

A lighthouse sits atop a rocky cliff overlooking the ocean at sunset. The sky and water are a deep orange color. The lighthouse is a small white building with a dark roof and a lantern room on top. There are some antennas or towers next to it.

# DISCOVER

WHAT YOUR FRONT-LINE MANAGERS  
NEED TO KNOW

**ABOUT HIRING, DIVERSITY, INCLUSION AND EEOC COMPLIANCE**

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EBOOK | FEBRUARY 2018

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 paycom®



Hire

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## INTRODUCTION

Building a diverse, inclusive workforce can fuel innovation, boost engagement and increase profitability.<sup>1</sup> In fact, companies that prioritize diversity experience:

- » **2.3 times higher cash flow per employee** <sup>2</sup>

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- » **a 35% greater chance of higher financial returns than their national industry median** <sup>3</sup>

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- » **higher sales revenue, more customers and greater profits** <sup>4</sup>

Of course, building that workforce goes hand in hand with another important responsibility: complying with regulations set forth by the U.S. Equal Employment Opportunity Commission (EEOC). Championing both diversity and compliance isn't without challenges. And one of the biggest is ensuring the myriad of people involved in your hiring process — which may include recruiters, front-line managers and even employees — evaluate candidates fairly and follow the letter of the law.

Because the truth is while HR ultimately is responsible for diversity and EEOC compliance, perhaps no one in the organization influences those outcomes more than the department heads, front-line managers and employees who interview and evaluate candidates. These team members play a major role in deciding which candidates are hired and why — or more importantly, why not.

That's why it's crucial these team members can recognize risk in the interview process and avoid it, while still getting the information they need to make the best decision. Ultimately, those involved in your hiring process want to do the right thing, by candidates *and* your company. They just need the knowledge and tools to do it.

As HR pros are aware, good intentions alone won't necessarily save your company from costly litigation or settlements. And the risk is high. In 2016 alone, \$482 million in damages were paid in EEOC claims.<sup>5</sup>



That's why it's time to enlist your company's anti-discrimination experts — members of the HR team, and in some cases, legal counsel — to take the lead and equip *everyone* in the interview process with the tools they need to:

- » **have a basic understanding of the law**

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- » **understand their role in fostering diversity and mitigating risk**

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- » **avoid risk in interviewing without sacrificing due diligence**

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- » **recognize the importance of following standardized interview processes and evaluation criteria**

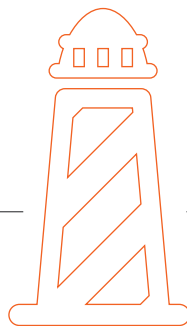
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- » **understand unconscious bias and how it can influence hiring decisions**

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- » **comprehend what being a “cultural fit” truly means**

This Ebook can help you get started. Consider using it to familiarize those involved in your hiring process with the basics of the law, and show them how the right decisions can protect your company and help you build a diverse and inclusive workforce.



## CHAPTER 1:

# The Law

### PROTECTED CHARACTERISTICS

EEOC regulations make it illegal during hiring and employment decisions to discriminate against someone on the basis of several protected characteristics. In this chapter, we'll touch on those characteristics and what's on the horizon in terms of additional regulations. Consider sharing this information with any team member who interviews potential candidates or makes hiring decisions.





Acquiring diverse candidates and complying with EEOC regulations go hand in hand. In this Ebook, we will focus on EEOC compliance rather than compliance with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFFCP). However, keep in mind that if you currently contract or subcontract with the federal government (or plan to in the future), you must follow additional OFFCP laws on top of the EEOC guidelines.

### 1. RACE, COLOR AND NATIONAL ORIGIN

Title VII of the Civil Rights Act of 1964 makes it illegal to discriminate against someone on the basis of race, color or national origin. Additionally, sections 102 and 103 of the Civil Rights Act of 1991 permits jury trials and compensatory — and punitive — damage awards in intentional discrimination cases.

### 2. SEX (INCLUDING PREGNANCY)

Title VII also makes it illegal to discriminate against someone based on his or her sex. Additionally, it's illegal to discriminate against a woman due to pregnancy, childbirth or a medical condition related to either condition, per the Pregnancy Discrimination Act of 1978.

