

Best Practices for Hiring and Firing Employees



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Hiring and firing decisions can present significant challenges and stress for business operators and managers. Much of this stress comes from not knowing whether a particular decision regarding an employee is going to lead the business into trouble or even into a lawsuit. While there are few guarantees against potential future claims, there are practices employers can use to minimize risks and limit claims. This article highlights certain best practices in hiring and firing decisions and can help steer employers during the process.

Hiring

In addition to finding employees who are the right fit for the job, one of the major legal issues relating to the hiring of employees is discrimination. Generally, employers cannot base decisions not to hire someone on the basis of a protected status, including race, ethnicity, sex, disability, religion, age, gender and sexual orientation. Protected class criteria generally should not play a role in the hiring decision, and an employer should avoid obtaining such information in the application and interviewing process if it is avoidable. Specifically, once an employer has gathered information that pertains to a protected class status regarding a candidate for employment, it is difficult for the employer to assert a defense of “ignorance” in response to a discrimination in hiring claim based on that information.

More and more employers are using social media and other internet searching to screen and recruit candidates. One of the risks in using social media screening is the same as set forth above--by looking at social media, and especially Facebook, an employer may learn that a candidate is in a protected class. While this practice has its pitfalls, the business reasons to do this screening usually outweigh the potential risks. Employers can take additional steps to mitigate those risks by insulating the hiring decision-makers from any protected status information. For example, social media screening can be conducted by an outside service provider or by an HR representative or other manager in the company who passes only relevant, non-discriminatory information to the hiring decision-maker in the form of a report.

Some employers have taken social media related diligence one step further and have required Facebook passwords from a potential hire, or have required them to log onto the site during an interview. This practice is precarious at best, and in many cases may not be lawful. Some states have passed legislation prohibiting employers from asking for such information, and obtaining

this type of information may also violate the Stored Communications Act and the Fair Credit Reporting Act.

There also are statutory limitations on the use of background checks, criminal history checks and credit checks to be mindful of in the hiring process. Specifically, inquiries into criminal history are limited by time and level of offenses. Additionally, employers must also take certain steps before and after obtaining any credit reports concerning potential employees, including providing notice and obtaining permission. If adverse employment action is taken on the basis of a credit report, an employer must comply with additional requirements, including, among other things, providing information concerning the consumer reporting agency that provided the report. If an employer is going to engage in these types of additional layers of background research regarding potential employees, it is best to consult with counsel before doing so to delineate clearly what is in and what is out of bounds.

The guiding principle for avoiding legal pitfalls in hiring is to keep the focus on criteria related to the job in question. Below are additional tips for avoiding risks in hiring:

- Always base hiring decisions on legitimate, non-discriminatory reasons.
- Focus questions during the interview process on job related subjects and criteria.
- Do not ask about an applicant's criminal history in an initial application. An employer can ask questions about this later in the hiring process, but the scope of inquiry should be limited and informed by a discussion with employment counsel prior to delving into the subject.
- Establish internal policies and procedures for making employment decisions and train your managers, HR staff, and interviewers on these policies and procedures.
- Maintain records of all applications, resumes and interviews for at least two (2) years in order to defend any claims brought against you.
- Trust your instincts about making hiring decisions. Sometimes employers will hire a borderline candidate because they are likable and the employer wants to "give them a chance." Borderline candidates frequently become problem employees down the road, leaving the employer with regrets about making the choice to hire the employee in the first place.

Firing

Inevitably, every employer is faced with the prospect of firing an employee. In Massachusetts, all employees are at-will employees unless there is an agreement between the employer and the employee establishing different terms for the employment relationship. At-will employees may be fired at any time, with or without any cause. The only effective limitations on termination of an at-will employment relationship are those that apply as a result of existing law. For example, employers cannot terminate employees for discriminatory reasons, as retaliation for claims of discrimination, and, in certain situations, for reporting violations of law where the protection of whistleblower statutes may apply.

When faced with a termination decision, the first thing to consider is whether the employee has an employment agreement. If an agreement exists, any termination must be carried out in

accordance with its terms. For example, some agreements will only allow an employee to be fired for cause or impose other conditions or limitations on permissible termination decisions, such as first providing notice and an opportunity for cure. Cause usually is carefully defined in the agreement and may include dishonesty, drug or alcohol abuse, incompetence or insubordination, and knowing or willful violation of company policies and procedures. An employer should consult competent employment counsel if there is any doubt or ambiguity about the rights of an employer to terminate an employee under an employment contract. An ounce of prevention is worth more than a pound of cure when faced with these issues.

Even where no employment contract exists, and at-will employment applies, employers should follow common sense, practical steps to avoid termination related issues, including the following:

- Establish and follow a termination policy, including a progressive discipline system. A simple graduated system for responding to misconduct or policy violations may include providing a verbal warning, followed by a written warning, suspension and ultimately resulting in discharge for repeated violations. All instances of discipline should be documented.
- Do not fire an employee on the spot unless his or her actions are so egregious as to warrant immediate termination. Rather, fully investigate all offenses and misconduct and make termination decisions in possession of all the relevant facts.
- Limit firing authority to a few people in your organization. This will allow for more uniform application of policies and procedures and places termination authority only in the hands of responsible managers.
- Have another manager or member of the HR staff present during any termination to avoid conflicting versions of events between the terminated employee and the firing manager.
- Do not give a false reason for terminating an employee. False reasons and justifications needlessly create bad facts and lend support to employee claims of pretext and ulterior motives.
- Do not be offensive, abusive or outrageous when terminating an employee. It is a business decision, and must be handled in a professional and business-like manner by the company.

While hiring and firing decisions can be challenging, many of the risks can be limited by knowing where the lines are that should not be crossed. If you have any questions or concerns about hiring or terminating an employee, want to discuss handling any given employment situation, or simply want to discuss the guidelines above, please contact the authors at bag@riw.com or mjd@riw.com.

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