



Hiring and Firing

The Danger Zones

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Navigating the employer-employee relationship is like walking a tight rope: it can feel like one wrong step can send you flying over the edge and into a pit of legal woes. While there are countless aspects of the employment relationship that give employers headaches, the beginning and the end are very common danger zones.

The hiring process

The hiring process usually begins with a search, followed by an interview, followed by an offer of employment. Even though the employment relationship has not yet officially begun at this stage, a company can be legally liable for its actions during the hiring process. Below are a few tips on how to stay out of legal hot water during this process:

(1) Job Postings/Criteria. Carefully evaluate the position to be filled and use only criteria and

requirements in the job posting and selection process that are legitimately required for the position. For example, having a requirement that the candidate be able to regularly lift 20 pounds for a position that in reality will require little or no lifting may result in a claim of disability or gender discrimination. Similarly, having

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a requirement that the candidate be a United States citizen will likely expose the company to a claim of citizenship discrimination unless the company has a legally valid reason for excluding non-citizens (like licensing requirements, which

is rare). Direct federal contractors (and companies doing certain work for federal contractors) must post open positions and track certain job and applicant information

(2) Interviews. Choose the interviewers wisely. While a particular employee may be very good at the technical aspect of his or her job, it does not mean the employee is good at lawfully gathering information without certain biases or stereotypes making their way into the interview or inappropriate questions being asked. Companies should pre-screen interview questions and conversation topics that will be brought up in candidate interviews and be very clear with interviewers about what topics and comments are off-limits. Interviewers should avoid questions that would reveal, discuss, or implicate an applicant's

race, national origin, disability, sex, family status or any other characteristic protected by law. For example, asking a female candidate about whether she intends to have children in the future could expose the company to a claim of sex discrimination under applicable local, state, and/or federal anti-discrimination laws.

(3) Criminal Arrests/Convictions. Be careful when asking about prior criminal arrests or convictions on job applications and during interviews. The Equal Employment Opportunity Commission (EEOC) has taken the position that excluding job applicants from consideration based on the fact that they have a prior criminal arrest or conviction can be considered a form of race discrimination.

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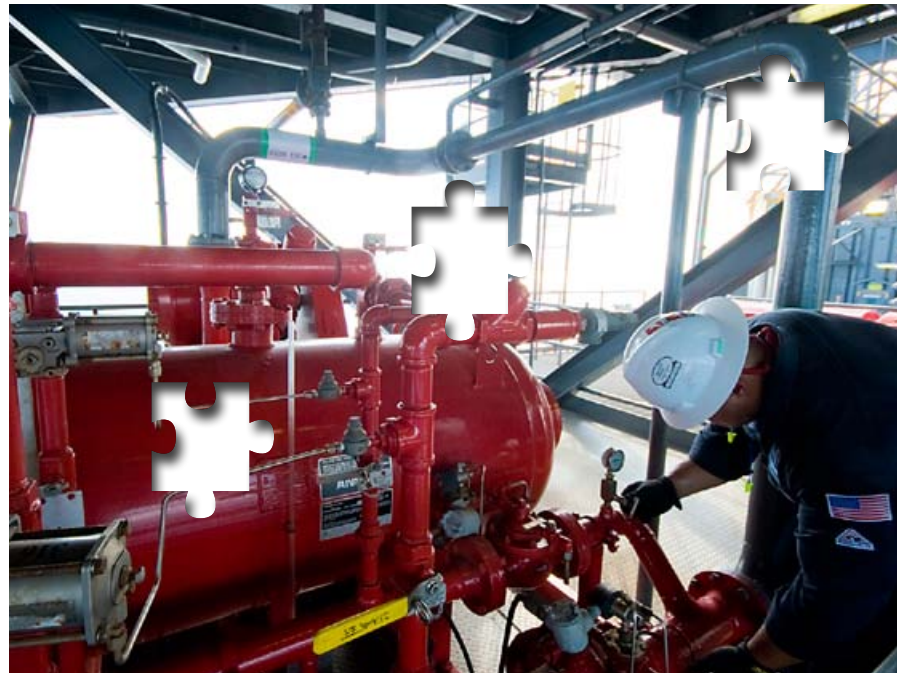
Moreover, some state and local laws categorically limit or prohibit the use of arrest (as opposed to conviction) records as the basis for employment decisions. With regard to criminal *convictions*, it is permissible to ask an applicant about them when not specifically prohibited by state or local law. However, companies should evaluate any criminal conviction(s), the explanation provided by the applicant regarding the criminal conviction(s), the nature of the crime(s) committed, the time that has elapsed since the crime was committed, and how all of the above relates to the nature of the job position at issue, among other considerations, before making any employment decisions on the basis of a criminal conviction.

(4) Background Checks. Certain federal, state and local laws are implicated when an employer decides to run a background check on job applicants or new hires.

Companies should find out what laws apply where they operate and make sure background checks are done properly. For example, the federal Fair Credit and Reporting Act (FCRA) requires an employer to give certain written notices to the individual about whom they intend to conduct a background check and to get written authorization from him or her to conduct the background check if an outside agency will be used. In addition, if the applicant is turned down, the

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employer must tell the applicant why, give the applicant a copy of the report, and let them know the name and address of the service that furnished the information. State laws may require more.



