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Avoiding Gatekeeper Bias in Hiring Decisions

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Bias in hiring used to be overt. For instance, during her keynote address at the Idaho Women Lawyers 2019 Gala, the Honorable Mary M. Schroeder, Senior Judge of the United States Court of Appeals for the Ninth Circuit, shared her experiences trying to find a job after moving to Phoenix, Arizona, in the 1960's. She suffered through several meetings where she was told that the firm wouldn't hire a female attorney. Then, after a meeting with a male partner who was willing to hire her, she was once again told that she didn't have a job because another partner refused to work with a woman attorney.

While these types of incidents hopefully don't happen today, diverse candidates can still face implicit bias in the hiring process. To help you avoid this type of bias, we will first explain why a lack of diversity hurts workplaces, what gatekeeper bias in the hiring process is, and the law governing employment in Idaho. We then offer some suggested ways to help any employer avoid gatekeeper bias.

The benefits of diversity in the workplace

Increasing diversity is a smart business decision.¹ Having employees with different personalities, at various stages of their careers, as well as the more common markers of diversity like gender, race, ethnicity, cultural background, and sexual orientation, improves workplace performance.² Studies as far back as 2006 have heralded the benefits of diversity in the workplace.³ In the specific context of gender diversity, noted benefits include more collab-

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orative leadership styles that benefit boardroom dynamics, increasing mentorship and coaching of employees, and economic outperformance of competitors. More recent articles continue to tout the benefits of diversity of all types.

For instance, working with diverse people makes everyone smarter because it challenges the brain to overcome stale thinking by focusing more on facts and processing facts more carefully; this in turn leads to more innovation.⁴ In addition to driving innovation, diversity at a workplace makes recruiting easier, avoids high turnover among employees, and increases employee productivity.⁵ Finally, diversity in the workplace can open the employer to a deeper talent pool and to a wider market.⁶

What is gatekeeper bias?

When we think of bias, we often think of discrimination. This bias or prejudice involves "dislike, hostility, or unjust behavior deriving from preconceived and unfounded opinions."⁷ We also tend to link bias with negative emotions.⁸ Some forms of bias, however, come from positive feelings, such as in-group favoritism.⁹ In other words, some forms of bias come from positive feelings

toward an individual that result in "significant discriminatory results from differential helping or favoring."¹⁰ Additionally, while some bias is overt and conscious, oftentimes bias is the result of implicitly held beliefs of which a person is completely unaware.

In the context of employment decisions, gatekeeper bias happens when an employment decision is based on the decision maker's perceived preferences of the existing employers or co-workers with whom the new employee would be working.¹¹ Gatekeeper bias—allowing the perceived bias of co-workers to influence employment decisions—happens even when the gatekeeper herself believes in the importance of diversity.¹² In fact, gatekeepers may not even be aware that these considerations are factoring into the hiring, or other employment, decision. It is not uncommon for such decisions to be considered simply a commentary on who best "fits" the company culture or mission. In other words, even a commitment to diversity doesn't necessarily prevent employers from accommodating biases in hiring decisions.

This gatekeeping bias happens because employers face a challenge with each hire: they must match unknown applicants to well-known, ex-

perience-based requirements.¹³ Thus, each new hire represents a risk to the employer, and the persons charged with hiring decisions often allow emotions, including the desire to avoid risk and reproduce the current situation with a new employee, to creep in.¹⁴ This isn't always bad, but these emotions can mean certain candidates are excluded from consideration based on a gatekeeper's perception that existing employees have a bias, though that might not be the word used, against the candidate's social characteristics, which could include race, gender, or ethnicity.¹⁵

Idaho and federal employment law

Gatekeeper bias is especially concerning not only because diversity in the workplace makes good business sense, but also because it could open up employers to legal liability.

The Idaho Human Rights Act prohibits discrimination in employment based on race, color, religion, sex, national origin, disability, and age.¹⁶ Employment decisions that cannot be based on these protected classes include hiring, termination, compensation, promotions and discipline, and other conditions or privileges of employment.¹⁷

The Idaho Human Rights Act applies to employers with five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, a person who as a contractor or subcontractor is furnishing material or performing work for the state, any agency of or any governmental entity within the state, and any agent of such employer.¹⁸ In addition to the Idaho Human Rights Act, some local governments have enacted legislation seeking to extend employment anti-discrimination protections explicitly on the basis of sexual orientation and gender identity/expression.¹⁹

Like the Idaho Human Rights Act, Title VII of the Civil Rights

Act of 1964 prohibits discrimination in employment based on race, color, religion, sex, and national origin.²⁰ Title VII similarly covers decisions regarding hiring, termination, compensation, promotions and discipline, and other terms and conditions of employment.²¹ Covered employers include those "affecting commerce" with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, any agent of such employer, and various federal governmental entities.²² In addition to the Civil Rights Act, a patchwork of other federal laws prohibit discrimination based on various characteristics in the employment context including on the basis of a disability, age, genetic information, and others.²³

Tips to avoid gatekeeper bias

We have extolled the virtues of diversity in the workplace; uncovered for you the sometimes subconscious and unintentional role of gatekeeper bias as an obstacle to achieving such diversity; and illustrated how this phenomenon can open up employers to legal issues in light of prevailing anti-discrimination laws. The question remains, especially if gatekeeper bias is sometimes subconscious and unintentional, how does your or your client's organization prevent gatekeeper bias from happening? Here is some guidance and some suggestions on how to prevent gatekeeper bias.

