

HOW TO FIND AND HIRE THE BEST EMPLOYEES

SETTING THE STAGE FOR HIRING YOUR BEST STAFF



Abstract

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How to Find and Hire the Best Employees

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Hiring the Wrong Employee

You can't have an excellent company without first having excellent people. A poor hiring decision typically reduces productivity as well as creates the potential for employee lawsuits. Most poor hiring decisions are made because of the failure to follow a sound hiring process. Hiring practices alone have been the subject of many books, articles, and training programs. However, despite all we know about the hiring process and all that is contained in these materials, we will still continue to hire the wrong people for some very human nature related reasons. These reasons include desperation, laziness, infatuation, baggage, and blind recommendations.

Desperation

Because we may be desperate for an employee now, we fail to follow a sound hiring process. For example, your secretary quit yesterday, so you hired the first person that said they knew how to type. No test, no sample projects, just blind faith, motivated by a feeling of desperation. Or, your company is growing so fast that you plan to just hire quickly and figure out how to manage them later. Rather than hire out of desperation, we suggest that you use a contingent worker — whether from a staffing or leasing agency, or an independent contractor.

Laziness

The second reason poor hiring decisions are made is due to laziness. It's not that we're lazy people — it's just that we have so little time. Since hiring isn't given the priority it deserves, we are focused on getting it over with as soon as possible, so we can get back to doing our work. If you are too crunched for time or too lazy to go through a sound hiring process, then let someone else do it for you. Use a recruiter, an agency, or someone else within your company. The 15 percent you may have to pay to convert the employee to a full-time status is well worth it.

Infatuation

Studies show that most interviewers make an emotional decision to hire someone within the first 10 minutes of an interview and then spend the rest of the time justifying that emotional decision. Many of us buy our cars the same way — we make an emotional decision to buy a certain car and then spend days reading reviews to justify the decision. You can avoid infatuation by having more than one person involved in the interviewing process. You can also avoid infatuation by making sure that you meet with the candidate on more than one occasion before extending an offer.

Baggage

Our own baggage, or preconceived notions about other people, can get in the way of our hiring decisions. Our baggage may be related to jobs we think a man may be unsuited for, or a position we think a minority shouldn't hold. Whatever our baggage may be, it often gets in the way of making a sound hiring decision. As an example, for years women complained that the New York Philharmonic Orchestra had discriminatory hiring practices. The women fought for and won the right to "blind auditions," where the musicians' sound is qualified while they are behind a curtain. This eliminates any stereotypes in the process. As a result, women were hired at the twice the previous rate. What management came to understand is that while the orchestra may not look like what they thought it should look like, it sounds much better and patrons are still buying tickets.

Blind Recommendations

We often trust someone else's viewpoint about a potential employee. As a result, we may not test that employee for skills, character, drug use, etc. If we are desperate, lazy, infatuated, or let our baggage or recommendations get in the way, we may eschew a sound hiring process — which is the most critical point in building powerful employment relationships.

Hiring only the best requires putting aside human nature and insisting that a hiring process be followed. What follows are insights, strategies, and tools you should consider to make sure you hire only the best. These are the most critical factors that must be mastered if you want to have the best company possible.

Determine Your Real Needs

Before hiring, savvy employers first ask themselves, "What are my specific needs? What are the most important job functions that need to be addressed? What resources do we currently have that could address some or all of these needs? How can we change our workflow so that we are that much more efficient and can meet these needs without having to hire an employee?"

For example, many companies complain they are "under staffed." However, the analysis may be that they are "over worked." It is not an issue of the staff, but rather of the workflow. Some of this workflow can be streamlined by eliminating unprofitable clients or customers. Many companies also make the mistake of perceiving the existence of a long-term need when, in fact, it is a short term one and extremely subject to market conditions.

Once you have specifically defined your needs, the next question is, "Who can best meet them?" Assuming you need a person to do some work, would you be better served by hiring an employee, using a temporary employment agency, a leased employee, or an independent contractor? Does the work have to be performed on the premises or can it be done out of the home? For example, hiring employees in extremely volatile marketing conditions makes little sense. Temporary workers may be a better choice.