Additionally, the Equal Pay Act of 1963 deems illegal the practice of paying different wages to men and women performing equal work in the same workplace. As noted above, sections 102 and 103 of the Civil Rights Act of 1991 permits jury trials and compensatory — and punitive — damage awards in intentional discrimination cases.

### 3. RELIGION

Religion is another protected characteristic under Title VII. The law also requires that employers reasonably accommodate applicants' and employees' sincerely held religious practices unless it would impose an undue hardship of the employer's business.

Sections 102 and 103 of the Civil Rights Act of 1991, permitting jury trials and compensatory — and punitive — damage awards in intentional discrimination cases, applies in cases of religious discrimination as well.

### 4. APPLICANTS OVER 40 YEARS OLD

Due to the Age Discrimination in Employment Act of 1967, it is illegal to discriminate against individuals who are 40 or over because of their age.



## 5. PERSONS WITH DISABILITIES

It is illegal to discriminate in employment practices against otherwise qualified individuals with disabilities, per Title I of the Americans With Disabilities Act of 1990.

Employers also are required to reasonably accommodate known physical or mental limitations of an otherwise qualified individual with a disability, unless doing so would impose an undue hardship on the operation of the employer's business.

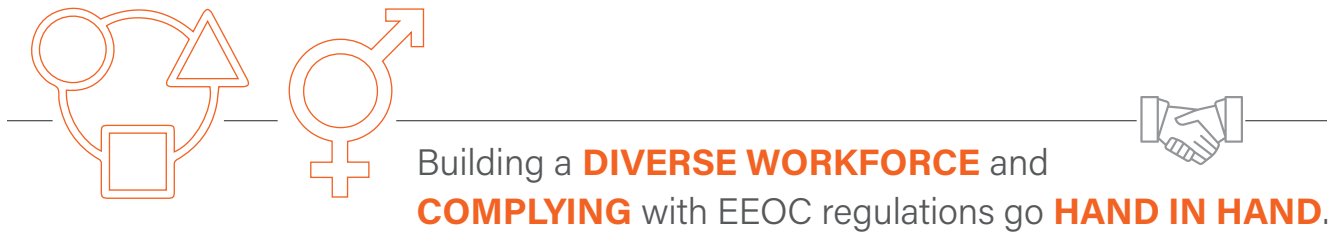
In an interview setting, many questions related to a candidate's protected status are not illegal per se, but *are discouraged*, because they potentially could put your company at risk of noncompliance with the EEOC. However, interview questions about disabilities are *illegal*, per the Americans With Disabilities Act. You'll find more information on interview questions in Chapter 2.

## 6. DISCRIMINATION FOR MEDICAL HISTORY OR GENETIC INFORMATION

It's also illegal to discriminate based on genetic information or the medical history (including family medical history) of a candidate, according to the Genetic Information Nondiscrimination Act of 2008 (GINA).

Recently, in addition to discriminating against disabled employees, the New York City-based utilities company Con Edison illegally required job applicants to undergo medical examinations and provide genetic information on their family members before being hired. The company paid an \$800,000 settlement for back wages and damages in 2017. <sup>6</sup>

Keep in mind this list of protected characteristics isn't comprehensive and doesn't include state anti-discrimination laws, which can differ from federal laws *and* each other.





## WHAT'S ON THE HORIZON

Legislative trends in states across the country soon could affect your business and your hiring process, if they don't already. Here are the biggest changes to anti-discrimination laws that have gained steam since 2009.

**Ban on salary history inquiries:** This law prohibits employers from asking for applicants' salary history. Proponents say eliminating this question from interviews can enable candidates to break the cycle of pay inequity.<sup>7</sup>

Some localities, like California and Delaware, have banned all employers from making inquiries about a candidate's previous pay, while others, like the cities of Pittsburgh and New Orleans only ban city agencies from asking this question. In some places, like Oregon, even if a candidate volunteers his or her salary history, companies are prohibited from using that information to determine the salary they will offer.<sup>8</sup>

**Ban-the-box laws:** According to the Society for Human Resource Management (SHRM), ban-the-box laws — so named for an application's check box regarding criminal record — require employers to ask questions about a candidate's criminal history only *after* the initial interview has taken place or a conditional job offer has been made.<sup>9</sup>

For those who evaluate and hire candidates in states or municipalities where ban-the-box laws apply, it's important to understand this does *not* require them to hire felons or abandon due diligence in hiring employees. However, it *does* require employers to wait until after the initial interview to check the background and criminal history of any applicant.

