



























## PERFORMANCE-BASED HIRING AND LEGAL COMPLIANCE OVERVIEW

### DAVID J. GOLDSTEIN<sup>1</sup>

Businesses hire people because there is a job to be done. The goal is to find the right people, bring them on board, and get them to work. When the wrong person is hired, the work doesn't get done. Worse yet, the productivity of others may be disrupted. And in the worst case a bad hire can lead to litigation. Employment related litigation is extremely costly and legal fees represent just the tip of the iceberg. Litigation distracts managers, impacts employee morale, and often breeds additional litigation.

For these and other reasons, successful companies need to adopt an effective approach to recruiting and hiring. Performance-based Hiring provides such an approach.

By creating compelling job descriptions that are focused on key performance objectives, using advanced marketing and networking concepts to find top people, by adopting evidence-based interviewing techniques, and by integrating recruiting into the interviewing process, companies can attract better candidates and make better hiring decisions.

Because the Performance-based Hiring system does differ from traditional recruiting and hiring processes, questions arise as to whether employers can adopt Performance-based Hiring and still comply with the complex array of statutes, regulations, and common law principals that regulate the workplace. The answer is yes.

In particular:

- A properly prepared performance profile can identify and document the essential functions of a job better than traditional position descriptions, facilitating the reasonable accommodation of disabilities and making it easier to comply with the Americans with Disabilities Act and similar laws.
- Even employers that maintain more traditional job descriptions may still use performance profiles or summaries of performance profiles to advertise job openings. Employers are not legally required to post their internal job descriptions when advertising an open position. Nor is there any legal obligation to (or advantage in) posting boring ads.

<sup>&</sup>lt;sup>1</sup> David J. Goldstein, a shareholder in Littler Mendelson's Minneapolis office, has over 25 years of experience working with in-house counsel, business leadership, and HR professionals to proactively identify and implement creative solutions for complying with legal and regulatory requirements, avoiding liability, and resolving internal and external disputes.

An experienced trial lawyer, David's clients include health care providers, construction companies, financial institutions, colleges and universities, and professional sports teams. David devotes a significant portion of his practice to assisting employers with the implementation and maintenance of effective affirmative action programs and representing contractors before the OFCCP.

David has a J.D. from Harvard Law School and a B.A. from Haverford College. While in law school he also taught freshman economics at Harvard College. Additional information on David is available at <u>http://www.linkedin.com/in/davidjgoldstein</u> and <u>http://www.littler.com/people/david-j-goldstein</u>

- Under some circumstances, federal government contractors will want to include in their job postings, objective, non-comparative qualifications for the position to be filled. Using SMARTe, employers can create performance-based job descriptions that include such objective, non-comparative elements. Requiring applicants to have previously accomplished specific tasks represents a selection criterion that is no less objective than requiring years of experience in some general area.
- Focusing on "Year 1 and Beyond" criteria may open the door to more minority, military, and disabled candidates who have a less "traditional" mix of experiences, thereby supporting affirmative action or diversity efforts.
- The law permits employers to define who will be an "applicant" by limiting consideration to individuals who fulfill certain procedural requirements such as fully completing an application form. Requiring interested individuals to complete a short write-up of some accomplishment related to the job to be filled (the "two-step") can serve as such a requirement. Individuals who do not submit the required write-up need not be considered as applicants for record-keeping purposes. Of course, while individuals can be rejected based on the quality of their submission, those individuals who do submit the write-up will need to be counted as applicants.
- Conducting performance-based interviews ensures that the interviews will be structured and properly focused, and minimizes the risk of an interviewer inquiring into protected characteristics. Moreover, since the performance-based interviews are conducted pursuant to a common methodology, one is assured that the candidates are being fairly compared.
- Performance-based interviewing promotes fair consideration of the different skills and experiences that each candidate has to offer which is essential to promoting diversity.
- One obstacle to diversity in hiring is the greater effort required for an interviewer to connect with a person who is different. *The Essential Guide for Hiring & Getting Hired* offers techniques for controlling this type of bias. Waiting 30 minutes and using the Plus or Minus Reversal Technique will reduce the impact of such biases and promote greater diversity in hiring.
- Although some employers may be required to maintain records of the actual applicant pools considered for each hire, a single posting may still be used to cover multiple openings by narrowing the pool through the two-step process and maintaining appropriate applicant tracking systems.
- Performance-based Hiring is a business process for hiring top talent. While the process will be useful for filling many different types of jobs, there may be some jobs (for example, lower level, lower skilled, high turnover positions) for which it doesn't make sense to use Performance-based Hiring. That is not a problem. Employers need to be consistent in their hiring processes for similar positions, but remain free to adopt different processes for different positions.

