



The Employment Process

Human Resources Elements

Hire ❖ Develop ❖ Retain

The Employment Process

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Employment Planning

To hire or not to hire? That is the question!

Here are some ideas to consider when planning your employment needs. Respond to the following questions based on your current practices.

	YES	NO
General		
Do you engage in employment planning?	<input type="checkbox"/>	<input type="checkbox"/>
Have you created a budget based on your projections for new employees and compensation?	<input type="checkbox"/>	<input type="checkbox"/>
Is that budget realistic?	<input type="checkbox"/>	<input type="checkbox"/>
Has employment planning been accurate in the past?	<input type="checkbox"/>	<input type="checkbox"/>
If employment planning has not been accurate in the past, have you taken steps to correct the inaccuracies?	<input type="checkbox"/>	<input type="checkbox"/>
Planning Factors		
Does your employment planning consider changes in the applicant pool?	<input type="checkbox"/>	<input type="checkbox"/>
Does your employment planning take into consideration any union contracts?	<input type="checkbox"/>	<input type="checkbox"/>
Does your employment planning plan for any economic changes (e.g., increases in minimum wage, required benefits, etc.)?	<input type="checkbox"/>	<input type="checkbox"/>
Policy		
Is there one person or one department responsible for your employment planning?	<input type="checkbox"/>	<input type="checkbox"/>
Is that responsibility included in the performance evaluation of that individual or department?	<input type="checkbox"/>	<input type="checkbox"/>
Are all department heads involved in employment planning?	<input type="checkbox"/>	<input type="checkbox"/>



	YES	NO
Is employment planning actually implemented by:		
Recruiters?	<input type="checkbox"/>	<input type="checkbox"/>
Trainers?	<input type="checkbox"/>	<input type="checkbox"/>
Managers?	<input type="checkbox"/>	<input type="checkbox"/>
Human Resources?	<input type="checkbox"/>	<input type="checkbox"/>
Recruiting		
Do you know how many employees you will need during the next year?	<input type="checkbox"/>	<input type="checkbox"/>
Do you know the qualifications necessary for the positions that will be open during the next year?	<input type="checkbox"/>	<input type="checkbox"/>
Is there a job analysis for each open position?	<input type="checkbox"/>	<input type="checkbox"/>
Is there a job description for each open position?	<input type="checkbox"/>	<input type="checkbox"/>
Have you analyzed the sources for recruiting such employees?	<input type="checkbox"/>	<input type="checkbox"/>
Are sources of employees routinely reviewed for adequacy?	<input type="checkbox"/>	<input type="checkbox"/>
Are the tests used to screen applicants reviewed for:		
Unlawful discrimination?	<input type="checkbox"/>	<input type="checkbox"/>
Accuracy?	<input type="checkbox"/>	<input type="checkbox"/>
Job relatedness?	<input type="checkbox"/>	<input type="checkbox"/>
Validity?	<input type="checkbox"/>	<input type="checkbox"/>
Do you post jobs so that current employees can apply for open positions?	<input type="checkbox"/>	<input type="checkbox"/>
Have you avoided overstaffing?	<input type="checkbox"/>	<input type="checkbox"/>



	YES	NO
Have you avoided being understaffed to the extent that it impedes your performance and erodes morale?	<input type="checkbox"/>	<input type="checkbox"/>
Have you acquired information on competitive compensation for the open positions?	<input type="checkbox"/>	<input type="checkbox"/>

Training

Have you considered training programs for current employees to enable them to fill some of the open positions?	<input type="checkbox"/>	<input type="checkbox"/>
Do you provide training to management about employment planning/succession planning?	<input type="checkbox"/>	<input type="checkbox"/>
Do you provide training to in-house recruiters concerning employment planning?	<input type="checkbox"/>	<input type="checkbox"/>

How are you doing?

Number of **Yes** responses today _____

Number of **Yes** responses in 6 months _____

The more questions you can answer **Yes**, the greater the care you take in planning for your employment needs.



Analyzing Hiring Costs

	YES	NO
General		
Do you have one person or one department analyzing hiring costs?	<input type="checkbox"/>	<input type="checkbox"/>
Do you have stated goals concerning the cost of hiring new employees?	<input type="checkbox"/>	<input type="checkbox"/>
Are these goals in writing?	<input type="checkbox"/>	<input type="checkbox"/>
Do you analyze the cost of hiring new employees?	<input type="checkbox"/>	<input type="checkbox"/>
Does your analysis include:		
Salaries of any recruiters?	<input type="checkbox"/>	<input type="checkbox"/>
Advertising for new employees?	<input type="checkbox"/>	<input type="checkbox"/>
Hours spent in interviewing and testing new employees?	<input type="checkbox"/>	<input type="checkbox"/>
Compensation paid to current employees for interviewing and testing new hires?	<input type="checkbox"/>	<input type="checkbox"/>
Number of new hires made in a year?	<input type="checkbox"/>	<input type="checkbox"/>
Average training time for new hires to learn how to do their jobs efficiently?	<input type="checkbox"/>	<input type="checkbox"/>
Cost of training in terms of compensation paid to new hires?	<input type="checkbox"/>	<input type="checkbox"/>
Increase (or decrease) in compensation due to new hires?	<input type="checkbox"/>	<input type="checkbox"/>
The reason you need to hire a person (e.g., turnover, increased sales, increased customer complaints)?	<input type="checkbox"/>	<input type="checkbox"/>
Amount of raise (if any) that would have caused the employee you are replacing to stay?	<input type="checkbox"/>	<input type="checkbox"/>
Cost of any temporaries hired to perform services while looking for a replacement for an employee?	<input type="checkbox"/>	<input type="checkbox"/>
Cost of overtime paid employees while vacancy exists?	<input type="checkbox"/>	<input type="checkbox"/>
Is this analysis performed at least yearly?	<input type="checkbox"/>	<input type="checkbox"/>
Do you use the analysis to evaluate your:		



	YES	NO
Goals?	<input type="checkbox"/>	<input type="checkbox"/>
Policies?	<input type="checkbox"/>	<input type="checkbox"/>
Budgets?	<input type="checkbox"/>	<input type="checkbox"/>
Do you use the analysis to evaluate (and reward):		
Your managers?	<input type="checkbox"/>	<input type="checkbox"/>
Your recruiters?	<input type="checkbox"/>	<input type="checkbox"/>
The person responsible for the analysis?	<input type="checkbox"/>	<input type="checkbox"/>

Budgets

Do you have a budget for the following:

Training department?	<input type="checkbox"/>	<input type="checkbox"/>
Human Resource department?	<input type="checkbox"/>	<input type="checkbox"/>

Number of **Yes** responses today _____

Number of **Yes** responses a year from today _____

The more **Yes** responses you have, the more effectively you should be able to manage your costs and make better-informed business decisions.



Factors to Consider

1. Know the sources of your applicants.
2. Find out whether the most successful applicants were recruited by:
 - Newspaper advertisements
 - Word of mouth
 - Posting on your bulletin boards
 - Outside recruiters
 - In-house recruiters
 - Radio advertising
 - Television advertising
 - Referral from placement offices of educational institutions
 - State Job Service
 - Temporary agency
 - Social Media
 - Professional organizations/networks
 - Alumni associations
 - Others: _____
3. Record the costs of:
 - Newspaper advertisements
 - Word-of-mouth advertising
 - Posting on your bulletin boards
 - Outside recruiters
 - Internal recruiters
 - Radio advertising
 - Television advertising
 - Referral from placement offices of educational institutions
 - **Social Media Advertising**
 - **Professional organizations/networks advertising**
 - Other:
4. Analyze the number of successful applicants based on the cost of the mechanism used to recruit them.



5. Consider your costs in terms of the following:
 - Number of applicants generated
 - Number of applicants hired
 - Length of time the persons hired work for you
 - Success of the persons hired

Defining the Employment Relationship

Employing at will

In most states, employment generally remains “at-will”, i.e., the employer or employee may terminate the employment relationship at either’s discretion. However, numerous laws and statutes have constrained the conditions under which employment can be terminated.

For example, employment can be considered a contract between the employer and employee, even when no written contract exists. As such, there can be much confusion concerning the rights and duties of the employer and the employee concerning the employment relationship.

Defining the “contract”

The employment relationship can be defined by a written or oral agreement.

Where a union has been recognized as the exclusive collective bargaining agent for employees, the respective rights and obligations of the employer and employee are defined by the terms of the collective bargaining agreement between the employer and the union. Under the National Labor Relations Act (NLRA), these bargaining agreements generally supersede any individual contract rights or common law rights of employees who are covered by the agreement, but they do not supersede rights conferred by statutes, such as nondiscrimination laws.