The EEOC provides guidelines on determining whether a previous offense should disqualify a candidate from a particular position. These are called "Green factors" and include:

- » nature and gravity of the offense
- » how much time has passed
- » the nature of the open position

These factors come from the 1975 *Green v. Missouri Pacific Railroad* decision. Businesses that disqualify an applicant based on a past criminal record may need to use the Green factors to prove the "business necessity" of that decision.<sup>10</sup>





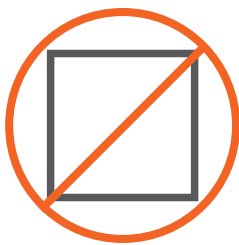
### A NOTE FOR BUSINESSES OPERATING IN MULTIPLE STATES AND CITIES

Because salary inquiry bans and ban-the-box rules currently apply only in specific locations, companies operating in multiple locations may need to take a few different approaches to legal differences in their locations.

For example, companies may need to implement different interview practices for offices operating in locations that ban salary inquiries. However, this may create logistical difficulties or confusion with internal cross-country transfers.

Others might proactively change interview policies across all locations to match the requirements of the office with the strictest regulations. This is generally the recommended route. Making that change can minimize internal confusion and means the business is prepared if more states and cities ban the box or the inquiry into salary history.

Either way, your best bet is to consult legal counsel, and keep an eye on what's happening in the cities, counties and states in which your company operates. Staying abreast of detailed regulatory changes like these — and finding the best way to incorporate them into your hiring process — helps ensure everyone in your company follows anti-discrimination laws and helps build a diverse workforce.



The **BAN-THE-BOX** rules currently apply only in specific locations.

## CHAPTER 2:

# Identifying and Mitigating Risk

Discrimination in the hiring process typically occurs in one of two ways: brazenly or subtly. But because flagrant violations often are deliberate — and symptomatic of a larger cultural problem — we’re not going to explore those scenarios here. Instead, we’ll focus on how interviewers can avoid innocent mistakes, make candidates feel at ease and still get the information they need to hire the best.



Some interview questions that touch on protected classes are typical, rapport-building questions you might ask to get to know someone. Others are attempts to understand if a candidate will be able to meet job requirements. However, it's important interviewers realize that some of these questions identify a protected characteristic and could land your company in hot water if the candidate isn't hired.

It's also critical interviewers know that even if no discrimination was intended, a candidate can make a claim in good faith if he or she believes discrimination *did* occur and it cost him or her the job. In this case, it's difficult to argue otherwise in a court of law, since theoretically, all interview questions are asked to determine whether an applicant should be hired. As a result, companies may opt for costly settlements even when no discrimination was intended because they find it preferable to a lengthy legal process.<sup>11</sup>

### GENDER DISCRIMINATION:

In *Stukey v. United States Air Force*, Linda Stukey, a woman who was asked several gender-based questions during the interview process, charged the defendant at the Air Force Technical Institute with illegal gender discrimination after the job was awarded to a man.

After each party presented its evidence, the court found that "the impropriety and sheer number of gender-based questions made it reasonable to conclude that the selection committee gave Stukey a low rating because of her sex." She had been asked several questions that male candidates were not, including her "marital status, her ability to work with men, her opinions on traveling with men, and her child arrangements when she traveled." As a result, Stukey was awarded \$89,371.24 in lost wages.<sup>12</sup>





## ASKING THE RIGHT QUESTIONS

Fortunately, most interviewers are *not* trying to engage in discriminatory hiring practices. And those involved in your hiring processes can take care to avoid compliance risk and compromising your vision of a diverse and inclusive workforce.

