

## Hiring in the US

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Employment in the US is riddled with laws as well as best practices that require total compliance. Penalties are often swift and steep when operating outside of safe boundaries. The document below lists some of these boundaries, but is not meant to be comprehensive enough to avoid a consultation with HR.

General Ground Rules: Employment in the US is at will, and employees are hired on an hourly basis.

This has consequences on every HR process, including hiring, performance and salary reviews, and terminations. As such,

- There is no need for a “trial period”. Mentioning it in the offer letter only creates lack of confidence and commitment on the part of the employee.
- There are exceptions to the hourly rule, for specific roles, such as sales, managerial roles, or remote positions that require minimal supervision. These roles are called **exempt**, as they are exempt of overtime regulation (and of hourly reporting). Exempt roles are paid according to a yearly salary. *You cannot decide to call a role exempt in order to avoid the hassle of hourly reporting and overtime.*
- Salaries for the same role should not differ by more than 5%, otherwise the person who earns 10% less than their colleague in the exact same position will have grounds for discrimination.
- Discrimination only apply to Title VII protected classes but latest regulations has expended these classes – in addition to race, religion, age, country of origin, marital status and gender, you now have disability status, veteran status, gender affiliation or identity, and sexual preferences. The two places where employees have taken the discrimination laws to the extreme are CA and NYC.
- Employees all go on payroll. Independent contractors (paid through a 1099) have to meet certain requirements and the IRS will always consider their case with suspicion. *You cannot decide to call someone a contractor in order to avoid payroll overhead.*

### 1. Job Descriptions

Job Descriptions are the first step in the process. They are often used as a reference in legal procedures, so they need to be written in such a way as to avoid liability.

- A. Start by describing the Company, the location and work environment
- B. JDs need to be concise and note the responsibilities and day-to-day tasks associated with the role. As it is almost impossible to think of all the tasks on the job, it is possible to add “othe5r “customer-facing” or “administrative” tasks related to the role as a final bullet point

- C. If the position is exempt (see paragraph above) the job description needs to mention this fact and give a proper explanation in the tasks and requirement –for instance, “ the employee will need to practice independent judgment in this role”
- D. In the Requirements portion, only legitimate business-related qualifications need to be listed. NEVER mention a background check. You can list personal qualities such as motivated, self-directed and autonomous, but not “young and enthusiastic” or “US Citizen”
- E. In general, the JD should reflect the Company culture and attract candidates who will recognize themselves in the description, however, in order to manage expectations, there is very little value in putting “honest and hard-working” as a requirements, because people never see themselves as lazy and dishonest
- F. It’s preferable not to communicate an exact salary range in the JD, but mention a *“competitive salary and excellent benefits coverage for you and your dependents, as well as access to a 401k and other outstanding voluntary benefits and perks through our PEO, TriNet”*

Ideally, a JD needs to be sent to the future employee together with the offer letter, in order to correctly manage expectations.

## 2. Interviewing Process

The interviewing process should preferably be short and not involve more than 4 people in a series (not including the external recruiter, if any). During the interview, you want to establish how the candidate’s background and skills match what’s needed on the job. You can ask for instances of certain activities or skills in the past – or you can give them problem-solving situations, or even simulations of real-life situations i.e. *“what would you do if a customer screamed at you over the phone that the product does not work but they clearly haven’t read the instructions”*.

- Avoid addressing any topic outside of the job description. You can ask candidates for examples of how they operated in an autonomous manner in the past. You can ask them for examples of outstanding results, and accomplishments. You can even ask them about the difficult commute but not about how they intend to make that commute and whether someone will take them to the train after they drop their kids to school
- It is illegal to inquire about current or past salaries in several locations, such as NYC. Therefore, ask about salary **expectations**. If they volunteer the information about their current salaries, do not comment, but reply with the range that the role pays.

## 3. Background, employment, education and reference checks

**There should be no mention of any of these verifications until an offer letter is presented.** In NYC, the penalties for mentioning a criminal background check in an ad are steep and immediately enforced by the Human Rights Commission.

- The offer letter is always contingent on these successful verifications, and can be rescinded at any time before the employee actually starts working.