The terms and conditions of employment for employees *not* covered by collective bargaining agreements may be governed by written individual employment contracts. Written contracts are most common with executives and other higher-level employees. Typically, written employment agreements define, as a minimum, current and deferred compensation, benefits, the period of employment, and the rights of the parties concerning termination and resignation.

Employees who are subject to neither a collective bargaining agreement nor an individual written employment contract **generally have only those rights to employment as are conferred by statute or as recognized by common law**. Pertinent state statutes define certain standards for employment (e.g., minimum wage, overtime) and ban certain types of employer conduct (e.g., discrimination, retaliatory discharge). **No Illinois or Missouri statute generally governs the employment relationship or prohibits the discharge of an employee without just cause.**



The nature of common law employment rights has been subject to much court interpretation and expansion. Historically, the common law of Illinois has put employees without written contracts into one of two categories:

1. Those employed for a definite term, e.g., month-to-month or year-to-year.
2. Those employed for an indefinite term.

Definite term employees

The first group of employees has a right to employment during the term of the implied contract, subject to the employer's right to discharge the employee for cause. However, a year-to-year employment relationship can be terminated at the expiration of each annual term without cause if either the employer or the employee gives notice. Absent such notice, the employment relationship is deemed to be renewed for an additional year.

Whether an oral employment relationship is for a definite term (year-to-year, or month-to-month) depends on the mutual intent of the parties, as ascertained by judicial examination of relevant facts and circumstances surrounding the employment relationship. It is also possible to show in a court proceeding that a month-to-month or year-to-year employment arrangement contemplates rights and duties beyond those, which automatically arise under common law. Employer handbooks and policies are one possible source of such rights and duties.

Indefinite term employees

The second group of employees—those employed for an indefinite term—historically were considered to be terminable at the will of the employer at any time, for any reason, good or bad, or no reason, subject, of course, to express statutory restrictions, such as nondiscrimination laws. However, there is a current trend for courts to imply some limits on the employer's right to terminate an "employee at will." In this respect, courts consider both "implied contract" rights and public policy limitations on the employer's right to discharge. Implied contract rights have been recognized.

Other agreements

Finally, both oral employment relationships and those governed by individual written contracts may be supplemented by specific, limited written agreements covering specified aspects of employment. These include agreements not to compete and agreements that restrict an employee's opportunity to hold a second job for another employer.

Statutory restrictions

Both state and federal laws specifically limit an employer's right to terminate employees for certain reasons. Various discrimination statutes restrict termination based on race, sex, age, national origin, ancestry, creed, color, religion, disability, veteran status, and sexual orientation. These statutes prohibit termination of employment in retaliation for filing discrimination complaints, filing workers compensation claims, or exercising rights conferred by the Occupational Safety and Health Act (OSHA), the NLRA, the Employee Retirement Income Security Act (ERISA), *etc.* Further, employees cannot be terminated for taking time off to vote, or for obeying a summons for jury duty. Federal and state laws concerning garnishments protect an employee from being discharged for garnishment of



"one single indebtedness." Finally, there are restrictions on the termination of persons departing for or returning from military service.

At some point, many companies are faced with the need to downsize, right size, re-engineer, or otherwise terminate employees. Before undertaking a reduction in force ("RIF"), employers are advised to consult legal counsel to determine the applicability of state and federal WARN (Worker Adjustment and Retraining Notification Act) laws.

Termination Benefits

In some states, a terminated employee is entitled to payment of wages earned on the payday when the wage payment otherwise would have been made. Other states, such as California, require employers to issue a paycheck at the time of termination. Some states also require the payment of earned but unused vacation or PTO benefits to terminated employees.

Severance pay is not required by any state statute but may be provided by the employer's policy, practice, or contract. Where the employer does have a severance plan, it may be subject to ERISA requirements.

COBRA amended ERISA and requires that an employee whose employment is voluntarily or involuntarily terminated for reasons other than gross misconduct must generally be permitted to continue to receive group health insurance coverage at his/her own expense for a specified time period.

Individual job rights vs. employer's prerogatives

Approximately 70% of the United States labor force is employed without the benefit of a stated contract. These employees can be released from employment with little or no notice. Developments in employment law indicate some change from a "hands off" employment posture to one that restricts an employer in the employment relationship.

Furthermore, employees protected from at-will managerial prerogatives to some extent include:

- Union members covered by collective bargaining agreements,
- Civil service employees
- Employees covered by expressed and implied employment contracts.

Therefore, the issue of employment-at-will is essentially one of an individual's job rights contrasted with an employer's right to employ whomever s/he wishes.

Limitation by statute and employer actions

Over the course of this century, several restraints have been placed upon employers regarding their right to discharge employees. For example:

1. The National Labor Relations Act of 1935 provided employees with the right to form labor unions and to engage in collective bargaining without fear of being discharged for these actions. Through collective bargaining, terms of employment and procedures for arbitration of grievances further limit the employer in the employment relationship.



2. Federal statutes such as Title VII of the 1964 Civil Rights Act, the Age Discrimination Act of 1967, and the Americans with Disabilities Act, have added additional considerations to the employment relationship. These acts prohibit employment discrimination based on protected characteristics such as race, sex, age, religion, or disability.

From "Blind" to "Bind"

To comply with these laws, employers created internal documents, manuals, policy statements, and practices to ensure that internal decisions were "**blind**" to these protected groups. By putting into writing the terms and conditions under which personnel actions, including termination, can occur, employers have produced statements about employment that the courts can and have interpreted as contracts for all employees.

Conversations between employer's representatives (e.g. HR department, supervisors) and employees about employment conditions can, under certain circumstances, constitute an oral agreement or contract. If an oral agreement can be proven, it can define the terms of employment.

Limitation by precedent and legal rulings

In a landmark case, *Peterman v. International Brotherhood of Teamsters Inc.*, 344 p. 2d 25 (1959), Peterman refused to commit perjury under oath in support of the teamsters and was fired by them. The court held in favor of Peterman, who sued to return to his job. An employer cannot fire an employee for failing to support the employer in immoral actions, because such action would run counter to the "intentions of public policy."

Other decisions by state and federal courts have left many managers uncertain and wary of employment decisions. Some feel that their prerogatives have been severely limited, with the power shifting toward the protection of employees and away from a concern with the organization's well-being. However, discharge that is based upon economic necessity is generally lawful as long as the employer can demonstrate that employment-related decisions are not discriminatory.

Public policy concerns limit an employee's termination for:

- Filing a worker's compensation claim
- Filing a complaint with the Department of Labor or the EEOC
- Exercising a civil duty such as jury duty
- Refusing to violate the law
- Having the right to certain benefits such as a pension
- Refusing to take a polygraph test (under certain circumstances)
- Reporting an employer's unlawful conduct
- Refusing to violate a professional code of ethics
- Refusing to lobby for a law or political candidate favored by the employer

Therefore, although the general rule is that employment in Illinois is "at will", it is better stated the exceptions to employment at will are the rule.



Recruiting

The ability to locate, hire, and retain productive employees is crucial to the success of any organization. This responsibility generally falls under the human resources umbrella, from the advisory, control, and service standpoints. Effective, well-thought-out recruitment strategies that include the types of positions to be filled, prevailing labor market conditions, area demographics, equal employment opportunity, and applicable affirmative action obligations are essential.

In our tight labor market, there are many more in the market searching for jobs. Just because many are in the employment pool, finding the right candidates can still be challenging. As a result, employers cannot rely solely on traditional "tried and true" practices, such as participating in job fairs, running newspaper ads, or holding an "open house." This technology age has brought a new mix to the recruiting process. Today there are so many different options through web-based recruitment to attract talent (i.e., Facebook, Linked-in, Twitter, and various recruitment websites)

Getting started

- Decide how much recruitment is necessary. Ask department heads to project staffing needs, factoring in normal attrition, scheduled or likely retirements, company plans for new products, etc.
- Set a budget that reflects and adequately supports the level of recruitment activity proposed.
- Establish and follow a job requisition system. Ensure that each requisition includes an up-to-date and detailed job description, a list of essential functions, and a list of basic prerequisites as well as desirable qualifications.
- Identify the internal and external recruitment methods, techniques, and social media that are most likely to attract the candidates sought. In deciding on the appropriate recruitment methods, consider company location, local labor market conditions, costs (how far the recruitment budget can be stretched), pay and benefits (critical to candidates), and the image the company wishes to project to the public.
- Use a group of techniques, rather than a single method, to meet the recruitment goals.
- Commit the resources necessary to support the proposed recruitment activities. For example, make sure recruitment literature is appealing and geared to the target audience.
- Involve line managers in the recruitment process by encouraging regular contact with in-house recruiters and HR office personnel. Meet regularly to conduct an ongoing review of prescreened resumes and applications.
- Make sure that everyone who might come into contact with a prospective candidate (did you remember your receptionist?) is aware of and informed about EEO and ADA requirements and restrictions.
- Regularly monitor recruitment activities so that efforts can be made to eliminate or improve methods or procedures that prove ineffective.
- Make an effort to develop and maintain good relationships with a variety of recruiting sources, even when there is no immediate need for applicants. The wider the scope of the recruiting effort and the greater the number of sources used, the more likely it is that the company will have a sufficiently large and diverse pool of qualified applicants.