Whether the interviewer is just trying to put the candidate at ease with small talk, or determine if that person is able to meet job requirements, a poorly worded question can make applicants uncomfortable and open your company to risk. Below are a few examples of seemingly innocent questions, why they might be problematic and what your interviewers can ask instead to get the information they need:

### “Where are you from? Where’s your accent from?”

<p><b>Why it’s a problem:</b> Asking candidates a question related to their national origin could violate Title VII of the Civil Rights Act of 1964.</p>
<p><b>To build rapport, ask this instead:</b> “I see you currently [work/live] in [city/state]. What’s your favorite thing about [working/living] there?”</p>
<p><b>To assess the candidate’s ability to meet job requirements, ask this instead:</b> “Are you authorized to work in the U.S.?”</p>

### “Are you married? Tell me about your family! Do you have kids?”

<p><b>Why it’s a problem:</b> These questions elicit a response about the candidate’s personal life and living situation, which violates the Pregnancy Discrimination Act.</p>
<p><b>To build rapport, ask this instead:</b> “What are some professional goals you’ve set for yourself this year? Tell me about the method you used to set those goals.”</p>
<p><b>To assess the candidate’s ability to meet job requirements, ask this instead:</b> “Can you work overtime or travel, if needed?”</p>



### “When did you graduate from [high school/college]?”

<p><b>Why it’s a problem:</b> If a candidate is over 40, asking this question may open you up to risk of claims of age discrimination, per the Age Discrimination in Employment Act of 1967.</p>
<p><b>To build rapport, ask this instead:</b> “What inspired you to pursue a career in [professional discipline/field of work]?”</p>
<p><b>To assess the candidate’s ability to meet job requirements, ask this instead:</b> “What is the highest level of schooling you’ve completed? Why do you think you’re the best candidate for this job?”</p>

### “Do you have any medical conditions that could keep you from doing the job? Do you have any disabilities we’ll need to accommodate?”

<p><b>Why it’s a problem:</b> It could violate Title I of the Americans With Disabilities Act of 1990. Hopefully, most interviewers aren’t asking these questions to build rapport. However, we’re covering it here because interviewers might consider it reasonable in order to determine the candidate’s ability to fulfill job responsibilities.</p>
<p><b>To assess the candidate’s ability to meet job requirements, ask this instead:</b> “Can you perform all of aspects of this job safely and satisfactorily?”</p>
<p><b>Note:</b> Questions about a person’s visible or invisible disability are <i>illegal</i>, according to the Americans With Disabilities Act of 1990.</p>



A good rule of thumb interviewers should follow is to stick to *performance*-based questions, rather than subjective questions that evaluate the *person* being interviewed. This helps ensure you hire the right person for the job, regardless of unrelated characteristics, and helps protect you and your company from claims of illegal discrimination during the hiring process.



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## STANDARDIZING INTERVIEWING AND EVALUATION PROCESSES

Ultimately, most people harbor *some* amount of bias, although they may not realize it. And these biases can come into play when interviewers deliberate over candidates.<sup>13</sup> According to *Harvard Business Review*, when interviewers without standardized questions or interview notes are left to mull over whom to hire, their decision making tends to be subjective and unconsciously influenced by preconceived notions about race, gender and ethnicity.<sup>14</sup>

To remedy this, consider instructing everyone participating in the interview process to take performance-based notes. You also might equip every interviewer with a set of standardized questions to ensure everyone is evaluating candidates fairly and looking for characteristics that will boost new hires' success.<sup>15</sup>

For example, Google implements structured interviews to ensure new hires are successful in their new roles,<sup>16</sup> which make the hiring process more efficient and effective. Companies large and small can adopt the three principles Google uses:

1. **Performance-based questions:** These are interview questions based on what an employee needs to be able to do to be successful in his or her role. This includes questions to assess how a candidate has addressed challenges in other roles, and hypothetical questions to judge how a candidate would approach the challenges your company faces. Ask each applicant the same questions so you have a fair assessment of the answers of each.
2. **Standardized rubric:** Having a rubric means that everyone involved in the hiring process agrees on what the important questions are *and* what an excellent answer would be. To build your rubric, ask individuals who already perform this role what success looks like in this position. Measuring each candidate's answers to the agreed-upon questions for that role allows for objective assessment of the answers, even when they are reviewed by others who were not in the interview.
3. **Interviewer training:** This is especially important when you have multiple interviewers or stakeholders for an open position. Take good notes that compare candidates' answers to the previously agreed-upon rubric, and make sure that everyone in your organization who is involved with interviewing for a certain position is on the same page regarding:
  - » past behaviors that indicate success in a role
  - » qualities that point toward success in the role
  - » interview questions that will help identify desired behaviors and qualities
  - » the answers to those questions that indicate high potential for success in the role

When multiple people interview the same candidates, they'll be able to make much more objective (and defensible) hiring decisions if everyone agrees on interview questions and potential successful answers, and pledges take good notes to compare afterward.