Many companies prefer to have employees working for them, based on the assumption that an employee will be more loyal and committed to their company. However, that isn't always the case. Employees, as with contingent workers, may be committed and loyal to their careers, their projects, and work teams, but seldom to their companies. Don't make decisions based on a false set of assumptions.

Creating Job Descriptions

Employers should have job descriptions in order to comply with the Americans with Disabilities Act (ADA) and other laws. Some management experts suggest you destroy job descriptions because they create limits on innovation and the development of a learning organization; however, there should be a comfortable middle ground. You should be able to define what an employee does in a workday, and these daily functions should be clearly set forth in a job description or performance agreement. They also should be the focus of interviewing and testing procedures.

Finding the Right Employee from Within

Look from within but be aware of the pros and cons of doing so. On the pro side, there is the potential for increasing productivity and commitment with the hopes of a promotion. There is also the possibility that a quality employee would like to continue to work for your company, but in a different capacity. On the con side, there is the problem with inbreeding and stagnation. There is also the problem with promoting people beyond their

competencies, which may occur with a promotion to a management position. While an employee may be very good at a product or service delivery, that does not mean they have good management or people skills. It is important that when you promote from within, you go through the same hiring process as if you were interviewing an outsider.

Consider Other Types of Hires

Given the rapid changes in technology and product development, some employers hire based on “fit” rather than on a narrow specification of skills with the rationale that the jobs are changing anyway, so hire employees who identify with the company’s mission and can move more easily to “new” jobs in the organization.

In addition, many companies have had great success hiring disabled workers or returning veterans and investing up front in accommodating the disabled worker or providing special training for the disabled worker or veteran entering the civilian workforce. There are government resources to assist employers in hiring these workers as well as potential tax incentives to do so.

Advertising for the Best

For many businesses, the classified help-wanted ad in the local newspaper, industry publication or online program may be the primary source of recruitment. The purpose of a help-wanted ad should be to attract the highest qualified candidate at the lowest possible cost. The help-wanted ad should be designed to attract the type of employee you want — not to provide a complete job description, the potential salary, or the benefits you intend to offer.

As with any other form of marketing or advertising, the effectiveness of your help-wanted ad is related to the cost per exposure to obtain qualified job applicants. There is a simple formula to help you to determine this factor: Cost of advertisement, divided by circulation of publication, multiplied by the percentage of qualified job applicants that read the periodical, equals the cost per exposure.

For example, you are advertising for an engineer. The paper tells you the ad cost is \$100 for four weekly runs. Its circulation is 10,000. According to the paper, 10 percent of its readers look at the classifieds and 5 percent of the readers are engineers. This means you are reaching 50 potentially interested candidates at a cost of \$2 each. If you receive 10 qualified responses, your cost is \$10 per qualified response.

Once you become more effective with your advertising, you will be able to further define and evaluate this equation. The methodologies that were used to attract yesterday’s employees do not necessarily work for today’s employees. You may end up finding that it is cheaper to reach the same audience, for less cost per exposure, by using different media (e.g., local trade journal vs. newspaper classified vs. LinkedIn). Also calculate the long-term value of the position in determining how much to spend on an ad.

The hiring of an employee must be viewed in terms of hiring an individual profit center. You won’t hire the person capable of giving the best value simply by telling people what it is you are willing to do for them. You get what you ask for. Today’s employer should be looking for employees who are concerned with adding value and quality, and who are flexible and innovative, dedicated to self-improvement, and willing to invest in your company’s future. Advertising for employees is no different from advertising for new customers. You must stress your company’s unique value proposition and let prospective employees know their compensation will be directly related to the amount of added value they provide to your company.

Create the Best Ads

Words and Phrases that Bring the Best

Keep wording in your advertising concise, but provide enough details to pique the interest of relevant candidates.

Consider the following language to describe your company, when applicable:

- "Great environment."
- "Progressive and innovative."
- "Growing and expanding."
- "Excellence, quality."
- "Industry-leading products or services."
- "Value-directed compensation."
- "We value diversity."
- "Equal employment opportunity."
- "We are searching for the best possible [position title]."
- Your unique value proposition.
- Your company mission or vision.
- "Challenging opportunity."

