Tips For Hiring and Firing: What Every Business Owner Should Know

Although it may not always be the most pleasant aspect of the job, hiring and firing is an essential part of running every business. In order to prevent potential lawsuits, all employers should be aware of the following simple, although not always obvious, employment law tips.

HIRING

1. Follow Anti-Discrimination Guidelines.

All pre-employment inquiries, whether on advertisements or applications, during interviews or informal lunches, must comply with anti-discrimination laws. As such, employers must avoid any and all language indicating employment limitations or exclusions based on race, national origin, color, religion, age, sex, marital status, sexual orientation, or disability. Although the need to follow such laws might seem obvious, slipping into suspect areas is easier than one might think. For instance, the following are examples of prohibited discriminatory language:

- “Seeking bright, aggressive female” – Discriminates against sex
- Need someone “willing to work on his/her feet.” – Discriminates against disabled persons
- Looking for “young, energetic” applicants – Discriminates against age
- “Are you a U.S. citizen?” – Discriminates against ethnicity
- “Family people” seem to do well here – Discriminates against marital status

The best option for employers is to stay away from any language that could potentially be interpreted as discriminatory. If an inquiry appears at all suspect, employers should change the language and/or consult an attorney. For further information regarding compliance with the Americans with Disability Act (ADA), review the U.S. Equal Employment Opportunity Commission (EEOC) guidelines detailing the types of disability-related questions an employer may and may not ask of an applicant. The guidelines are available on the EEOC website at http://www.eeoc.gov.

2. Preserve the At-Will Employment Relationship.

Most states either have “at-will” employment or “presumption” of the at-will relationship. “At-will” employment is generally defined as “an employment, having no specified term, [which] may be terminated at the will of either party.” This means, in theory, an employer and/or employee may terminate an employment relationship, at any time, with or without cause, with or without notice.

An at-will presumption may be rebutted by evidence of a written or oral contract agreeing to terminate the employment relationship only for good cause. Employers desiring to maintain the at-will nature of employment should not enter into such contracts. Potentially more
dangerous, however, is the possibility of creating an implied-in-fact contract. Even where no express written or oral employment contract has been formed, courts have construed a variety of factors, such as length of employment, promotions or commendations, and lack of criticism received by the employee, to find an implied contract of continuing employment. For example, the following phrases might be construed as implying an employment contract for a specified duration:

- “Secure position”
- “Like one big happy family”
- “Do a good job and you'll always have a job”
- Asking for candidates willing to make a “long-term commitment to the company”
- “Don't worry, we'll always find a place for you”

If an implied contract is found, employers who do not have evidence substantiating “just cause” for a termination, may have a very difficult time defending wrongful termination lawsuit.

The best way for employers to protect themselves is to express, in writing, their at-will employment policy. Employers should repeat the policy over and over, in employment applications, employee profile forms, employee handbooks, and more. To that end, employers should obtain a signed, written acknowledgment, from every employee, agreeing to the at-will employment relationship and specifying the exclusive way to alter such status.

3. Create an Effective Job Application.

In addition to gathering relevant information, employment applications serve another worthy purpose --- they can be designed for damage control in anticipation of the possibility an applicant/employee may sue for defamation, invasion of privacy, wrongful termination, and more.

An effective job application should contain:

- An authorization to check all information listed by the applicant, including references, work record, education and other matters related to the employee’s suitability for employment. Checking this information helps protect employers from potential “negligent hiring” lawsuits
- A statement that all answers given by the applicant are true, and any omissions or false information are grounds for rejection of the application or for termination.
- A clause preserving the presumption of an at-will employment relationship.
- Language advising applicants the employer may conduct a review of their public records, such as records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment. Note, in some states, however, employers who receive information about applicants from public records must provide the applicant with a copy of the public records within a specified number of days, unless the applicant waives the right, in writing, to receive such information.

Additionally, employers should require applicants to separately initial each of these sections. By drawing attention to the specific provisions, employers weaken any potential claims by applicants alleging they were not made aware of what they were signing.
FIRING

1. **Track Employee Performance.**

   Document, document, document…

   Maintaining written documentation of employee performance benefits employees who perform well because employers then have a record on which to base promotions and raises. Moreover, evaluations ensure employees know their employers recognize their strengths and quality work. Employees who are performing well but are not given evaluations may feel as though they are not appreciated and their work is not noticed or valued.

   Tracking poor employee performance also ensures employers have the critical documentation to discipline or terminate those employees when necessary. It also enables employers to defend against meritless unemployment insurance, discrimination, or wrongful termination claims. Further, evaluations provide poor performing employees with ways to improve their performance, as well as the incentive to do so.

   Whether the employee performs well or poorly, the most important thing for an employer to remember is to evaluate *honestly*. The documentation should accurately reflect how the employee is truly performing.

2. **Train Managers Thoroughly.**

   It is essential managers and supervisors follow the law, company guidelines and policies. Otherwise, employers will likely be the ones held responsible.

   As such, employers should ensure all managers and supervisors know how to:

   - Handle problem employees;
   - Prepare honest and thorough performance evaluations;
   - Discipline employees;
   - Avoid sexual harassment; and
   - Ensure implied contracts of continuing employment are not created.

3. **Consider Potential Claims Prior to Terminating Employment Relationships.**

   Before terminating an employee, make sure to have documentation establishing the termination is based on legitimate, non-discriminatory reasons. Moreover, considering the following list of topics can help employers become alert to potential legal issues which could follow a termination.

   - Were any state and/or federal laws potentially violated (is the employee physically or mentally disabled, pregnant, etc.)?
   - Are there any employment contracts (written, oral or implied) specifying the duration of employment or the terms for termination?
   - Are there any company policies which may limit the employer’s right to terminate the
employee (notice requirement, progressive discipline plan, etc.)?

- Is the employee eligible for unemployment insurance?
- Are there any potential legal ramifications if you do not terminate the employee?

Hopefully, these simple tips will provide employers with a foundation upon which to base their hiring and firing practices. However, as the different state and federal laws surrounding hiring and firing can be very tricky, the best advice for employers is to educate themselves when questions or confusion arise. Time spent preventing a lawsuit is time well spent.

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