

HR LAW UPDATE AND HOW IT AFFECTS PRACTICE OPERATIONS, HIRING, RECRUITING INCENTIVIZING

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LEARNING OBJECTIVES

- Legal Pitfalls To Avoid In Recruiting And Hiring
- Drafting Legal, Effective Applications, Job Descriptions, And Handbooks
- Disciplining and Discharging In A Manner That Reduces The Risk Of Litigation
- How To Comply With Wage And Hours Laws



EFFECTIVE RECRUITING AND HIRING

■ Chronology

- Creating job description and posting job opening
- Accepting applications
- The interview
- Screening references
- Selecting an applicant
- Making a contingent job offer or sending rejection notice
- Conducting background checks

ADVERTISEMENTS



- Employers should avoid sex-reference language in job titles (i.e. “server” instead of “waitress”)
- Employers must avoid language that explicitly or implicitly suggests a preference for a particular race, color, religion, national origin, sexual orientation, sex, or age group unless such preference is a bona-fide occupational qualification
- Use equal opportunity employer language
- Though most employers are not required to post job openings, when you do, accurate, concise descriptions are important.
- Briefly outlining job and expected hours of work avoids potential applicant confusion about job at issue.
- Include Equal Opportunity Employer language and avoid language that could offend any group protected under the law.

JOB DESCRIPTIONS



- The description should include:
 - Description of physical and mental demands of job.
 - Objectives to measure performance.
 - The essential functions of the job should be clearly identified.

- Why are job descriptions important?
 - As a resource for hiring, both in determining the minimum qualifications for a job and putting the employee and/or applicants on notice of what is expected of them.
 - As a guide for physicians to use in pre-employment and return-to-work physical examinations.
 - Provide companies with a legal defense to challenges which can arise under the Equal Pay Act, The Fair Labor Standards Act, Title VII, and The Americans with Disabilities Act, among others.
 - Help supervisors focus on prioritizing the duties and responsibilities of the position in relation to the overall mission and goals.
 - A clear delineation of characteristics or qualifications is necessary to “weed out” unqualified candidates.

APPLICATIONS



■ Accepting Applications

- What you should ask on a job application:
 - Name, address, phone number, e-mail, and other contact info
 - References
 - Job history
 - Requested wage
 - Days and hours available to work

- Notices:
 - Equal Opportunity Employer
 - The application does not constitute a contract or promise of employment.

APPLICATIONS (CONTINUED)



- What should not be contained in applications
 - Questions which directly or indirectly seek information about race, age, sex, national origin, disability status, or any other protected characteristics
 - Age or date of birth inquiries
 - Place of birth or questions about national origin or ancestry
 - Inquiries as to marital status, pregnancy, number of children, child bearing, or child care
 - Arrest records inquiries
 - Financial status inquiries
 - Weight inquiries
 - Handicap and disability inquiries

BACKGROUND CHECKS



- The Fair Credit Reporting Act (FCRA) is a federal law requiring that very specific requirements are met for background checks conducted by consumer reporting agencies
- Informed consent should be obtained on a stand-alone acknowledgement form
- Failure to follow FCRA rules exactly can result in statutory penalties, attorneys fees, and punitive damages
- There has been an increase in class action FCRA lawsuits against employers

BACKGROUND CHECKS (CONTINUED)



■ Background Checks

- Do not obtain background check without legally complaint consent if you will be securing information from a consumer reporting agency
- Do not act upon a background check without following all requirements in the FCRA
- Do not terminate or fail to hire based upon background check without first providing a pre-adverse report along with a copy of his/her rights under the FCRA, and then, later a notice of adverse action (i.e. refusal to hire)