Consider the following when describing specific jobs, where applicable:

- Provide the position, title, essential skills, and education required.
- Give additional specifics via voice mail, email, fax, or mail.
- Challenging opportunity for the right person.
- Where the job is located.
- If travel is involved.
- Team environment vs. independence.
- Work with purpose.
- Non-monetary benefits of the job.

Consider these terms to describe the desired applicant:

- "Trustworthy."
- "Desire, ambition, motivation, attitude."
- "Personal excellence."
- "Healthy lifestyle."
- "Seeks challenges."
- "Flexible/adaptable to change."
- "Seeks to add value."
- "Computer literate."
- "Communication skills."

Things to Avoid

Avoid the following terms and suggestions:

- Passive words.
- "Security."

- “Long term.”
- “Guaranteed.”
- Any words related to race, age, sex, physical type, etc. unless directly related to a bona fide job requirement.
- Don’t stress salary or benefits in your ads unless they exceed your competitors’.

Additional Points to Consider

Consider these additional points when crafting advertisements for new employees:

- Try advertising in different media. Consider industry journals, graduate schools, adult education programs, newsletters, and job lines.
- Ask for ad placement on the upper or lower right hand corner of the right-hand page.
- Change your ad content weekly to see which ad draws the best response. (Benchmark and test your results.)
- Use an ad headline — be creative.
- Change your ad headlines frequently.
- Ask what current employees like about their jobs and put their endorsements in the advertisement.
- Review the classified ads and circle what you like best about the different ads. Save these ads and phrases; revise and incorporate them into your own ads.
- Monitor the source of all applicant leads. Which efforts are providing the best results?
- Unless you fear the loss of an existing employee, don’t use “blind ads.” Take pride in your company.
- Try running long copy ads using weekday rates.
- Use bullet points.
- Make sure you know where your most fertile applicant pool exists. Consider using demographic studies.
- Send a direct mail piece to the mailing list of an industry-related publication.
- Let your customer, vendors, and other stakeholders know about the job opening.
- Study the effectiveness of your ad based on lead generation and qualified response rates.
- Ask what it’s worth to the company to attract the best possible applicant. Then match your advertising budget to the perceived benefit.
- Compare the rate cards and circulation figures of different publications for cost per exposure of the ads and demographics of the readership.
- Set yourself up as an in-house agency and get a 15 percent discount on ad placements.
- Compare the effectiveness of different advertising methods. For example, what is the total one-month cost for a two-column ad in the local paper? What can you get for an equivalent cost if you use a two-line ad with a voicemail and/or fax-on-demand system? Which one gets better results?
- Be careful to place the ad under the proper job heading when using classifieds. Are you seeking an “administrative assistant” or a “secretary”?

Expand Your Hiring Sources

While there is benefit in using classified ads, there are many other ways to hire an employee. Consider industry journals, graduate schools, adult education programs, newsletters, job lines, and Internet based services. The latter is the fastest growing medium for seeking out new employees. The following is a partial list of current job boards:

- www.bestjobsusa.com

- www.careerexchange.com
- www.careerexposure.com
- www.careerbuilder.com
- www.dice.com
- www.glassdoor.com
- www.indeed.com
- www.linkedin.com
- www.monster.com
- www.simplyhired.com
- www.thejobmarket.org
- www.theladders.com

Many companies do a successful job of using highly skilled college and graduate students through their schools work-studies programs. There are also internships available at little or no cost.

A number of companies have successfully used their own employees as a source of job prospects. Offer a bonus to an employee who refers a qualified job applicant as well as an additional bonus if they are hired and remain in the companies' employ for six months or more.

The Interviewing Process

As stated earlier, we have to make sure that the interviewing process isn't dominated by our emotions, but rather that we stick to an objective analysis. What follows are some points to consider during an interview:

