

Strategic Staffing
Chapter 3 – The Legal
Context

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Learning Objectives

- After studying this chapter, you should be able to:
 - Explain why complying with staffing laws can be strategic.
 - Discuss different types of employment relationships.
 - Describe different types of staffing-related lawsuits.
 - Discuss the role affirmative action and equal employment opportunity play when it comes to a firm's staffing process.
 - Describe various barriers to legally defensible staffing.

How Can Legal Compliance Be Strategic?

- Avoid the expense of lawsuits
- Avoid the negative public relations that comes with litigation
- Allows companies to capitalize on the strengths of diversity and perform better because they focus more on performance and merit
- Be better able to hire quality people from all segments of the labor force

Why Do Employment Laws Exist?

- Because the employer typically has disproportionate power in the employment relationship
- Help to promote fairness and consistent treatment among different employees by prohibiting *unfair discrimination* in employment and providing equal employment opportunity for everyone

Complying With Employment Laws

- Enhances hiring quality
- Enhances the firm's reputation and image as an employer
- Promotes fairness perceptions among job candidates
- Reduces spillover effects (for example, rejected applicants not becoming customers or discouraging others from applying for jobs)
- Reinforces an ethical culture
- Enhances organizational performance by ensuring that people are hired or not hired based on their qualifications, not biases
- Promotes diversity, which can enhance an organization's ability to appeal to a broader customer base

Types of Employment Relationships

- *Employee*: someone hired by another person or business for a wage or fixed payment in exchange for personal services, and who does not provide the services as part of an independent business
- *Independent contractor*: performs services wherein the employer controls or directs only the *result* of the work
- *Contingent workers*: any job in which an individual does not have a contract for long-term employment
 - Temporary workers
 - Part-time workers
 - Seasonal workers
 - Leased workers
 - Outsourced work

Employment at Will

- *Definition:* either party can terminate the employment relationship at any time, for any legal reason, with no liability as long as there is no contract for a definite term of employment.
- Following formal discipline and termination procedures whenever possible is still advised to help avoid discrimination and wrongful termination claims.
- Best used as a legal defense to keep the organization from being forced to follow its own policies inflexibly.
- Signing an employment application or to acknowledge receipt of an employee handbook produces a written record that the policy has been read and understood.

Exceptions to Employment at Will

- *Retaliatory discharge* (NLRA protection)
- *Implied employment contract* (when an employer's personnel policies or handbooks indicate that an employee will not be fired except for good cause or specify a procedural process for firing)
- *Implied covenant of good faith and fair dealing* (e.g., firing an employee to prevent their vesting in the pension plan next month)
- *Federal or state discrimination protection* supersedes employment at will

Labor Unions

- Legally representing workers, organizing employees and negotiating the terms and conditions of union members' employment
- The conditions of employment are contained in a contract called a *collective bargaining agreement* or a *collective employment agreement*.

Four Union Models

- A *closed shop* exclusively employs people who are already union members. An extreme example is a compulsory hiring hall, where the employer must recruit directly from the union.
- A *union shop* employs both union and non-union workers, but new employees must join the union within a specified time limit.
- An *agency shop* requires non-union workers to pay a fee to the union for its services in negotiating their contract.
- An *open shop* does not discriminate based on union membership in employing or keeping workers. Some workers benefit from a union or the collective bargaining process despite not contributing to the union.

Laws and Regulations

Table 3-2

LAW OR EXECUTIVE ORDER	WHO IS COVERED	GENERAL PROVISIONS	FURTHER INFORMATION
Title VII of the Civil Rights Act of 1964 (Amended in 1991)	Private employers with at least 15 employees Labor unions, employment agencies, and educational institutions Local, state, and federal governments	Prohibits discrimination on the basis of race, color, religion, sex (both women and men), or national origin	www.eeoc.gov/policy/vii.html
Executive Order 11246 of 1965 and Executive Order 11375 of 1967	Federal contractors with contracts exceeding \$10,000	Prohibits discrimination and establishes affirmative action to promote diversity in race, color, religion, sex, or national origin	www.dol.gov/esa/regs/statutes/ofccp/eol1246.htm www.dol.gov/esa/regs/compliance/ofccp/fsl1246.htm
Pregnancy Discrimination Act of 1978	Private employers with at least 15 employees Labor unions, employment agencies, and educational institutions Local, state, and federal governments	Pregnancy, childbirth, or related medical conditions (Defines pregnancy as a temporary disability that requires accommodation)	www.eeoc.gov/facts/fs-preg.html
Americans with Disabilities Act of 1990	Private employers with at least 15 employees Local, state, and federal governments	Qualified individual with or perceived as having a disability	www.usdoj.gov/crt/ada/