Fulfilling EEO obligations

Recruiting procedures are one of the first areas that investigators may examine to determine whether an employer complies with EEO laws. If company policies and practices - either intentionally or inadvertently - screen out protected classes, the company may be found in violation of anti-discrimination law. To guard against legal problems, remember:

- Reliance on walk-in applicants and word-of-mouth recruiting may not be considered enough of a proactive effort if the workplace is predominantly white.
- Hiring standards may be suspect if they do not relate directly to the job.
- Although employers are not obligated to hire certain quotas of minority employees, a significant imbalance in the number of minorities in a workforce, relative to the number of minorities available in the area, can suggest discriminatory practices.
- Federal contractors and others who are required to have an Affirmative Action Program under Executive Order 11246 must be familiar with the specific requirements and carry them out.

Contract recruiting

In industries where employment goes through an up-and-down cycle, employers may be able to make their recruiting more efficient by hiring a contract recruiter. A contract recruiter is an outside recruiter who accepts a temporary assignment (usually for three to six months) to address a particular recruiting problem or other problem in an organization. The person serves largely as an adjunct to existing employment or HR department staff and is paid for time worked, usually at an agreed-upon hourly rate.

Duties may range from screening resumes, conducting telephone interviews with out-of-town candidates, or preparing employment offers, to planning and staffing open houses, assisting with advertising campaigns, designing employee referral promotions, or conducting campus recruitment activities, to launching an HR function in a start-up operation.

External sourcing

Consider the following questions as they pertain to your external recruiting practices today.

	YES	NO
General		
Do you have goals for external applicant sourcing?	<input type="checkbox"/>	<input type="checkbox"/>
Are the goals in writing?	<input type="checkbox"/>	<input type="checkbox"/>
Is there a budget for applicant sourcing?	<input type="checkbox"/>	<input type="checkbox"/>
Is that budget analyzed for efficiency?	<input type="checkbox"/>	<input type="checkbox"/>



	YES	NO
Do you track and coordinate your applicant sourcing with your:		
Recruiting policy?	<input type="checkbox"/>	<input type="checkbox"/>
Job descriptions and qualifications?	<input type="checkbox"/>	<input type="checkbox"/>
Testing of applicants?	<input type="checkbox"/>	<input type="checkbox"/>
Budget process?	<input type="checkbox"/>	<input type="checkbox"/>
Training of managers in hiring matters?	<input type="checkbox"/>	<input type="checkbox"/>
Affirmative action plan?	<input type="checkbox"/>	<input type="checkbox"/>
Policy	<input type="checkbox"/>	<input type="checkbox"/>
Do you use the following sources for applicants?		
Newspaper advertisements (e.g. national, local, weekly, special interest, minority)?	<input type="checkbox"/>	<input type="checkbox"/>
Word of mouth?	<input type="checkbox"/>	<input type="checkbox"/>
Posting on bulletin boards/company website/social media?	<input type="checkbox"/>	<input type="checkbox"/>
Listing with state job service, internet job boards (i.e. monster.com, jobdig, etc.)	<input type="checkbox"/>	<input type="checkbox"/>
Outside recruiters?	<input type="checkbox"/>	<input type="checkbox"/>
In-house recruiters?	<input type="checkbox"/>	<input type="checkbox"/>
Radio advertising?	<input type="checkbox"/>	<input type="checkbox"/>
Television advertising?	<input type="checkbox"/>	<input type="checkbox"/>
Referral from placement offices of educational institutions?	<input type="checkbox"/>	<input type="checkbox"/>
Alumni associations?	<input type="checkbox"/>	<input type="checkbox"/>
Magazines and trade publications?	<input type="checkbox"/>	<input type="checkbox"/>
Job fairs?	<input type="checkbox"/>	<input type="checkbox"/>
Bill and bus boards?	<input type="checkbox"/>	<input type="checkbox"/>
Flyers and other direct mail vehicles?	<input type="checkbox"/>	<input type="checkbox"/>



	YES	NO
Do you use the following sources for applicants?		
Employment agencies?	<input type="checkbox"/>	<input type="checkbox"/>
Professional associations?	<input type="checkbox"/>	<input type="checkbox"/>
Former employees?	<input type="checkbox"/>	<input type="checkbox"/>
Current employees?	<input type="checkbox"/>	<input type="checkbox"/>
Social Media?	<input type="checkbox"/>	<input type="checkbox"/>
Alumni Associations?	<input type="checkbox"/>	<input type="checkbox"/>
Do you ask employees to suggest sources for external applicants?	<input type="checkbox"/>	<input type="checkbox"/>
Discrimination	<input type="checkbox"/>	<input type="checkbox"/>

Do your advertisements/postings avoid words that suggest you discriminate?
 (attractive, draftsman, recent college grad, retirees, workers 25-45, housewives, gal Friday)

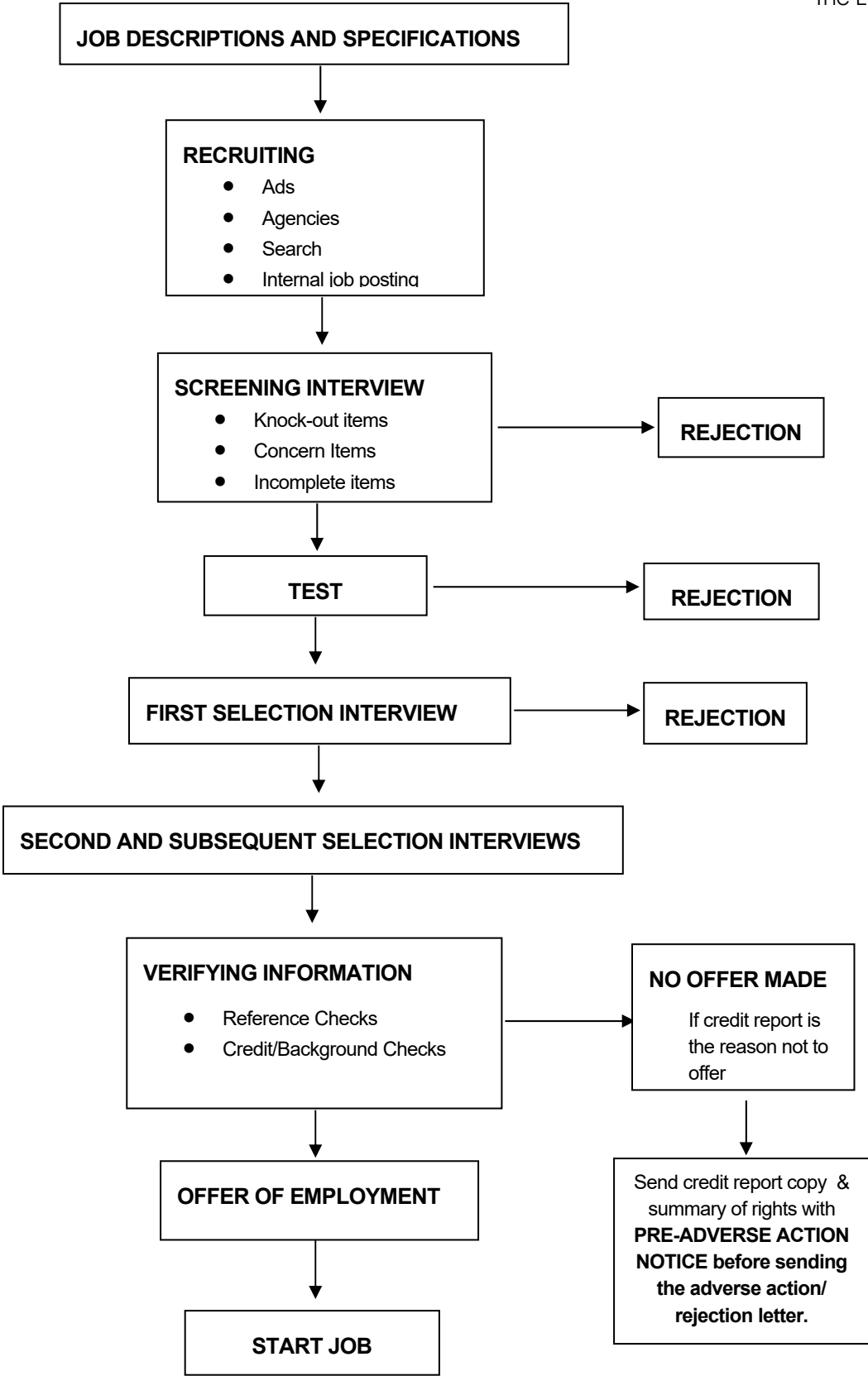
Do you review your applicant flow for indications that you are discriminating?	<input type="checkbox"/>	<input type="checkbox"/>
Do you certify sources annually?	<input type="checkbox"/>	<input type="checkbox"/>
Do you analyze your sources' applicants for indications that those sources are discriminating?	<input type="checkbox"/>	<input type="checkbox"/>

