

Interviewing, Hiring, Firing and Disciplining Employees

*STEPS TO TIGHTEN UP YOUR COMPANY'S
EMPLOYMENT PRACTICES*

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SPFA Antitrust Policy

"Our policy is to comply with all federal, state and local laws, including the antitrust laws. It is expected that all company member representatives involved in SPFA activities and SPFA staff will be sensitive to the unique legal issues involving trade associations and, accordingly, will take all measures necessary to comply with U.S. antitrust laws and similar foreign competition laws."

It is a per se violation of the federal antitrust laws for competitors to agree on prices, limitation of supplies, allocation of customers or territory, or boycotts. "Per se" means that no legal defense can be used to mitigate this automatic violation.

Even an agreement by competitors that is for the good of society and our industry may be a violation of the antitrust laws if it could affect competition.

If a topic of antitrust concern is raised at any time during a meeting, note your objection for the record. If the topic continues to be discussed, you should leave the room immediately and contact SPFA's general counsel and your company's attorney for further guidance.

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Using Social Media in Hiring Practices

Here are some essential Guidelines for using social media to screen applicants:

- Consult with your legal counsel before using social media as a hiring tool
- Facebook, LinkedIn, photo and video sharing sites like YouTube, Flickr, Instagram, etc.
- Wiki sites where users can add articles or edit existing articles
- Forums and message boards
- A survey in 2017 determined that roughly 70% of employers use social media to screen prospective employees
- Employers may be concerned with information suggesting the candidate lied or exaggerated qualifications and experience
- Discriminatory posts
- Posts sharing confidential employer information and negative comments about former employers

Using Social Media to Screen Applicants

- Using social media saves time and money in learning a candidate's background and to identify potential risks and red flags
- Helps eliminate unqualified candidates
- Reveals job application and resume discrepancies
- May reveal activities harmful to previous employers
- May reveal drug or alcohol usage, hard partying, unlawful activity, violence and aggression, racism or other intolerant activities
- May reveal sexually explicit material
- Can be used to avoid or mitigate claims of “negligent hiring”

Potential Risks of Social Media

- Information may not always be reliable or accurate
- Applicants may not honestly represent themselves online
- Applicant profiles may be contaminated by third parties
- Doesn't necessarily tell the Applicant's whole story
- Information found may not be relevant, useful or accurate
- Risk of intruding into "private" areas; some states and cities have laws prohibiting employers from making adverse employment decisions based on off-duty conduct
- It may contain information that is "public" but illegal to consider in making a hiring decision

Risks of Social Media Use in Hiring

- Information obtained may influence or bias hiring decisions intentionally or unintentionally and may lead to inconsistent and potentially biased hiring practices
- May open employer to possible discrimination claims
- Fair Credit Reporting Act requirements and potential for violations

Consider Risks and Benefits

- Focus your efforts on other screening options to find out information including past employers, education and license verification, checking references, and drug testing
- Considering not using social media searches at all or make use of a third-party vendor to do so
- If you do it in-house, establish firm guidelines for use of social media to screen applicants, and stick to those guidelines
- Use outside employment counsel to confirm what you can and cannot do in making use of social media in the hiring process
- NEVER ask for passwords and never review private content
- Some states have “Facebook” privacy laws – California, Maryland and Illinois

Pre-Employment Testing

-Drug or alcohol testing is GENERALLY lawful post-offer and pre-employment

-Most employers may require an applicant, as a condition of hiring, to successfully pass a post-offer pre-employment examination, including drug screening

-Testing procedures should be consistent and focus on drugs that are likely to adversely impact the person's ability to perform the essential functions of their job or pose a threat to other employees

-“Suspicionless” drug tests must be limited to the conditional offer stage and applicants must be notified that testing will be part of the interview and pre-hiring process

-Confirm whether any Federal or State law requires business to maintain a drug free workplace or to decline employment of a candidate who tests positive for marijuana

Pre-Employment Drug Testing

- Confirm whether any State or Local laws prohibit testing of new hires (Nevada, NYC)
- Confirm whether lawful and off duty use of cannabis is permitted or protected in the state or states where you have employees
- California law prohibits the most common cannabis/THC testing
- Nevada requires drug test results to be analyzed by a licensed and qualified laboratory
- An alternative to pre-hiring testing is to consider “reasonable suspicion” testing of current employees, but consult counsel first

