

# EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

## Effective and Legal Hiring Re-energize your Hiring Practices

Most managers have come to realize that their most troublesome personnel problems are almost always rooted in poor hiring decisions. Poor performance, employee conflict, and countless other workplace problems too often confirm a manager's "gut feeling" that something was not right even before the employee was hired. And with so many experts offering conflicting advice on how to "hire smart", it's no wonder that the number one complaint of manufacturing managers is the inability to "find the right people".

Recently, these managers have been swamped by ads and direct mail touting scientific – or scientific-sounding – approaches to the hiring dilemma. The allure of any such approach is that it promises an easy and reliable fix to a complex issue. Proponents of behavioral interviewing, for example, will teach you a formula of questions designed to reveal those candidates most likely to thrive in your work environment. Psychological assessment testing promises to reveal those best-suited to your production, sales, managerial or executive work environments. Now, "emotional intelligence" assessments promise to help you recognize, evaluate and match an individual's complex personality traits to equally unique and complex workplace dynamics. It

sounds a lot like an online dating service search for "true compatibility"...and, truth be told, it is.

But, like successful matchmaking, a successful hiring often requires a more artistic than scientific approach.

**Recognize that hiring itself is a critical job function.** Like an artist must learn how to use a paintbrush, managers must learn the basic skills necessary to hire quality employees. They must also learn that they will be held accountable for practicing those skills. Accordingly, recruiting/hiring must be viewed by all employees in your company as a valued job function, not a random or ad hoc event. So, train your managers how to interview and select the best applicants. Observe them in the process to ensure that they are putting these skills into practice. Evaluate them based, in part, on the skill with which they utilize the techniques they are taught. Assuming that the techniques are sound, their skillful application will generally yield the best hires.

**Consider a continuous process.** Most businesses begin to think about hiring when they are under the gun. An employee leaves, sales are tanking, or some other crisis prompts a frazzled executive to conclude "we need someone immediately". While some hiring will always be targeted to fill an immediate and unforeseen

opening, the best hiring is part of a well-conceived plan, where your business needs are anticipated and available talent is actively recruited to meet a longer term goal, and not a quick fix for an organizational problem. Toward that end, create a hiring team to evaluate personnel needs (now and in the future) and to create a database of potential hires. Continuously evaluate and enhance your work environment and benefits to assist you in attracting the right talent over the long haul, as opposed to creating a hodgepodge of benefits thought up on the spot to entice a single sought after applicant.

**Start with the basics.** When you are hiring for a specific position, start by defining the operational objectives to be fulfilled through the position. The particular job duties should reflect these objectives and the intangible attributes you seek should enhance the job duties. Is your third shift "lead person" really a surrogate supervisor? If so, leadership and conflict resolution skills are likely just as important as knowledge of your KBA Press. There is no substitute for effective interviewing. There are many interviewing techniques and they can all work. The key is finding the techniques which suit you and other interviewing managers.

**Know what your asking in an interview and why.** The job interview must not be a random or haphazard event. It is part of

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## Effective and Legal Hiring Re-energize your Hiring Practices (cont'd)

the formal process of employee selection which not only impacts your business operationally, but has potentially serious legal implications as well. Your goal is two-fold. First, to find the best person for the position in question. And second, to stay out of court in the process. Standardized operating procedures or protocols can help. Each manager should be equipped with a basic interviewing guide setting forth questions which will elicit the necessary operational information while keeping the interview process free from unintentional discrimination.

Every question asked during a job interview, starting with the opening personal introduction, and concluding with escorting the applicant to the door, should be asked with a purpose in mind. If you are looking for a detail-oriented independent thinker, your questions must be framed to solicit this type of information. Usually the key lies in not just asking what an applicant has done in prior positions, but rather how the tasks have been completed from start to finish. A broad brushed answer "I filled the order", can then be compared with a detailed answer "I checked the shipping slip against the p.o., made sure it was correct, made sure the date and other information was filled in, completed the inventory sheets and filled the order". Before the interview, be sure to ask yourself how the questions you will ask relate to the job functions to be performed or the qualities you are seeking. Make sure you know what the right answer is. It is important for each interviewer to find his or her own depth and comfort level in the types of questions asked and the purposes behind them.