Number of **Yes** responses today _____

Number of **Yes** responses a year from today _____

The more **Yes** responses you have, the more effectively you should be able to manage your external recruiting activity.





Preparing to recruit

Before you can recruit adequately to fill a job, you need to understand what the job entails. One of the more common tools to assist in this is a written job description.

What is a job description?

It's easy to talk about job descriptions without actually defining what they are. Everyone is familiar with the term, and even supervisors and employees have a basic working knowledge of what a job description contains. However, we must define here what a job description is (or has been in the past) and what it *should be*. The definition below should serve as a reminder to those responsible for writing the job descriptions of what their efforts should produce:

A job description is a formalized statement of the duties, qualifications, and responsibilities of the job, based on information obtained through job analysis. Its purpose is to identify the job, define it within certain established limits, and describe its scope and content. It may include information on working conditions, tools and equipment used, and relationships with other jobs. It should be accurate, concise, and complete.

There are two basic types of job descriptions: "generic" or general and "specific" or individual job descriptions. As the name implies, the specific job description is a statement of nearly *all* the duties and responsibilities assigned to one or more individuals in the job. It is usually quite detailed and comprehensive, providing a good basis for recruiting as well as job evaluation, training, orientation, and comparing the relative requirements of jobs. This type of job description demands a thorough job analysis, considerable care and expertise in preparation, and an active effort to keep it useful and up-to-date. While it may be the soundest type of job description to use, it is also the most expensive to prepare.

Generic job descriptions, on the other hand, are written in more broadly stated, general terms without identifying *each specific* task. Because they apply to a group of similar or near-similar tasks, the normal cost of preparation is usually lower. The time required to perform job analysis and to write the generic job description is about the same as that for specific job descriptions. It must be written broadly enough to allow for some variation in product, equipment, or procedure, and may include some functions performed by one or more of the jobs but not all of them.

How to develop a job description

Analyze the Job. Use a systematic process to gather information about the tasks making up a job, employee skills required to do the job, time factors, situation factors such as technology use, physical aspects, information flows, interpersonal and group interactions, and historical traditions associated with the job. Look at survey descriptions and compare them to your own.

Develop Job Specifications. Specify the requirements or qualifications necessary on the part of the individual to perform the job successfully in terms of knowledge, skill, and ability.



Why are job descriptions so important?

The advantages of having carefully prepared, properly used job descriptions should be obvious to anyone in the HR field. However because so many companies have *not* prepared and used their job descriptions properly, many of these benefits have been lost or overlooked. Consider the following:

- Job descriptions are helpful for recruiting -- to job applicants, to employees, to supervisors, and to personnel staffers at every stage in the employment relationship, all the way from recruiting to retirement. They provide information about the knowledge, training, education, and skills needed for each job. They prevent unnecessary misunderstandings by telling employees what they need to know about their jobs. They can guide a new employee who may have forgotten or misunderstood some aspect of the job, or a supervisor who may think the new hire doesn't fully understand the job. Best of all, they provide this information in a completely objective and impersonal way.
- Job descriptions clarify who is responsible for what within the company. They also help define relationships between individuals, departments, etc. When used to advantage, they can settle disputes and improve communications.
- Job descriptions help the employee understand the responsibilities of the position. This not only enables the employee to assess the relative importance of everything s/he is accountable for, but also provides a sense of where the job fits into the larger responsibilities of the company as a whole.
- Job descriptions help management analyze and improve the company's structure. They reveal whether all company responsibilities are adequately covered and where they should be reallocated to achieve a better balance.
- Accurate job descriptions provide a basis for job evaluation, wage and salary surveys, and an equitable wage and salary structure. (Job descriptions can be used to either support or discredit comparable worth and other job description complaints, therefore they should reflect only the truth about the job in question.)

Before you recruit, develop an effective written job description to use as a tool (and evidence). Make sure the department manager concurs and that the description covers, at a minimum, all essential functions of the position. Furthermore, it's important to add a "catch-all" phrase such as "and other duties as assigned."

The ADA general rule:

The ADA precludes an employer from discriminating against a "qualified person with a disability" who can "perform the essential functions of the job." While the ADA does not tell the company what jobs to have and how to define them, it does mandate that a person's ability to do the job be measured by analyzing the ESSENTIAL job functions. A person who is **not** qualified to perform the essential functions of the job (with or without reasonable accommodation) need not otherwise be hired, promoted, or retained.

All jobs at your company have essential and marginal functions. Employment decisions cannot be based on the person's inability to do a marginal function. *Essential functions should be included in job descriptions.*



Who will you consider an "applicant"?

Your recordkeeping, or lack thereof, regarding job applicants could land you in legal hot water with the Office of Federal Contract Compliance Programs (OFCCP), the Equal Employment Opportunity Commission (EEOC), or the Department of Justice. The OFCCP and the EEOC require covered employers to maintain records and data on all **applicants** to determine whether a company's hiring practices adversely impact women or minorities. The problem is that neither agency defines "applicant" within its regulations. Most companies are very lax in defining this term, too. Before recruiting, it is best to develop your company policy (and disseminate it to all) as to "who" will be considered an "applicant."

A movement is afoot at the OFCCP to clarify what it meant by "applicant." It has proposed to define "applicant" as "anyone who expresses interest in a job or a series of jobs." If the OFCCP gets its way, the newer, broader definition will create an increased administrative burden on contractors, who are required to maintain applicant flow to test their hiring practices for discrimination. And if the OFCCP lays down a broader range, can the EEOC be far behind? Until the OFCCP regulations change, employers and contractors are on their own to decipher who the government thinks is an applicant, and to create legal application procedures accordingly.

Here are some insights into what the government considers when determining if a candidate meets its "definition" of an applicant.

- **Minimal qualifications.** If the individual is at least minimally qualified for the position.
- **Formal application.** Whether the individual communicates a clear interest in being considered for the position by filling out an application, submitting a resume, sending an e-mail message, etc.
- **Formal application procedures.** Whether the company has formal application procedures, and whether the candidate follows the prescribed procedures.

To reduce potential liability when maintaining applicant records, incorporate the following into your application procedures:

- Define when applications or resumes will be accepted, i.e., only when a vacancy exists and the company is recruiting.
- Require a written/electronic application to consider any candidate for a job.
- Establish minimum qualifications for every available position and publish
- Establish a policy regarding the time during which jobs will remain open for application consideration; and
- Arrange to be notified when an applicant eliminates himself/herself from consideration.

NOTE: This is the OFCCP's definition of an applicant, which applies to fewer companies than Title VII and the EEOC would but is a good guide to follow when evaluating applicant status.



Develop a Hiring Profile

Developing a hiring "profile"—a brief statement of job particulars and the necessary or desired qualities that a successful employee should possess—can help reduce your risk of EEO problems. Steps to take to develop your profile include:

1. Systematically analyzing the job to identify the competencies (technical knowledge, skills, etc.) needed for successful job performance. Examine the job's specific characteristics, including work conditions, major duties and responsibilities, and expected outcomes.
2. Developing for each competency requirement a standard set of questions designed to elicit information on the applicant's past accomplishments, activities, and job performance.
3. Preparing a list of things to look for in the applicant's responses. The list might include examples of desired work behaviors or attributes, types of experience, achievements, or demonstrations of specific traits or skills.
4. Using an applicant appraisal form and supplemental blank paper to record applicant responses and summarize observations and impressions. Your comments should be job-related and bias-free.