(Table 3-2 continued)

Rehabilitation Act of 1973	Federal contractors with contracts exceeding \$2,500 must engage in affirmative action	Individuals with a handicap	www.dol.eeoc/esa/regs/compliance/ofccp/sec503.htm
Age Discrimination in Employment Act of 1967	Private employers with at least 20 employees	Protects people 40 years of age or older	www.eeoc.gov/policy/adea.html
Immigration Reform and Control Act of 1986	Employers with at least 4 employees must verify the employment eligibility of everyone hired	Citizens, nationals of the U.S., and aliens authorized to work in the U.S. are eligible for employment	www.dol.gov/esa/regs/compliance/ofccp/ca_irca.htm
Worker Adjustment and Retraining Notification Act (WARN) of 1988	Employers with at least 100 employees not including employees who have worked less than 6 months in the last 12 months and not including employees who work less than 20 hours per week Private, public, quasi-public entities which operate in a commercial context Regular local, federal, and state government entities that provide public services are <i>not</i> covered	Must provide 60 days advance notice of covered plant closings and covered mass layoffs of 50 or more people (excluding part-time workers)	www.doleta.gov/layoff/warn.cfm
The Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994	All members of the uniformed services (including non-career National Guard and Reserve members, as well as active duty personnel)	Ensures that members of the uniformed services are entitled to return to their civilian employment after their service	www.dol.gov/elaws/userra.htm
Consumer Credit Reporting Reform Act of 1996	Employers who conduct credit checks for employment purposes (e.g., if an employee handles money, which may require being bonded)	Employers must disclose in advance the company's intention to obtain a credit report and obtain written permission from the applicant or employee. The applicant or employee must receive a copy of the report and a written description of their rights under this Act before action is taken based on the report	www.ftc.gov/os/statutes/03.1224fcra.pdf

EEO, AA, and Quotas

- *Equal employment opportunity*: employment practices are designed and used in a “facially neutral” manner
- *Affirmative action*: the proactive effort to eliminate discrimination and its effects, and to ensure nondiscriminatory results in employment practices in the future
 - An *affirmative action plan* describes in detail the actions to be taken, procedures to be followed, and standards to be adhered to, to establish an affirmative action program.
- *Quotas*: establish specific requirements that certain percentages of disadvantaged groups be hired to equalize their proportional representation in the company’s workforce with their proportions in the job and organization’s relevant labor market

Affirmative Action Plans Involving Preferential Treatment

Table 3-3

- *Affirmative action plans should be remedial in nature.* Employers found guilty of discrimination can be forced to implement an affirmative action plan to remedy the discrimination. Employers that have an imbalanced workforce but that have not been found guilty of discrimination may be able to justify an affirmative action plan to remedy the imbalance. Employers whose workforce is representative of the available workforce will have a difficult time justifying an affirmative action plan.
- *An affirmative action plan should not exclude all nonminorities.* Exactly how restrictive any subgroup quotas can be is unclear, but an affirmative action plan that excludes all members of a nonminority group would likely be found to be illegal.
- *An affirmative action plan should be temporary.* Discontinue the plan after meeting the affirmative action goals.
- *An affirmative action plan should be formalized.* Actions taken under informal affirmative action plans (that is, those lacking formal goals or a formal statement of the actions to be taken under the plan) have been found to be discriminatory.

Equal Employment Opportunity Commission (EEOC)

- Enforces the following federal statutes:
 - Title VII of the Civil Rights Act
 - The Age Discrimination in Employment Act (ADEA)
 - The Americans with Disabilities Act (ADA)
 - The Rehabilitation Act
 - The Civil Rights Act
 - The Equal Pay Act
- The EEOC receives between 75,000 and 80,000 charges each year.
- The agency pursues more than 400 full-fledged lawsuits annually.
- Even companies with large, sophisticated staffing functions are vulnerable.
- The EEOC encourages and facilitates voluntary compliance through tailored programs to meet the needs of employers and through programs to educate the public on EEO laws.

