however, to obtain full consideration submit by (date).”)
4. DO include required notice regarding affirmative action and religious character of institution.
5. *DON'T include any statements relating to prohibited considerations.*



# Avoiding Legal Traps in the Hiring Process

Doug Welch

Office of General Counsel



**BAYLOR**  
UNIVERSITY

# Hiring Legally

- Do's
  - Do verify educational qualifications
  - Do obtain criminal background check
  - Do check references—both directed and non-directed
  - Do obtain the statement of religious faith
  - Do heed the “red flags”



# Hiring Legally

- Don'ts
  - Don't ask improper questions
  - Don't make decisions which discriminate
  - Don't hire without proper immigration status
  - Don't hire for out-of-state duty location without prior approval
  - Don't make oral offers or representations about the terms and conditions of employment



# Offers

- Only the President or Provost are permitted to make employment offers
  - Work with HR to get an offer letter to candidate
  - Make sure that any special conditions are clearly defined in terms of dollars and duration
  - Oral offers may be binding, so don't make any verbal commitments to hire
    - Always discuss in terms of
    - You may be personally liable



# Immigration Status

- Law requires that we hire only those eligible to work in the United States
- Salaries and availability to work are conditioned by state and federal regulations
  - Must demonstrate that no American citizen with the qualifications may be found to fill the job
  - Must post the salary, dictated by the state salary survey, in the department



# Failure to Hire Claims

- Baylor gets a few claims filed with the Equal Employment Opportunity Commission asserting discriminatory practices in a failure to hire
  - Primary issues are age, disability, race, religious and sex/pregnancy discrimination



# Religious Exemption

- Baylor may, as a church-related institution, discriminate in hiring in favor of “co-religionists”