Other Medical Inquiries

- As an employer you have the right to establish job-related requirements and to seek the most qualified candidate for the job
- Medical information will only rarely be “job-related”
- In most instances employers are prohibited from asking about a candidate’s mental or physical disability or medical condition\
- An employer MAY inquire into the ability of the candidate to perform job-related functions and may respond to an applicant’s request for a reasonable accommodation under the ADA
- Federal and some State laws prohibit all employers of 15 or more employees from requiring physical examinations prior to the point of hire
- Once an offer has been made but prior to the commencement of work, an employer may require a medical or psychological exam provided that 1) the examination is job-related and consistent with business necessity, 2) entering employees in the same job classification are subject to the same requirement

Job Interviewing Practices

- Have a job description that accurately reflects the requirements of the position – responsibilities and tasks required
- Convert job description into relevant and appropriate selection criteria
- Use the selection criteria to develop your interview questions before the actual interview
- All questions should be job-related with a focus on job attributes that really matter to you
- Try to elicit specific factual answers vs generalities
- Consider standardized interview questions and review them with HR and your employment counsel and train managers in the hiring and interview process
- Ask about non-competes that the applicant may be subject to

Offer Letters and Applications

- Ask each applicant to complete a job application that has been screened by HR and employment counsel, even if they have a resume
- Applications may provide the employer with protection if the application states that all information must be truthful and accurate
- Read completed applications and ask for any missing information you deem relevant
- Obtain the applicant's consent in writing to check their references
- Be sure to include "employment at will" language in the offer letter
- Attach a final job description to the application and offer letter
- Include any contingencies in the offer letter (drug test, background checks, medical exam) and required background check/credit check notices and forms

Non-Competition Agreements

- Must be supported by consideration
- Must be reasonable in scope, geography and time
- Must be designed to protect legitimate business interests
- Note that they are sometimes difficult and expensive to enforce
- Both State and Federal governments are tightening restrictions on non-competes
- Recent FTC Final Rule No non-competes going forward and existing non-competes are unenforceable except for pre-existing non-competes with Senior Executives (making more than \$151,164 annually)
- The FTC rule will face legal challenges so stay tuned
- Check your State law to see if non-competes are permitted or restricted in some way

Disciplining Employees

- Performance Management through defining job duties, explaining expectations and evaluation and communication of employee performance against those duties and long-term goals, training, promotion requirements

- Set goals for improvement and growth

- Establish work rules and procedures and update your employee handbooks to ensure compliance with applicable laws

- Develop tools for measuring employee performance against the job description and provide for regular feedback to employees

- Types of discipline include progressive, non-punitive counseling and employee participation to correct performance or behavioral issues

- Always preserve the “at will employment” relationship

- Be consistent in the application of these processes to your employees

Key Discipline Considerations

- Common causes of disciplinary action – attendance, performance issues, safety, harassment, behavioral issues, equipment or materials, substance abuse, theft, violence or threats of violence
- As an employer be sure you and your managers know the rules and enforce them objectively and consistently
- Be sure all employees are provided with your Standards of Conduct
- Act promptly on all violations
- Investigate, interview and compile the facts
- Permit the employee with an opportunity to respond
- Consider appropriate action to take, if any
- Document and keep records of violations, investigations and outcomes

Considerations in the Disciplinary Process

- Is there a written contract to consider? If so, follow the letter of the contract with respect to discipline or termination
- Avoid discriminatory practices or violation of public policy in taking corrective measures
- Does your Employee Handbook fall into the category of a contract of employment? Clearly disclaim that throughout the Handbook.
- The Handbook promotes uniform and consistent application of policies
- Reduces the risk of discrimination claims
- Provides evidence to support claim that employer has complied with applicable laws
- Avoids confusion about policies
- Acquaints new employees with the business and educates supervisors and managers
- Provides guidance for dealing with employee complaints
- No signature on Handbook, only an acknowledgement of receipt

Corrective Actions

-If it is NOT business related – stay away from it

-Four steps in corrective action process:

