

Some Key Legal Considerations in Hiring Faculty Search Committees

I. Nondiscrimination

- a. Rationale: Various statutes prohibit discrimination on the basis of a “protected category”: Race, Color, National Origin, Ethnicity, Sex (includes pregnancy), Age (40 years and older), Disability, and Military / Veteran status.
- b. Legal Issues:
 - i. The factual inquiry is generally about the intent of the person making the recommendation or decision. It is unlawful to hire, or not hire, a person, or take other employment actions, because of that person's protected category.
- c. Evidence of unlawful intent has different forms:
 - i. Direct evidence: "I did not hire you because you are over 40."
 - ii. 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.
 - iii. See below examples of questions /comments to avoid.
- d. Guidance:
 - i. Be consistent to the extent reasonably possible in the manner in which candidates are treated, interviewed, assessed, and notes are recorded.
 - ii. Distinguish among candidates based on legitimate, nondiscriminatory, job-related reasons.
 - iii. Apply distinctions consistently.

II. Baylor's Religious Hiring Preference and Standards of Conduct

- a. Rationale: As a private, religious institution, Baylor has a constitutional right to differentiate among candidates on the basis of religion and to apply standards of conduct consistent with its faith beliefs. 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 Christian composition of the Board of Regents and the religious composition of its faculty. Baylor faculty (and staff) have the privilege of modeling faith and impacting faith formation through their research, teaching, and interaction with students.
- c. Guidance: As long as Baylor remains a private, religious institution, the manner of implementing the religious hiring preference and standards of conduct is a matter of internal policy. Therefore, the guidance to be followed is Baylor's stated policy to hire co-religionists and in conformity with Baylor policies based on the religious tenets.
- d. Candidates and Employees should be clear on the standards of conduct prescribed and which are consistent with its religious mission and values. For example, see Baylor Policies which include BU-PPs 022, 023, 028, 030, 031, 034, 410, and 701 and Baylor's [webpage on Human Sexuality](#).

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:
 - i. Not discriminate on the basis of race, color, sex, or national origin, and

- ii. Take "affirmative action to insure that such discrimination does not occur."
 - iii. 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:
- i. Use AA/EEO statement (Bottom of [HR careers webpage](#)).
 - ii. Facilitate application by underutilized minorities. (Recruiting / searching)
 - iii. 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:
- i. Generally, only the Vice Presidents and the President have authority to make legal commitments on behalf of Baylor.
 - ii. 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.
 - iii. Generally, only faculty have written agreements. Others acknowledge at will status.
 - iv. 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:
- i. Use Provost's templates for Letter of Appointment and Special Terms and Conditions
 - ii. Only use titles approved by Provost and in Policy (Policies become part of contracts for certain titles.)
 - iii. Say what you mean and mean what you say.
 - iv. Do not make promises you cannot keep--it may be your personal promise, not Baylor's.
 - v. Avoid overstatements (even in advertisements) if no present intent or authority to promise. Examples:
 - 1. "You can work here until you retire."
 - 2. "Teaching load will be 2/2."

V. Immigration / Work authorization

- a. Rationale: Employers are required to verify that an employee is authorized to work in the United States.
- b. Legal Issues: The employer (HR – not Search Committees) verify:
- i. Identity of employee, and
 - ii. His or her legal status which permits working for Baylor.
 - iii. 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.

- iv. Citizenship is *not* required for work authorization. There are many ways a person can work legally in the U.S. without citizenship.

c. Guidance:

- i. Do *not* ask about national origin or citizenship nor should these matters be part of departmental deliberation and discussions (See Discrimination).
- ii. HR will ask applicant if he or she is or will be authorized to work in the United States when employment begins.
- iii. Do keep in mind that it can take months to obtain proper work authorization, if it can be obtained at all.
- iv. You can, and should, inform every candidate equally that if they need Baylor sponsorship for work authorization in the U.S., should they be selected for the position, to contact Baylor HR directly with any questions rather than discuss the issue with the search committee. It would be wise to include a brief statement to this effect in written format that is identical for all candidates. This process permits the search committee to focus on fit for the job and not engage or appear to engage in national origin discrimination. Well intentioned questions in this vein can be received by a candidate as based on incorrect assumptions associated with national origin or family heritage. There are several ways a non-U.S. citizen may be authorized to work in the U.S., and someone may have work authorization or be a citizen even if they live and have studied outside the U.S.
- v. If you do not wish to entertain a candidate who may need visa sponsorship, the job advertisement should state that the position is not eligible for work authorization (visa) sponsorship.
- vi. If you learn that your selected candidate requires a visa before joining the faculty, notify your HRC as soon as you possibly can. They will review your candidate's situation, and engage the appropriate Baylor departments.

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:
 - i. Ensure ability to contact directed and non-directed references before decision to hire.
 - ii. Eliminate any candidate who is not willing to permit you to contact directed or non-directed references.
 - iii. 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:
 - i. 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)
 - ii. We recommend Search Committees NOT perform their own social media checks
 - iii. HR: Background Checks (all new hires)
 - iv. Research-related Screening (select agents, import/export limitations, security clearance, grant debarment lists)

VIII. 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 maintained in accordance with Records Retention policy. 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:
 - i. Save your notes (in the computer system).
 - ii. Do not make observations related to prohibited considerations.
 - iii. Consider how your notes may appear to someone several years later.

IX. Onboarding

- 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 to Baylor HR (not to a Chair or Search Committee) before employment commences (1-9 completion). Any employee who is permitted to work must be paid in a timely manner (Payday laws).
- c. Guidance:
 - i. Ensure contracts are in place *before* work begins to ensure timely payment.
 - ii. HR: Ensure employee completes I-9 before permitted to work.

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 religious character and departmental identity, risk to the institution or individuals, and a rich-diverse population.
3. DO restrict employment decisions to legitimate, nondiscriminatory, job-related reasons for your decisions.
4. DO be consistent in the application of your reasons for your decisions.
5. DO work with HR if the candidate raises the need for work authorization sponsorship.

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 the duties. 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 treat candidates consistently.
5. DO ask a candidate what the current or former employer would say about the candidate's past performance.
6. DO let HR ask about criminal background checks and need for work authorization sponsorship.
7. *DON'T ask questions or make statements or make notes relating to prohibited discriminatory considerations:*
 - Our department needs a young tiger.
 - How would you feel working for someone younger?
 - Have you ever consulted a psychiatrist?
 - Some other areas to avoid:
 - 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)

8. DO refer candidates to HR if issues such as child-care, medical issues, disabilities, or other protected category discussions arise.
9. *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.
2. DO provide candidates a group of policies and Baylor's Statement on Human Sexuality for review so they understand Baylor's expectations.

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.
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 groups.