The Office of Federal Contract Compliance Programs (OFCCP)

- Part of the U.S. Department of Labor's Employment Standards Administration.
- Responsible for administering and enforcing three equal employment opportunity programs that apply to *federal contractors* and *subcontractors*:
 - Executive Order 11246 (later expanded by Executive Order 11375)
 - Section 503 of the Rehabilitation Act of 1973
 - The affirmative action provisions of the Vietnam Era Veteran's Readjustment Assistance Act of 1974.
- Ensures that federal contractors with at least 50 employees and who receive \$50,000 or more in grants, goods, and services take affirmative action to promote equal employment opportunity and annually file appropriate affirmative action plans.
- The OFCCP's mission is to ensure non-discrimination, to expand opportunities, and to make sure that all employment decisions are inclusive and supportive of diversity.
- Primarily relies on compliance reviews and complaint investigations.
- Although the OFCCP does enforce affirmative action compliance, it focuses to a greater extent on *class action discrimination*.
- Conducts systemic reviews of employers' employment practices to search out discrimination.

What Is an “Applicant?”

- The legal definition of an applicant is particularly important with regard to two employment law issues:
 1. Only “applicants” may establish a prima facie case of unlawful discrimination regarding hiring decisions under state and federal discrimination statutes.
 2. Employers must determine who qualifies as an “applicant” in order to identify the gender and race of all applicants to evaluate whether its hiring practices have an adverse impact on men, women, or minorities.
- The question of who is an applicant is critical to establishing the proportions of the applicant pool belonging to different legally protected groups (e.g., sex, race, national origin, etc.).
- Understanding the definition of an applicant can help employers minimize risk and protect themselves from costly audit defense.

How the OFCCP Defines “Applicant”

The OFCCP considers a person applying via the Internet and related technologies to be an applicant if all four of the following criteria are satisfied:

1. The individual submits an expression of interest in employment through the Internet or related electronic data technologies;
2. The contractor considers the individual for employment in a particular position;
3. The individual’s expression of interest indicates the individual possesses the basic qualifications for the position; and
4. The individual at no point in the contractor’s selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

Disparate Treatment

- The intentional application or administration of employment practices, including recruitment, in a discriminatory manner
- Can be *direct*, for example resulting from a company's policy to not hire older workers
- Can be *inferred* from situational factors or result from a combination of permissible and prohibited factors

Inferring Disparate Treatment

- To establish this type of prima facie case of discrimination under the theory of disparate treatment, the plaintiff must show:
 - That he or she belongs to a group protected from discrimination (race, gender, etc.).
 - That he or she applied for the job and was qualified for the job for which the employer was seeking applicants.
 - That despite being qualified he or she was rejected. (The plaintiff does not need to prove that he or she was rejected because of his protected status, only that despite his or her qualifications, he or she was rejected.)
 - That after being rejected, the position remained open and the employer continued to seek applicants whose qualifications were similar to those of the plaintiff.

Inferring Disparate Treatment

- The burden then shifts to the employer to show that the discrimination is the result of a *bona fide occupational qualification* that is reasonably necessary for the normal operation of the business or the plaintiff wins the case.
- If the employer shows that the discrimination is based on a business necessity, the plaintiff then has the opportunity to present evidence showing that the employer's stated reason for the rejection was false and merely a pretext.
- To establish a prima facie case, the plaintiff need not prove that discrimination was the motivating factor in the hiring or promotion decision, only raise an inference that such misconduct occurred.

Mixed Motive Case of Disparate Treatment

- Employer is accused of having both a legitimate and an illegitimate reason for making the employment decision.
- It is sufficient to show that a protected characteristic (race, sex, etc.) was a motivating factor in an employment decision, even if other legitimate factors (such as absences) also motivated the decision.
- A plaintiff only needs to prove that the protected characteristic was a *motivating factor* – one of the reasons for the decision – no matter how small a role it played.
- If a plaintiff satisfies the burden of proof that discrimination was a motivating factor in the employer's adverse employment action, the employer is found liable.
- The burden of proof then shifts to the employer to eliminate or reduce a plaintiff's monetary damages by proving to the jury that it would have made the same employment decision in the absence of the discriminatory motive.

