

6 ways to avoid being the EEOC's next hiring "test case"

By [Robin E. Shea](#) on July 01, 2011



The U.S. Equal Employment Opportunity Commission recently held a meeting with "a battery of experts" on disparate treatment in hiring. According to the EEOC, hiring discrimination continues to run rampant.

Time for a grain of salt here: According to the EEOC's [press release](#), most of the experts were from the EEOC, or were individuals who had been denied jobs and claimed they were discriminated against. Only one individual from an "employer" group was quoted (scroll *way down* for Rae Vann's comments). So I'm respectfully skeptical that there is an epidemic of hiring discrimination -- particularly so, since we know that the EEOC considers background and credit checks, and discrimination against the unemployed, to be illegal.

Plus, who's hiring these days, anyway?

All of my respectful skepticism aside, since this appears to be a big issue for the EEOC, it is a good idea for employers to ensure that their hiring practices will withstand scrutiny. Here are six suggestions that may help you stay out of trouble:

- 1. If you're a federal contractor, make sure your hiring processes comply with affirmative action requirements.** These requirements are complex, and are about to become much more so if [proposed regulations on recruitment of veterans](#) go into effect. But make sure you are doing everything that your affirmative action consultants/attorneys tell you to do.
- 2. Even if you're not a federal contractor, periodically monitor your hiring statistics to ensure that applicants of a given race, national origin, age, or sex (etc.) are not being rejected disproportionately.** If you see a statistical problem, then do a more in-depth analysis of these individuals' qualifications to ensure that you can explain the disparities.
- 3. Cast as wide a net as you can.** Circumstances will vary, of course -- when you're searching for your new CEO, you don't want to consider every candidate in your county who has a worker's permit. But, generally, the less "cherry-picking," the better. Make sure that you recruit from appropriate

sources to ensure that you have a balanced pool of candidates ... or, at least, that no one who is qualified will be able to say you didn't give them the chance.

4. Make sure your hiring managers know which criteria are legal, and which are illegal. If you have not had training for your hiring managers in a while, it may be a good idea to conduct some. Managers need to be aware of the laws that apply to your company and the consequences for violation. They also need some practical advice on how to deal with difficult hiring situations, such as qualified candidates who may need disability-related or religious accommodations.

5. Watch out for "gray areas." In my experience, few employers discriminate on the grounds that are clearly prohibited by law, but there are a number of areas that are in a "gray zone" and may cause problems. Background and credit checks, and "unemployment discrimination," are some areas into which the EEOC is trying to expand the reach of the law, contending that these screening criteria disproportionately exclude racial and ethnic minorities. I'd also recommend being careful about rejecting candidates because they are overweight or smoke. Depending on the location of the employer, these individuals may be protected. Under the Americans with Disabilities Act Amendments Act, some overweight individuals may qualify as "individuals with disabilities" or individuals who are "regarded as" having disabilities. In addition, some local laws prohibit "appearance discrimination." Many state laws prohibit discrimination against individuals who smoke off-premises during non-working time. Discrimination based on sexual orientation violates an ever-growing number of state and local laws. Although there is currently no federal law specifically addressing it (not yet, anyway), some courts have considered sexual orientation discrimination to be a form of unlawful "sex stereotyping" that violates Title VII.

6. Make sure your post-offer medical screening complies with the ADA and the Genetic Information Non-Discrimination Act. You should not be doing *any* medical screening pre-offer. (*You aren't, are you?*) If you screen individuals post-offer, you should make sure that the same screening is done for all offerees in that job classification, and that no offers are withdrawn unless you have thoroughly considered reasonable accommodation options and have determined that none are possible. Compliance with the GINA is relatively easy: just be sure that you provide the "safe harbor"* language on the medical forms that you give the offeree to take to the doctor. If you do the medical screening in-house, make sure that you are not asking the offeree for any type of "genetic information," which includes questions about family history.

This is far from an all-inclusive list, but if you monitor your performance in these areas and correct problems promptly, you will minimize your chances of being the EEOC's next hiring "test case."

*Here is the GINA "safe harbor" language:

NOTICE UNDER GENETIC INFORMATION NON-DISCRIMINATION ACT

The Genetic Information Non-Discrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law,

CONSTANGY

BROOKS & SMITH, LLP

The Employers' Law Firm, Since 1946

we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.