Some Key Legal Considerations in Hiring
Faculty Search Committees

I. Discrimination
   A. Rationale
      1. a. Race,
         b. Color,
         c. National origin,
         d. Sex
         e. Age (40 years and older),
         f. Disability, or
         g. Veteran status
   B. Legal Issues:
      1. The factual inquiry is normally about the intent of the person making the decision or recommendation. It is unlawful to hire, or not hire, a person because of that person's race, color, national origin, etc.
      2. Evidence of unlawful intent has different forms:
         a. Direct evidence: "I did not hire you because you are over 40."
         b. Indirect or circumstantial evidence: Inquiry normally requires employer to state a legitimate, nondiscriminatory reason for its action, then allows applicant to show reasons are not true, or applied in a discriminatory manner. For example, the lack of recent experience disqualified a female candidate, but the male selected for the job also had a lack of recent experience.
   C. Guidance:
      1. Be consistent to the extent reasonably possible in the manner in which candidates are treated, interviewed, assessed, and notes are recorded.
      2. Distinguish among candidates based on legitimate, nondiscriminatory, job-related reasons.
      3. Apply distinctions consistently.

II. Baylor's Religious Hiring Preference
   A. Rationale: As a private, religious institution, Baylor has a constitutional right to differentiate among candidates on the basis of religion. Accordingly, Baylor is exempt from any statutory prohibitions on discrimination on the basis of religion.
   B. Legal Issues: Baylor must maintain its religious institutional character, including the Baptist/Christian composition of the Board of Regents and the religious composition of its faculty.
   C. Guidance: As long as Baylor remains a private, religious institution, the manner of implementing the religious hiring preference is a matter of institutional policy. Therefore, the guidance to be followed is Baylor's stated policy.

III. Baylor's Affirmative Action Plan
   A. Rationale: By directive of the President of the United States, some of those who do business with the federal government must:
1. Not discriminate on the basis of race, color, sex, or national origin, and
2. Take "affirmative action to insure that such discrimination does not occur."
The requirements apply as well to the categories of veterans and individuals with
disabilities.

B. Legal Issues: In essence, the legal requirement is for an open, accessible and
competitive application process. However, the hiring decision itself must not violate
the prohibitions of discrimination.

C. Guidance:
1. Do not be misled by ill-defined social policy discourse.
2. Know areas of under-utilization of minorities/Use AA/EEO.
3. Facilitate application by underutilized minorities. (Recruiting / searching)
4. Hire the best qualified applicant to fit Baylor's mission.

IV. Oral Promises
A. Rationale: Mutual promises may be legally enforceable as a contract; some
unilateral promises that induce action by the other party may also be enforceable.
Such promises need not necessarily be in writing to be a legal commitment.

B. Legal Issues:
1. As a general rule, only the Vice Presidents and the President have authority
to make legal commitments on behalf of Baylor.
2. In the absence of a written agreement, employment at Baylor is normally "at
will." If employment is at will, either party may terminate employment at any
time, for no reason or for any lawful reason.
3. Generally, only faculty have written agreements. Others acknowledge at-
will status.
4. Oral statements may alter a written agreement or employment at will. Any
statement may induce reliance, which can make the statement enforceable
at least to some extent.

C. Guidance:
1. Say what you mean and mean what you say.
2. Do not make promises you cannot keep--it may be your personal promise,
not Baylor's.
3. Avoid overstatements (even in advertisements) if no present intent or
authority to promise. Examples:
   a. "If you take the lecturer position, we will convert it to tenure track after
      you complete your doctorate."
   b. "You can work here until you retire."
   c. "Teaching load will be 2/2."

V. Immigration
A. Rationale: The burden is on the employer to verify that an employee is authorized
to work in the United States in order to minimize employment of aliens who are not
properly in the United States or who are not properly authorized to work in the
United States.
B. Legal Issues: The employer (HR – not Search Committees) must verify appropriate proof of:
   a. Identity of employee, and
   b. His or her legal status which permits working for Baylor.

Lawful presence in the United States does NOT equate to a right to work! Right to work for one employer does NOT necessarily mean a right to work for Baylor!

C. Guidance:
   1. Do not ask about national origin or citizenship (See Discrimination).
   2. HR will ask applicant if he or she is or will be authorized to work in the United States when employment begins.
   3. Do keep in mind that it can take months to obtain proper work authorization, if it can be obtained at all.
   4. See H1B OGC handout for details

VI. Confidentiality

A. Rationale: Some candidates insist that their application be held in confidence to protect their current employment or relationships with the current employer.

B. Legal issues: Such requests may create manifestations of intent not to contact a current employer or hamper Baylor's ability to perform due diligence.

C. Guidance:
   1. Ensure ability to contact directed and non-directed references before decision to hire.
   2. Eliminate any candidate who is not willing to permit you to contact directed or non-directed references.
   3. Control access to files (and list of applicants) and authority to contact references. See Access to Applicant Files below.

VII. Negligent Hiring

A. Rationale: Under some circumstances, individuals in the hiring process and Baylor can be legally responsible for harm to others caused by an employee who should not have been hired.

