



BEST PRACTICES FOR HIRING, DISCIPLINING AND TERMINATIONS

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HIRING PRACTICES

Goals for Hiring

- Select the best possible candidate
- Conduct the selection process in compliance with law
 - Anti-discrimination laws
 - Laws protecting other employers
- Maintain the right of the Company to terminate at-will, where applicable

Potential Risks

- Lawsuit by an unsuccessful applicant
 - Hiring manager may be sued
- Claims by a competitor
 - Trade Secrets
 - Confidential Information
 - Non-Competes
- Future claim for breach of contract
 - Wrongful termination

The Best Defense

- Know the requirements of the job
- Make hiring decisions based upon qualifications for the job
- Know the law and avoid improper questions and discussions
- Carefully document decisions

Review the Qualifications

- Review and update job description
- Job descriptions are used as the standard for measuring qualifications and determining whether the rationale for the hiring decision is credible
- Review all job descriptions and ads with HR to be sure that it accurately reflects requirements of the job

Application

- Ban-the Box/Salary/Age Restrictions
- Remove inquiries that review membership in protected class
- Authority to work in United States
- Agreements with prior employer
- Prior experience and reason for termination
- At-will employment statement
- FCRA as stand-alone Document

Screening For Potential Problem Employees

- Incomplete responses
- Employment gaps
- Job hopping
- Career changes
- Relocation
- Reasons for leaving
- Laid off/terminated/ resigned/personal
- No references
- Transportation/other job conflicts

Interview Questions

Not OK

- ▶ How old are you?
- ▶ When did you graduate?
- ▶ Were you in the military?
- ▶ Where is your accent from?
- ▶ Are you legal, or are you an illegal alien?

OK

- ▶ Are you 18 or older?
- ▶ Do you have a degree?
- ▶ What did you do in the military?
- ▶ Are you bilingual, or do you speak Spanish?
- ▶ Can you provide proof of authorization to work in the US?

Interview Questions

Not OK

- ▶ Do you have reliable childcare?
- ▶ Do you have children?
- ▶ How is your health?
- ▶ Have you ever been hurt on the job?

OK

- ▶ Can you work flexible hours?
- ▶ Can you work nights and weekends?
- ▶ Can you perform essential functions?

The ADA and Applicants

Possible reasonable accommodations during hiring process

- providing written materials in accessible formats, such as large print, Braille, or audiotape
- providing readers or sign language interpreters
- ensuring that recruitment, interviews, tests, and other components of the application process are held in accessible locations
- providing or modifying equipment or devices
- adjusting or modifying application policies and procedures

Audit Documents

- Job description for the position
- Job posting and advertisements
- Employment Application
- Arbitration agreement
- Fair Credit Reporting authorization
- New hire documentation

Train Recruiters and Managers

- Content of postings/ads
- Review of applications
- Red flags
- Protected categories under federal, state and local laws
- Interviewing dos and don'ts
- Proper documentation of interviews and decisions
- Use of credit, criminal, and other background checks
- Timing of rescissions based upon 3rd party report

Mistakes to Avoid

- Doing all the talking
 - Applicant should do 80% of the talking
- Asking questions that call for a yes or no answer
- Allowing the applicant to distract you from your script
- Not exploring reasons for frequent job changes and gaps in employment
- Basing decision on impermissible basis
- Recording observations that suggest there is an impermissible basis for decision

Social Media

- Over-reliance on social media sites as a recruiting tool can result in an overly homogenous applicant pool
- Hiring practices that rely heavily on social media sites or that require screening through these sites have the potential to give rise to claims of discrimination
- Can't ask for access in Colorado

EEOC Guidance on Title VII and AI

- ***Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964***
- Examples:
 - resume scanners that prioritize applications using certain keywords;
 - “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements;
 - video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and
 - testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test.

EEOC Guidance on Title VII and AI

- Employer administering may be responsible for Title VII violation even if the test was developed by an outside vendor.
- EEOC recommendations for employers:
 - ask the vendor, at a minimum, whether steps have been taken to evaluate whether use of the tool causes a substantially lower selection rate for individuals with a characteristic protected by Title VII.
 - if the vendor responds that it does, the employer should consider whether use of the tool is job related and consistent with business necessity and whether there are alternatives that may meet the employer's needs and have less of a disparate impact.
 - BUT, if the vendor responds that it does not and is incorrect and the tool does result in either disparate impact discrimination or disparate treatment discrimination, the employer could still be liable.

EEOC Guidance on Title VII and AI

- Encourages employers to conduct self-analyses on an ongoing basis to determine whether their employment practices have a disproportionately large negative effect on a basis prohibited under Title VII or treat protected groups differently.
- Does not provide clear guidance on how to measure.
- Traditionally, a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate “was regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”
- However, in the AI Guidance the EEOC said that it might not consider compliance with the rule sufficient to show that a particular selection procedure is lawful under Title VII when the procedure is challenged in a charge of discrimination.
- Generally, employers can proactively change the practice going forward.