Hopefully, you won't ever need to defend a decision to hire one candidate over another, but detailed notes and previously agreed-upon identifiers of success will help you do so, should the need arise. Following these best practices also can help those involved in your hiring process identify candidates who would be successful in the position, but may not immediately seem identical to co-workers currently occupying that role.

### CLARIFYING WHAT FINDING A 'CULTURAL FIT' REALLY MEANS

Finding a cultural fit is important, but doing so without sabotaging efforts to build a diverse and inclusive workforce can be difficult. The key is ensuring that *everyone* in the interview process understands what the phrase "cultural fit" *really* means. In short, interviewers should evaluate candidates based on whether they embody the tenets of your company culture, *not* on how similar they act, look or speak like your current employees.

To help them do that, first identify the most important parts of your culture:<sup>17</sup> innovation, professionalism, empathy, grit, fun — you name it. Whatever characteristics define your company's culture, use them to set cultural standards and build them into standardized questions and processes. Qualities like work ethic, keen attention to detail, comfort in a variety of social settings, scientific insight or persuasiveness are all fair game for nondiscriminatory cultural characteristics.

Then, ensure interview questions measure how employees have demonstrated those characteristics in previous jobs or professional situations.

It's easy for anyone to feel more affinity toward candidates who have a similar background, or went to the same college the interviewers did. However, that type of thinking can lead to discriminatory hiring practices by ignoring otherwise qualified candidates.

## TEXAS ROADHOUSE'S SETTLEMENT

**\$12**  
**MILLION**  
**SETTLEMENT**

The global restaurant chain Texas Roadhouse was found to have discriminated for years against workers over the age of 40 in their front-of-house positions.<sup>18</sup>

The lawsuit against Texas Roadhouse was filed in September 2011 and settled five years later. The company will pay \$12 million to compensate applicants age 40 and over who were denied a front-of-house position between Jan. 1, 2007, and Dec. 31, 2014. Furthermore, the chain was ordered to establish a diversity director, follow a consent decree for three and a half years and pay for a decree compliance monitor.

Were the hiring managers trying to discriminate against older workers, or were they simply used to putting younger workers in the visible front-of-house roles? It's hard to say. But hiring practices that result in the discrimination of a protected class of workers are illegal, even if discrimination is not the intent.

## CHAPTER 3:

# What to Expect If a Charge of Discrimination Is Made

If a candidate makes a charge of discrimination against your company, rest assured that your company is *not* immediately assumed to be guilty.<sup>19</sup> However, it *does* mean that the EEOC will investigate to see whether discrimination has occurred. Here's what to expect.







## INVESTIGATION PROCESS

1. The EEOC notifies you of a charge filed against your organization, within 10 days of the filing.
2. During the investigation, your organization may be asked to:
  - » submit a statement of position (your chance to tell your side of the story)
  - » answer a Request for Information (RFI), which may include sending personnel policies and files
  - » allow an on-site visit: this makes the investigation much quicker and may help you reach a resolution faster. In some cases, it can serve as an alternative to an RFI.
  - » permit witness interviews
3. Once an investigation is complete:
  - » the EEOC may determine no discrimination occurred.
  - » if the EEOC determines discrimination has occurred, both parties will be invited to participate in conciliation, an informal process to resolve the charge.
  - » if conciliation does not result in a resolution, the EEOC or the charging party may file a lawsuit against your organization.

## RESOLVING A CHARGE

There are three voluntary ways to resolve a charge without a lawsuit: mediation, settlement and conciliation.<sup>20</sup>

### MEDIATION

The EEOC will advise you at the outset if a charge is eligible for mediation. This process is voluntary, quick and confidential. Successful mediation means an investigation will not occur. Mediation typically takes significantly less time than an investigation would and can be less disruptive to your business operations.