First, be aware of your implicit biases.²⁴ We all have them. Unfortunately, too often we do not want to admit, to ourselves or others, that we categorize people based on their appearances, history, or yes, specific culture-conforming attributes. We do not want to admit that we feel more comfortable with people who act, look, and think like us. It is time to get over that. Until we do, we will

never win the battle against implicit bias. Have your hiring managers take implicit bias tests or training.²⁵

Second, create definable rubrics for your hiring process.²⁶ Systemizing your hiring process will go a long way towards ensuring your hiring process results in the most qualified, successful candidate. For example, keep your job description handy and only ask questions related to job-related duties. Consider asking the same questions to all candidates. Assign numbers for candidate answers with "1" being unable/incompetent to complete the required task and "10" being perfectly able/competent to complete the required task.

Third, be very careful of assigning too much weight to "likability," "fit," or "gut-feeling." These feelings could just be implicit biases in disguise. Consider, instead, including another element to your hiring rubric for personal interaction or ability to work well in a team setting, if those are truly important components of the job at issue. Then make sure you rate the candidates based on the definite qualities in the rubric.

Finally, diversify your hiring panel. Have multiple employees in your office responsible for giving input on job candidates. You can have the candidates meet one-on-one with multiple employees, or in a group setting. Regardless of the format, ensure that the hiring panel includes different genders, cultures, and ages.

Diversifying your panel does not mean that every member will have an equal say in who gets hired, but it does ensure that the feedback that goes into the decision is varied and more likely to be free from individual bias. This diversifying can also go a long way toward ensuring that a single person's feelings about how a candidate's co-workers would feel about him are based on explicit ratings or reactions, not biased assumptions.

Endnotes

1. David Rock & Heidi Grant, *Why Diverse Teams are Smarter*, Harvard Business Review, available at <https://hbr.org/2016/11/why-diverse-teams-are-smarter> (last visited April 9, 2019).
2. Rose Johnson, *What Are the Advantages of a Diverse Workforce?* Houston Chronical (Jan. 28, 2019), available at <https://smallbusiness.chron.com/advantages-diverse-workforce-18780.html> (last visited April 9, 2019); see also *What Are the Benefits of Diversity in the Workplace?* available at <https://theundercoverrecruiter.com/benefits-diversity-workplace/> (last visited April 9, 2019).
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6. Kim Abreu, *The Myriad Benefits of Diversity in the Workforce*, available at <https://www.entrepreneur.com/article/240550> (last visited April 9, 2019).
7. Anthony G. Greenwalk & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, *American Psychologist* 669 (October 2014).
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10. *Id.* at 672.
11. Bill Hathaway, *Three Is Not Good Company for Women Job Seekers*, Yale News (October 19, 2018), available at https://news.yale.edu/2018/10/19/three-not-good-company-women-job-seekers?utm_source=YNemail&utm_medium=email&utm_campaign=yn-10-22-18 (last visited March 22, 2019).
12. See *id.* (noting that the gender biases of potential co-workers can influence hiring decisions even when the gatekeeper is committed to gender diversity).
13. *Emotionalizing Organizations and Organizing Emotions*, 86 (Barbara Sieben ed., 2010).
14. *Id.* at 87, 100.
15. *Id.* at 100.
16. Idaho Code §§ 67-5909.
17. *Id.*
18. Idaho Code § 67-5902(6).
19. See e.g. Boise City Ordinance Title 5, Chapter 15, available at https://www.sterlingcodifiers.com/codebook/index.php?book_id=1079 (last visited April 9, 2019).
20. 42 U.S.C. § 2000e-2.
21. *Id.*
22. 42 U.S.C. § 2000e(b); 42 U.S.C. § 2000e-16.
23. See e.g. Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.; Americans with Disabilities Act Amendments Act; Rehabilitation Act, 29 U.S.C. § 791 et seq.; Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq.; Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff et seq.; Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311.
24. See Rebecca Knight, *7 Practical Ways to Reduce Bias in Your Hiring Process*, Society for Human Resource Management (April 19, 2018), available at <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/7-practical-ways-to-reduce-bias-in-your-hiring-process.aspx> (last visited March 29, 2019).
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