

EPSTEIN BECKER & GREEN P.C.

Hiring and Firing Employees – Without Getting Sued in the Process



ADA Issues

- Disability-Related Inquiries
 - Pre-hiring stage
 - Alcohol and drug use
 - Conditional Job Offer
 - Post-hiring
- Genetic Testing
- Access for the Disabled



Age Discrimination Issues

- You should not inquire about
 - Age
 - Date of Birth
 - Date of High School or College Graduation
 - Other age-identifying information



Religious Discrimination

- You should not inquire about
 - Religion
 - Religious days observed
- You can ask whether applicant can meet scheduling requirements of job



Race and National Origin

- You should not inquire about:
 - An applicant's race.
 - An applicant's national origin or place of birth.
 - An applicant's arrest record.
- What you can do: Inquire into whether the applicant has ever been convicted of a crime.



Citizenship Issues

- You should not ask
 - "Are you a U.S. citizen?"
 - "Do you have a work visa?"
 - "Do you have a legal right to remain permanently in the U.S.?"
- You may ask an applicant if he or she is currently authorized to work in the United States.



Sex Discrimination Issues

- You should not inquire about:
 - Applicant's gender.
 - Whether applicant is pregnant.
 - Whether applicant has children (esp. female applicants).



Marital Status Issues

- Marital status discrimination may be prohibited by state law.
 - e.g., NY, CT, FL
- You should not inquire about:
 - Whether applicant is married.
 - The applicant's maiden name.
 - "Mrs.," "Ms." or "Miss" status.



Misc. Discrimination Issues

- You should not ask questions about clubs or social organizations to which the applicant belongs because such questions tend to identify the religion, national or ethnic origin, or race or color of the membership.



Retaliation Issues

- You should not ask applicant if he or she has ever sued a former employer for discrimination or filed a discrimination charge with the EEOC.
- Pre-offer questions regarding worker's compensation claims may be viewed as retaliatory, depending on state law.



Honesty/Fraud Issues

- Lying or giving incomplete information on an application can be a good legal reason to fire an employee if the correct story later surfaces.
- After-acquired evidence defense



Trade Secrets and Non-Competes

- Employers should not encourage applicants to divulge the trade secrets or confidential business information of a present or former employer -- especially a competitor.
- Employers should be cautious about an employee who volunteers such information or promises to bring secrets to the new position.
- Employers should be cautious about hiring employees who are bound by non-competes and other restrictive covenants



Job Descriptions

- ADA issues
 - Why job description is critical
 - Activity-based job descriptions
 - Identify essential job functions
- Other Discrimination Issues
 - BFOQ
 - Disparate Impact



Background Checks

- Why they're important
- Types
 - Credit reports
 - Other consumer reports
 - Educational records
 - Bankruptcies
 - Medical records
 - Military service
 - Driving



Pre-Employment Drug Tests

- ADA
 - Pre-offer drug tests
 - Post-offer drug tests
 - Positive results



Polygraphs/Lie Detectors

- The Employee Polygraph Protection Act (EPPA) generally prohibits the use of pre-employment polygraphs or lie detectors.



Other Pre-Employment Tests

- Personality Profile Tests
- Pen and Paper Tests
- Physical Agility Tests



Discipline and Termination – Basic Guidelines

- Basic Guidelines
 - Keep promises made to employees.
 - Treat employees fairly.
 - Be aware of the law.
 - Follow Company policies and procedures.
 - Be honest with employees about business decisions. Provide employees with feedback
 - Tell the truth, both good and bad, to employees.
 - Document personnel files



Evaluating Employee Performance

- Give performance appraisals at regular intervals
- Review prior appraisals.
- Appraise the performance of an employee accurately, truthfully, and objectively.
- Give details and specific reasons for any criticisms
- Document the facts
- Apply the standards used to judge the performance of employees consistently.



Investigating Complaints

- Conduct the investigation in private, to the extent possible.
- Interview the complaining employee
- Obtain the names of other employees who witnessed the incident or other similar incidents
- Assure the employee who complained that the complaint will be investigated and explain the investigation process generally.
- Document the conversations with the employee who complained, the employee who is the subject of the complaint, and the witnesses.
- Schedule a private, follow-up meeting with the employee who complained
- Meet with the accused employee, advise him or her of the nature of the complaint, and obtain his or her response to the complaint.
- Schedule a private, follow-up meeting with the accused
- Counsel both employees that retaliation will not be tolerated.