DISCIPLINING

Benefits of Performance Evaluations

- They accomplish important objectives
 - Goal setting and motivation for the employee
 - Reinforces good performance (and the reverse)
 - Basis for raises, bonuses, and promotions
 - Makes record (good/bad) for legal defense



Drawbacks of Performance Evaluations

- The halo effect – overly positive reviews
 - E.g., one category winners; long-term employees; favored employees; employee hired by reviewer; managers afraid of confrontation
- The hard grader (and proud of it)
 - Managers attempting to compete with other divisions or departments may be overly critical
- Imprecise measurement
 - Performance, as opposed to the person, is difficult to objectively measure
- Unnatural timing
 - Evaluating long after problematic performance or conduct has occurred is difficult

Delivering the Evaluation

- Schedule meeting at appropriate time
- Be ready to justify ratings
- Do not attempt to soften the blow – skip the small talk
- Get the form signed
- Keep the signed form
- Don't make a promise of continued employment – including “you have 30 days to improve”



After the Evaluation

- Do not discuss evaluation scores with other employees
 - But assume they will all learn how others were reviewed
- Don't wait until next year to deal with problem employees
 - There is a certain implied "improved" rating when there is no further action



Verbal Warning



Constructive – the goal is to fix the problem

Talk with employee

Review responsibilities and explain expected conduct

Explain how employee failed to perform

Give the employee an opportunity to explain

Document date, time and topics discussed

Written Warning

Issue disciplinary warning notice

Indicate that employee must improve or not allow conduct to occur again

Set time for improvement when appropriate

Set reasonable goals and standards

Have a witness sit in

Place copy in employee's file

How to handle refusal to sign



Delivering The Write-Up

- Require employee to sign
 - *Consider persuasive techniques*
 - *Just get them to write on the document*
- Witness
 - *As substitute for signature*
 - *To confirm what you said*
 - *Use an appropriate person*
- Be polite but **STAND FIRM**
 - *Provide reasons – not excuses*

Documenting Discipline

- Category One: Misconduct, where investigation is the key
- Category Two: Performance, where fair notice is the key



The “CLEAN” Doctrine - Misconduct

Consider

Consider the facts behind discipline.

Learn

Learn what managers, witnesses, and documents have to say.

Evaluate

Evaluate what disciplinary action has been taken in the past.

Analyze

Analyze risk.

Narrow down

Narrow down potential options and decide.

The “NEAT” Doctrine – Performance Issues

Notice

does the employee know about the standard?

Explanation

how is the employee's performance sub-par?

Assistance

what can the Company do to help?

Time to Improve

fairness principle

TERMINATIONS



The Termination Decision

- Most litigation stems from the termination decision, so it is important you evaluate for potential liability.
- Recognizing Red-Flags
 - Discrimination traps
 - Harassment liability
 - Failures to properly engage or accommodate disabled employees
- Document, document, document
- Take all complaints seriously and respond appropriately

Seek guidance from Human Resources!

Protected Categories

1. Age
2. Ancestry
3. Color
4. Religious creed
5. Denial of FMLA rights
6. Disability
7. Martial Status
8. Medical Condition
9. Genetic Information
10. Military and Veteran Status
11. National Origin
12. Race
13. Sex
14. Gender *[Non-Binary identification and expression]*
15. Sexual Orientation

Drafting Termination Documents

- Track warning language
 - *Wrap-in prior warnings and use same language*
- Be truthful
 - *Don't sugarcoat it*
 - *Don't say it was a downsizing if it wasn't*
 - *Avoid Defamation*
- Be complete
 - *What you leave out may be the very reason you want to use in court*
 - *Create fallback arguments*
- Avoid vague language

Paperwork



Review existing documents

- Handbook policies (probationary period)
- Past discipline for this employee and other employees

Considerations in drafting disciplinary notices

- What were the results or effects of the employee's actions or inactions?
- **Example:** "Joe's failure to clean the line resulted in the Company having to destroy a full shift's run of tablets."

Use the "5 W's": who, what, when, where, and why.

A third party should be able to read the document and understand what happened.

Paperwork

Record exact quotes and avoid labels:

- Write “She said, “This is bullshit. I’m out of here” not “She used profanity and left.”
- Write “Employee refused to wear his dust mask after I instructed him to do so.” not “Insubordination.”

Document facts, not conclusions:

- “Her walk was unsteady, she grabbed the table for support, she slurred her words, and she smelled of alcohol” not “She appeared drunk.”
- “Joe violated the Company’s no harassment policy” not “Joe sexually harassed an employee.”

Potential Problem “Reasons”

Things just aren't working out

Going in a different direction

We've decided to make some changes

I don't have to give you a reason

I no longer need your services

I found someone better than you

Your position has been eliminated

We are laying you off





Q & A

Thank You

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