B. Legal issues: The legal issue may focus on whether a screening process should have identified facts in an applicant's background that could create a foreseeable risk to others in the work setting.

C. Guidance: Use the tools available to the search committees and Baylor to ensure adequate background checks are conducted. These include:
   1. Routine Screening (all new hires; can include reference checks [both directed and non-directed references], interview, educational verification, social security number verification, and review of performance history and work product)
   2. We recommend Search Committees NOT perform their own social media checks
   3. HR: Criminal Background Checks (all new hires)
   4. HR: Sex Offender Registry Checks (if duties include working with minors)
   5. HR: Driving Record Checks (if duties include driving)
   6. Research-related Screening (select agents, import/export limitations, security clearance, grant debarment lists)

VIII. Recordkeeping

A. Rationale: To permit enforcement of legal requirements, the law requires employers to maintain their own records to permit plaintiffs and the government to ensure compliance with the law.

B. Legal issues: Records relating to applicants not hired must be kept for a minimum of one year after the date of the personnel action to which the records relate. If a decision is challenged legally while records are retained, the records must then be maintained for the duration of the legal proceedings. Premature destruction may
result in adverse factual findings.

C. Guidance:
1. Save your notes.
2. Do not make observations related to prohibited considerations.
3. Consider how your notes may appear to someone several years later.

IX. In-processing
A. Rationale: Federal and state laws regulate parts of the employment relationship once established.
B. Legal issues: All employees must provide appropriate proof of identity and authorization to work at Baylor before employment commences (1-9 completion). Any employee who is permitted to work must be paid in a timely manner (Payday laws).
C. Guidance:
1. Ensure contracts are in place before work begins to ensure timely payment.
2. HR: Ensure employee completes I-9 before permitted to work.
Final Decision

1. DO hire the best qualified to fulfill Baylor's needs.

2. DO remember that need includes more than the immediate tasks; it includes religious character and departmental identity, risk to the institution or individuals, and a rich-diverse population.

3. DO restrict employment decisions to legitimate, nondiscriminatory, job-related reasons for your decisions, even if reasons are subjective.

4. DO be consistent in the application of your reasons for your decisions.

5. DO consult with Human Resources if a competitive candidate has a felony record.

6. DO work with HR and OGC if the candidate is not currently authorized to work in the U.S.

7. DO provide the Dean and Provost a summary of the background information obtained through Routine Screening and the Criminal Background Check.

Information Evaluation

1. DO carefully review indicators of past performance, including not only knowledge, skills and abilities, but productivity and manageability.

2. DO be mindful of potential red flags in past performance history.

3. DO resolve doubts in favor of Baylor.

Interviews

1. DO prepare for the interview.

2. DO collect information relating to the duties. Permissible areas may include religious affiliation, education, prior job duties, documentation issues, knowledge, skills and abilities, productivity, manageability, and support of mission. Focus on whether job can be done, not on why job cannot be done.

3. DO remember that nothing is off the record.

4. DO treat candidates consistently.

5. DO ask a candidate what the current or former employer would say about the candidate's past performance.

6. DO let HR ask about criminal background checks.

7. DON'T ask questions or make statements or make notes relating to prohibited discriminatory considerations:
   - Our department needs a young tiger.
   - How would you feel working for someone younger?
Have you ever consulted a psychiatrist?
Some other areas to avoid:
- Miss, Mr. Or Ms., maiden name, plans for marriage (sex)
- Emergency notification (national origin)
- Date of birth (age)
- State or country of birth (national origin)
- Medical history, anatomical losses or weight (disability)
- Number and ages of children, and child care responsibilities (sex)
- Arrest records (race, national origin)
- Credit issues (sex, race, national origin)
- Associations (other than professional, job related) (sex, race, national origin)
- Foreign language ability (unless job related) (national origin)
- Citizenship/national origin (national origin) [But it is permissible to ask if applicant is authorized to work in the United States.]

8. **DO** refer candidates to HR if issues such as child-care, medical issues, disabilities, or other protected category discussions arise.

9. **DON'T** make statements that could raise issues about oral promises such as: “This lecturer position will become tenure track.” “You can work here until you retire.”

Notice to Candidates on Short List or Those Selected for Interviews

1. **DO** notify candidates that Baylor conducts background checks it deems appropriate for the position, including routine criminal background checks.

2. **DO** provide candidates a group of policies for review so they understand Baylor’s expectations.

Information Collection

1. **DO** verify credentials, or have transcripts sent directly from the institutions.

2. **DO** develop other references who are not provided by the applicant.

3. **DO** obtain available employment records and work examples from top candidates.

4. **DO** use a consent and release form to facilitate the collection of information.

5. **DO** use Routine Screening tools appropriate to the hiring decision.

6. **DON’T** mix the Affirmative Action information with the applications.

Applicant Pool

1. **DO** make a good faith effort to foster applications by any likely candidates.

2. **DO** make a special effort to foster applications by underrepresented groups