Verbal warning – meet privately and provide opportunity to explain, formally issue a warning, create a plan of action and provide to HR

Written warning (PIP) – For repeated or serious violations you should talk to HR, create a plan of action, give a copy to the employee and have the employee sign it

Final Written Warning (PIP) – State performance to be improved with specifics, state expected performance and that it must be consistently achieved and identify support and resources you will provide

Suspension/Termination – Consult with HR and legal counsel, meet with the employee and document the same, have employee sign necessary forms to indicate notice, and in the case of suspension, follow-up

-The process does not need to be progressive, only clearly spelled out and consistently applied

Termination of Employment (1)

- Above all, follow the company's specific process and procedures in a manner consistent with company policies
- Create and retain documentation and proof supporting the legitimate grounds for termination of employment – This is the first and most important rule as both judges and juries like to see documentation
- Bring issues to the employee's attention and document the same
- Address problems in a timely manner and discipline employees where appropriate
- Be factual and specific – DO NOT invent cause or provide alternative reason that is not in fact why employment is being terminated
- Again, create a paper and/or digital paper trail
- If your company performs performance evaluations, they should be limited to the employee's skills and performance on the job

Termination of Employment (2)

- Employees are less likely to pursue a claim if they are aware of the existence of a paper trail, that they have been put on prior notice and provided with an opportunity to correct the issue
- Keep all versions of your Employee Handbook and other company employee policies and rules
- Keep the employee's signed acknowledgement of receipt of the Handbook and other policies and rules
- Document the termination meeting and don't do it alone
- Remain polite and professional
- Make sure your explanation of the grounds for termination is truthful and brief

Termination of Employment (3)

- Provide the employee with a copy of a termination letter, final pay and any other necessary paperwork
- Provide a separation or severance agreement where applicable
- Do NOT promise the employee will be eligible for unemployment benefits
- Don't say anything about *fighting* or *denying* unemployment
- If they ask, simply advise that they are welcome to apply but do not tell them they are eligible
- If employee becomes argumentative, do NOT get into a debate
- Ensure privacy of the meeting but have a witness in the room with you
- Be accurate, respectful, direct and brief – not more than 10 to 15 minutes

Severance Agreements (1)

- As a means of decreasing the likelihood of litigation some employers may deem a separation or severance agreement a protective measure
- New consideration is required, on top of wages and benefits owed as of the date of termination
- New consideration is required demonstrate the employee was provided with something he or she would not have otherwise received as consideration for signing the release
- New consideration need not be monetary
- Consider permitting the employee to resign
- Consider paying COBRA premiums for a specific period
- Follow any severance policy in your Handbook
- Ensure that the release is addressed to all applicable Federal and State statutes and common law causes of action, including wrongful termination and breach of contract
- Include OWBPA language, a waiver of unknown claims, recovery of attorneys' fees if the employee brings a cause of action and employer prevails

Severance Agreements (2)

- Include a choice of law, jurisdiction and venue clause
- Consider the time requirements imposed by the ADEA if the individual is 40 years of age or older
- Employee must have 21 days to consider the agreement
- Seven days from the date of signature to rescind
- Advise the employee to seek counsel in writing
- Be sure to release only those claims accrued through the date of execution of the severance agreement
- Remember that some claims, like unemployment and workers' compensation cannot be released
- Don't hand over the severance payment until the document is signed and the applicable time periods have expired
- Be sure to make payments as provided in the agreement

Wrap-Up

- Ensure that your company interview, hiring, disciplinary and termination policies, procedures and forms are compliant with Federal and State laws – consult with HR and employment counsel
- Review and update your company’s application form, Employee Handbook and policies regularly to ensure that they align with actual practices in your company’s workplace and applicable law
- Document all performance and disciplinary issues and actions taken
- When you have a doubt about whether you can or cannot do something in the employment setting, whether at the time of hiring or firing, consult with qualified employment counsel

Questions?

If you have a question regarding this presentation, please do not hesitate call my office (703 225 3477) or send me an email at bob@rweillaw.com

While I am admitted to practice only in Virginia, DC and Maryland, I will do my best to point you in the right direction and to appropriate resources.

Thank you for your attendance and participation today.

Bob Weil