INTERVIEWS

- **Specific considerations during interviews**
 - If possible, utilize individuals with HR experience to conduct interviews
 - **Discrimination**
 - **ADA**
 - The EEOC issued guidelines for employers on what kinds of inquiries are illegal under the ADA
 - Inquiries are illegal if they seek to, or are likely to, elicit a response that requires disclosure of the existence, nature, or severity of a disability. Questions concerning the employee's abilities, including the ability to perform the job are allowed. Thus, the way the employer asks the question is often the key to determining whether an inquiry is prohibited or allowed.
 - Accommodations for hiring process—Employers are allowed to ask applicants to identify if they will need reasonable accommodations for the hiring process.
 - Attendance—The employer may state the attendance requirements, such as no more than one absence per month, and ask if the attendance requirements can be met. In this way, the employer avoids making direct inquiry about a potential disability, and instead focuses in on the information desired.
 - Ability to perform job-related functions—The employer may describe the job functions and then inquire about whether the individual can perform the job.



INTERVIEWS (CONTINUED)

- **What Can I Ask?**
 - What were your job duties in your prior job?
 - What type of work do you like the least and why?
 - What was the most difficult work for you?
 - What types of work do you like best?
 - What is the easiest work for you?
 - Have you ever been disciplined or warned in a previous job?
 - What type of programs, machines, etc. are you familiar with?
 - What experiences have you had in the type of work at issue?
 - What skills do you have that would assist you in performing the job?



REFERENCES

■ References

- Put yourself in the shoes of the person giving the reference. They want to protect themselves against:
 - Defamation claims from the applicant.
 - Retaliation/discrimination claims from the applicant.
 - Invasion of privacy claims from the applicant.
 - Negligent referral claims from you.
- Expect:
 - Relatively neutral job related information that has been documented in the employee's file.
- Do not expect:
 - Details of job performance.
 - To be able to talk to the applicant's immediate supervisor or those who have worked closely with the applicant as HR will normally be providing references.



JOB OFFERS

■ Making a Job Offer

■ Consider

- Avoiding employment agreements that employee could later attempt to enforce.
- Restrictive Covenants
- Arbitration Agreement

■ Independent Contractor vs. Employee?

- Utilize Independent Contractor Agreement setting out type of work, method of payment, etc. if the person will be labeled as an independent contractor



HIRING PROCESS

■ Sending a Rejection Letter

- Applicants usually appreciate receiving notification that you have received an application/resume and updates as to the status of their application.
- There is no legal requirement that you send such acknowledgments or an eventual rejection letter.
- If you choose to send a rejection letter, keep it brief and neutral.
- Remember to keep documentation, such as your interview notes, regarding your legitimate, non-discriminatory reasons for rejecting the candidate's application.



TESTING CANDIDATES

- Medical Testing

- Pre-employment- prior to making a job offer to an applicant, no test can be conducted
- Post-offer
 - Must be consistently applied to particular positions designated for testing and tailored carefully to gather only the necessary information
 - Tests or selection criteria may not be used if they would exclude disabled individuals from consideration, unless they are job related and consistent with business necessity
 - The tests must be related to essential functions of the position at issue

- Personality Testing (Not Recommended)

- Psychological and personality tests are risky but generally permitted so long as the test is used to determine such things as motivation, honesty, tastes, habits, leadership skills and personality.
- If the test is geared toward measuring mental health, then it is a medical test that may be performed only after offer has been made
- Psychological evaluations are medical tests if “they provide evidence that would lead to identifying a mental disorder or impairment”

- Drug Tests

- Testing for illegal drugs is permissible under the ADA. Tests should be done at the post-offer, pre-employment stage

- Criminal Background Checks

- EEOC Guidelines
 - Beware of the current EEOC focus on claims that background checks are being used by employers to discriminate against minorities. Convictions used to disqualify individuals should be related to the job at issue
- Ban The Box Laws
 - Some states and municipalities are passing measures that, with limited exceptions, prevent use of criminal background checks or asking about criminal history until after a conditional offer of employment has been made



ORIENTATION AND TRAINING

■ Orientation and Training

- Explain policies and ask whether there are questions.
- Have employee sign employee handbook acknowledgement and acknowledgement of separate policies.
 - Retain signed forms in the employee's personnel file.
 - Secure new signed acknowledgement forms each time the handbook and policies are updated.



