INTRODUCTION

It is important for search and screen committees to understand their responsibilities and protections under state and federal laws. This document provides an overview of those issues. In addition, the Office of Legal Affairs would be happy to send an attorney to discuss these concepts with any committee. Committee chairs should also feel free to contact Legal Affairs with any questions regarding these principles.

Principles to Guide the Process

Search and screen committees should adopt several basic principles to guide the recruiting process. First, the committee should strive to create a process that will provide fairness and consistency for all applicants. No candidate should be subject to any special, different, or additional consideration or process. In order to provide this fairness and consistency to all candidates, committee members should plan well ahead of each step in the process, so that decisions can be made jointly as to the specific procedures that will be used.

Second, each committee member's own expertise is an invaluable asset for identifying high-quality candidates. As such, committee members should feel free to use their professional expertise and judgment to make informed decisions about candidates, so long as they are able to articulate their rationale in making these decisions. Committee members are encouraged to set high standards and to stick to those standards throughout the recruiting process.

A process based upon these principles should produce not only a slate of highly qualified candidates, but will provide legal justification for the result as well.

Equal Employment Opportunity, Affirmative Action, and Diversity Goals

Federal and state fair employment laws prohibit employers from making employment decisions based upon a person’s protected status. Under Wisconsin law, protected statuses include race, age, sex, national origin, religion, disability, marital status, sexual orientation, arrest record, membership in the military or national guard, veteran status, and use of lawful products outside of work (such as tobacco and alcohol). For the same reason, committee members should not solicit information in an application or interview process that would likely reveal a person’s protected status in any of these categories. The Wisconsin Department of Workforce Development publishes a guide to "Fair Hiring & Avoiding Loaded Interview Questions,"
Increasing the numbers of underrepresented groups of people and achieving diversity on campus are two extremely important goals to the UWM community and throughout the UW System. UWM’s diversity initiatives have the common purpose of enhancing the diversity of our student body, faculty, and staff; improving the learning and retention of students of color; and maintaining the important access role that UWM plays in the Milwaukee community. Nevertheless, because equal employment opportunity laws prohibit discrimination, even benign discrimination in favor of underrepresented groups, there are certain steps that UWM can and cannot take to achieve its diversity goals.

First, UWM can and should carefully analyze each position description to ensure that candidates with alternative, but equally valuable, experiences are not excluded from consideration. That is, the minimum qualifications should be stated carefully so as to avoid excluding any individuals who are qualified to perform the responsibilities of the position.

Second, UWM can and should take steps to broaden the available applicant pool for each position in creative ways. For example, UWM staff may identify national professional organizations in which to advertise the position, or announce the position at national conferences attended by individuals working in that area. Search and screen committees should consider advertising in non-traditional places that may be more likely to reach minority candidates. Even better, UWM staff may make direct contact with known qualified individuals to share information about the opportunity with them. UWM can also reach out to people or organizations who may know qualified individuals.

UWM cannot, however, make employment decisions, such as whom to interview or select for the position, based on the candidate’s protected status. Instead, search and screen committee members must carefully examine each applicant's qualifications and experiences to determine which would best serve UWM’s interests, as articulated in the position description, without regard to the applicant's race, sex, age, or other protected status. The argument that an individual of a particular race or sex will be better suited to the position is generally not legally sustainable because it is based on assumptions about the person’s experiences that may or may not be valid. Instead, the committee must rely on tangible evidence of the person’s actual experiences and qualifications.

Our office often receives questions such as, "What if there are two candidates who have equal qualifications? Can the person’s race or sex or disability be used as a tie-breaker?" or "Can't a person’s particular race or sex or disability be considered a ‘plus factor’?" The clear legal answer to these questions is no. Search and screen committees must make their recommendations based on
the candidates’ qualifications in relation to the stated requirements for the position, and not based on the person’s protected status.

These concepts remain confusing to many in higher education because legal decisions in the area of student admissions allow a person’s diverse status to be considered a "plus factor" in order to promote diversity. However, the area of student admissions is legally distinct from employment decisions.

