

# HOP ON THE BULLET TRAIN: HIRING AND RETENTION CONSIDERATIONS IN A FAST- PACED EMPLOYMENT MARKET

Whether an organization is a public or private entity, a small business with a handful of employees, or an international corporation with thousands, attracting and retaining top talent is critical to a successful operation. When the labor market is tight, hiring and retention can seem like a daunting task: not only are there too many available jobs and too few qualified candidates, but current employees are at risk of being poached by other companies.

What can an employer offer to prospective talent and current high-performing employees to convince them that the employer's business is the right place for them to develop a productive and meaningful career? And what legal and non-legal obstacles stand in an employer's path in tackling this important question?

Employers should start first with some key basics in appealing to and retaining top talent, such as (1) important best practices even when it might be tempting to cut corners to remain competitive, (2) the often-overlooked role of employee benefits, and (3) the benefits and challenges of utilizing noncompetition/nonsolicitation agreements.



**WRITTEN BY:**  
Erin Burris  
Naomi Haslitt

## Back to the Basics: Best Practices Optimal Hiring

Many entities experienced labor shortages in 2021 and 2022. Job postings went unanswered or those that did answer were unqualified and unprepared for the role. This mismatch caused significant challenges for companies, including issues from declining production to overworked employees, and even to on-the-job safety considerations due to too few staff. Although human resources professionals know the many possible hiring pitfalls if the process is rushed or bypassed, a staffing crisis can lead decision-makers to take more practical and legal risks to keep the trains running smoothly. Below are some reminders for best practices when hiring.

### Job Descriptions

The written explanation about a position that accurately describes the job duties not only increases the likelihood of getting qualified applicants, but also serves important legal functions. The job description should thoroughly provide an up-to-date explanation of the position and set forth the purpose of the position, its essential functions, and the requirements for education, experience, skill, licensure or certifications, and knowledge. A properly crafted job description can be important legal evidence of the company's honest expectations of the position's essential functions—fundamental, not marginal, job duties—determined and announced in advance before a discrimination claim is asserted, including a

claim of failure to accommodate a disability. Should the hired applicant later on not fulfill expectations, the employer can point back at the job description to support claims of poor performance. Something new (but essential to the current times) is that the description should also clearly explain expectations for remote or in-person work. Finally, every entity should be aware of state requirements for job postings (see our Washington Law Update materials for examples). When trying to hire even for tough-to-fill positions, avoid cutting corners on prospective employees' experience and ability to perform the essential functions of the job.

### **Applications and Interviews**

Job applications and interviews are opportunities to explore an individual's qualifications for the position and their fit with workplace culture. At times, competitive markets may lead to rushed or informal processes that may run afoul of certain protections for applicants. For example, remember that applications and interviewers should only ask job-related questions to avoid a possible discriminatory-appearing question (such as those about marital status or national origin). They should only ask questions related to a protected classification when certain of a bona fide qualification for a position (such as asking language experience for a translator position). The focus must be on the applicants' abilities to perform the essential functions of the job.

### **Pay Equity and Pay Transparency Issues**

Employers often seek to incentivize a candidate to choose their business over a competitor by offering higher pay than market rate. But keep in mind that federal and state pay-equity laws prohibit employers from paying an employee more than it pays an employee of a protected class when the employees perform comparable work. Oregon has an express statutory requirement that any such difference must be justified by certain bona fide factors (such as a seniority system, merit system, and others). Additionally, some states (including Washington and Oregon) explicitly prohibit employers from asking about salary history before offering employment or determining compensation based off of current or past salary of the new employee. Check applicable laws before making compensation offers, and consider what it will mean with respect to your other employees. Additionally, laws requiring pay transparency is another issue to consider. Some states (including Washington, beginning on January 1, 2023) require job postings to include the pay range.

### **Labor Union Considerations**

Among other issues facing employers with labor unions, certain hiring practices may be mandatory subjects for negotiation between the employer and the union, which can limit an organization's flexibility in certain respects. While signing bonuses and other incentives can be good tools for attracting and hiring excellent candidates, remember that those are negotiable subjects if the positions are represented by a union. Additionally, remember that certain other hiring practices could be negotiable subjects and could even set a precedent for future hires. For instance, elevating an employee's placement on a pay scale based on experience to attract candidates may set a precedent for future hires.

### **Diversity-Conscious Recruitment**

Many organizations are making efforts to diversify their workforces with respect to race, national origin, sex or gender, sexual orientation, and other characteristics through new hiring efforts. In addition to overall internal equity, one reason has been to create a workplace more attractive to applicants searching for a diverse company:

information show that particularly younger workers, such as Gen Z and millennials, are actively searching for an employer that values diversity and equity practices. But, as hiring professionals also know, those diversity efforts have to comply with federal and state anti-discrimination laws which prohibit employers from making hiring decisions based on protected characteristics, such as race. Although direct race-conscious hiring is impermissible, employers can still find opportunities to diversify their workforce. For example, employers can market jobs to underrepresented groups (such as recruiting at historically black colleges and universities or affinity organizations). Employers should also ensure the criteria used to review applications to select who will be interviewed do not unintentionally adversely impact diverse groups. Employers should also develop a uniform interview process and consider training interviewers on implicit bias to reduce the chance of bias in the selection process.