Screening

When you are selecting individuals to interview based solely on a resume or application, phone screening or screening questions can help immensely. Screening will allow you to make prudent decisions quickly about whom to schedule for interviews. You'll be looking for "knock out" items, "concern" items, and "incomplete" items. This is especially critical when screening out-of-town candidates where significant cost to the company is incurred as well as inconvenience to the candidate for "in person" interviews. Additionally, screening helps you to consolidate your true applicant base when you are faced with a large volume of resumes.

Three distinct benefits in the hiring process stemming from screening include:

1. It saves time and money.
No one can afford to spend hours interviewing a parade of individuals who may or may not be well qualified. Prescreening enables you to weed out candidates whose qualifications and sincere interest in your job opening are questionable. It also allows you to eliminate those individuals whose compensation needs are not in line with the position. Thus, you can devote more individual attention during on-site visits to those candidates warranting serious consideration.
2. It is impartial.
Candidates can't have visual advantages over one another. Content and tone largely determine whether the interviewee is a viable candidate. With no visual distractions, you can concentrate on what the other party is saying. Does the person on the other end of the phone understand the job and adequately express his or her qualifications? How well does s/he listen? Does the candidate ask "quality" questions when given the opportunity? Is there excitement about the prospect of visiting the company? Would you be proud to present this candidate? Would the candidate want the position if it were offered?
3. You can read directly from your notes.
Since you won't have to maintain eye contact with the candidate, you can read from your prepared paperwork and mark down comments. If you've prepared your "must have" and "nice to have" lists of qualities for the job, the phone screen should be easy to conduct. This is extremely helpful for the less seasoned interviewer.

Remember, candidates who sell themselves sight unseen are worthy of being asked in for a face-to-face interview. If phone screening has been conducted, mutual interest and rapport will already have been established.



Employment Application Forms

Job applications are the first tool most organizations use to obtain information needed to screen prospective hires. ***Being invited (or permitted) to complete an application automatically "qualifies" a person as an official applicant.***

Unless a resume is received, application forms are the employers' primary written source of initial information about applicants' education, paid and unpaid work experience, and job skills. Application forms vary in design and scope, but their purpose is the same: to obtain information in the company's preferred format that will help indicate whether an applicant for a particular job is qualified and should be considered for employment. While applications may be used to select persons for interviews, they also may be used to eliminate from further consideration those who are unsuitable or unqualified applicants.

Many employers use a single, standardized form for all job applicants. Some, such as hospitals, have a separate form for each occupational group they employ; others use one form for hourly employees, and another for exempt personnel.

While employment applications can provide much useful information, they also can cause legal problems for employers. Among the more common are questionable inquiries about arrest records, marital status, height or weight, number and ages of dependents, availability for Saturday or Sunday work, length of residence, mode of transportation, and type of military discharge.

To avoid costly and time-consuming legal problems, you should become familiar with fair employment requirements and privacy laws; consider each question's job-relatedness before including it on an application; and periodically review application forms to keep them updated and in line with current law.

Standardized vs. job-tailored forms

Standardized employment applications request the same information of all applicants, regardless of the job being filled. These forms provide only the most general information about work experience. They are little more than snapshots of any individual's career.

Tailored application blanks, on the other hand, seek information relevant to a particular position or job class. Because the focus is on job-relevant experience, which may be elicited through multiple-choice, short-answer, or narrative responses, the employer is in a better position to compare each applicant's qualifications to position requirements or specifications. Also, because a request for information may be discriminatory in some circumstances but not in others, customized application forms help ensure against the collection of information that is not job-related.

Design features

An application form should be easy to read, provide clear instructions, be easy to complete, and request information in a logical sequence. While the application should elicit enough information to ensure a good selection decision, it should include only those questions pertinent to the job in question. Inquiries about race, color, religion, sex, national origin, political affiliation, marital status,



economic status, and number of children should be avoided altogether. Also, the form should contain sufficient space to provide all the information requested. Should your policy be to accept unsolicited applications, the period for which the application is considered active should be limited and stated clearly on the form.

The design and format of an application should reflect consideration of the applicant population (blue-collar, managerial, professional, administrative), the nature of the job being filled, the amount and kind of information sought, and HR department procedures for processing, filing, and retrieving applicant data. Most importantly, the phrasing and content of the form should reflect the employer's careful consideration of the level and requirements of the job and of legally permissible forms of inquiry.

You should not use standard, pre-printed application forms or forms you design yourself unless the forms have been reviewed and approved by legal counsel familiar with employment laws. Some questions may be lawful under Equal Employment Opportunity Commission guidelines, but not under state laws or regulations. All inquiries on applications should be subjected to a job-relevancy test.

Application components

Certain basic information is collected on all application forms, including:

- **General personal data.** This section of the employment application requests the applicant's full name, current address, and telephone number. There is new regulation of social security numbers and how they are protected.
- **Education, knowledge, and experience.** In this section, the applicant is asked to provide job-relevant information about education (e.g., schools attended and degrees awarded), participation in training programs, employment history (including unpaid job-related experience), and work-related skills and knowledge.
- **References.** Typically, the applicant is asked to provide business references (to verify whether the applicant was employed, dates of employment, position(s) held, and job skills, duties, and responsibilities). Since most applicants provide only the name of the supervisor whom they think will provide the best reference and you are interested in gleaning job-relevant information from persons familiar with the applicant, consider asking for (and allowing space) for the names of *all* the managers at the last two employing organizations who evaluated or supervised the individual's job performance.

Other components that applications may also include:

- **An affirmative employment statement or EEO legend.** A bold-type banner may run across the top or bottom of the first page of the application indicating that "This Company Is An Equal Opportunity Employer M/F/Veteran/Disability." (*If also Affirmative Action, state Equal Opportunity/Affirmative Action Employer.*) Beneath the banner can be a statement indicating that the company does not discriminate based on age, sex, race or color, national origin, religion, disability, sexual orientation, gender identity, veteran status, or any other reason prohibited by law. You may also want to include instructions on how disabled applicants can request accommodations needed to enable them to complete the application.



- **A blank page or half page** on which the applicant is invited to provide additional information that he or she believes might be useful to the person making the selection decision. For example, the applicant may be asked to describe *job-relevant* extracurricular activities, interests, or qualifications not covered elsewhere in the application.
- **At-will disclaimers.** At-will disclaimers are the most common types of disclaimers found on applications. They are designed primarily to protect employers from wrongful discharge suits by workers who are not covered by a union contract or some other written employment agreement. A typical statement reads as follows:

"I understand that nothing in this application is intended to imply or create an employment relationship or contract for employment. I further understand that, if hired, my employment is at-will and can be terminated at any time, with or without notice, for any reason. I also understand that while personnel policies, programs, and procedures may of necessity change from time to time, such at-will status is not subject to change absent a written agreement signed by the company's president or a designated authorized representative."

Companies wanting to include an at-will disclaimer on their application forms should make sure the provision is clear in meaning and technically consistent with other provisions that may be stated elsewhere on the application, in handbooks or policies, or literature distributed to applicants and employees. Merely including a simple disclaimer on an application will not necessarily prevent a wrongful discharge or other claim.

- **Accuracy statement and freedom-to-check release.** Most applications include a statement that the applicant reads and signs verifying that s/he understands and agrees that all information provided is correct and truthful, and that the veracity of the statements may be checked with former employers and others who would know the individual without incurring liability, and that falsification would render the individual, if hired, subject to discharge. For example:

*"I acknowledge that the information I have supplied is correct to the best of my knowledge and understand that any falsification, misrepresentation, or omission of fact may **result in rejection of my application or dismissal from subsequent employment.**"*

Usually, an accuracy statement is followed by an authorization for a reference, security, or background check by the employing organization. Such an authorization might read as follows:

- *The consent form must be on a separate document apart from the application.*

Note: If you will be checking credit information or are using a third party to gather background information, applicants must sign a separate written disclosure.

- **Detachable sheet on which to collect affirmative action or fair employment data.** Employers may need to collect certain kinds of personal information about applicants to comply with equal employment opportunity or affirmative action reporting requirements. However, it can be difficult to collect such information on applications without disclosing the data to those who do the hiring. For paper versions of the application, employers can include with applications a "tear-off" sheet for identifying sources of job referrals or for gathering



statistics on the number of applicants who are females, minorities, disabled, or Vietnam-era veterans. **For electronic applications, a link to a separate voluntary disclosure form can be included on the application page.**

- **The employers should** indicate the employer's need for the information; emphasize that the provision of the information is voluntary, and that failure to disclose the data will have no effect on hiring decisions, and provide assurances that the data is treated as confidentially as possible. For an employer required by federal law to have an affirmative action program, a statement on a tear-off sheet might read as follows:

"The Company is required by federal law to maintain records as part of its affirmative action program. We have detached this sheet and invite you to answer the appropriate questions listed on both sides of this sheet. Please be aware that you are not obligated to complete this form, and that any information you do provide voluntarily will be treated confidentially. The information will not be stored with the application and will be retained only to monitor Company's affirmative action program compliance. It will not be used for or have any effect on any hiring or employment decision."