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(5) Physical Exams. In order to comply with federal law, companies must request pre-employment physical or medical examinations in a consistent manner, only when properly required for the position, and only *after* the candidate has received a conditional offer of employment. Because many states have their own laws governing this issue, it is important for companies

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eligibility (as listed on the Department of Homeland Security's Form I-9) within three business days after their employment starts (or on the date of hire if the employee is hired to work for less than three business days), and a Form I-9 must be completed by the employee and the company. Companies cannot dictate which specific type of document must be used to prove identity or employment eligibility. Companies should carefully review and follow the instructions for completing the Form I-9. It is advisable that employers keep all Form I-9's (along with photocopies of the original documents presented), in files separate from the employees "personnel file," and do so in a consistent manner.

Employee handbooks should be regularly reviewed and updated by legal counsel to make sure any changes in applicable law are properly reflected in the various policies. In addition, it is also advisable to include with the employee handbook all necessary consent and acknowledgement forms for the employee to sign and return to the appropriate company officials or managers.

(8) Confidentiality & Non-Competition Agreements. When a company hires a new employee, it should consider requiring the employee to enter into a confidentiality agreement if he or she will have access to the company's confidential information, proprietary information, or trade

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secrets during employment. The company should also consider whether non-competition and/or non-solicitation provisions are needed to protect the company's valuable information and assets upon the conclusion



to find out what state or local laws apply to them before requesting that a candidate undergo a physical or medical examination as a condition of prospective employment. Don't conduct your own physical or mental capacity testing without first talking to a lawyer.

(6) I-9 Compliance. Immediately upon hiring a new employee, companies must require the employee to present appropriate documentation to establish his or her identity and employment

(7) Offer Letters and Company Policies/Employee Handbooks. Upon hire, it is advisable to document the basic terms of employment — including job title, rate of pay, general benefits, and at-will status — in a written offer letter. The employer should also provide new company employees with copies of the policies and procedures that will govern their employment, preferably in the form of an employee handbook.



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of the employment relationship. These kinds of provisions can be enforceable if they are drafted and used properly. Because the law in this area varies from state to state, it is recommended that legal counsel be involved in the drafting of any such agreements.

The do's and don'ts of firing

Much like a breakup in a romantic relationship, emotions often run high when an employer ends an employment relationship with an employee. Below are a few tips on how to handle employee firings in a manner that will lessen the legal and emotional impact.

(1) No Surprises. Nobody likes a surprise, and an employee should not learn about recurring performance problems for the first time when fired. Contemporaneous communication about performance issues can actually improve performance (!) and avoid the need for termination, and it reduces the risk of legal claims if termination is inevitable.

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(2) Be Brief. Be clear and concise when communicating the company's termination decision to the employee. Do not debate the merits of the termination decision with the employee, as that will only create confusion and doubt about the basis for the decision. Your words may be used against you later. (In some states, it is legal for an employee to secretly record conversations.) Be understanding and sympathetic to the employee, but respectfully reinforce that the decision is final.

(3) Be Respectful. Terminated employees often feel surprised,

hurt, and/or humiliated by both the fact that they were terminated and how it happened. This can sometimes lead to lawsuits and — in extreme situations — to violence or threats of violence. Ensure that terminated employees are treated with the same respect and dignity that current employees receive. Deactivating an employee's building access card or email before informing the employee that he or she is being terminated, and/or having security escort the terminated employee out of the building like he or she is a criminal, may only elevate the employees' emotional response and the humiliation factor. It may also cause the employee to question the legality of the employer's actions.

(4) Keep It Confidential. The meeting to notify an employee that he or she is being fired should be held in a private setting, if possible, and should only include the employee and the company representative(s) tasked with communicating the termination



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decision. The details of and reasons behind an employee's firing should only be communicated to the company officials or managers who have a legitimate business reason to know the information.

Ensure that terminated employees are treated with the same respect and dignity that current employees receive.

(5) Document Everything. Before terminating an employee, the company should make sure that the underlying basis for the decision to terminate the employee is legitimate and well documented. If for example, the employee is being terminated for poor performance, the employee's performance deficiencies should be documented in writing, where possible. In addition, if the company chooses to provide the employee with a written termination notice, it is imperative that the notice accurately state all of the reasons for the termination — and not just one or some of them. Don't call it a "reduction in force" or "job elimination" if it is really for performance or conduct issues. Transparency and consistency are key when defending against a former employee's wrongful termination or discrimination lawsuit.

The goals behind hiring and terminating employees are the same: having the right people working for your company.

(6) Return Company Property & Information. Upon termination, request that the employee return all company property and confidential information in his or her possession. Do not, however, automatically withhold a terminated employee's final paycheck beyond the deadline for payment because he or she did not return company property, as doing so may violate the law.

If an employee fails to return company property or confidential information, the company should consult legal counsel to discuss what legal remedies are available to it before taking any action.

(7) Post-Termination Notices & Forms. Companies are obligated to provide terminated employees with all legally required notices, which include, for example, notices of employee rights and responsibilities under the Consolidated Omnibus Budget Reconciliation Act (COBRA), state laws and applicable benefit plans and programs. Failure to provide the required notices and forms post-termination could subject a company to monetary penalties, sanctions, and legal claims.

(8) Pay Final Pay Timely. If the company terminates an employee's employment, it may have to pay the employee his final pay before the next regularly scheduled pay day. Failure to pay timely is unlawful and may result in fines and penalties (or worse). The deadline to do so varies by state.

Summing it up

The goals behind hiring and terminating employees are the same: having the right people working for your company. Employers that train their supervisors how to properly interview and select candidates, manage and coach employee performance and terminate employees for legitimate, documentable reasons and with dignity will reduce the risk of legal claims and have happier, more productive workers. 📌

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