## **Back to the Basics: Best Practices When Using Retention Strategies**

After a business attracts quality candidates to its workforce, keeping the team intact is a major challenge because of the competitive labor market. Good employees are receiving recruiting emails regularly, whether they are looking to leave a business or not—some of the offers may pay more money, offer unique benefits such as flexible remote work, or make promises of a positive workplace culture that highlights the employee's personal values. To retain high-value employees, organizations are implementing a wide variety of new internal measures to support employees, foster connectivity between colleagues such as social events and committee work, and remind employees of advancement opportunities. These types of activities are even more important as we move forward with remote and hybrid workplaces. Novel approaches to retention are important to compete with other businesses seeking to poach top talent, but remembering the basics of good employment best practices (in addition to vetting the legality of unique approaches) can improve your organization's retention efforts. Below are some reminders for best practices when carrying out the nuts and bolts of retaining your workforce.

### **Workplace Culture and Practices**

While compensation levels are always an important factor in retaining top talent, they are not the only factor. Workers resign from jobs for a variety of non-compensation reasons, including a demand for a better work-life balance, child care limitations and safety concerns that arose during the pandemic, an employer's remote-work practices, and reconsidering workplace culture and the purpose of work in one's life. Between burnout and rethinking priorities, the threat of employee losses has driven companies to highlight employee personal well-being through offering hybrid/remote work and flexible schedules, wellness holidays and mental health benefits, more social opportunities among colleagues, and other efforts to show that businesses value their employees as people. While each organization has different priorities, employers should consider what perks its employees may value (this could range from zero-cost team-building activities to weekly lunches) to encourage retention of top talent in a market when competitors down the road are doing just that.

### **Professional Development**

Retention not only relies on the here and now, but where the employee sees themselves down the track. To retain top talent, employers should consider increasing opportunities for employees to attend conferences, obtain additional education and certifications, or other professional development steps. In recent years, some large companies have

offered workers paid higher education programs as a way to allow them to grow professionally, but remember the other legal implications of such benefits. Particularly when it comes to retaining diverse employees, offering professional development is a good way to keep those individuals—but remember to offer the benefits to all employees to avoid discrimination claims. Instead of singling out diverse employees, be sure that your diverse workers are aware that the opportunities exist and that the organization encourages their attendance.

### **Address Employees' Concerns and Requests for Support**

Human resources professionals know that promptly and adequately responding to employees' workplace concerns or requests for support (such as for disability accommodations) remains critically important during times when retention is tenuous. In a competitive market, when employees have opportunities for other jobs, an organization should be particularly careful to follow its policies for investigating concerns and supporting employees to avoid talent losses that may be avoided.

### **Labor Union Considerations**

Retention can be challenging for employers with labor unions because while there may be more retention among senior employees, younger employees may have more flexibility to move jobs to increase their pay than wait on a union pay scale. Indeed, employers may lack flexibility to make changes to an employee's work site or benefits because of a collective bargaining agreement. Employers should always be mindful of contract terms and be aware that retention or performance bonuses are negotiable subjects for represented employees.

### **Retention Bonuses and Compensation Raises**

Retention raises and bonuses are often driven by the job market to retain top talent. But employers should be mindful that such raises or bonuses don't run afoul of the pay-equity laws, explained above. An employee may have a viable pay-equity claim if there is a negative disparate impact on employees of one protected class as compared to another (i.e., race, gender, or other) and if the employees perform comparable work and have comparable experience then there must be justifications for the differences.

### **Employee Mobility**

Employee mobility is top of mind in a competitive labor market, whether employees are coming or going. Restrictive covenants—typically, confidentiality, non-competition, and non-solicitation agreements—are essential to consider when both recruiting and retaining talent. These types of agreements have parameters for enforcement, however, that can operate both as a sword and a shield.

Statutory requirements and court interpretation vary from state to state so it is imperative that employers make sure that they are aligning situations in which restrictive covenants are going to be used with applicable state law standards. In many cases, requirements start before a candidate accepts the employment offer and begins work. And requirements may also have post-employment obligations for the employer, for example notification of intent to enforce or periods of garden leave. Violations of restrictive covenants by an incoming employee can also have implications for the hiring employer, such as tortious or contractual inference claims. Employers should make sure to evaluate potential benefits and implications of restrictive covenants in both the employee hiring and exit processes to avoid going off track.