EMPLOYEE FILES

- **Creating an Employee's File**
 - General personnel file should include W4 forms, application, performance reviews, discipline, etc.
 - I9s should ideally be kept in a separate file
 - Separate medical File- including doctor's notes, requests for accommodations, FMLA paperwork
 - Pay and Time Records - easier to respond to an audit if this information is organized and kept separate from other records



RECORD RETENTION

- It is recommended that employers keep personnel files for at least 5 years due to potential wrongful discharge and other legal claims.
- Per HIPPA, protected health information (PHI) must be kept for 6 years from the date it was created or from the date it was last in effect, whichever date is later.
- Payroll records must be kept at least 3 years for purposes of compliance with FLSA.
- Under ERISA, disclosure of ERISA plan description and summary annual reports must be kept for 6 years after the filing date.
- Under OSHA, employee hazard exposure records and related medical records must be kept for the duration of the employee's employment plus an additional 30 years.



RECORD RETENTION (CONTINUED)

- **Documents related to job openings**
 - You should also retain documents for at least one year for applicants who did not receive a job offer:
 - Job Posting
 - Application
 - Interview notes
 - Outline of reasons that the applicant was not offered the job.

HANDBOOKS



■ Employee Handbooks

- **Anti-discrimination/harassment policy**
 - Should not commit employer to additional obligations above and beyond what is required by law
- **Whistleblower policy**
 - More important now in light of the increase in common law wrongful discharge litigation
- **Employee benefits provisions**
 - Refer to any applicable plan documents
- **Attendance**
 - Set expectations and clear procedure for employees to use for notifying managers of absences
- **Discipline**
 - Don't limit the company's right to discipline or terminate. Use broad language.
- **National Labor Relations Board**
 - Be aware of language that the NLRB has recently indicated violated the NLRA rights of employees to engage in concerted activity with respect to wage, hours, and other terms and conditions of employment
- **At Will Employment**
 - Confirm that employees are at-will employees subject to discharge for any lawful reason
- **Amendments**
 - Reserve employer's right to amend handbook at any time and clarify that the handbook is not a contract

DISCIPLINE AND DISCHARGE



- Put employees on notice of expectations through published policies, rules and handbooks
- Documented and/or witnessed conversations with the employee during discipline process
- Prior counseling, written warnings, etc. acknowledged by employee in writing
- Remembers Jurors dislike unreasonable rules/unilateral actions

DISCIPLINE AND DISCHARGE (CONTINUED)



- **Decision Knowingly Made Based on Facts**
 - Establish an adequate investigation
 - Secured co-worker statements and/or affidavits prepared near the time of the events
 - Establish that the employee was provided with “notice” and an opportunity to “respond” (i.e. due process) prior to the termination
 - Avoid the quality of the investigation from becoming the focus of the trial
- **Establish the violation by the employee**
 - While the employee has the burden of proof, it is critical that the employer be able to document and establish the legitimate, non-discriminatory reason for the discipline or discharge
 - Avoid swearing matches between employee and the employer; document, document, document!

DISCIPLINE AND DISCHARGE (CONTINUED)



- **Establish Employee Was Treated Consistently**
 - Fairness implies equal, consistent treatment for all employees for the same offense
 - Employee will typically focus on different treatment for similarly situated employees as a means to avoid confronting the consequences of his/her actions
 - Jury often is willing to infer discrimination or wrongful termination from different treatment despite the justification to the contrary by the employer
- **Rely on Previous Discipline That Led Up To Discharge**
 - Less likely to infer discrimination or wrongful termination if employee was provided with multiple chances to correct bad behavior or attendance problems
 - Poor employees rarely won up to the shortcomings in their performance, good documentation will help contradict a story by the employee that he/she was the model employee
 - Past discipline will case doubt on employee's credibility or sympathy