- **Medical Exam Requirements.** Application forms also may include space for applicants to consent to an employment physical. The ADA prohibits pre-employment medical exams but allows for post-offer, pre-placement exams as a condition of employment. Such a statement might read as follows:

"Employment in the position for which you have applied is contingent upon completion of a company-paid physical examination that includes testing for the presence of illegal substances. Are you willing to take, and do you consent to a physical examination in the event an offer of employment is made to you? Please circle: YES or NO."

Before including such a provision on an application, check state law conditions for conducting employment physicals that include substance abuse testing. Employment physicals required as a condition of employment should be conducted promptly. Physical requirements must be necessary for job performance and must be applied equally to all persons, without regard to age.

- **Documentation space for administrative action.** This section of the application is marked "For Administrative Use Only" or "Do Not Write in this Space." For companies that only accept solicited applications, it is often marked "To Be Completed After Hire."

This is a processing checklist and space to list the names of those who review the application or interview the applicant. The checklist (for unsolicited applications) may include comments such as:

- No position available; application placed in active file
- Applicant selected for interview
- The manager rejected applicant
- Position offered and accepted

Or, after hire, for various administrative details related to processing an applicant into an employee.



- **Trial employment statement (not recommended).** Some employers include on application forms a statement that new-hires must serve a "trial" or "probationary" period of employment, typically 90 days to six months. It is **not advisable** to include references to probationary employment on applications because such statements can imply (and courts have held) that once the probationary period has ended, the employee becomes a "permanent" employee who can be discharged only for just cause per the company's due process, grievance, or disciplinary procedures. If a probationary employment statement is included on applications, it should be qualified by an additional statement that any employee serving in a trial or introductory period may be terminated at any time, with or without cause.

Application processing

The job application process, which often represents the first formal contact an individual has with an organization, should be consistent, administered in a non-discriminatory fashion, and adhered to by everyone involved in the hiring process. To ensure equitable treatment of applicants and to reduce the risk of legal problems, you should consider establishing a policy that:

- Defines who an applicant is.
- Indicates when, by whom, and under what conditions job applications may be accepted and reviewed. For example, a policy might require that a vacancy notice be posted or advertised for a specified number of days and that the notice specify the name and department of the person from whom a printed application can be obtained and to whom the application should be returned; require that a specific day (or week) and time be designated for accepting applications for posted or advertised vacancies; set clear deadlines for accepting and considering applications; and require that prospective applicants receive, and be instructed to read, essential functions of the position and/or written job descriptions or specifications, as well as written descriptions of any necessary testing procedures, before they fill out an application form.
- Establishes procedures for handling walk-ins and unsolicited resumes.
- Offers guidance on preparing acknowledgment letters and letters of rejection.
- Specifies procedures for retaining applications.

General Guidance

Application forms should be checked for thoroughness; applicants should be advised that their forms will not be valid and will not be considered if questions are left unanswered. **DO NOT ACCEPT "SEE RESUME."** On the other hand, you may also want to include a statement that applicants should not provide information that is not requested. This is useful because some applicants may include extraneous information about themselves on an application so they can later claim they were rejected for unlawful reasons.

Where applicants are required to sign their applications, they should do so in the presence of the company's HR rep or other "application recipient" whenever possible.

Forms should be stamped with an expiration date and purged from HR department files at the appropriate time (unless the company is legally required to keep them longer). Unsolicited applicants



should be informed of the expiration date and notified that they must reapply should another vacancy occur for which they are qualified. When applications are only active for a solicited position, (when the position is filled, the applications are inactive), candidates should be told this and advised that they may reapply for other solicited positions should they meet the qualifications.

Unsolicited applications

Generally, employers should accept applications (and resumes) **only** when there are job vacancies and should refuse unsolicited applications. The company should reject any applications that are not submitted on the company's own form and that do not indicate interest in a particular job.

While employers have no legal obligation to respond to unsolicited job applications, most companies send acknowledgment cards or letters to persons who submit unsolicited applications, letters, or resumes (or otherwise express an interest in employment). Where it is the practice to use such letters, a good practice is to return the unsolicited resume to the individual, stating that the interest is appreciated, but the company policy prohibits accepting or reviewing any applications or resumes that are not submitted in response to a solicitation from the company for a specific vacancy.

The EEOC considers that if you keep or review unsolicited resumes, you have a business purpose in doing so. Therefore, to avoid charges of discrimination, every time an opening occurs, you will need to review the merits of all applications and/or resumes you have accepted, solicited, or unsolicited, during the period that they must be kept active.

Reading the employment application

Many HR practitioners design forms specifically to steer interviewers to appropriate questions and to avoid legally indefensible ones. If so, your application form will be comprehensive in scope. Your goal may be to train those who interview at your facility to understand that "if they don't find certain information requested on the application form, it may not be appropriate to ask for it."

Below are some guidelines to help you extract pertinent information when reading the application form:

- **The best indicator of what the applicant will do for you is what the applicant has done elsewhere.** This is summarized in the HR maxim, "The best predictor of future performance is past performance." In most cases, past work behavior points to the behavior you can expect if you hire the person. With less experienced applicants, signs are less distinct; nevertheless, behavior patterns shown in school, part-time jobs, interests, and achievements (or lack thereof) may suggest future trends.
- **Focus on KSAs.** The majority of valid data—data by which you can predict job success—is associated with the applicant's knowledge, skills, and abilities ("KSA's"). KSA's must be relevant to the job requirements, which points to the necessity of valid job descriptions and succinctly defined "essential functions."
- **Verifiable facts are the most reliable data on which to base selection decisions.** Look at the previous positions held by the applicant, responsibilities, dates, salary (if provided), etc. Some selection specialists believe up to 20% of applications and 40% of resumes contain significant misrepresentations. Verifying facts is the way to uncover



deception. Information that can't be verified may be factual, but should not influence you unduly.

- **Weigh strengths, but also search for weaknesses.** Strengths are probably listed on their resume; weaknesses seldom are. Since the application form requests the same information of all candidates, it's a better way to compare "apples and apples" than relying on resumes. For example, if the candidate's career progression has been strong, it will be revealed on the application. If it was weak, that fact may not be presented or may be obscured on the resume. Watch for blank spaces or nebulous responses on the application form.
- **Don't be misled by generalizations.** Obtain details. Ambiguous words and phrases or voids may be used to hide weaknesses. For example, the phrase "better opportunity elsewhere" is sometimes used to divert the interviewer's attention from an unsuccessful experience.
- **Consider the written product as important evidence.** Usually, resumes are checked and double-checked, and often "smoothed" by professional resume services.

How carefully has the candidate completed the application form? This is more representative of the candidate than a letter or resume. Has s/he followed the directions, made significant errors, or rushed through the paperwork with blocks left blank? The completed application form is a direct representation of how the candidate perceives him/herself and can be a good indicator of the quality of care and detailed attention that will be evident in the work s/he would do for your company.

Note: In terms of handwriting, please be aware that some individuals may suffer from arthritis, which affects the legibility of their writing. Unless handwritten work is an important function of the position for which the individual is applying, it should not otherwise be considered as a "knock-out" item.



The Interview

Before ever conducting an interview, you should complete the steps below:

- Evaluate the job. Get consensus from the management team on what the job really is.
- Write your questions.
- Review the resume/application form.
- Phone screen to generate your true candidate slate.
- Block out appropriate time for the interviews.
- Set the stage for the greatest applicant disclosure and testing.
- Advise the receptionist whom to expect and what to do.
- Be prepared to tell the applicant what happens next in the process.

The objective of the selection interview is:

- To gather data so an accurate evaluation can be made
- To separate the candidate from the image s/he is trying to present

This is done through excellent pre-planning, including using effective questioning techniques. Human Resources professionals should take the lead in mastering this skill and helping to coach supervisors and managers in this area at your facility. (Because of the legal complexities involved in interviewing today, HR, line, and staff managers must be specifically trained in this skill.)