## **Recruiter Competency Model: Talent Advisor and Career Consultant**

This model is for a full-cycle recruiter handling challenging search projects in a talent scarce market. It's based on Lou Adler's <u>*Performance-based Hiring*</u> training program.



lame:	Title:	Evalu	ator:	Date:
	High Tech – Active – Traditional		High Touch – Passive – Diverse	
ersistence, Quality,	Consistency and Drive	for Results		
Description	Needs Training – 1	Qualified – 2	Well Qualified – 3	Highly Qualified – 4
Delivers 3-4 strong peo-	Can handle basic active	Very solid. Can source and	Delivers high quality pas-	Totally committed to de-
ole efficiently and con-	searches with reasonable	recruit for most spots with	sive candidates with strong	liver top-tier talent for
istently.	quality.	active candidates.	performance metrics.	toughest projects.
nderstands Real Jol	b Needs and the Employ	vee Value Proposition (	<b>EVP)</b> (Core Online Cour	se)
Understands real job as	Has little understanding of	Intake meetings focus is	Has good understanding of	Relentless ensuring full job
performance objectives	actual job and larger con-	largely on skills, experiences		understanding. Leads intake
and their importance.	text. Box checks skills.	and generic competencies.	depth intake meetings.	meeting with hiring team.
rong Intonviowor a	- nd Par Paicar Tructod	by Hiring Managor (Cr	oot Course for Hiring M	anagors Too)
-	nd Bar Raiser – Trusted Emphasizes skills. Assess-	Conducts behavioral inter-	Conducts in-depth objective	Can lead panel interviews
Conducts objective, in- depth and professional	ments not fully trusted by	view as part of good phone	interview. Assessments are	and debriefing sessions.
nterview.	hiring managers.	screen. Input is valued.	insightful and correct.	Very accurate. Persuasive.
interview.		Second input is valued.		i ci y docarace. i ci sudsive.
an Source, Recruit a	and Close Semi-finalists	in Tandem – Best Top	of Funnel to Close Met	r <b>ics</b> <u>(Best Course)</u>
inds, connects and con-	Good sourcer but doesn't	Identifies good passive tal-	Can find & contact top pas-	Finds best talent. Very high
verts great names into	contact and convert the	ent but just okay conversion	sive talent with high conver-	contact & conversion rates.
strong prospects.	strongest people. Low yield.	rate into strong prospects.	sion into serious prospects.	Lowest candidates/hire.
ull Understanding o	f Company/Culture/Ma	nager/Team/Industry	(Best Course)	
(nows industry, com-	Unconvincing. Too generic.	Understands key non-job is-	Insightful. Sees beyond job.	Respected, trusted advisor
bany, competition and	Strongest candidates opt	sues to convince strongest	Overcomes Glassdoor-like	to hiring managers and can-
compensation issues.	out. Fluffy. Low conversion.	candidates to proceed.	concerns. High conversion.	didates. Highest close rate!
compensation issues.			U U U U U U U U U U U U U U U U U U U	0
ecruits, Advises, Ne	gotiates and Closes Tie	r 1 Candidates by Creat	ting Career Move (Four	dational Course
Overcomes objections,	Okay with active candidates	Strong at recruiting top ac-	Excellent for all positions.	Raises the talent bar.
persistent, closes on ca-	but clumsy with most pas-	tive candidates. Okay with	Career advisor mindset. HM	Trusted advisor to HM &
reer growth, not \$\$.	sive candidates.	best passive candidates.	partner. Persistent!	prospect. Best close rate!
ources Semi-finalist	s: Knows Boolean, Grea	nt Messaging & High Re	sponse Rates (Core On	line Course)
Can quickly source, con-		Solid Boolean. Uses variety	Leverages Boolean to focus	Can find/attract anyone. Ex-
tact and convert best	with basics tools. Metrics	of niche databases. OK re-	on performance, quality	cels at "High Touch." High-
people into prospects.	low. Quality is average.	sponse rates & OK quality.	and hirability. Great results.	est sendouts/hire metrics.
1				
	Deep High Quality Taler Ineffective. Not able or not			
Referral generating ma-	interested in direct calling	Okay with cold calling but needs help convincing the	Can call and contact anyone with high conversion rates	respected. Assigned diffi-
chine of top-tier talent.	or networking.	best to move forward.	and/or gets great referrals.	cult searches.
		1		
· · ·	aign Nurturing Approac		-	
Proactive, targeted	Inbound focus. Too much	Builds good talent pools us-	Great success using work-	Builds very successful multi-
planning with sup-	standard posting and email-	ing a variety of channels. Fill	0. III //	channel CRM campaigns
ply/demand analysis.	ing. Results inconsistent.	metrics are strong.	mand analysis & campaigns.	that meet tough KPIs.
lanages the Entire F	Process with Strong Me	trics and Ensures a Stro	ong Candidate Experien	ce (CX) (Live Workshop)
On top of everything.	Reactive. Metrics incon-	Tracks, plans and ensures	Keeps managers informed	Great organization. Proac-
Prioritizes efforts to en-	sistent. Insensitive to candi-	positive CX. Stays on top of	and engaged. Improves CX.	tively ensures goals and
sure objectives are met.	date needs.	critical jobs & hits metrics.	Drives the process.	metrics are met.
	-	1	1	
			FINAL RANKING	



