

# Hiring and Firing: Legal Do's and Don'ts for Crucial HR Functions

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# Why Good Hiring Matters

- Hire good performers
- Not hire toxic employees
- Minimize legal risk



# Legal Risk

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- 42 U.S.C. § 1981
- Pregnancy Discrimination Act
- Uniformed Services Employment and Reemployment Rights Act (USERRA)

# Protected Class

- Race
- Gender
- Religion
- National origin
- Disability
- Age
- Pregnancy
- Military service

# Pre-Employment Procedures

- Understand legal risks
- Prepare and review job descriptions
- Train managers and other hiring personnel on policies
- Use the same application or other paperwork for all employees or class of employees
- Standardize interview process

# Job Descriptions

- Not required under federal or state law
- Useful in hiring, establishing compensation, and managing employee performance



# Job Descriptions – Elements

- Job title
- Job classification
  - Exempt v. nonexempt
  - Full-time v. part-time
  - Regular, temporary, or seasonal
- Duties
- Qualifications
- Physical requirements
- Additional information

# Job Descriptions

- Duties – essential job functions. What the employee will be doing on a day-to-day basis.
- Qualifications –
  - Education level
  - Licenses or certifications
  - Prior work experience
  - Skills
  - Traits



# Legal Impact of Job Descriptions

- Disability accommodation
- Religious accommodation
- FLSA classification
- Managing employee's return from leave
- Discrimination claims
- Immigration

# Job Descriptions – Best Practices

- Analyze the job – what does this employee do?
- Describe the job. BE SPECIFIC!
- Include a disclaimer that the description is not intended to be comprehensive.
- Review job description by supervisor.
- Have employee sign.
- Review and update as necessary.

# Medical exams, background checks, and credit histories

OH MY!

# ADA & Medical Examinations

- Never permitted before an offer is made.
- May require medical examination if ALL employees in that job classification are required to pass medical examinations.
- May only withdraw offer if supported by business necessity AND no reasonable accommodation can be made.

# Background Checks

- Do not run a criminal history before making job offer.
- If using criminal histories, ask about history on job application AND make it clear that arrest/conviction will not automatically disqualify candidate.
- Conduct individualized inquiry if past arrests/convictions.
- **BE CONSISTENT!**

# Credit Histories

- Governed by the Fair Credit Reporting Act (FCRA)
- Most employers use a third-party reporting agency
- Any communications regarding a person's credit, character, reputation, personal attributes, or lifestyle that are used in making employment decisions

# Credit Histories

- Employer obligations under FCRA
  - Must notify individual BEFORE credit report is pulled
  - If taking adverse employment action based on credit history, must notify individual BEFORE action
  - Must wait “reasonable” time between obtaining report and taking action
  - Notice must satisfy requirements under FCRA

# Integrity Testing

- Evaluates candidate's propensity for truthfulness
- Generally accepted
- Want verification of no disparate impact
- Do NOT use tests that evaluate mental health



# Drug Testing

- Only after job offer is made
- Follow policy
- Allow for retesting if positive result
- If no policy, do not require pre-employment drug testing
- Be consistent!

# Noncompete Agreements

- Governed by state law
- Codified at Ala. Code § 8-1-190
- To be valid, a noncompete agreement must be reduced to writing, signed by all parties, and supported by adequate consideration.

# Noncompete Agreements

- Ala. Code § 8-1-190 provides that contracts restraining competition are void EXCEPT if they preserve a protectable interest by:
  - Limiting ability to hire or employ employee where employee holds a position uniquely essential to management, organization, or service of the business;
  - Limiting commercial dealings to each other;
  - Limiting sellers of good will to specific geographic region;
  - Prohibiting current employee from soliciting current customers; or
  - Upon dissolution of entity, partners/owners/members may agree to not engage in similar commercial activity in geographic area.

# Protectable interest

- Trade secrets
- Confidential information
- Commercial relationships
- Customer, patient, vendor, or client good will
- Specialized and unique training involving substantial business expenditure directed at a particular employee (but has to be in writing)
- NOT general job skills

# Noncompete Agreements

- Void if overly broad or unreasonable in duration
- Typically 12-18 months is reasonable
- Blue pencil rule: court may rewrite agreement to make duration and geographic scope more reasonable

# Nonsolicitation and Confidentiality Agreements

- Generally enforceable
- Again, need to be in writing, signed by all parties, and supported by consideration



# Verifying Immigration Status

- Immigration Reform and Control Act of 1986
- Required employers to verify eligibility
- Form I-9 must be completed
- Alabama also requires employers to use E-Verify
- Must verify and complete authorization paperwork on first day of employment

# E-Verify

- Online system to verify employment eligibility
- Maintained by Department of Homeland Security and Social Security Administration
- Free to use
- Mandatory in Alabama



# Terminating Employees – Issues

- Performance Evaluations
- Discipline v. Discharge
- Termination

# Performance Evaluations

- BE HONEST!
- Avoid negative statements associated with a protected class
- Use specific language and examples

Remember this is part of your **record keeping**

# Putting a Discipline Policy in Place

- Communication
- Sets expectations
- Creates necessary procedures
- Helps supervisors
- Risk management

# What if there is no specific policy?

Look to other policies.

# Discipline v. Discharge

- First step: Investigate
- Second step: DOCUMENT, DOCUMENT, DOCUMENT
- Third step: Evaluate
  - Automatic discharge
  - Progressive discipline

**Be consistent!**

# Automatic Discharge

- Look to your policy!
- Common grounds:
  - Lying on application
  - Workplace violence/threats
  - Stealing
  - Property damage/destruction (intentional)
  - Major safety violations
  - No show

# Progressive Discipline

- Again, look to your policy.
- Common grounds:
  - Attendance/tardiness issues
  - Minor safety violations
  - Poor job performance
  - Poor communication/interpersonal skills
  - Insubordination
  - Other misconduct

# Progressive Discipline Procedure

1. Oral reprimand
2. Written warning
3. Formal punishment
4. Termination





# Alternatives to Discharge

- Changes in pay
- Transfer
- Demotion
- Resignation

**You've decided to  
discipline/discharge an  
employee.**

**Now what?**



# Discipline Letter

- What is the problem?
- What does the employee need to do to solve the problem?
- How long does the employee have to solve the problem? – Last chance?
- What will the employer do to help the employee?
- Consequences

# Discharge Letter

- Date and time of discharge
- Benefits the employee will be given
- COBRA and HIPAA notices

Should I include the REASON for termination?

# Minimizing Risk During Termination (the Dos)

- Have a witness in the room
- Keep the meeting private
- Be considerate
- Be honest
- Remind employee of non-competition/non-disclosure agreements
- Arrange for return of company equipment
- Cut off computer/email access
- Allow employee to gather personal belongings

# Common Mistakes to Avoid (the Don'ts)

- Not documenting discipline or discharge meeting
- Not involving legal counsel
- Being too nice
- Not having at-will disclaimer in handbook
- Taking the bait

# Terminating Employees on Leave

- Types of leave:
  - ADA
  - FMLA
  - Military
  - Personal/vacation

# Terminating Employees on Leave

- Issues to consider:
  - What type of leave is involved?
  - Did the misconduct occur before leave?
  - Was termination discussed before leave?
  - Is there any documentation?



# Separation Agreements and Releases

- Need to be in writing and supported by consideration
- All claims must be expressly released
- For Age Discrimination in Employment Act claims, must give 21 days to review PLUS 7-day revocation period
- May be the best money you spend!

# Questions?

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