The bottom line is that hiring qualified employees who add diversity to the UWM community is desirable and beneficial. It strengthens UWM as a whole and bolsters its ability to provide students with a quality educational experience. By following the points above, UWM should be able to enhance its diversity and be able to legally defend its actions.

**The Search and Screen Committee's Presentation of Candidates to the Decision-Maker(s)**

The ultimate goal of the search and screen committee is to produce a list of candidates whom they recommend for interviews. When a search produces only one candidate, in most instances, this would be a failed search and the process should begin again, with modifications calculated to better attract a larger and more diversified pool of qualified applicants. When there are enough candidates to present a list to the decision-maker, the committee should not rank the candidates. Instead, the committee should provide the decision-maker with the names of all qualifying candidates, accompanied by positive and negative observations about each one. This practice affords the decision-maker the opportunity to make her/his own determinations without the possibility of bias that ranking could create. This is also consistent with the concept that the purpose of a search and screen committee is to find and review candidates, while the decision-maker chooses the candidate to hire.

**Application of Open Meetings Laws to the Search and Screen Committee**

The general rule for all search and screen committees is that when they act, they must do so publicly and in accordance with Wisconsin’s open meetings laws. This means that first, each committee meeting must be properly noticed to the public. This is accomplished by providing notice of the meeting to UWM’s News and Publications Department (online submissions are available at [http://www.uwm.edu/News/Open_Meet/om_instructions.html](http://www.uwm.edu/News/Open_Meet/om_instructions.html)). Second, the committee meetings must always begin in an unlocked room (preferably with an open door) that will be accessible to members of the public who wish to attend. While members of the public may not participate in the discussions, they may listen and have access to any handouts provided to committee members in open session. Third, committee members may not meet or make decisions outside of properly noticed meetings. For example, committee members may not make substantive decisions by email regarding its recruiting process.
because the public has not had the opportunity to be informed of the "meeting" or attend it.

There are times, however, when the search and screen committee may act in closed session. Most commonly, the search and screen committee may meet in closed session when it discusses and/or considers data regarding the individual candidates for the position. The Wisconsin Statutes describe two separate exceptions that allow committees to go into closed session under these circumstances:

[When] considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility. Wis. Stat. § 19.85(1)(c).

[When] considering financial, medical, social or personal histories or disciplinary data of specific persons... Wis. Stat. § 19.85(1)(f).

In order to use these exceptions, however, the meeting must be properly noticed. That is, there must be a statement in the meetings notice that explains the reason for going into closed session and that cites the statute. For example, the following statement would be sufficient:

The committee will go into closed session pursuant to Wis. Stat. § 19.85(1)(c),(f) to discuss the individual candidates’ qualifications.

Committees must also move into closed session properly. To do so, the chairperson of the committee should announce both the nature of the business to be considered in closed session and the specific statutory exemption which authorizes the closed session. In addition, of course, the chairperson’s statement of the reasons for going into closed session must be consistent with the reasons provided in the open meetings notice. The chairperson may efficiently meet all of these requirements by simply reading the quoted statement found in the above preceding paragraph (assuming this statement was also used in the meetings notice). The chairperson must then seek a motion to go into closed session, which must be carried by majority vote. The announcement, the motion, and the votes of each member on the motion should be recorded.

Once in closed session, committees should take care to avoid discussing any general business or other committee business that is not covered by the exceptions allowing the closed session. For example, committees often will want to discuss planning and scheduling for future meetings at the end of each meeting, when it knows better what is left to be accomplished. In order to do so properly, the committee must provide an additional statement in its open meetings notice to the effect of the following:
The committee will reconvene in open session to discuss planning and scheduling for future meetings.

If the committee fails to provide notice to the public that it plans to reconvene in open session after the closed session, it may not do so at this session.

Chairpersons of search and screen committees should feel free to contact the Office of Legal Affairs to further discuss the requirements of the open meetings law to ensure understanding and compliance.

Application of Public Records Laws and Other Recordkeeping Requirements to Committee Paperwork

The open meetings law is only one half of the equation for search and screen committee members. The committee must also bear in mind that all documents officially generated or received by the committee are subject to public records requests.