Disparate Treatment and Mixed Motive Cases

- Under the mixed motive analysis, the burden of proof is on the defendant to show that the decision would have been the same despite plaintiff's race or sex.
- Under the disparate treatment method, the burden of proof is on the plaintiff to disprove the same thing.

Disparate Impact

- *Definition:* When an action has a disproportionate effect on a protected group, regardless of intent or actual disparate treatment
- The only defense for disparate impact is when the disparate impact is justified by business necessity or job relatedness (*a bona fide occupational qualification* or BFOQ)
- Assessment scores cannot be altered or changed to reduce the disparate impact on protected groups

Disparate Impact Statistics

- *Stock statistics*: compare the percentage of men, women, or minorities employed in a job category with their availability in the relevant population of qualified people interested in the position

Disparate Impact Statistics

- *Flow statistics*: compare the percentage of applicants hired from different subgroups to determine if they are significantly different from each other
- The Uniform Guidelines on Employee Selection Procedures states that organizations must keep records of applicant flow statistics and applicant selection rates must be calculated:
 - For each job category,
 - For both internal and external selection decisions,
 - For each step in the selection process, and
 - By applicant race and sex.
- *The 80% rule*: a selection rate for any race, sex, or ethnic group which is less than 4/5 (or 80%) of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact
 - Only a guideline; provides for exceptions based on issues surrounding statistical and practical significance of the difference in selection rates (such as small sample sizes)

Disparate Impact Statistics

- *Concentration statistics*: compare the percentages of men, women, or minorities in various job categories to see if men, women, or minorities are concentrated in certain workforce categories
- Example:
 - 50% of an organization's employees may be female
 - But if women tend to comprise 90% of the clerical workforce and men tend to comprise 90% of the managerial workforce women may be underutilized in managerial positions and men underutilized in clerical positions

Establishing a Disparate Impact Case

- The plaintiff must prove, generally through statistical comparisons, that the challenged practice or selection device has a substantial adverse impact on a protected group.
 - The defendant can then criticize the statistical analysis or offer different statistics.
- If the plaintiff establishes disparate impact, the employer must prove that the challenged practice is “job-related for the position in question and consistent with business necessity.”
- Even if the employer proves business necessity, the plaintiff may still prevail by showing that the employer has refused to adopt an alternative employment practice that would satisfy the employer’s legitimate interests without having a disparate impact on a protected class.

Defending Failure to Hire Lawsuits

- Failure to hire lawsuits can be difficult to defend because of the lack of work history with the plaintiff to rely on.
- Providing all recruits an accurate job description and using a standardized and well-documented recruitment and screening process are the foundation of the employer's defense.
- Screening candidates using objective, job-relevant criteria with an established ability to predict job performance, and archiving all recruiter and interviewer notes, test and interview scores, etc. on each applicant can help defend the employer's employment decisions in court.
- Reduce people's desire to file a lawsuit by proactively and genuinely trying to generate applicants from diverse groups and treating all recruits fairly and respectfully.

Fraudulent Recruitment

- *Definition:* misrepresenting the job or organization to a recruit (also called *fraudulent inducement*)
- Making employment at-will does not preclude a fraudulent recruitment claim
- To win a case involving an allegation of fraudulent recruitment and hiring, the plaintiff must prove five things:
 1. That the employer made a false representation of material fact;
 2. With the knowledge or belief that it was false, or with an insufficient basis for asserting that it was true;
 3. With the intent that the employee rely on it;
 4. That the employee justifiably relied on it; and
 5. That the employee suffered damages as a result, such as the cost involved in relocating, resigning from employment, or rejecting other offers.

Negligent Hiring

- Based on the common law concept that an employer has a general obligation not to hire an applicant that they knew or should have known poses a risk of harm to third parties
- In order for a customer, employee, or other third party to win a negligent hiring suit against an employer, the following must generally be shown:
 1. The existence of an employment relationship between the employer and the worker,
 2. The employee's unfitness,
 3. The employer's actual or constructive knowledge of the employee's unfitness (failure to investigate can lead to a finding of constructive knowledge),
 4. The employee's act or omission causing the third party's injuries, and
 5. The employer's negligence in hiring the employee as the most likely cause of the plaintiff's injuries.
- *Negligent retention* is similar to negligent hiring, but it focuses on situations in which a company knowingly retains employees who have a high risk of injuring themselves or others