- **Engage in a pre-interview screening process.** Your hiring process should be focused on interviewing quality candidates only. The process of weeding out inferior candidates should be done without you having to meet with them. You should require every job candidate to complete a pre-interview questionnaire, fax or email you a resume, and fill out a job application. Consider using a voicemail message that encourages the job applicant to listen carefully with no paper and pencil in hand as you will be giving detailed information about your interviewing process and the job opportunity. You may even consider using an outside resource to go through this process for you. With the advent of today's "virtual human resource systems," much of the weeding out process can be done online without your direct interaction. For example, CISCO (www.cisco.com/jobs) reportedly performs 85 percent of its hiring process through an automated online system.
- **Choose an appropriate time and place.** Now that you have three to five potential job candidates and have forwarded your letters of rejections to those who don't pre-qualify, it's time to begin the interview process. Ideally, you should set aside at least one hour of time per interview. If punctuality is something that you value at your company then make sure to start and end the interview on time. It is also important to have a proper setting. In today's tight labor market you don't want to turn off a potential hiree by interviewing them in an appropriate setting such as an overly cluttered office or busy working environment. You should interview in an environment free of distraction including phone calls or other interruptions.
- **Don't take a "wing it" approach to a job interview.** Plan accordingly and have a list of designated interview questions on hand.
- **Establish rapport, but don't rely on small talk.** Begin the interview by establishing some rapport with the interviewee. Realize that many interviewees will be nervous and that your job is to put them at ease.

You should have already done your homework by reviewing the applicant's resume, pre-interview questionnaire, job application, etc.

- **Engage in active listening.** During the interview process, don't be so focused on asking the question that you ignore the answer. Listen to a person's answer and dig deeper. Remember you should be talking only 20 percent of the time and the interviewee 80 percent of the time.
- **Has the interviewee done his or her homework?** While it's important to ask questions about the applicant's background, education and experience, accomplishments and awards, challenges and defeats, personal and career goals, etc., learn what the job applicant knows about your company. To the extent that they have done homework and prepared themselves for the interview, chances are they will be a better employee.
- **Have you done your homework?** Be prepared to answer potential candidate questions.
- **Get specific.** One of the topic predictors of future performance is past performance. Get specific in having a candidate describe a major project, challenge, hurdle, etc. Don't settle for general answers, continue to probe. Ask questions such as, "Why did you do that?", "What other options did you consider?", "What is the value that resulted from that activity?", etc.?
- **Challenge the candidate.** It is important to resist the temptation to be judgmental or disagreeable with a job candidate. At the same time it is important to see how a candidate responds to some adversity. Challenge them. Disagree with their assumptions and see how they react to the pressure.
- **Look into the candidate's eyes.** There is a strong relationship between eye movement and communication. By observing the direction of a person's eye movement, you can determine the origin of the message, and according to researchers, whether they are being truthful with you or not.
- **Group interviewing.** Depending on the type of position involved, a group interview may be appropriate. Group interviews give you an opportunity to see how applicants interact in a group, how assertive they are, and how well they communicate verbally.
- **Co-employee interviews.** Having a pool of future co-workers interview final job candidates is another approach. After all, they are the ones who will have to work with the new employee and many times they have insights that you or your managers may lack.
- **Don't misrepresent the opportunity.** It is important not to misrepresent the parameters or benefits of the job. Instead, be very clear as to what can be their expected compensation and benefits, career growth, unique job requirements, overtime demands, etc.
- **Keep accurate notes and assessments of the interview.** Psychologists will tell you that the concept of "recency" dictates many a decision. Make sure not to lose the influence of early interviews by not capturing an assessment through a formalized process of applicant appraisal. This will allow you to make an accurate assessment after meeting with a wide pool of candidates.
- **Concluding the interview.** Before concluding the interview, ask if the applicant has any questions of his or her own. Thank them for spending the time to interview. Realize that even if you have already made the decision that they are not a fit for your company, it still makes sense to be courteous as you may run into that applicant again, perhaps as an employee for a potential client, supplier, or vendor. Let the job applicant know when you will respond back to them and explain what your process will be.
- **Skills training.** Don't assume that your managers know how to conduct a job interview. Train them so they know how to properly do so. You may consider going through a mock interview with them, sit in on one of their interviews, or ask the job applicant for permission to record the interview. Many companies will also have "test" applicants involved in the process.