For that reason, the chair of the committee, or the individual providing clerical support to the chair, must maintain copies of every document generated or received as a part of the committee’s processes. This would include the applications, any and all correspondence to applicants, any and all correspondence to or between committee members (including email), any forms or procedures generated for use by the group, minutes of meetings, and any other records of official actions. The chair must also maintain a record of the committee’s deliberative processes at each stage of the search, e.g. at the time resumes are first reviewed, at the interview stage, and when references are checked. While there is flexibility in how the committee’s evaluation of the candidates is documented, Legal Affairs recommends that the committee use a short worksheet to evaluate the resumes, and a list of predetermined questions for interviews and reference checks. The committee can then designate one of its members to record the committee’s evaluation of each candidate on these forms, which can be placed in the official search and screen file.

Because Wisconsin law requires governmental bodies to apply a balancing test analysis prior to releasing public records, and also requires certain protections for any individuals named in public records, all requests for committee records should be referred to UWM’s Public Records Custodian. No individual committee member should release committee records on their own.

Individual committee members may wish to adopt some form of note-taking to help keep track of committee discussions or personal observations regarding individual candidates. Such personal notes are not subject to public records requests, and do not become a part of the official file, as long as they are prepared for the individual committee member’s own use and are not shared with anyone else, including others on the committee. Note, however, that, as
described above, evaluation of candidates must be documented for the official file.

Even though they are not subject to public records requests, committee members should still take care when creating personal notes. Committee members should not write down anything they would not want shared with others. In the (rare and unlikely) event that a lawsuit results from a search and screen process, all individual notes in existence at the time the lawsuit becomes known must be preserved while the litigation is pending and likely will be subject to subpoena by the parties to the lawsuit.

**Candidate Confidentiality**

All applicants in the search and screen process have basic, fundamental privacy interests that committee members should take care to protect throughout the process. These rights are based on several legal principles.

First, applicants have the right to indicate in writing that they wish for their identities to remain confidential up to the point they become a "final candidate." Wis. Stat. § 19.36(7). Under UWM’s policies and procedures, the committee chair sends applicants a form on which they can make this request soon after the applications are received. In order to allow all applicants the opportunity to return this form, committee members should simply avoid disclosing outside of closed committee meetings the identities of any candidates.

Second, references should be contacted only after the committee develops a procedure for doing so. If the committee determines that it will contact references that are "off the list," as a matter of fairness, candidates should first be notified of the intent to contact "off the list" references and should be given the opportunity to express any concerns, or withdraw their application, prior to contacting such references.

Third, all individuals must be notified of certain legal rights before documents that compromise their privacy or reputation interests are released to the public. This is yet another reason why public records requests, particularly those requesting records that contain information about individuals, should be referred to the Public Records Custodian. The Public Records Custodian will work with the committee to determine whether the candidate is a "final candidate" for the purpose of the open records law.

**Can UWM Employees Be Sued for Participating in the Recruiting Process?**

Having discussed all of the legal principles outlined above, committee members may wonder whether they can be sued for participating in the recruiting process. It is true that any UWM employee may be "named" as a defendant in a lawsuit at any time. However, Wisconsin law provides broad protection for
employees who are named in a lawsuit as a result of acting within the scope of their employment.

Wisconsin law states:

If the defendant in any action ... is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs ... shall be paid by the state... Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorneys fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment.

Wis. Stat. § 895.46(1).

Thus, under Wisconsin law, a search and screen committee member will be provided a full legal defense if he or she is sued relating to service on that committee. Further, if any judgment is entered against a search and screen committee member, UWM will be responsible for that judgment.

One will note from reading the statute that if a UWM employee acts outside of the "scope of employment," that employee is not protected from legal judgment. What acts are or are not within the "scope of employment" and thus protected is something that has been defined by case law. On the one hand, acts that are obviously not in good faith or within the scope of one’s employment (e.g., requesting sexual favors in return for support in the search and screen process) may not be protected. However, over the years, courts have determined that the law broadly protects employees who are in good faith performing their job responsibilities, including serving on search and screen committees.

**Conclusion**

This guide is intended to be a summary of the legal issues impacting search and screen committees, but it cannot substitute for actual legal advice. Search and screen committee members may contact the Office of Legal Affairs to discuss any of these issues further.