**Be prepared with consistent questions.** We have worked with some managers not only comfortable with but truly committed to asking "outside of the box" questions or setting up unexpected hypotheticals in an effort to escape a "by-the-numbers" interview and gain insight into the true character of their applicant. One manager, for example, no matter the job opening, asks applicants why manhole covers are round. We have found, however, that all things

being equal, most industry managers are most successful using a straight forward interview process that deals with exploring, in detail, the manner in which a candidate would perform a specific job and the various sub-tasks involved. There are many opportunities, in exploring education and work history, for example, to evaluate whether or not the candidate possesses the intangible qualities you are seeking. Just be sure that your applicant is doing most of the talking. Many managers, uncomfortable with the interview process, are more worried about how impressive they appear to the applicant than they are about undertaking a critical evaluation of a potential employee.

There are easily thousands of interview questions which can be adapted for various job positions in every industry. However, at a minimum, consider using the following:

- Inquire in detail as to the manner in which the candidate performs a given task by asking a job candidate to explain, in detail;
- Ask the candidate why he or she is leaving his or her current job;
- Ask the candidate to identify a specific emergency that had to be handled in a former job;
- Ask the candidate what sort of work environment he or she is looking for and what he or she would need from the hiring organization;
- If the interview is for a sales or other professional position, be sure to ask the candidate if there are employment contracts or any other legal restrictions that would impact on ability to perform the job;
- Be sure to ask the reasons for any gaps in employment history;
- Ask the job candidate for a self-assessment of strengths and weaknesses;
- Ask the candidate what, if anything, he or she would change about management at his or her last job;
- Ask the candidate if he or she has any questions with regard to the position;
- Ask the candidate if there were particular

areas of experience or qualifications that the interviewer did not explore, that the candidate would like to expand on.

**Unfortunately, it is a jungle out there.** Remember that the entire process of job selection, including recruiting procedures, application forms, job interviews, all of your notes, records, emails and voice-mails are part of a highly-regulated legal environment. Every job applicant is a potential plaintiff and everything that takes place during the hiring process is potential evidence. Too often, a business' own records are used against it by a plaintiff's attorney to prove that a job applicant was rejected, not because of job-related qualifications, but for an impermissible reason (e.g., race, religion, disability, age, etc.). No one should recruit, interview or screen job applicants without a basic understanding of the legal environment impacting hiring decisions.

Fight the urge to give up on the task of dealing with the complex legal compliance aspects of human resource management. The solution is not to turn your managers into employment lawyers – there are enough of us around already. Rather, the key is to institute user-friendly procedures that coach managers through the interview process, teach them how to avoid employment discrimination, and leave behind the type of documentation – also known as future evidence – that will help you defeat employment discrimination claims.

Employees thrive in workplaces characterized by fairness, consistency, reasoned decision making and a well thought out management scheme. Employees who join a workforce after experiencing a well managed hiring process are likely to begin work with a positive outlook and motivation to succeed. Coupled with effective management in each aspect of the employment life cycle, a fine-tuned hiring process can be the first step toward creating a management strategy for truly capitalizing on workplace talent.

## Managing The Non-Performer: Minimizing Termination Risks

The decision to discharge a problem employee can seem so right at the time. The employee may be a disruptive and even destructive influence on your workplace and you know it's the right thing to do. So why wait? Get it over with quickly; like pulling off a bandage.

Unfortunately for many employers, it's this "quick trigger" mentality that can make a decision that feels so right, go so very wrong. Too often, the decision to discharge an employee takes place in a perfect storm of high emotions, immediate business needs, and disregarded legal rules. Such a decision – justified though it may be – can end up costing your company thousands of dollars in legal fees, back wages to the employee, and could result in that same problem employee being reinstated to his or her prior job. Think about it. If an employee was a problem before being fired, imagine what he or she will be like after being reinstated. Employment-related lawsuits can also sap your intellectual energy, hurt company morale, and cause you to lose focus on your company's goals.

The legal risks associated with discharge decisions can be minimized when employers take the time to become acquainted with the legal standards involved well in advance of being faced with a pressing need to discharge an employee. Absent a collective bargaining agreement or an individual employment contract, most employees in this country are employed on an "at will" basis. In other words, in the eyes of the law, they can be discharged "for good reason, bad reason, or no reason at all". However, there are numerous and often obscure legal exceptions to this rule.

Consequently, before any discharge decision is made, employers should analyze each situation to determine whether their discretion is limited by an exception to the "employment-at-will" rule.