Negligent Referral

- *Definition*: misrepresenting or failing to disclose complete and accurate information about a former employee.
- A former employer can be sued for negligent referral if the employee is involved in some incident at the new workplace that might have been predicted based on prior behavior.
- *Defamation* (an unprivileged publication of false statements to third parties that tends to harm the reputation of the plaintiff in the community) is currently the most common cause of action used by former employees to challenge a former employer's reference.
- To avoid the risk of a defamation charge it may be best to say as little as possible except in those situations where the employee's behaviors could endanger others in the new workplace.

Trade Secret Litigation

- *Trade secrets* can be any type of information, process, idea, or “know how” that is not generally known and gives the possessor an advantage in the marketplace.
 - Includes a wide range of confidential business or proprietary information, such as chemical formulas, industrial processes, business strategies and even customer lists.
 - Almost all organizations have trade secrets to protect.
 - Trade secret disclosure can take place after an employee is hired by a competitor, or during the interview process.
- Companies must take reasonable precautions including requiring employees to sign confidentiality, noncompete, and nondisclosure agreements.
- Interviewers must know what information is protected, and how to question job candidates.
- Warn candidates at the beginning of an interview not to share a previous employer’s proprietary information.

EEOC Best Practices Definition

- A best practice in staffing:
 - Complies with the law,
 - Promotes equal employment opportunity,
 - Addresses one or more barriers that adversely affect equal employment opportunity,
 - Manifests management commitment and accountability,
 - Ensures management and employee communication,
 - Produces noteworthy results, and
 - Does not cause or result in unfairness.

Key Elements That Support Successful EEO Programs

- **Sudy** – know the laws and standards, remove EEO barriers, and seek assistance from the EEOC, professional consultants, associations or groups, etc.
- **Plan** – know the relevant workforce and demographics, define the problem(s), propose solutions, and develop strategies for achieving them.
- **Lead** – have all levels of management champion the cause and provide leadership for EEO implementation at all organizational levels
- **Encourage** – link pay and performance for how employees interact, support and respect each other.
- **Notice** – monitor and self-analyze the impact of EEO practices; ensure that unfairness does not occur as a result of a corrective strategy.
- **Discussion** – communicate and reinforce the message that diversity is a business asset.
- **Inclusion** – bring all employees and groups into the analysis, planning, and implementation process.
- **Dedication** – assign needed resources and stay persistent; investment in EEO may take a little while to pay off.

General Barriers to Legally Defensible Staffing

- The “like me” bias
- Stereotypes
- Ignorance
- Prejudice
- Perception of loss by persons threatened by EEO practices
- Hiring managers

Specific Barriers to EEO

- Barriers to recruiting:
 - Failing to advertise widely
 - Recruitment practices that overlook or fail to seek all qualified individuals
 - Reliance on informal networks of recruitment or word-of-mouth
 - Having no formal systems for recruitment

Specific Barriers to EEO

- Barriers to advancement and promotion:
 - Deficient feedback, performance evaluation, and promotion processes
 - Little or no access to informal networks of communication
 - Different standards of performance, disparate treatment
 - Lack of equal access to assignments that provide key career experiences, visibility, and interaction with senior managers
 - EEO directors not included in the recruitment process for higher job levels

Specific Barriers to EEO

- Barriers in terms and conditions:
 - Unequal pay
 - Counterproductive behavior and harassment in the workplace
 - Employer policies that are not family friendly
 - Inflexible hours and working conditions
 - Failing to provide reasonable accommodation to qualified individuals with disabilities

Specific Barriers to EEO

- Barriers in termination and downsizing:
 - Unfairness of standards used in making decisions, differences in benefits given
 - Inadequate planning
 - Lack of adequate incentives to encourage voluntary separations
 - Lack of communication between employers and employees
 - Failure to provide counseling, job placement assistance, and training

Discussion Questions

- Do laws prohibiting certain kinds of hiring discrimination benefit only job seekers? Or do companies benefit from the enforcement of discrimination laws? If so, how?
- What is meant by “at-will employment” and what advice would you give an organization considering this type of employment relationship?
- What is the difference between flow, stock, and concentration statistics? How is each type of statistic used?

