

Hiring & Recruiting: The Liability Risks of Evaluating Job Candidates' "Fit" with Your Organization



Skills and experience are important to job success. But so are personal “fit” with an organization’s culture. The problem is that unlike skills and experience, “fit” is a subjective standard that’s hard to define and measure. So, basing hiring and firing decisions on fit—or lack thereof—can get you into trouble under discrimination laws. Here are the legal risks and 4 things you can do to avoid them.

THE LEGAL RISKS

“Fit” has become an HR buzzword for assessing whether a job applicant or current employee is compatible with the organization’s culture. The employment arrangement is a personal and multilateral relationship and for employees to do the best job possible, they must feel connected to and invested in the organization. So, as a strictly HR principle, probing an individual’s personality “fit” isn’t only legitimate but crucial.

But as a legal principle, basing employment decisions on fit is highly problematic. That’s because “fit” can be seen as a code word indicating a preference for individuals of particular socio-economic, racial and age characteristics. Basing employment decisions on such characteristics is discrimination.

Example: Company A uses “fit” as a pretext for deliberately excluding minorities. Company B is open-minded and really wants to provide equal employment opportunity. But, in practice, its corporate culture steers hiring decisions in the direction of homogeneity. Companies A and B would *both* be guilty of discrimination.

4 WAYS TO PROTECT YOURSELF

We’re not saying that you can’t consider fit to determine which individuals you want to work for your organization. What we are saying is that the practice is potentially illegal and that if you do it, you must recognize and manage the risks. There are 4 ways to do that.

1. Establish a Clear Definition of “Fit”

First and foremost, ensure that fit is used as an objective measure of an individual’s qualifications without regard to race, age, sex, religion, etc.

What To Do: Start by nailing down an organization-wide and clear definition of what your culture is and what personal and professional characteristics and values fit it. In addition to avoiding liability, agreeing on such definitions will help you discover what your organization is really about and the image of it that you want to convey to the world.

Try to be as objective as you can in defining your culture. Emphasize the “hard skills” and experiences that define your culture. And keep in mind that even soft and squishy concepts like personality characteristics can be defined to some extent in objective, measurable terms.

Example: Rejecting a 50-year-old applicant for IT position due to lack of “overall fit” wasn’t discrimination. While acknowledging that most of the employees in the IT department were in their 20s, the Ontario human rights tribunal found that the applicant was rejected not just because of his personality but lack of technical experience with Blackberry Enterprise servers [[Sukhu vs. Universal Energy](#), 2009 CanLII 2009 HRTO 1922, Nov. 10, 2009].

2. Review Your Definitions for Discrimination Code Words

Once you define “culture” and “fit,” step back and take a detached look at what they may say about your organization. Are your definitions fair and non-discriminatory? Or will they send a discriminatory message about the kind of people you want? Clearly, statements like “XYZ employees share Christian values” are a no-no. But beware of more subtle statements that sound neutral but could be perceived as expressing racial and socio-economic preferences.

Example: Google fires a 54-year-old employee because he isn’t a good “cultural fit.” The employee claims that the whole cultural fit business is a pretext for the company’s preference for younger employees, citing statements in its job ads expressing preference for employees “who like to work and play hard.” The California court agrees and finds Google liable for age discrimination [[Reid vs. Google, Inc.](#), 2010 FindLaw S158965 Santa Clara County Superior Ct., August 5, 2010].

What To Do: Put yourself in the shoes of job applicants when reviewing your statements. Also ask your lawyer to review your statements. Be on the lookout for buzzwords that could create the wrong perception. For example, how will statements about “family-oriented” come across to applicants who are gay or single parents? How will words like “energetic” and “dynamic” be perceived by applicants in their 50s? Mere use of such words isn’t necessarily discrimination; but it creates the perception of discrimination. And in the world of employment discrimination, perception can be just as important as actual intentions.

3. Formulate Pre-Set Interview Questions to Collect “Fit” Information

Having a clear and non-discriminatory definition of “fit” sets you up to incorporate personal characteristics into your employment decisions. But troubles can still arise when you apply those criteria to actual hiring decisions. To determine whether applicants have the characteristics you want, you might end up asking for or collecting information that crosses the line.