- Some companies ask candidates to send a copy of their degree as part of the verification process. I have seen fraud with that wherein people who have enough nerve to lie on their LinkedIn profile and resume will also produce a falsified degree.
- When working with background checks companies, such as HireRight or GoodHire, you will choose a package most relevant to your needs. Usually, this package includes criminal background checks and employment checks (only dates and title are mandatory to report so companies can decline to mention anything else).
- Companies that choose to perform drug testing have to take into account the new laws around cannabis use in the state of CA, and MA. Provisions need to be made in the employee handbook regarding performing certain tasks, such as driving, under the influence, as defined by local laws.
- SHRM (Society for HR Management) recognizes the lack of validity and reliability of reference checks. Clearly, if the candidate gave you these references, they will only have good things to say about him. Additionally, most companies instruct their managers to avoid giving references and only give general employment information as mandated by law. There is absolutely no upside for a Company to say the truth about a Sales Manager who didn't meet their quota. *Both the Company and the person giving the reference can be sued by the candidate for loss of opportunity and revenue.*
- Just to align expectations: I have come across two extreme cases wherein the employee was fired for cause but having signed a special settlement, the fact that this employee stole money from the Company never appeared in legal proceedings and was never mentioned to anyone outside of the Company. The other case involved a rather mind-boggling instance of harassment. These two cases will not show up in any of the checks that can be regularly performed on the employees.

#### 4. Offer Letter

- The offer letter is not a contract, and it needs to specify that employment is at will
- You want to engage the Company to as little as possible in the offer letter. Future raises, and bonuses should be avoided in the offer letter. Basically, if all works well, you will want to keep the employee happy, and therefore will allocate these raises down the line – employees who want a guarantee in the offer letter need to be told so
- It is not advisable to offer a mutual notice period in the offer letter, as it will not be enforceable on the side of the employee and only engages the Company
- We have a certain type of offer letter with TriNet, and it's preferable to use their wording
- An offer letter prepared for a specific employee cannot be re-used for another, as they may be in a different role, location, or report to different people
- Holidays and sick days are pre-defined, but vacation days are negotiable. You may want to give a similar number of days to employees in the same role as a best practice

## Q&A

- *Can I ask candidates what their accent is from?*

Absolutely not. This means that you would be discussing their country of origin, which puts them in a protected class in case you don't hire them (adverse impact) or if you have to terminate their employment later on.

Of course, the same rule applies to all protected class mentioned above, even after the employee has started working. If they volunteer information, for *instance about their gender identity, you may acknowledge and should use the required pronoun, but avoid commenting in any way that should make it appear a valid factor for a work decision.*

- *What if the candidate asks me which hours we work every day?*

If this is an exempt role, you can answer that the employee will have to put in all hours necessary to get the job done. It is not recommended to "warn" the candidates that they may have to spend all hours awake checking their emails – and of course, it is not recommended to instill that practice in the first place.

Hourly employees will work a maximum of 8 hours a day, and up to 40 hours a week, before reporting overtime. CA law will extend overtime to hourly employees who work over 8 hours in a day even if they don't come to work on the next day.

- *Can I call references the candidate gave me without sending the offer letter first?*  
Although it should be safe to approach references voluntarily given by a candidate prior to receiving the offer letter, experience shows that candidates can turn and claim loss of employment due to the inquiry with their present employer, if they end up not being hired. The court will side with them in most states, particularly in NYC and CA
- *The employee is supposed to start on Monday, but his employment check came back showing that he didn't work at that Company during the specified dates. What do I do?*  
There needs to be reasonable accommodation for mistakes, i.e. a month or so in the dates of employment. People don't always remember exactly what their first day was, or may confuse that date with the date of the offer letter. However, intentional errors, such as prolonging the date of employment by several months on LinkedIn or on a resume, should be addressed with the candidate.
- *Can we ask the candidates if they own a car?*  
In most cases, no. This question may be discriminatory. The Equal Employment Opportunity Commission (EEOC) considers car ownership "financial information." While federal law does not prevent employers from asking candidates about financial information, the federal equal employment opportunity laws prohibit employers from illegally discriminating when using financial information to make employment decisions. The EEOC notes that an employer may not have a financial requirement if it does not



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help the employer to accurately identify responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular race, color, national origin, religion or sex. In addition, implying that there is a requirement to own a car may also adversely impact candidates with disabilities who may be unable to drive due to their impairment.