### SETTLEMENT

You may request a settlement at any time during the investigation. Doing so early in the process may help you reach a resolution more quickly than completing an investigation. It's informal and not an admission of liability. If all parties are satisfied with the agreement (including the EEOC), the charge will be dismissed.

### CONCILIATION

After an investigation is completed and "reasonable cause" exists to believe that discrimination has occurred, conciliation is the final chance to reach a resolution informally, before the EEOC or the charging party may file a lawsuit.

According to the EEOC, a typical investigation lasts 10 months.<sup>21</sup> Mediation and settlement can minimize the time your business operations are disrupted, and cooperating with the EEOC's requests can help speed up the investigation as well. In each instance, keeping excellent records will help you reach a satisfactory resolution sooner.

That's why it's critical everyone involved in hiring candidates understands the importance of taking detailed interview notes and following standardized procedures. The right HR technology can help you with that and more.

## CHAPTER 4:

# The Role Paycom's Technology Plays

Standardization and eliminating bias in the interview process are necessary to implement hiring practices that contribute to a diverse workforce and ensure compliance. Paycom makes this easy with several key tools in our HR software suite.





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Our **Applicant Tracking** system enables you to gain answers to standardized compliance questions using knockout questions, manage the application process from a dashboard and gather important information — such as EEOC requisition details — in real time to aid in compliance.



With **Government and Compliance**, you can help ensure your company is in step with EEOC-related legislative changes. You also easily can report on all employees' ethnic backgrounds and job classifications — an annual EEOC requirement.



Because **Background Checks** are built into the Paycom system, you can review applicants' records and hire the candidate without ever having to log out or switch applications. Additionally, you can run checks on your existing workforce at any time, with access to 300 million criminal records within the tool.

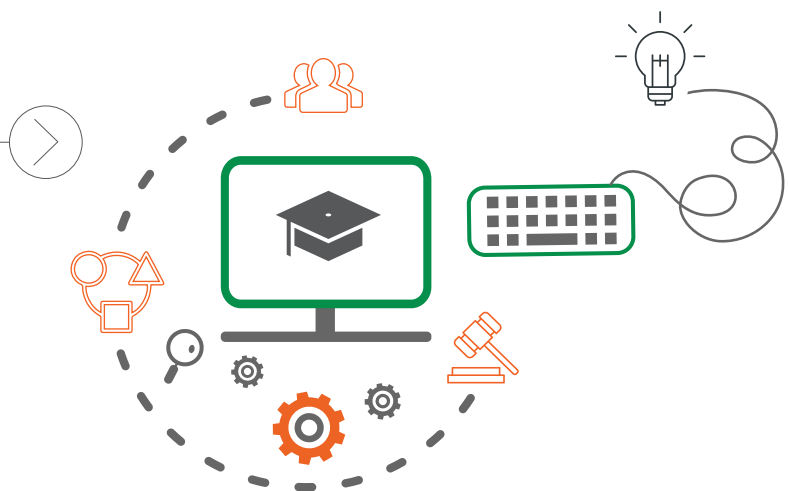


Use **E-Verify**® to confirm instantly an applicant's eligibility to work in the U.S., and reduce exposure to audits and penalties from I-9 violations.



With **Paycom Learning**, you can train department managers, front-line managers, employees — basically anyone involved in your hiring process — on best practices and provide uniform compliance-related instruction, even across multiple locations.

PAYCOM CLIENTS WITH **LEARNING MANAGEMENT SOFTWARE** CAN ACCESS BUILT-IN, COMPLIMENTARY TRAININGS FOR GUIDANCE ON EEOC COMPLIANCE BEYOND THE HIRING PROCESS.



## CONCLUSION

Building a diverse and inclusive workforce and complying with EEOC laws takes time and deliberate effort from *everyone* involved in the hiring process. Helping team members promote diversity through hiring and mitigate compliance risk — while equipping them with powerful tools — can make it easier to work together toward doing just that.



Learn more about how Paycom can help your business at [Paycom.com](https://www.paycom.com) or call 800.580.4505.

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