Complete List of Resources in the Performance-based Hiring Learning Platform

Each of our self-paced training courses include a number of resources to help users quickly learn and apply the methodology. Following is a complete list of these resources. Those marked with an asterisk (\*) are exclusive to the sourcing and recruiting courses.

### Littler Mendelson White Paper on Compliance of Performance-based Hiring

This is a white paper prepared by David J. Goldstein who is one of the top legal authorities on the topic of equal employment opportunity, diversity, OFCCP and related employment compliance issues.

### Defining the Job as Performance Objectives

Conducting a Performance-based Hiring Intake Meeting

This is a step-by-step guide for use during the job description in-take meeting with the hiring manager and team. It offers a simple approach to convert traditional skills-based job descriptions into performance-based job descriptions.

#### Getting Started Preparing Performance-based job Descriptions

This summary is a great tool for introducing hiring managers to the value of defining work as a series of 5-6 performance objectives rather than a list of skills and generic competencies.

#### Performance-based Job Description Handbook

This handbook contains a variety of different performance-based job descriptions and performance objectives that can used as templates for all types of jobs.

### Sourcing and Recruiting Resources

#### Recruiter of the Future Competency Model

This competency model describes all of the skills a recruiter needs to master in order to source, recruit, assess and close the strongest and most diverse talent for critical roles.

Clever Boolean Search Terms Summary Cheat Sheet \*

This cheat sheet is designed for use in the Performance-based Hiring method. It contains basic and advanced search operators along with other clever terms useful for finding more top passive candidates.

#### Comprehensive Candidate Persona Guide – Short and Complete Versions \*

This is a step-by-step guide for capturing the essential information to create specific job branding and the Employee Value Proposition. This information is critical for developing compelling recruitment messaging.

Job Offer – Candidate Offer Comparison and Decision-Making Process Worksheet \*

This form allows a candidate to objectively compare different job opportunities by examining all of the short- and long-term factors in balance rather than emphasizing compensation and location.

