
The Dos and Don'ts of Hiring and Firing

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WHY ARE WE HERE TODAY?

- The average cost to defend an employment-related claim is about \$75,000
- State and federal employment laws affect virtually every aspect of your day-to-day business
- Hiring and firing are some of the most high-risk areas
- Our goal today: To provide you with tools to avoid, or at least minimize, the costs of these claims

THE HIRING PROCESS

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"I pruned a tree once, so technically I'm allowed to put 'branch manager' on my resumé."

VALUE OF THE INTERVIEW PROCESS

- An integral part of every employer's talent acquisition process
- If done well, can positively impact costs and employee morale
- Standardization ensures maximum efficiency and best results

RISK AREAS FOR INTERVIEWING

- Age
- Citizenship / National Origin
- Marital Status
- Pregnancy
- Disabilities
- Health Concerns
- Religious Affiliations
- Race

PREPARING FOR AN INTERVIEW

- Identify and write down the attributes of your ideal candidate, and tailor questions around those attributes.
- Prepare a list of essential job functions and ensure you explore competency/experience in all of those areas.
- **Try to ask only open ended questions . . . You'll be surprised by how much you learn from an applicant's response!**

IMPROPER INTERVIEW QUESTIONS

- Where were you born?
- What is your native language?
- Are you married?
- Do you have children?
- Do you plan to get pregnant?
- How old are you?
- How was your Christmas?
- Do you have a disability or chronic illness?
- Do you smoke, use alcohol, or use drugs?
- Are you in the National Guard?

IMPROPER INTERVIEW QUESTIONS

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"We are not a sexist employer, so we ask all employees exactly the same questions. Now, 'What happens if you become pregnant?' "

PROPER INTERVIEW QUESTIONS

- If you stayed with your current company, what would be your next move?
- What makes you stand out from others?
- What is your greatest accomplishment?
- What is your greatest weakness?
- What are your future goals?
- How do you deal with conflict?

PROPER INTERVIEW QUESTIONS

- Can you fulfill _____ physical task?
- What circumstances bring you here today?
- What type of work environment do you prefer?
- What tools or habits do you use to keep organized?
- Are there any days or times you are not available?
- In what ways do you raise the bar for yourself and others around you?
- What unique experience or qualifications separate you from other candidates?

AT-WILL EMPLOYMENT

- **At-Will Employment Doctrine**
 - *Both the employer and the employee may terminate the employment relationship at any time, for any reason or no reason, with or without cause or notice.*
- **This is the presumption in virtually all states (including Texas)...**
 - BUT, you as the employer must be careful not to inadvertently alter that presumption!

AT-WILL EMPLOYMENT

- **Places to include an at-will employment disclaimer:**
 - Job application form
 - Offer letter
 - Employee handbook
- **Avoid:**
 - Using words like "promise" or "guarantee"
 - Comments like, "This is a secure position," or "Work hard and you'll always have a job here"
 - Any statements relating to duration of employment

NEW HIRE PAPERWORK

- New hire paperwork should be filled out on the date the new employee is hired, and not any earlier or later.
- In the case of certain documents (*i.e.*, Form I-9), strict compliance with the rules is more than just a best practice – it's mandatory to avoid government fines!
 - I-9 should be completed on the date of hire, but no later than 3 business days thereafter
 - New employee must be physically present when form is being completed
 - Must see original documents, not copies
 - No exception for temporary or part-time employees

OTHER POTENTIAL PITFALLS IN HIRING

- **Job postings/advertisements**
 - Avoid listing job qualifications that categorically disqualify groups of people
- **Discussing other applicants**
 - Avoid discussing credentials and backgrounds of other applicants being considered during the interview process
- **Applicant rejection**
 - Limit explanations to generalized statements. Stay away from sensitive terms such as "overqualified" or other terms that could be misconstrued to reference or implicate protected categories

OTHER POTENTIAL PITFALLS IN HIRING

- **Offers of employment**
 - Put everything in a formal, written offer letter
 - No informal promises through e-mail or verbally
- **Inconsistency**
 - Best to centralize hiring (and firing) functions
 - Ensure that all employees responsible for hiring/firing are properly trained
- **Confidential information from prior employer**
 - Watch out for this – can expose you to serious liability
 - Require acknowledgement that new employee hasn't brought any confidential information with him/her

TERMINATING EMPLOYMENT

- **Things you're trying to avoid:**
 - Discrimination
 - Retaliation
 - Defamation
 - Intentional infliction of emotional distress
- To avoid these things, you must think ahead and make smart decisions leading up to termination....

DOCUMENT, DOCUMENT!

- **Three reasons for documenting discipline**
 - 1) May cause an unsatisfactory employee to improve and thus avoid termination
 - 2) Establishes a record of fairness
 - 3) If termination becomes necessary, it will be evidence that the reason was real and not a pretext
- **RESULT → Decreased chance of litigation & attorneys' fees, increased profit & morale**

DOCUMENT, DOCUMENT!

- **In a perfect world, documentation should contain:**
 - Notice of employee's shortcomings and realistic time period to correct them (cite to handbook if applicable)
 - Intermediate disciplinary steps such as transfer, suspension, or probation
 - A specific warning of the disciplinary action to be taken, "up to and including termination," if employee fails to improve
 - Place for employee to sign, acknowledging receipt and review

DOCUMENT, DOCUMENT!

- **At a minimum, you should do the following:**
 - Write a brief statement of the event/problem
 - Abbreviations/shorthand are ok
 - E-mail it to yourself, another manager, or send a quick note to the employee's personnel file
 - Raise the issue with the employee, and document that you did so
 - Make sure it's timely (don't send weeks later)
- It becomes a timeline showing how often you have to deal with the issue/problem

DOCUMENT, DOCUMENT!

