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Hiring & Firing: A Proper Foundation

From hiring the wrong candidate to being mired in a termination lawsuit, hiring and firing can have legal and financial risks. However, a strong legal and procedural foundation can substantially decrease these risks.

This article will discuss how to establish a hiring and firing process and recommend procedures to help ensure that time and money go toward your company's bottom line instead of its legal fees.

The Hiring Process

Properly screening job candidates helps companies find employees with the skills, aptitude, and qualities to become productive members of their workforce. Poor or ineffective hiring practices can result in unsuccessful or unsuitable employees. Since training and onboarding new employees is costly, there is a definite incentive to get it right.

Good hiring practices can help companies reduce legal risk and avoid processes that might illegally or improperly eliminate candidates. There are various laws to consider, including Title VII of the *Civil Rights Act*,¹ the *Age Discrimination in Employment Act* (ADEA),² the *Americans with Disabilities Act* (ADA),³ or any of the numerous state and local laws that prohibit preferential treatment or provide more protection for individuals in certain groups than these federal laws do.⁴

Contractors must also be cognizant of affirmative action and equal employment opportunity requirements that may be mandatory for contracts with federal, state, and some local governments.⁵

Just as a contractor wouldn't start construction on a building without the proper foundation, it should not embark on hiring an employee without addressing some preliminary details.

Job Description & Function

The first step is to determine the essential functions of the available job (e.g., carpenters must be able to construct and repair building frameworks and structures – such as stairways, doorframes, partitions, and rafters – made from wood and

other materials. They also may install kitchen cabinets, siding, and drywall.).⁶ Next, consider what certifications, knowledge, skills, and abilities are required to perform the job. For example, if hiring an engineer, is a Professional Engineer certification required? From this information, create a job description to advertise for the ideal candidate. This job description will also be helpful should there be a future discipline issue regarding job performance or a request to accommodate a disability.

The Application Process

Consider using a standard application form to consistently gather and standardize candidate information. Employers can then quickly screen applications, review pertinent sections, and eliminate unqualified applicants. And, it enables employers to review all applications objectively in the same format, helping to minimize potential discrimination claims.

Be aware that there are restrictions on what can be included in job applications. Many states and municipalities have “ban the box” laws,⁷ which prohibit employers from asking about criminal arrests and/or convictions on the application. There are also other potential issues for employers in requesting information that might violate discrimination laws. As such, it is best to have an attorney review the application to ensure it is in compliance with the law.

The Interview Process

Employers should use the interview process to evaluate applicants and further determine their qualifications for the position. It can confirm what is already known and provides the opportunity to obtain more information about the candidates' qualifications. The interviewer should be trained in how to ask proper questions. In general, questions during the interview process should be job-related, narrowly tailored, and appropriate for that point in the hiring process.

When interviewing for a particular opening, the same questions should be asked consistently of each applicant. The interviewer should avoid making any promises or statements that could be interpreted as an offer or promise of employment.

The interviewer should document each candidate's evaluation immediately following the interview and retain all records. Federal contractors should be aware that there are various time requirements for retaining employment materials, including applications.⁸

Just as with the application, there are areas of caution for the unwary interviewer to consider. Specifically, questions should be avoided that could directly or indirectly elicit such information as whether the applicant has a disability, if he or she is a member of a protected class, or about his or her marital status.

Pre-Employment Testing

Before extending an offer, companies may request that applicants undergo some pre-employment testing, which is governed by Title VII, the ADA, and laws that vary from state to state.

In general, pre-employment testing should be required of all applicants for the position regardless of membership in a protected class or disability, and it should not adversely impact protected class members; it should only be used to measure essential job functions. Finally, it should be standardized in form and use. Be aware that state or local laws may create additional restrictions on pre-employment testing.

Reference Checks

Checking references is an easily overlooked step in the hiring process. To be true, most former employers are extremely guarded in what information they will give to protect themselves from a potential defamation claim by the applicant. Additionally, applicants are not likely to provide references who would give derogatory information.

Despite that, useful information can still be obtained. Try to ask open-ended questions to elicit more than a "yes" or "no" answer. Ask the applicants what their references might say about them and use those responses to come up with questions for their references. Listen not only to the actual words that were used, but also any other clues, such as enthusiasm for a candidate. Consider using the same questions to obtain the same information for all applicants from each reference to better compare candidates.

The Offer

An employment offer should come in the form of an offer letter documenting the job description and title, terms and conditions of employment, and the employment-at-will relationship. (See sidebar at right.)

Avoid words or phrases that might indicate a promise of employment for a specific period of time or require the employer to have cause to terminate an employee. All offers should also be made contingent upon fulfillment of all other requirements, such as providing I-9 documentation and completion of a reference check, medical screening, credit check, and/or background check. If desired for the position, the signing of a trade secret agreement, a noncompete clause, nonsolicitation clause, or any other restrictive covenant should also be included.