EMPLOYMENT AT-WILL



- Under Missouri employment at will doctrine, in general, an employer can discharge an at will employee for any reason or no reason.
- However, more and more statutory and common law exceptions to the at will employment doctrine have been created over time

EMPLOYMENT AT-WILL EXCEPTIONS



- **Exceptions to the General Rule- Federal Edition**
 - **Title VII of the Civil Rights Act of 1964**
 - Prohibits employment discrimination based on race, color, religion, sex or national origin
 - **Age Discrimination in Employment Act of 1967**
 - Prohibits employment discrimination against people at least 40 years of age
 - **Americans with Disabilities Act**
 - Prohibits discrimination against “qualified” individuals with a “disability”
 - **Civil Rights Act of 1991**
 - Provide a cause of action for discrimination during employment on account of race and provides for a jury trial and expanded remedies for Title VII and ADA cases
 - **Family and Medical Leave Act**
 - Provides up to 12 weeks unpaid leave due to, among other things, an employees “serious health condition”
 - **Employee Retirement Income Security Act**
 - Prohibits discharge or discrimination for exercise of rights under employee benefit plan
 - **Pregnancy Discrimination Act**
 - Prevents discrimination on the basis of pregnancy, childbirth, or related medical conditions

EMPLOYMENT AT-WILL EXCEPTIONS



■ Exceptions to the General Rule- State Edition

■ Missouri Human Rights Act

- Prohibits employment discrimination on account of race, color, religion, national origin, sex, ancestry, age or disability.

■ Common Law Wrongful Discharge

- Employee must establish he was discharged for refusing to perform an illegal act or that he was discharged for complaining about an allegedly unlawful activity

■ Service Letter

- Upon proper request, the employer must advise the former employee as to the “nature and character of services rendered, the duration thereof and truly state for what cause, if any, such employee was discharged or voluntarily quit.”

■ Breach of Contract

- Employees can assert claims based on an employment contract entered into with the employer which may provide employment for a specific number of years, discharged only for certain reasons, etc.

WAGE AND HOUR LAW



- Wage and Hour

- FLSA

- FLSA claims are the most commonly litigated employment lawsuits in the federal court system.
 - Can be prosecuted by the Department of Labor or by individuals.
 - The more than 8,100 FLSA lawsuits in 2014 was a record high.
 - It is essential that employers retain documents related to payroll and time cards to protect against such litigation.

WAGE AND HOUR LAW (CONTINUED)



■ Wage and Hour

■ Minimum Wage Requirements

- Requires that employers pay non-exempt employees minimum wage of \$7.65/hour
- If employees are required to purchase their own uniforms, tools or supplies or must drive their personal cars during working time, you must ensure these expenses do not effectively reduce their wage to less than minimum wage

■ Overtime Requirements

- Requires that employers pay appropriate overtime to non-exempt employees
- 1 ½ times the regular rate for each hour worked over 40 in a one week period, non-discretionary bonuses increase the regular rate for purposes of calculating overtime pay
- Each 7 day workweek stands by itself

WAGE AND HOUR LAW (CONTINUED)



■ Wage and Hour

■ Determining Hours “Worked”

- Employers are responsible for keeping accurate records of time worked by non-exempt employees
- Employer should discipline employees for failure to properly record time or for failing to follow clock in/clock out procedures
- Employers should always pay employees for time worked
- Breaks
 - Meal periods- employee should be relieved of all duties during meal period
 - Rest periods- rest periods of 20 minutes or less during work day should be counted as hours worked
 - Length of unpaid Breaks- best practice to ensure that unpaid rest of meal periods are at least 30 minutes long
 - Training Time- time spent in required work related training is typically considered compensable time
 - Travel time- commute time to and from work at the beginning and end of the day is generally not compensable. However, travel during the work day such as from job site to job site is generally considered compensable work time

QUESTIONS