Discussion Questions

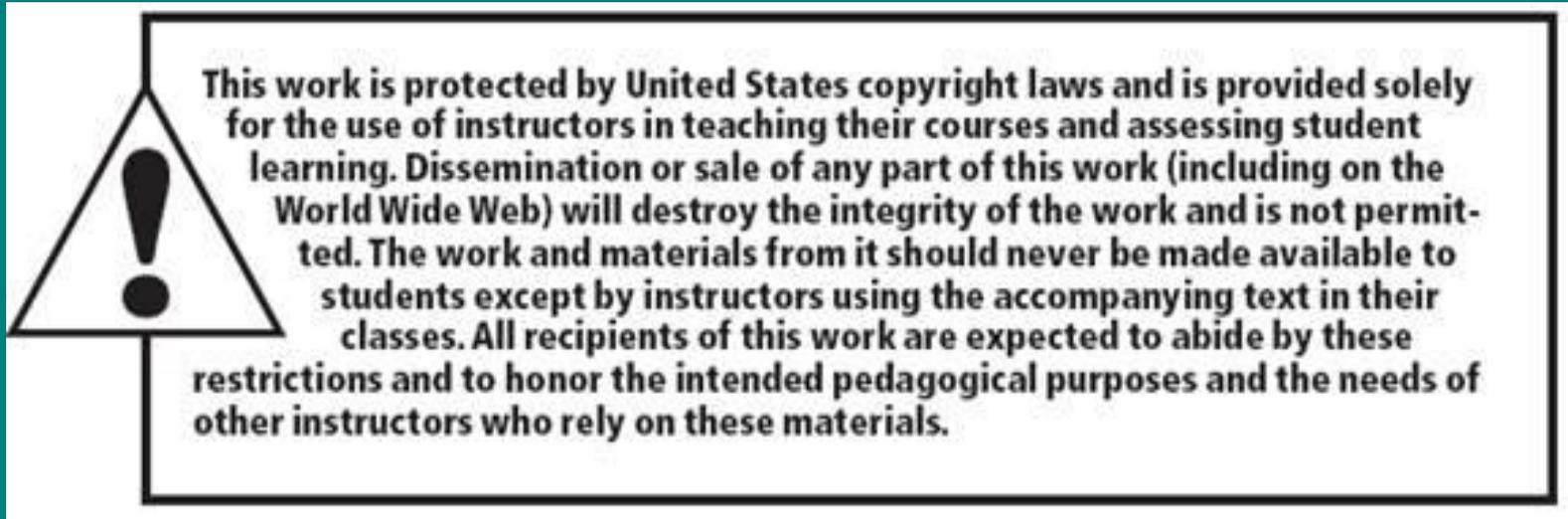
- What is affirmative action? What is an affirmative action plan? Do you feel that affirmative action is a good way to remedy past discrimination? Why or why not?
- Which three general barriers to legally defensible staffing do you feel are most common? What can companies do to remove these barriers?

Opening Vignette Exercise

- The opening vignette describes how Abercrombie & Fitch engaged in “creative” recruiting to fill sales jobs with candidates who matched the company’s carefully constructed marketing image. The high-profile clothing retailer staffed its stores with good-looking young white men and women and touched off a lawsuit that ultimately cost the company \$40 million and a barrage of bad publicity.
- Working alone or in a group of 3-5 people, answer the following questions. Be prepared to share your answers with the class.
 - Do you think Abercrombie should be allowed to staff its stores in a way that reinforces its marketing image? Why or why not?
 - What are some alternative ways Abercrombie can staff its stores legally and still project a desirable image?

Develop Your Skills Exercise

- The best test of any question posed to a job applicant is whether the employer can demonstrate a job-related necessity for asking the question. Because both the intent behind the question and how the information is to be used by the employer are important, an employer should consider whether the answers to the question, if used to make the hiring decision, will adversely affect and screen out minorities or members of one sex.
- This chapter's Develop Your Skills feature presented five improper interview questions (provided again below), along with an explanation of why each question should be avoided. Working with a partner, identify what the employer really wants to know by asking each question, and come up with an alternative ways to find out the same information.
 - How many children do you have?
 - What is your native language?
 - What clubs or organizations do you belong to?
 - What is your height? What is your weight?
 - Are you able to work on Christmas Day?



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