Test for Skills

Almost every job has a skill set that can be tested for. The law only requires that skill tests be “reasonably related to the job” and “validated.” There have been cases where the courts have claimed the tests demanded of job applicants were discriminatory because they had the effect of excluding a particular class of persons from the job (known as disparate impact). Our advice is to be sensible. Our analysis reveals that very few cases of this sort have been filed against private sector employers and then typically only against those in the Fortune 500. Your legal exposure is a risk management issue. Is the risk of a lawsuit greater or less than the risk of hiring a poor performing employee? Statistical analysis reveals that only a very few hiring claims are filed in a private sector based on testing issues. Hiring managers must determine what risk is most important, and taking the risk and testing employees to eliminate the risk of hiring poorly qualified workers may be the best choice. The damage an under-qualified work force can cost your company is probably greater than the risk exposure you will face from using objectively based tests.

Having stated the above, with some effort you can probably find a skill test for almost any job position. If you can't find one, you can work with your employees to create one. Just make sure you follow a sensible process and keep notes of your efforts.

Assessing for Character

Assessing for an employee's character traits brings the issues of reasonableness and validation further into focus. There have been a number of lawsuits filed related to companies using psychological exams in the hiring process. There is a wide range of character assessment tools on the market today. Some are clearly not appropriate for making hiring decisions, but are excellent when used as communication facilitation tools. The latter can help you determine whether someone is dominant in their personality, controlling in their personality, an influencer, etc. The strength of character-assessment programs are the job candidate profile and interview guidelines, which can provide you with uncanny insight into the areas to be probed. The use of careful questioning and attention to responses helps you decide how to proceed in the interview and afterwards during reference checks.

Final Points in Interviewing and Choosing Hires

Lastly, the strength of any employer/employee relationship is based on the factors of trust, shared direction, communication, and commitment. Make sure the employee has the skills and character necessary to be trustworthy. Make sure their personal and professional goals are in alignment with your company's vision, mission, values, and goals. Make sure the job applicant shows an ability to communicate through dialog. Are they a good listener, do they have preconceptions without basis, do they know how to solve problems and think in terms of win/win resolutions? And lastly, what is their definition of commitment? What personal or workplace experiences can they share with you to help define their version of commitment? Are they the type that engage in only “sunshine commitment” and flee at the first sign of difficulty or trouble? Or, are they the type of person who is deeply committed and willing to stick to their word long after the mood they said it in has past?

The discussion of the concept of testing for skills and character could go on for many more pages. Hopefully we have brought home the points that 1) there are strategies and tools available for testing for skills and character, 2) as with any management at management decision, there is a risk factor associated and 3) do not be blinded by all-or-nothing thinking. Eliminating your exposure to hiring claims by eliminating testing procedures may have the unattended consequence of business failure. You must balance your tolerance for risk with your desire for excellence so that you can make a well-informed decision about what your hiring process will be.

Reference and Background Checks

The importance of properly checking references and backgrounds cannot be understated. Hours of wasted resources and many lawsuits could have been avoided simply by checking references and backgrounds. All applicants should be required to sign a Fair Credit Reporting Act (FCRA) disclosure allowing the company to conduct complete reference and background checks.

Some companies simply under-appreciate the “bad employee” risk because they have yet to feel its impact. They have yet to have an employee attack a co-worker. They have yet to have their CPA embezzle money. They have yet to have the warehouse supervisor dealing drugs. They have yet to be hit with a million dollar sexual harassment lawsuit. Don't be one of those companies “comfortable” with the way they manage employees. There are times when you don't want to learn from a painful experience. The risk is real; hopefully your appreciation of it is real, too.

Possible reference and background checks include:

- **Credit Check:** Indicates an employee's stability, if employee balances his or her life, and if employee should work with financial information or finances. Various federal and state laws place limitations on the use of credit references. The FCRA requires an employer to notify employees when an investigative credit check is being performed. They then must sign a separate permission statement. The FCRA allows the employee, upon request, to receive a copy of the report. These checks should be limited to those in a position dealing with finance or security.
- **Police Check:** Indicates employee's ability to work in a situation where he or she is unsupervised and where security or finance is involved. We recommend you do a nationwide criminal background check on all hires. You may not directly inquire into nonfelonious arrests unless specifically job related. The FCRA also requires a consent form for this check. Please be sure to check the latest federal and state laws relating to criminal records checks prior to proceeding.
- **Previous Employer Check:** Check at least three references. Ask previous employers “Is this employee eligible for rehire?” If an employer says no, there has probably been a problem with this candidate. If the past employer wishes to limit the reference, offer a release signed by your company and the applicant.
- **Make sure not to limit your references to those provided by the candidate and seek out other names.** One of the favorite questions of professional recruiters when conducting a reference check is to ask a person to rate the quality of the job candidate on a scale of 1 to 10. If the answer is below a 9, ask why it isn't higher? It is also important to ask if the employee is eligible for rehire. The mere hesitation on the part of someone providing a reference is an important clue in and of itself.
- **Department of Motor Vehicles Check:** Should be used with all those who drive for the company, whether they use your vehicle or their own. Note that some insurance policies and regulations may require proof of driving record.