- **Example of quick/easy documentation:**

"J. Smith tardy this morning. Shift began at 9:00; arrived at 9:30. Third tardiness this month. I addressed with J. Smith this afternoon; he acknowledged it was a violation of company policy and promised to improve."

DOCUMENT, DOCUMENT!

BUT.....Think before you write!!

- Written communications about a problem employee can be subject to discovery in a future lawsuit
- Bringing lawyers into the conversation, where appropriate, may help
- At a minimum, make sure written communications are objective and not sarcastic
- Don't editorialize, explain or conclude – just DOCUMENT!

PRE-TERMINATION

- **BEFORE terminating an employee, make sure you're well-prepared.**
 - Contact your HR Dept. (every time!) and communicate to your subordinates that a branch/regional manager should always be involved
 - Review personnel file
 - Check past practices and company policy
 - Was the relevant policy communicated to employee?
 - Be consistent!
 - Warning signs:
 - No documentation
 - Good work record
 - In a protected class
 - Call employment counsel if you're unsure!

THE TERMINATION MEETING



THE TERMINATION MEETING

- **In the termination meeting:**
 - Have another manager/supervisor present, so it doesn't become a "he said/she said" situation
 - State reasons clearly
 - Be truthful, direct and decisive
 - Avoid arguing
 - Don't apologize
 - Be courteous

POST-TERMINATION

- **Post-termination procedures and practices**
 - Document, in detail, the reasons for termination
 - Complete necessary post-termination paperwork (e.g., COBRA)
 - Obtain a release, if severance pay is given
- **Future references**
 - If employee is leaving on bad terms or has a history of poor performance, avoid a defamation claim by limiting commentary to dates of employment, job title, and salary

OTHER POTENTIAL PITFALLS IN FIRING

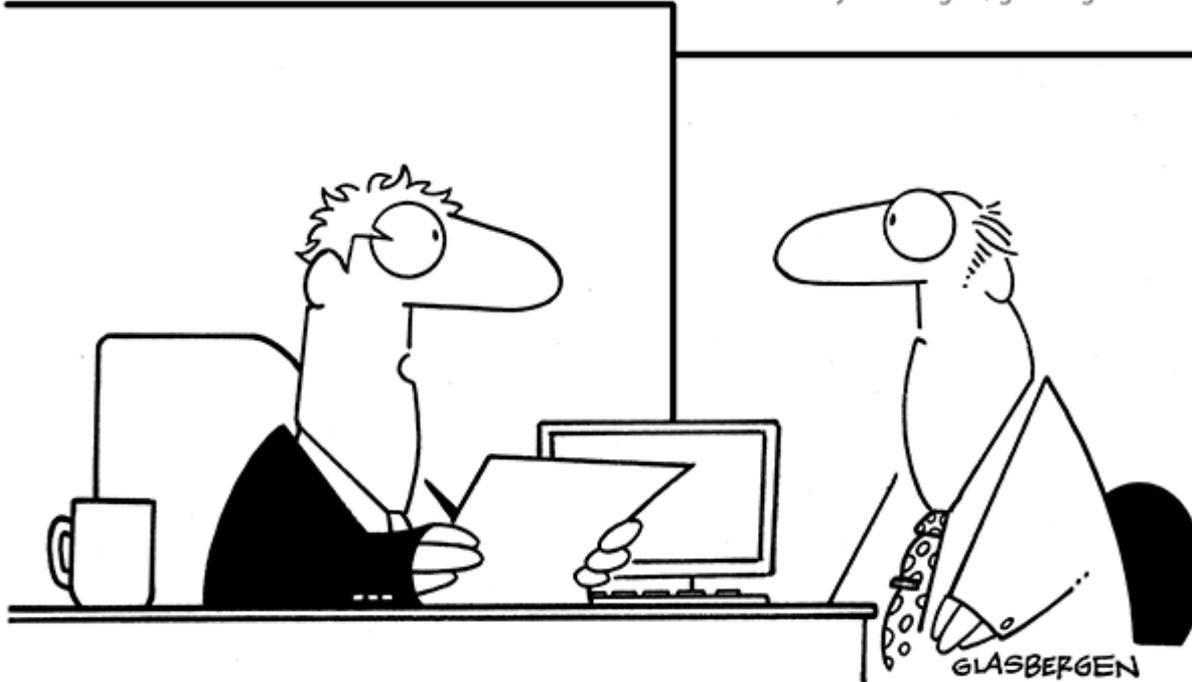
- **Relying solely on a supervisor's assessment or recommendation**
 - Conduct your own, independent investigation in the event of alleged employee misconduct
- **Inconsistency**
 - Always apply rules/policies in a consistent manner
 - Don't play favorites

OTHER POTENTIAL PITFALLS IN FIRING

- **Terminating based on social media posts**
 - Recent decisions by the National Labor Relations Board have made this much more risky
 - Consult with employment counsel before doing this
- **Firing before doing homework/consulting with HR**
 - Call your HR manager EVERY TIME you're considering firing someone!

WHAT NOT TO SAY IN A TERMINATION MEETING...

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“You have enough money for a comfortable retirement. Spend it on a good sleeping bag and you can be comfortable almost anywhere.”

IF A FORMER EMPLOYEE FILES A CLAIM...

- If you do get served with an EEOC charge or a lawsuit by a former employee, take these three steps immediately:
 - 1) Notify your insurance carrier
 - 2) Get counsel involved
 - 3) *Preserve evidence*

THANK YOU!

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