The bulk of the questions should be direct and open-ended. Look for technical knowledge and intellectual efficiency, evidence of emotional maturity and stability, human relations skills, insight into self and others, and the ability to organize self (and others).

You are trying to determine if: (1) the candidate is qualified to perform successfully in the position, and (2) which candidate is best suited to perform successfully in the position.

General advice for HR interviewers

Even skilled HR professionals find themselves being less effective than they know how from time to time. They have provided the following advice:

- Screen, screen, screen.
- Be aware of the "whole person." You will be hiring more than a pair of hands.
- Consider your company's environment and culture.
- Beware of the "perfect" candidate. (His/her name is probably "Murphy")
- Don't be influenced by the other interviewers.
- Let the candidate know you will be taking notes, and then do it.
- Manage your interview schedule. Don't keep candidates waiting in your lobby or reception area.



- Don't pursue improper information.
- Don't feed the applicant the right answers or provide feedback during the interviewing process.
- Follow good ethics. Set a very high standard and stay there.
- Be courteous. (Pretend each candidate is being hired to be *your* boss.)
- Conduct and record worthwhile reference checks or outsource to a reputable firm.
- Listen, listen, listen. Prepare to listen and summarize what you hear.
- Don't hire the best of the worst...even if you're desperate.

What you'll be determining is the two aspects of success probability

- "Can do" factors. KSA's (knowledge, skills and aptitudes)
- "Will do" factors. Refers to interests, motivation, personality factors

"Can do" factors are measurable; "will do" factors are inferred. Both "can do" and "will do" factors are necessary for successful job performance.

Legally defensible interviews

An important policy communication...

Our company is an equal-opportunity employer. [Also note Affirmative Action obligation, if applicable]. Any inquiry that elicits information that is not job-related and which may be used to discriminate, or may be perceived by any candidate to have been used to discriminate based on race, color, religion, sex, national origin or ancestry, age, disability, veteran status, or in violation of any other law is strictly prohibited . . .

EEOC Uniform Guidelines For Selection Procedures

Two kinds of unlawful discrimination:

Intentional: shown through comments and actions that suggest bias

Unintentional: shown through hiring statistics that reveal patterns of discrimination (adverse impact)

The Guidelines consider virtually *any method used to make an employment decision*, whether formal or informal, oral or written, objective or subjective, to be a "test." The Uniform Guidelines specifically cite interviews, review of experience or education from applicant forms, work samples, physical requirements, and evaluations of performance, and require that all tests be administered in a non-discriminatory manner. If a test (or other selection device) results in an adverse impact on a protected class, the employer must be able to demonstrate that it is a business necessity.



If any employment standard, although neutral on its face, is shown to have an adverse impact on a protected group, the employer *may* have to prove that the standard is job-related. (Under the Uniform Guidelines, studies that validate the job-relatedness of a particular selection method are held to be desirable, but are not required unless an adverse impact is demonstrated.)

So what is “adverse impact?” Adverse impact is defined as "a substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group." (41 CFR Sec. 60-250 et seq., 1980).

How do you know if your selection method creates an “adverse impact?”

The OFCCP has developed a rule of thumb that can be used to determine whether a selection procedure has an adverse impact. It's called the 80% Rule, or the "Four-Fifths Rule."

It holds that if the hiring rate for the protected group *is less than 80% of the hiring rate of the majority group*, the protected group is suffering an adverse impact. This calculation, however, can be more complex than it appears.

Example:

<u>Candidates</u>	<u># Hired</u>	<u>Selection Ratio</u>	<u>Low SR/ High SR</u>	<u>Disparate Impact</u>
6 Black	2	.33	.33/.75=.44	Yes
3 Hispanics	2	.66	.66/.75=.88	No
12 Whites	9	.75		



Are there certain things you can't ask?

Even if your hiring rates don't demonstrate adverse impact, there are still some kinds of interview questions that are unlawful. These questions alone can serve as evidence of unlawful discrimination.

Experienced interviewers know to avoid these questions. What are two good reasons to avoid these questions?

- These questions don't have anything to do with the probability that a person can or can't, will or won't, do the job; (can do, want to do)
- These questions can lead to unnecessary, embarrassing, and costly discrimination charges.

Here are some questions that are best avoided:

Questions that have been deemed to have an adverse impact based on RACE or COLOR:

You should **NOT** ask:

- Any questions about the candidate's complexion, eye color, hair, etc.
- Any questions about the physical characteristics of members of the candidate's family.
- Any questions about membership in groups that are known to have a large minority representation, such as the NAACP.
- Whether the candidate has ever been arrested or about misdemeanor convictions that are not related to the job at hand.
- Depending on the state or local area in which you operate, you may not ask about criminal convictions prior to a job offer being extended.
- Whether the candidate has ever received any form of welfare benefits.
- If the candidate served in the Armed Forces, the type or condition of discharge s/he received.
- Whether the individual owns or rents the place where s/he lives, and how long the individual has resided there.
- How the applicant would get to and from work.
- Any questions about credit ratings.

It is also inappropriate to ask the candidate how s/he feels about working with co-workers of different races.

Questions that have been deemed to have an adverse impact based on NATIONAL ORIGIN:

You should **not** ask:

- About the candidate's or the candidate's parents' or spouse's nationality, ancestry, lineage, or parentage.



- Whether the candidate's parents or spouse are native-born or naturalized citizens.
- The name of next of kin or who to contact in case of emergency.
- Where the candidate or candidate's family was born.
- How the candidate learned a second language.
- Questions about reasons for foreign travel or about a foreign address that could indicate national origin.

By the way, you should never rate a candidate on English-language proficiency when such a skill is not a job requirement.

Questions that could be deemed to discriminate based on RELIGION:

You should **not** ask:

- About religious beliefs or membership in any religious group, denomination, etc.
- Questions that would reveal the religious affiliation of a school.
- About religious holiday observances.
- For references from the candidate's minister, pastor or religious leader.

Unless the job regularly and/or often requires weekend work, it is probably not wise to ask about availability for weekend work. (The EEOC has concluded in its Guidelines that the use of inquiries that determine an applicant's availability to work during an employer's scheduled working hours has an exclusionary effect on the employment opportunities of persons with certain religious practices. Using these questions could be considered a violation of Title VII unless the employer can show that it was justified as a business necessity . . . that the practice is necessary to the safe and efficient operation of the business.)

Questions that are inappropriate based on SEX:

You should **not** ask:

- About a candidate's change of name, maiden name, or original name
- About a candidate's current, previous, or "anticipated" marital status
- About the candidate's preferred form of address (Miss, Mrs., or Ms.).
- Anything about the candidate's spouse or "significant other"
- The number, names, or ages of children or dependents
- About methods of birth control, reproductive ability, or reproductive plans
- Whether the candidate has ever received any form of Welfare benefits, or Aid to Families with Dependent Children (now TANF)
- Whether the candidate will be able to work overtime due to childcare or other family responsibilities
- What sports activities the applicant participated in during high school or college
- Any inquiry made of a female that is not also made of a male, and vice versa



Inappropriate questions related to AGE:

You should **not** ask:

- How old the candidate is.
- The date of graduation from grade school, high school, or college (of someone not a recent graduate). (In confirming degrees, ask the candidate to provide proof of degree.)
- The date of eligibility for Social Security benefits.
- Dates of military service or which war an older candidate served in.
- If the applicant can supply a birth or baptismal record before hire.
- Any question that would indicate if an applicant is over 40 years of age.

Questions that are inappropriate based on DISABILITY:

- Whether s/he has ever been treated for specific diseases or medical conditions, or whether s/he has ever been hospitalized.
- How many days the applicant was off work last year (or any other year of employment) due to illness?

You may, however, provide information on realistic attendance requirements and ask all applicants if they will be able to meet these requirements.

Do **not** ask the candidate:

- For details about a disability (nature, severity).
- About the condition causing a disability.
- If s/he has ever been treated by a psychiatrist or psychologist, or been treated for any mental condition or psychological disorder.
- If s/he has had a major illness in the last six years.
- If s/he has any physical defects that would preclude her/him from performing certain kinds of work.
- If s/he is taking any prescribed drugs.
- If s/he has ever been treated for drug addiction or alcoholism.
- If there is any health-related reasons the candidate may not be able to perform the job for which s/he is applying.
- Whether the candidate has ever applied for or received Worker's Compensation.
- Whether the candidate has ever suffered an industrial accident.
- Whether the candidate receives any form of disability pay (veteran's, a prior employer, Social Security, etc.).
- About any prognosis or expectation regarding a disability.
- Whether the candidate has responsibilities to care for a disabled relative.
- Whether the candidate has AIDS or asthma.
- How much alcohol s/he drinks each week.