Investigating Complaints (cont'd)

- Interview all of the witnesses to the incident or to similar incidents in which the employee was involved. Determine if the witnesses have any biases against either employee.
- Review the personnel file of the accused employee.
- Obtain the assistance of higher management, if necessary, to investigate the complaint.
- Decide what disciplinary action should be taken on the complaint. Get a second opinion.
- Inform the employee who complained generally about the action taken, but do not reveal the specifics of the discipline.
- Meet with the employee accused of the misconduct and inform him or her of any disciplinary action.
- Monitor the employees involved to ensure that problems do not arise between them in the future.



Disciplining Employees

- Benefits of a written disciplinary policy
 - it promotes uniformity in an employer's decisions
 - provides advance notice to employees of the performance and conduct expected by the employer
 - it contributes to a sense of fairness among employees who are disciplined under the system.



Disciplining Employees (cont'd)

- Progressive Discipline
 - Definition
 - Retain flexibility



Disciplining Employees (cont'd)

- Guidelines
 - Confront employees, without delay
 - Be straightforward and direct
 - Review the employee's personnel file
 - Review applicable policies and contracts, if any.
 - Provide clear, specific information to employees about the changes needed in their performance and about the results that the employer expects.
 - Give employees a fixed time frame to improve
 - Warn employees in advance of the consequences
 - Give employees an opportunity to respond to the counseling
 - Document the facts of the incident in which the employee was involved, the policies violated by the employee, the disciplinary action taken by the employer, and the outcome that the employer desires.
 - Be consistent with other employees
 - Do not discuss the counseling or discipline of an employee with other employees.



High Risk Terminations

- Protected Class
- Whistleblower
- Leader in workplace rights
- Previous complaints with EEOC
- Previous worker's compensation claim
- Long tenure
- Near vesting in benefits
- Good employment history
- Employer failed to follow its policies
- Employer failed to investigate



Severance and Releases

- A release must be:
 - Knowing
 - Voluntary
- OWBPA requirements:
 - Written agreement between employer and employee.
 - The release must specifically refer to claims arising under ADEA.
 - The release cannot apply to claims that arise after the date on which it is executed.
 - The release must be in exchange for something of value to which the employee would not otherwise be entitled.
 - The employee must be advised in writing to consult with counsel before signing the release.
 - The employee must be given at least 21 days to consider whether to sign the release, or 45 days if the waiver is requested in connection with an exit interview or an employment-termination program offered to a group or class of employees.
 - The release must provide that the employee is given at least seven days within which to revoke the agreement, and the release will not become effective until the revocation period has expired.



Guidelines for Terminating Employees

- Prior to terminating an employee, the employer should make sure that:
 - The facts have been recorded accurately and completely.
 - All of the records regarding the employee have been assembled and reviewed.
 - The supervisor at issue has been consulted with
 - The decision to terminate the employee is based on facts
 - The employee understood the job requirements
 - The employee knew of the exact problem
 - The employee received at least one warning of possible termination, if appropriate.
 - The employee had sufficient time and opportunity, if warranted, to correct the problem
 - The employee had an opportunity to respond to any counseling or disciplinary action taken.
 - The employer considered any special, mitigating circumstances.



Guidelines for Terminating Employees (cont'd)

- The employer used progressive discipline, if appropriate, and complied with all relevant personnel policies and procedures.
- The termination of the employee is consistent with the past practice of the employer.
- Termination is consistent with the facts set forth in the performance appraisals of the employee and with the other facts contained in the personnel file.
- The employer will be able to justify the termination of the employee if the employee brings a wrongful termination suit or a discrimination claim.
- The employee was treated fairly by the employer.
- The decision to terminate the employee was discussed with higher management, and it was independently reviewed and approved.
- The employer has considered alternatives to termination.



Mechanics of Termination

- Respect and Dignity
- General Rules
 - Meet face to face
 - Have a witness present
 - Tell the employee the truth
 - Be brief
 - Allow employee to respond
 - Consider employee's response if appropriate
 - Collect company property
 - Have a supervisor or neutral person escort the employee out
 - Document termination



Post-termination

- Provide only neutral references.
- Keep internal comments regarding the termination to a minimum
- Think seriously about whether you want to oppose unemployment claim
- Be consistent about the termination in communicating to all third parties, such as the EEOC.



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