Finally, don't assume that executives and managers aren't a risk. Many companies make the mistake of thinking that “bad employee” issues only relate to rank and file workers. The fact is, losses from executives gone bad cost American businesses 16 times as much as those generated by rank and file workers. Remember, the higher the position on the company organization chart, the greater the risk exposure.

A Cautionary Note About Negligent Hiring

Not only does a company risk business failure, but it may also be subject to a lawsuit if it does not give the proper

attention to the hiring process. During the past few years, negligent hiring claims have taken off. While the popularity of this tort is approximately 20 years old, its parameters are still not completely understood. In general, for an employer to be liable for negligent hiring, the employer “must have known” or “should have known” that the employee posed a reasonable risk of harm to others. The duty to investigate employees’ backgrounds is balanced against their privacy rights and varies according to an employee’s position. Where security or safety responsibilities or the use of weapons is involved, the courts have held to a higher standard of investigation. Generally, the more a consumer, client, or customer relies on the trustworthiness or safety of the services provided, the greater the duty owed to third parties when hiring employees.

Watch What You Say

Watch that what you say when hiring an employee cannot be misconstrued. Misrepresentation claims have been filed where an employer promises too much or is not forthright and honest about either the position being offered or the health of the company. Companies who promise too much during the hiring process may find themselves bound to oral or implied promises, thereby losing the protection of an “at-will” employment relationship, or may also be sued for misrepresentation. The use of offer letters, employment contracts, and “at will” language can help mitigate these claims.

From Interviewed to Hired

Setting Compensation and Benefits

Before even beginning the hiring process you should have a clear idea on how you expect to compensate your future employee. Begin by obtaining competitive salary information from the Department of Labor Statistics (www.dol.gov) or from a private online search (i.e. www.salary.com). You should also research local statistics maintained by your chamber of commerce or local organizations. Lastly, look online as well in the classified section of your newspaper and find out what competitors are paying for their new employees.

Establish Systems for Home-Based Workers

As a result of technology and mobility, today’s workplace is undergoing an incredible amount of change. One of those changes is the ability to have home-based and remote site workers. Your employees could be working in their suburban community, in another state, or even in another country.

The advent of home-based or remote workers has created far more legal questions than can be answered. Questions such as “what is my responsibility for providing a safe home-based work environment?”, “What is my responsibility for preventing harassment and discrimination that may occur at a remote work site?”, “Can I demand that an employee show childcare coverage during the day?”, or “What are my responsibilities for personal equipment used by the employee?” By the time we figure out the answers to even half these questions, we’ll be faced with a dozen new legal issues created by today’s rapidly changing business environment.

Your company needs a system for managing home-based and remote site workers. For example, it’s a good idea to have home-based workers check in on a regular basis. You must establish a powerful communication system so that the quality of the work relationship does not fall victim to the distance between it.

Cautionary note: Resist the temptation to turn home based workers into independent contractors. This will only work where they have their own business, other clientele, and are not an integral part of your business. Also, remember that you cannot control how independent contractors do their job.

Use Established Agencies when Hiring Leased or Temporary Employees

The contingent workforce has been growing at approximately 10 to 20 percent per year over the last five years. The nation's largest agency, Manpower, replaced General Motors as America's largest employer many years ago. The contingent worker has evolved from being a part-time secretary to a full-time nurse, engineer, or even CEO. Today's contingent workers include temporary, leased, and borrowed employees as well as independent contractors.