Example: You define “dedication” as a characteristic fitting your company’s corporate

culture. During a job interview, one of your managers asks a female job applicant about her family arrangements. His intent is to determine if she'll be dedicated enough to work nights. The problem, of course, is that in seeking to apply the criterion, he's relying on the stereotype that women with kids aren't as committed to their jobs. And that's illegal.

What To Do: If you're going to make cultural fit part of your hiring decision, you must ensure that the people involved in hiring decisions apply the exact same criteria and do it in an orderly, consistent and controlled way across the organization. These individuals need to understand exactly what they can and can't do. Conversely, they need to be restrained from freelancing and making "gut" decisions about who is and isn't a good fit.

One of the best ways to ensure control over how fit criteria are applied in the hiring process is to craft a model policy requiring all interviewers to pose standard interview questions to gather the personal information about the applicant the organization needs to determine if they fit the culture. ([Click here](#) for a Model Policy.)

Example: A university concludes that a 59-year-old employee is the wrong fit for a promotion because he lacks knowledge of and is unwilling to embrace newfangled green products and computer technology. The employee claims age discrimination but the human rights tribunal disagrees. The university's opinion about the employee's resistance to new technology was based not on age-ist stereotypes but actual answers to the pre-set interview questions that the university posed to all applicants for the position [[White vs. Queen's University at Kingston](#), 2010 CanLII 2010 HRTO 640, March 25, 2010].

Formulating pre-set questions also goes a long way toward removing the subjective element from fit criteria. Such questions represent the difference between "I know it when I see it," and "I can actually measure it." They don't completely eliminate the "gut" from the equation; but they force the hiring personnel to actually probe and back up their instincts and impressions with measurable data.

Example: Remember the *Sukhu* case where the company with the IT department dominated by 20-somethings was allowed to deny an IT position to a 50-year-old applicant because he was the wrong fit? At trial, the guy who interviewed the applicant admitted that personality "fit is hard to describe." However, he wasn't making calls about fit based just on his gut. His conclusion was the product of a structured interview process that probed for experience and skills, which ultimately provided a clear picture of personality as it relates to fit.

Model Questions for Job Applications

You can gather useful data about a job applicant's fit with your organizational culture by including certain questions on the screen on your corporate careers website that you ask applicants to fill out before submitting a resume or application. Here are sample questions from the British American Tobacco graduate careers site:

1. What type of work really motivates you (select up to 4)?

1. Independent thinking
2. Working in a team
3. Presenting creative ideas to your peers
4. Working on your own all the time
5. Challenging projects and situations
6. Routine work and understanding exactly what is required

2. In what environment do you think you excel (select up to 3)?

1. An environment which promotes diversity and lateral thinking
2. An environment which encourages creativity of thought
3. An extremely driven workplace
4. One where there is consistency and stability
5. A very secure and risk averse environment

4. Apply Fit Criteria Consistently

In judging the validity of your hiring decisions, courts and arbitrators will look at whether you apply your fit criteria consistently.

Example: Candidate A, who's white, and Candidate B, who's African Canadian, have similar credentials and personalities. Candidate B is asked questions to determine her fit with the company; Candidate A is asked no such questions. The company decides that Candidate A is a better fit and offers her the job. The company's lack of consistency in applying its fit criteria to Candidate A would be evidence that rejecting Candidate B as a poor fit was racially discriminatory.

What To Do: Standard definitions, hiring policies and pre-set interview questions are a good start. But you also need to exercise oversight over the hiring process and ensure your controls are being applied consistently to similarly situated job applicants across the organization:

- Are all candidates for the same positions or within the same departments being vetted for fit regardless of age, race, religion, etc.?
- Are they all being asked the same questions with regard to fit?
- Are the answers of all candidates being accorded the same weight in the ultimate hiring decision?

TAKEAWAY

Human rights laws require you to remove personal prejudices and stereotypes from the employment process. Accordingly, fit is a legitimate factor for recruitment and hiring to the extent it measures merits, qualifications and prospects for success at your organization; but it becomes illegal if it allows prejudice to creep in the back door. Doing the 4 things outlined in this story should go a long way in helping you keep your own fit practices within the boundaries.

And remember that actions speak louder than words. So, if your workplace culture really is stifling diversity and favouring particular races, religions, genders or socio-economic groups, there are no policies or practices that will keep you out of trouble.