

## Employee Hiring and Firing: Understanding the Legal Guidelines

There are numerous state and federal laws which restrict employers in their hiring and firing decisions. As a result of these laws, many of which can impose significant penalties for violations on employers, it is crucial that all companies understand the laws and apply those laws to their employment practices.

### **HIRING**

One of the most important laws involving employees' rights comes from Title VII of the 1964 Civil Rights Act. This legislation prohibits employers from making adverse employment decisions based upon race, gender, national origin or religion. The law therefore restricts the level of pre-employment inquiries that an employer can make in order to avoid discriminatory hiring. Since 1964, there have been many other laws enacted to protect individuals from potentially discriminatory inquiries, for example in the areas of age and education. With the passage of The American with Disabilities Act in 1990, there have been sweeping reforms in certain employment practices since the law requires that all qualified individuals should be considered for employment, even those with disabilities, as long as the disabled individual can perform the essential functions of the employment position with reasonable accommodation. The ADA provides that an employer may not require pre-employment medical examinations or medical histories, but may condition a job offer on the results of a post-offer medical examination. A test that screens out or tends to screen out a person with a disability on the basis of the disability must be job related and consistent with business necessity. The ADA also narrowed the field of appropriate questions which can be asked as part of the employment hiring process, especially in the area of prior drug or alcohol use. Although it is illegal to ask questions in the pre-employment stage concerning the past use of drugs, an employer can make an offer of employment conditional upon passing a drug test, provided all new hires are required to do so.

Based upon the State and Federal Laws, job applications should be nondiscriminatory and should not contain questions about the applicant's race, sex, age, religion or national origin, marital status, number or ages of children or other dependents or the existence, nature or severity of a disability. Job announcements, advertisements

and other recruitment notices should include information on the essential functions of the job. The laws, however, do allow inquiries into an applicant's credit history and criminal history, as long as the applicant approves of such an inquiry. Employers can be held liable for an employee's actions where the employer failed to perform an adequate investigation of the employee's background prior to hiring and the employee commits a criminal act or causes injuries to persons or property. Such claims of "negligent hiring" can be defeated where the employer has conducted a thorough background check on the prospective employee.

## **DURING EMPLOYMENT**

One of the best methods to limit employment disputes during the employment relationship is with the use of employment agreements and employment handbooks. One of the reasons for this growth is the mutual desire of both owners and managers to formalize their relationship. Employment agreements allow both parties the opportunity to clarify their roles and responsibilities in the operation of the business. Most importantly, an employment agreement includes what is necessary to record the understanding of the parties so as to avoid future disputes over issues such as the employee's duties, compensation and benefits.

The purpose of an employee handbook is to communicate to the employees the personnel policies and standards of the company and to provide to the employer written guidance as to how to implement and enforce those policies and standards. The most important function of an employee handbook is to create consistent guidelines for both employees and employers so as to reduce the risk of disparate treatment. If used properly, a handbook can protect employers from lawsuits by making clear to employees that treatment by their employers will be fair and uniform. An employee handbook can also motivate employees by informing them that the employer has carefully considered benefits available to them such as workers' compensation, health insurance and vacations. There should be an affirmative statement in the handbook, both repeated in the introductory section and throughout the handbook, that the handbook does not constitute an employment contract and that the employment relationship remains as one terminable at will. "Employment at will" is based on the concept that an employee may quit his job at any time

for any reason and that the employer has the equal right to terminate an employee at any time for any reason. When an employer hires an employee to work for an indefinite period of time and the employee does not have a contract limiting the circumstances under which he can be discharged, the employer can terminate the employee at any time without legal liability with or without cause. Yet employers must still act in good faith, even under an employee at will relationship. Wrongful discharge arises when a termination is made in bad faith and involves the violation of a legal right of an employee.

## **FIRING**

Improperly handled employee terminations can create significant liability for an employer and it is therefore crucial that policies be in place to assist an employer to properly handle such stressful events. Terminations with "at-will" employees can be "for cause" or "without cause." There are certain actions which are overwhelmingly supported as "for cause" reasons for dismissal. These are falsification of records, theft or any other violation of law, disorderly conduct or abusive behavior, repeated acts of insubordination or failure to comply with company policy, drunkenness at work, substandard performance of work, indecent conduct at work, acts of sexual harassment and excessive unapproved absenteeism or tardiness.

Many of these acts provide grounds for immediate dismissal without prior notice, such as in the case of verbal or physical threats from the employee. Other acts may result in termination only after repeated violations. In those cases, where the employer has properly documented each infraction in writing in the employee's file, the employer should be able to produce documentation for the employee to establish cause for the termination. Discharge decisions should only be made by top management and should be handled only by those trained to issue terminations. Disciplinary actions leading to terminations should be consistently handled as to all employees.

Court rulings have determined that an employee cannot be fired for filing workers compensation claims, filing charges with the Department of Labor, reporting OSHA violations or for receiving garnishments for debts. Certainly, just as the laws do not allow discriminatory practices in the area of hiring, nor do the laws allow discrimination in termination decisions based on an employee's race,

sex, age, religion, national origin or disability. In order to prove discrimination, an employee has to have at least a satisfactory job performance record. Such a good employee record might suggest that the termination occurred for reasons other than for job performance. An employee with a bad job performance record has a more difficult time in pursuing a discrimination claim since the lawsuit may be perceived as a retaliatory act by the employee for the loss of their job. Therefore, it is important that employers document all disciplinary actions which occur in the workplace and keep a record of those actions.

There are numerous guidelines to follow when it comes to employment laws and potential liabilities, but an employer can protect itself if it complies with a few basic guidelines. First, an employer should have a hiring plan which includes a written job description for the employee to be hired and identifies the essential functions for the position. Second, the company should use an updated job application which limits the questions to those which are pertinent for the position to be filled and all hiring materials should be revised to eliminate all references to an applicant's medical history, physical or mental disabilities. Third, the person responsible for conducting interviews for the company should be trained to focus all questions on job related functions and avoid any pre-employment inquiries concerning whether an applicant has a disability or medical condition. Fourth, companies should check references and perform background checks on all potential hires. Fifth, companies should use employment handbooks and agreements and Sixth, employers should document all employee discipline actions and be consistent on all discipline and discharge decisions. Through compliance with these few items, an employer can reduce the likelihood of employment claims and costly litigation by disgruntled employees.