**Review all contracts and other writings.** Where an employment or union contract exists, the employer's right to discharge an employee is most likely encompassed within the "four corners" of that document. But the analysis should not stop there. Offer letters, performance evaluations, email, and other communications should also be analyzed to determine whether the employer's right to discharge has been limited. For example, where an evaluation states "you have six months to correct these problems...", an employer would be hard pressed to discharge an employee after two. Where a sales employee is given a quota of \$500,000.00, an employer is on shaky ground discharging for performance if this threshold has been met.

**Are you discharging an employee in a "protected class"?** Wrongful discharge cases generally hinge on an employee proving that: 1) the reason for the discharge offered by the employer is false; and 2) the action itself violates a law which protects the employee from discharge. To address this first issue, employers must realize that any written document which appears inconsistent with the discharge decision can be fatal to defending the employer's actions in court. Let's say, for example, that you have an employee whose prior annual evaluations indicate that her job performance is "satisfactory", even though it was not. This is not uncommon, since many managers are reluctant to rate overall performance as "unsatisfactory". Where such an employee is later fired due to poor performance, those annual evaluations will be used as evidence to "prove" that the employer's reason for firing the employee is false, and that illegal discrimination is the "real" reason.

Accordingly, all documentation related to the employee should be analyzed by the employer and its attorney prior to discharge. Where contradicting documentation exists, employment lawyers will often

counsel a client to postpone a discharge. We will tell the client to try to rehabilitate the employee's performance and carefully document those rehabilitation efforts. If they work, the problem is solved. If not, the client has time to document the employee's performance deficiencies to offset the earlier contradictory documentation.

Employers must also understand the concept of "protected classes". The National Labor Relations Act of 1935 was the first major exception to the employment-at-will rule and created this concept of "protected classes". In essence, this Act provides that employees cannot be fired because of their union-related activities. In other words, where an employee engages in union organizing activities, for example, the employee belongs to a class of individuals protected from discharge under the law.

Today, there are many other classes. They prohibit discrimination on the basis of an employee's race, color, gender, religion or national origin. Therefore, any termination based on these factors is a violation of law.

Thus, when confronted with discharge decisions, employers/managers must bear in mind this concept of protected classes. A discharged employee in a protected class can start a wrongful discharge claim merely by establishing that they are a member of a protected class and suffered an adverse employment action. It then becomes the employer's obligation to prove a legitimate non-discriminatory reason (e.g., job performance deficiencies, misconduct, lack of qualifications, etc.) for its action. It is virtually impossible to "re-construct" this reasoning after the fact. The key is to recognize before a discharge decision is finalized that where a protected class is involved, a heightened duty of proof exists should the matter end up in court.

So, without obtaining an employment law degree, how does an employer make rea-

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## Managing The Non-Performer: Minimizing Termination Risks (cont'd)

sonably safe discharge decisions?

**The Manager's Role.** Documentation is critical. It is incumbent on the employer's managers to document all employment decisions in a manner designed to defend potential claims of wrongful discharge. The manager can substantially limit the company's potential liability by remembering that all discharge decisions will ultimately be judged on a standard of job-relatedness. Accordingly, the manager must be able to demonstrate with clear documentation that the action was taken because of a true job requirement.

**Progressive Discipline.** With the exception of certain "summary" offenses which warrant immediate dismissal (e.g., workplace violence, theft, etc.), creating a "record that stands up" requires a personnel file which includes successive levels of "discipline." A strong personnel file will generally include evidence of: oral/written warnings, poor evaluations,

rehabilitation efforts, and possibly a suspension, prior to the discharge.

**Evaluating Company Discipline.** Whether operating in a union or non-union environment, certain general principles will help the employer withstand a challenge to its decision to impose discipline. The following considerations should be addressed before a final decision regarding the discharge of an employee is reached:

- It should be clear that the employee was aware that his or her conduct violated company standards or rules.
- The standard used to measure the employee's performance conforms to an acceptable industry practice. It is not arbitrary or unreasonable.
- The employer should be able to establish that the standard has been consistently applied with regard to all employees. In other words, no employee should be "singled out".

- The employee should have received the same training in meeting the company standard that other employees received.
- The employer should be able to establish that the employee was aware that failure to meet the company standard would mean loss of his or her job.
- Progressive discipline should be taken in all cases, except the most serious summary offenses.
- Does the punishment fit the crime? The employer should consider the employee's past record, length of service, and what the employer's past practice has been.
- Discharge should never be "on the spot." Suspend first, investigate further, then decide.

Considering these matters prior to any termination decision can help minimize the legal risks associated with this area of employment law. It may not be as quick as ripping off a bandage, but in the long run it can help eliminate the sting of employment litigation.

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