Hiring and Firing
Helpful Hints to
Avoid Legal Risks

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Potential Claims

• The Starting Point: Employment At-Will
• Breach of Contract Claims
• Discrimination Claims
  – Civil Rights Act of 1866
  – Civil Rights Act of 1964
  – Age Discrimination in Employment Act of 1967 (amended by 1990 OWBPA)
- Rehabilitation Act of 1973
- Americans with Disabilities Act of 1991
- Genetic Information Nondiscrimination Act of 2008 (GINA)
- Worker Adjustment and Retraining Notification Act of 1988 (WARN)
– Other Laws containing Anti-Retaliation Provisions
  • FLSA
  • ERISA
  • FMLA
  • NLRA
  • USERRA
  • OSHA
  • Virginia Worker’s Compensation Act
  • Jury Service
  • Garnishment
Other Employment-Related Claims
- Wrongful discharge in violation of public policy
- Defamation
- Intentional infliction of emotional distress
The Hiring Process

• The Application
  – No promises
  – “At-will” disclaimer
  – Applicants should certify that the information is complete and accurate
  – Check all information on job applications
  – State reference-checking law
  – No questions related to sex, race, age, disability, etc.
• Unsolicited Applications
  – May create risks of liability for negligent hiring claims and/or discrimination claims
  – May result in failure to do a complete, pre-hire investigation
  – Employers should have a consistent policy

• The Interview
  – Written guidelines for interview
  – Avoid statements regarding grounds for discharge, “fair treatment,” job security, or duration of employment
  – Questions to avoid during job interviews
• The Offer of Employment
  – At-will disclaimers
  – No commitments regarding discharge or duration
  – Explicit compensation provisions (e.g. commissions, bonuses, etc.)
Performance Evaluations

- Objective Job Performance Standards
- Documenting Good or Bad Work Performance
  - Make sure evaluations are honest, candid and accurate
  - Make sure criteria are job-related
  - Employ consistent grading
  - Consequences of the failure to improve or future misconduct
– Reviewed by next level of management before making them final
– Discuss the evaluation with the employees
– Document misconduct and counseling
– Apply same standards to senior executives
Handling “Troubled” Employees

- Mental illness, drug and alcohol abuse, and workplace stress
- If threats, weapons or danger is imminent, the police should be called immediately
- Security experts
- Corporate counsel
- Physicians and therapists
• Drug and alcohol clinics
• Negligent retention
• Negligent hiring
• Supervisor training
  – Document and investigate all complaints alleging dangerous, harassing, or otherwise bad acts of employees
  – Take prompt action by immediately suspending employees
– Take prompt, remedial action (including suspension or discharge) if, after investigation, the employer learns that one of its employees has dangerous or other unlawful proclivities
– Report complaints and bizarre behavior
– Take all threats seriously
• Confronting the problem employee
  – Seek professional assistance before confronting an employee
  – Take security precautions prior to and during the meeting
Documenting Discipline

- If violation of company rule is involved, make sure employee was aware of rule
- Examine the alleged wrongdoer’s personnel record
- Before disciplining employee, look for warning signs of potential problem areas
- Timing and manner of communicating any discipline is important
Pre-Termination Review

• Review should include
  – Employee’s personnel file
  – Check past practices and company policies
  – Was policy published to the employee
  – Were employees in the same or similar circumstances treated in the same or similar matter

• Warning signs
  • No documentation
  • Long-time employee
  • Good work record
  • Protected category
• Suspension
• Investigations
  – What should investigation include
    • Interview the employee’s supervisors and co-workers - Who? What? Where? When?
    • Interview the employee
    • Gather all relevant documents
    • Evaluate the purpose and scope of the investigation
Terminations

• In Person
  – Another manager or supervisor should be present
  – Be truthful and direct
  – Avoid apologies
  – Allow departing employee to have an opportunity to explain
  – Avoid arguing
– Minimize the embarrassment and humiliation to the employee
– Avoid unnecessary demeaning security measures
– Make sure the termination procedure is consistent
– Termination letter – pros and cons

• Separation agreements and waivers
• Wage withholding
• Job references
30 QUESTIONS TO AVOID DURING EMPLOYMENT INTERVIEWS

1. How old are you?
2. Do you have a disability?
3. Do you have any illnesses?
4. Do you have any children?
5. Are you pregnant?
6. Are you a United States citizen?
7. Have you ever been arrested?
8. What are your child care arrangements?
9. Do you plan on having any children?
10. Are you married?
11. Do you plan on getting married?
12. Have you ever filed a workers’ compensation claim before?
13. Do you have a bad back?
14. Have you ever filed an EEOC charge before?
15. Have you ever filed a wage claim with the federal or state Department of Labor?
16. Have you ever filed a safety complaint?
17. Do you have any health problems?
18. What is your religion?
19. Are you religious?
20. Where were you born?
21. Where were your parents born?
22. What is your race?
23. Could we have a photograph of you?
24. What is your native tongue/language?
25. Are you a high school graduate?
26. Have you ever served in any other country’s military?
27. What type of discharge did you receive from the United States or other military?
28. Do you have AIDS or HIV infection?
29. Have you ever been tested for HIV?
30. Do you own a car?
Thank you for attending

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