### Interview Guides (there are 10 interview guides in this template series)

#### The Master Two-question Performance-based Interview Guide

This is a semi-scripted interview designed to utilize the Performance-based Hiring two-question interview format. This version of the guide can easily be adapted to any job type.

Phone Screen Interview Guide

This is a semi-scripted interview to determine if a candidate should be invited onsite. Mastering just this phone screen will reduce hiring errors due to bias and save time by only inviting potential finalists onsite for a full, in-depth interview.

#### Consultative Sales Rep Interview Guide

This is an interview guide for consultative sales and business development candidates who use a discovery process.

#### Project Management Performance-based Interview Guide

This semi-scripted interview guide is designed to evaluate the candidate's project and self-management skills along with their organizational ability.

#### Soft Skills Performance-based interview Guide

This semi-scripted interview guide is designed to evaluate the candidate's soft-skills including their organizational ability, time management, cross-functional teamwork, influencing and communication skills.

Performance-based Hiring Learning Systems • Irvine, CA • The Hiring Machine LMS



Complete List of Resources in the <u>Performance-based Hiring Learning Platform</u>

### Interview Guide to Assess Fit with the Job and Company Culture

This semi-scripted interview guide is designed to assess the candidate's fit, fit with the company culture and fit with the hiring manager's style in managing their team.

#### Team Skills Performance-based Interview Guide

This semi-scripted interview guide is designed to assess the candidate's capability to work within a team environment. This includes understanding their role within the team, ability to influence and cooperate to meet team goals, and to compromise when necessary.

#### Technical Role Performance-based Interview Guide

This is a semi-scripted interview guide designed to assess the candidate's technical competence in relationship to the objectives within the job's performance-based job description.

#### The Performance-Based Hiring Panel Interview Guide

This is a comprehensive guide for conducting panel interviews. This includes a preparation checklist, instructions on how to conduct a panel interview and roles for each panel member.

### Talent Scorecards and Additional Interviewing Tools

Predicting and Improving Quality of Hire Using the Performance-based Hiring Talent Scorecard

Accurately predicting Quality of Hire is possible when each hiring team member shares their evidence in a formal debriefing session. This same talent scorecard can be used to establish a corrective feedback system by comparing post-hire actual performance to the pre-hire prediction.

#### Interviewing – The NO 2s! Training Guide

This guide provides additional guidance on how to assess and rank the key factors on the Talent Scorecard. The most important thing to understand is that candidates who score 2 or lower should raise a red flag.

#### Standard Talent Scorecard Phone Screen

This is a scorecard to summarize your phone screen and document whether or not the candidate is recommended for an inperson interview or other next steps.

#### How to Organize the Interview by Roles Checklist

This checklist is a matrix of hiring team roles and talent scorecard factors. Completing this checklist ensures all assessment factors have been assigned and provides variety during the candidate interview.

#### **Extras and Special Tools**

#### Performance-based Hiring Certification Package \*

Each of the four modules comes with a series of step-by-step worksheets covering the fieldwork needed to practice and master the concepts. Upon successful completion the recruiter receives his/her Performance-based Hiring certification.

#### **Mobile Digital Application**

This tool offers instant coaching advice for preparing performance-based job descriptions and asking a variety of different interviewing questions.

Interactive Overcoming Objections Tool \*

It's important for recruiters to be able to handle candidate concerns at any stage in the funnel. This tool provides 30+ instant rebuttals that will prevent strong candidates from opting out for lack of trying.

#### Interactive Behavioral Fact-finding for Handling Different Accomplishment Questions

The performance-based interviewing process involves fully understanding a candidate's accomplishments related to the performance objectives of the job. This tool provides the behavioral fact-finding probes needed to conduct an accurate assessment.

Prep Your Candidate

Recruiters should <u>send this free lesson to all of their candidates</u> to ensure they're accurately interviewed. It's best if they recruiter and candidate discuss the core techniques before the actual interview with the hiring manager.