While a written offer is ideal to avoid any dispute as to what was actually conveyed, a verbal offer is legally acceptable. A verbal offer should also follow these guidelines and be documented via an internal memo.

After the Offer

Medical Screenings

If companies wish to have applicants perform a medical or physical test, then there are further restrictions. The test must be used only for the purpose of determining the capability to perform the work, may only be required after an offer of an employment has been made, and may only test for essential job-related abilities. Again, it must be required of all persons conditionally offered employment for the same position regardless of membership in a protected class or disability.

Credit & Background Checks

Running credit checks on potential employees is also a common and regulated practice. The *Fair Credit Reporting Act*⁹ requires that employers provide separate authorization and disclosures related to all background checks, including both credit checks and criminal background checks conducted by third parties.

Before an employer takes any adverse action, such as withdrawing an offer based on the results of the background check, the employer must provide a notice of the adverse action, a copy of the report used, and a summary of the applicant's rights. It is generally advisable that the applicant be allowed to review the report before action is taken, in case of errors in the report.

If adverse action is taken because of the report, then employers must inform the applicant that he or she was rejected because of information in the report and his or her rights to dispute with the third-party agency that provided the background check.

Some employers use background checks as the final layer of review before a candidate is hired; the practice can vary from company to company.



Criminal background checks have become a hot topic recently, as the Equal Employment Opportunity Commission (EEOC) has made statements about the potential negative impact of the use of criminal background checks on minorities since they tend to experience a statistically higher rate of criminal convictions than non-minorities.¹⁰ While this position remains controversial, it is something of which to be aware when using criminal background checks.

Another issue with criminal background checks is the legality of their use. For example, Wisconsin prohibits the use of a criminal conviction against a candidate unless the conviction is substantially related to the job.¹¹ Other states have similar rules, and some are silent on the issue. As always, check with legal counsel before proceeding.

Claim Prevention & the Termination Process

Even with a solid hiring process in place, there are myriad reasons why employment may lead to termination. Perhaps employees aren't as skilled as they need to be, they keep making mistakes, or they simply aren't a good fit for the company.

With all the possible protected classes and workers' rights, how can an employer protect itself from employee claims? While it isn't possible to prevent former employees from filing a discrimination claim, it is possible to provide a defense to these claims.

Like with the hiring process, preventing and responding to wrongful termination claims starts with a foundation of solid employment policies and procedures.

Defined Expectations

The foundation of any successful employment relationship is having defined expectations that are clearly communicated to employees. These expectations may be set out in either employee handbooks or in standalone guidelines. Some policies (e.g., against sexual harassment) are generally expected while other policies (e.g., requirements for requesting vacation time) vary among employers.

In order to avoid a claim for discrimination, the employer must provide a legitimate, nondiscriminatory reason for termination.¹² An offer letter, internal policies, employment manuals, and contracts all play a role if an employee is terminated.

By having employment policies or an employee manual, employers can provide reasons for termination that relate to breach of employment policies.

Employment-at-Will

All states except for Montana¹³ follow the employment-at-will doctrine. That is, absent a contractual agreement to the contrary, an employee can be terminated at any time for any reason (or for no reason whatsoever). While the employment-at-will doctrine seems to give employers discretion and latitude in deciding whether or not to terminate employment, it does not insulate an employer from lawsuits regarding terminations.

Even with the existence of the employment-at-will doctrine, employees still have the ability to file various claims, including discrimination, retaliation, whistleblower, breach of contract, defamation, and more.

Discrimination can cover many different protected classes. The basis of a discrimination claim is an allegation that the employee was treated differently than others because he or she belongs to a protected class. Federal law protects employees from being terminated because of age, race, gender, religious preference, disability status, or other protected class. In 2014, there were 88,778 charges of discrimination lodged through the EEOC.¹⁴ Local laws can create even more protected classes.¹⁵

Similar to discrimination, it is illegal for employers to engage in retaliatory termination. A termination is retaliatory if the employee is terminated because he or she was exercising his or her legally protected right. Examples of this include complaining about discrimination or filing a workers' comp claim. These are very common in connection with harassment or discrimination complaints.

Whistleblowing stems from an employee's good-faith complaint to a third-party about a violation or suspected violation of the law (e.g., a laborer filing a complaint to OSHA regarding workplace safety conditions) and the later termination of that employee.

An employer can unwittingly create a contract with an employee in any number of ways. As previously discussed, it could happen during the interview or offer process. It could also arise in verbal representations during a performance review or due to a poorly drafted policy or employment manual.¹⁶

Further, having a well-defined job description can help provide evidence for documenting issues with the employee. For example, let's say the employee in question has a job description that requires him or her to accurately prepare an expense ledger. If the employee continually makes mathematical errors or is transposing numbers, then he or she isn't able to complete a key task of the job.

Progressive Discipline Policy

The linchpin of all employment policies is the progressive discipline policy. The "three strikes and you're out" disciplinary policies of the past are no longer the norm. That type of policy required employers to follow a lockstep procedure and keep employees at the company until they reached their third strike – regardless of the level of their offense. For example, under such a policy, the employer would not be able to fire an employee who stole money or assaulted another employee on the job if it was the first offense.