Along with the contingent worker comes incredible flexibility, exposure, and responsibility. With the financial explosion of this sector also come many opportunists who give good agencies a bad name. An agency is only as good as the employees it hires and the training they are provided. Make a point to find out how they are hired, their length of employment, the training they receive, what they are paid, and what it would cost you to hire them on to your payroll.

Because the contingent workforce is such a new phenomenon, comparatively little has been written on how to manage these relationships from either a human resources or legal standpoint. Many agencies tout the fact that they can insulate clients from legal, managerial, and administrative needs associated with having employees. However, that is often not the case. Often a company will be held responsible for the acts of a contingent worker under an "agency," "dual capacity," or "borrowed servant" theory. This is why it's so important to clearly define the parties' rights and responsibilities.

In the last two years, there have been a number of cases clearly indicating that companies that hire contingent workers remain responsible for complying with the Civil Rights Act, Americans with Disabilities Act, Family and Medical Leave Act, Occupational Safety and Health Act, and other employment laws. For example, what would be your obligation if you hired a contingent worker who then sexually harassed one of your employees? Is that contingent worker subject to your harassment and discrimination policies? Who should investigate the employee's complaint of sexual harassment? Do you have the ability to fire or discipline the contingent worker for their conduct? And ultimately, if your employee sues, will you be responsible to that employee for the acts of the contingent worker, and if you are, will the agency or its insurance company indemnify you against the legal fees and other costs associated with the claim?

The Internal Revenue Service (IRS) and other agencies have plenty of incentive to define any worker as your employee. The IRS alone estimates that there is approximately \$10 billion in unpaid taxes every year due to misclassification of employees. As a result, your company could be responsible for the wages and employment taxes of a contingent worker who is not paid by his or her agency. For that reason and many others, you should not walk blindly into contingent employment relationships. There are other factors to consider when working with contingent workers including loyalty factors, their exposure to trade secrets, and the difficulty of controlling their conduct.

You need to also consider workers' compensation insurance, general liability insurance, employment practices liability insurance, and indemnity obligations surrounding the hiring of contingent workers. It is important to determine whether an agency will indemnify your company for any wrongful acts on the part of a contingent worker. Also make sure that they meet the various state financial and registration requirements of your state. If you don't work with an established agency, you risk increased exposure to wage claims, sexual harassment and discrimination claims, tax claims, unemployment claims, workers' compensation claims, and more.

Watch for Noncompetition, Nonsolicitation, and Confidentiality Agreements

Depending on the particular state you are in, there is either a bias to open competition or strict enforcement of these agreements. Even if it appears that the employee is not being hired in a competitive arena, there is a doctrine known as “inevitable disclosure,” which implies an obligation where the potential for disclosure is foreseeable. This logic also implicates parent agreements, work for hire and copyright agreements, and release agreements.

You’ve Hired the Best, Now Keep Them the Best

Keep your new employees focused on being the best they can be by keeping these points in mind:

- It is important to have a formalized orientation process. Ask for new employee input about their first months on the job. What can they see about your company that you can’t see for yourself?
- With the cycle of change revolving ever faster, the need for training grows ever more important. Place your valuable employees in an ongoing training effort and you will reap significant benefits.
- Engage in a performance improvement process by giving employees feedback on their performance. As a leader, you will help them to identify their challenges, opportunities, and solutions to any problems.

Conclusion

These are the most important strategies you can use to find and hire the best. The biggest problems employers find when it comes to hiring are 1) the failure to properly define the “need”; and 2) the failure to take the time to follow a process, including the interview of numerous candidates, co-employee interviews, a rating process, and background and reference checks. You must be vigilant in fighting the very human tendencies that result in poor hiring decisions discussed earlier in this report.

As a final note, take a snapshot of your company’s current condition before you start the improvement process. This serves not only as a source of insight, but also as a benchmark for progress. What are you doing right today? What do you have to do better tomorrow? Where are you vulnerable? If you look at your turnover, poor performing employees, and employee lawsuits, you will see that many of them trace back to poor hiring practices.

This report is provided with the understanding that we cannot provide a wide audience with specific legal, technical, or other professional service or advice relating to hiring employees versus independent contractors. Additional information relating to this topic is available in the ThinkHR compliance library and from our ThinkHR Live Hotline advisors.