Replacing that old policy is a more flexible progressive discipline policy. While it maintains the increasing levels of severity that most are familiar with (verbal warning, written warning, termination), when drafted properly it provides employers with the ability to proceed directly to termination should the employee's behavior warrant it.

Violation Documentation

Documenting employee policy violations is important for evidence to build a case for terminating an employee or respond to discrimination claims. Any effective system requires a commitment to maintain records of written summaries of verbal warnings, performance evaluations, attendance records, and written records of disciplinary meetings with the employee. Ensure the employee's personnel file shows what policies were broken and when. It will show that the problem was addressed with the employee and given steps to correct it.

Written records can make up for fallible human memories. If a case proceeds to a hearing, documentary evidence is generally given more weight than individual recollections (i.e., it is more powerful to show a memo to an employee file about a verbal warning than a supervisor testifying that it happened). Documentation can also show similar treatment of other employees, which can be crucial in discrimination cases. Finally, showing that there was a system in place and the procedures were followed can be very persuasive in a judicial setting.

However, having a system in place does not eliminate the risks. A manager's failure to document every situation or

event can be problematic, as subsequent decisions would not appear to be supported. Moreover, improper documentation can give rise to inferred discrimination simply because of the way it was written (e.g., unwittingly admitting to discrimination based upon poor word choice).

Best Practices

Contemporaneous preparation is key. Preparing the documentation at or shortly after the time of the incident allows the facts to be fresh in the preparer's mind. Waiting until a later date to document the incident can give rise to the specter of manufacturing evidence.

A specific act should be described along with which employee policy was violated. Written statements that read more like narratives are more likely to be well received than generalized statements. Noting an employee's reaction to discussions can also be helpful. If there are several people involved in the discussion with the employee, one should be appointed to document it with the facts from others' statements.

Keep in mind that any documentation in a file can be used as evidence should a case go to trial. Toward that end, the goal in documenting incidents should be to provide a clear and concise recitation of events that can be easily understood by a third party who was not present. Documentation should always include the basic facts of the incident:

- What happened?
- What policy was violated?
- How did it impact the employer?
- What should have been done?
- What will happen upon future occurrences of the same or similar violation?

Things to exclude from documentation include:

- References to protected classes
- Descriptions of attitude (describe behavior instead)
- Inferences or assumptions
- Words that have legal consequences

The documentation should be placed in the employee's personnel file, a copy should be provided to the employee, and be sure to document that the employee received a copy.

The Parting of Ways

Once enough documentation has been gathered and the decision has been made to let an employee go, there are two ways to proceed. The first option is to simply terminate the



employee. As with the interview process, there are things better left unsaid during the termination meeting. While it is important to convey information about benefits and ensuring that company property is returned, saying too much can give rise to claims of discrimination or defamation.

The second option is to enter into a separation agreement with the employee. While both parties must agree to such an arrangement, there is generally some incentive for the employee. In a separation agreement, the employee is paid severance in exchange for waiving claims against the employer. The employee may also receive extended health care or other benefits. These documents have very technical requirements in order to comply with waiving claims under federal law (e.g., ADA, ADEA). Some states also have additional requirements for these agreements to be enforceable as well.¹⁷

If the requirements are not followed, then the agreement is unenforceable, meaning that the employee has not waived the right to sue the company. Due to the risks involved, check with your attorney when drafting a severance agreement.

Conclusion

There are many legal predicaments and issues involved with hiring and firing. Establishing a solid legal and procedural foundation in tandem with the previously listed guidelines for hiring and termination policies will help ensure the right people get on and stay on your team. ■

Endnotes

1. 42 U.S.C. § 2000e et seq.
2. 29 U.S.C. §§ 621-634.
3. 42 U.S.C. §§ 12101-12213.
4. e.g., *Wisconsin Fair Employment Law*, Wis. Stat. §§ 111.31-111.395.
5. See, e.g., *City of Madison Ordinance* § 39.03.
6. www.bls.gov/ooh/construction-and-extraction/carpenters.htm.
7. See, e.g., R.I. Gen. Laws §§ 28-5-6, 28-5-7, The Philadelphia Code § 9-3500, and Montgomery County Code § 27-72.
8. See, e.g., 41 CFR 60-1.12(a).
9. 15 U.S.C. § 1681 et seq.
10. See U.S. Equal Employment Opportunity Commission Enforcement Guidance, www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
11. Wis. Stat. § 111.335(1)(b).
12. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
13. MONT. CODE ANN. §§ 39-2-901 through 39-2-915.
14. U.S. Equal Employment Opportunity Commission Charge Statistics FY 1997 Through FY 2014, www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
15. See, e.g., Minn. Stat. § 363A.08 subd. 2.
16. See, e.g., *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983).
17. See, e.g., Minn. Stat. § 363A.31.

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