Questionable inquiries of VETERANS:

You should *not* ask:

- In which branch of the military the candidate served.
- What type of discharge the candidate received.
- Whether the candidate served overseas or saw any combat duty.
- Any inquiry about military service performed for any country other than the U.S.A.
- The individual to supply military service records.

You *can* ask the candidate to describe military experience if it is related to the job you are filling. For example, a candidate who was a computer operator in the Army who has recently been discharged and has no other employment history can be asked to describe the kind of hardware or software on which s/he worked and the extent of responsibilities.

Don't ask any candidate about Reserve or Guard status or future anticipated military duties or service. These questions are viewed as violating the spirit of military service, leave, and reemployment laws, and usually affect males differently than females. Alternately, granting a hiring preference based on military service can have an adverse impact on the employment of women and some minority group members (unless explicitly authorized through Affirmative Action.)

Unlawful inquiries about NAME:

You should *not* ask:

- Anything about a name or title that would indicate race, color, religion, sex, national origin, age, marital status, or ancestry. Don't ask a female if she's changed her name.

Unlawful inquiries about RELATIVES and FRIENDS:

- You should not ask anything about a relative that would be unlawful if asked about the applicant.
- Don't ask whether the company has employed or currently employs any friends or relatives. This has no relevance to a person's fitness to perform a job and can have a discriminatory effect by reducing employment opportunities for women or minorities.
- Don't ask how the person was referred to the job. (If you have a business need to gather this type of information, gather it on a form separate from the application, and don't ask about it in the interview.)
- Don't ask how much the applicant's spouse will earn this year.

Unlawful inquiries about REFERENCES:

- You should not request references specifically from clergy or other persons who might reflect the religion, race, color, or ancestry of the applicant.
- Before making a conditional offer of employment, you may not request any information about a job applicant from a former employer, family member, or other source that you would not be permitted to request of the applicant.



Unlawful inquiries about SOCIAL ACTIVITIES:

- Do not solicit, directly or indirectly, information on social organizations or clubs to which the applicants belong that indicate the race or color, national or ethnic origin, or religion of the applicant.
- When asking about civic activities or organizational memberships, always include the verbal instruction to omit any information that would disclose race, age, ethnic origin, or religious or political persuasion or affiliation.

Risky questions about EDUCATION:

You can ask applicants to outline their educational background and even stipulate that they have some minimum educational attainment; however, you should be prepared to explain why a specific level or type of education is necessary for job success and be flexible in applying the criterion. No educational requirement should result in the disqualification of a disproportionate percentage of minorities or women.

Other risky stuff:

- Don't ask for photographs of the applicant before hiring and only if there is a legitimate business purpose.
- Don't ask if the applicant has had a problem in obtaining bonding or a security clearance in the past because such questions elicit information that is not relevant to the applicant's current circumstances. If the bonding information is relevant to the job in question, inquire in the future tense; "Do you know of any reasons that will make it difficult for the company to obtain a surety bond ensuring your honesty? If yes, please explain."
- Do not ask questions about garnishments, bankruptcies, or credit ratings.
- Do not ask about driver's licenses, prior traffic violations, or accidents if the job does not involve the use and operation of a motor vehicle.



Candidate Selection Process

Consider the following questions in light of your candidate selection processes today:

	Yes	No
General		
Is one person or one department responsible for managing the selection process?	<input type="checkbox"/>	<input type="checkbox"/>
Is that one person or department evaluated based on the success of that process?	<input type="checkbox"/>	<input type="checkbox"/>
Is that one person or department rewarded based on the success of that process?	<input type="checkbox"/>	<input type="checkbox"/>
Policy		
Does your company have a policy concerning candidate selection?	<input type="checkbox"/>	<input type="checkbox"/>
Is it in writing?	<input type="checkbox"/>	<input type="checkbox"/>
Is the policy reviewed at least annually to determine whether it is meeting your goals?	<input type="checkbox"/>	<input type="checkbox"/>
Is your candidate selection process coordinated with your policies regarding:		
Affirmative action?	<input type="checkbox"/>	<input type="checkbox"/>
Equal employment opportunity?	<input type="checkbox"/>	<input type="checkbox"/>
Applicant flow	<input type="checkbox"/>	<input type="checkbox"/>
Recruitment?	<input type="checkbox"/>	<input type="checkbox"/>
Employment planning?	<input type="checkbox"/>	<input type="checkbox"/>
Immigration law compliance?	<input type="checkbox"/>	<input type="checkbox"/>
Pre-employment testing?	<input type="checkbox"/>	<input type="checkbox"/>
Interviewing and interview questions?	<input type="checkbox"/>	<input type="checkbox"/>
Reference checks?	<input type="checkbox"/>	<input type="checkbox"/>



	Yes	No
Employment agencies?	<input type="checkbox"/>	<input type="checkbox"/>
Pre-placement physicals?	<input type="checkbox"/>	<input type="checkbox"/>
Documentation of selection activity?	<input type="checkbox"/>	<input type="checkbox"/>
Are at least two persons involved in candidate selection?	<input type="checkbox"/>	<input type="checkbox"/>
Discrimination		
Have your selection methods been validated?	<input type="checkbox"/>	<input type="checkbox"/>
Is the same selection method applied to each candidate for the same job?	<input type="checkbox"/>	<input type="checkbox"/>
Is the candidate selection method tailored for the specific job (e.g., word processing tests for secretaries, math tests for bookkeepers?)	<input type="checkbox"/>	<input type="checkbox"/>
Is your candidate selection process audited for legal compliance?	<input type="checkbox"/>	<input type="checkbox"/>
Is it audited at least once a year?	<input type="checkbox"/>	<input type="checkbox"/>
Is there a known method for rejected individuals to complain about discrimination?	<input type="checkbox"/>	<input type="checkbox"/>
Are your applicant flow records analyzed for evidence that your selection process discriminates?	<input type="checkbox"/>	<input type="checkbox"/>
Does your candidate selection process rely on as many objective criteria as possible?	<input type="checkbox"/>	<input type="checkbox"/>
If you give a preference to current employees in the selection process, do you avoid the danger that such promotions may discriminate against minorities not represented in your current workforce?	<input type="checkbox"/>	<input type="checkbox"/>
Have you requested your employment attorney to review your candidate selection process for compliance with current discrimination laws in your state?	<input type="checkbox"/>	<input type="checkbox"/>



Yes **No**

Effectiveness

Is your candidate selection process reviewed for its efficiency?

Does your candidate selection process meet the goals of your company?

Is your budget adequate for the process to be efficient and conducted in a timely fashion?

Does your company's management team abide by the selection process? (rather than "go around it" when it suits their convenience)

Number of **Yes** responses today _____

Number of **Yes** responses a year from today _____

(Every NO response makes you vulnerable!)



Interviewing and selection

The importance of EEO awareness during the pre-employment interview cannot be overemphasized. To make absolutely certain that supervisors do not commit potentially disastrous errors in interviewing female, minority, seasoned and/or disabled job applicants, many companies are now incorporating detailed fair employment interviewing guidelines as part of their selection policies. The stakes here (in terms of potential lawsuits and financial penalties) are certainly high enough to justify inclusion of this material in this program. It is not uncommon to see not only guidelines for interviewers but also lists of specific questions that should and shouldn't be asked during the interview itself.

- **"Red flags":** These are the danger cues or warning signals that alert you to the need to dig a little deeper. For example, what if there are significant gaps in the applicant's employment record? What if a certain question provokes an obviously nervous response? How far should you go in pursuing the truth?
- **The selection decision:** This is a crucial point in the whole hiring process, and you should not overlook it. Include any information you can think of that might help the supervisor make up his or her mind; but don't make the mistake of being too specific. Remember that the "right" choice will vary in every situation, and it is ultimately up to the judgment of the supervisor, who is best qualified for the job in question. You can, however, include suggestions for what factors to weigh in making the selection decision, for balancing the interview results against the information given in the application, etc.
- **EEO reminder:** As mentioned above, the interview and selection process can lead to discrimination complaints. It is vitally important that you include some sort of EEO reminder--something that goes beyond a cross-reference to your policy on EEO and affirmative action. You may want to summarize what types of questions are considered dangerous under existing EEO legislation, how to avoid making a female, minority, or disabled applicant feel uncomfortable or defensive, and how the interviewer can assess his or her own biases.
- **Job analysis ("essential functions" if ADA):** Prior to any interview, you should prepare a job analysis. This analysis will identify the components of successful job performance. It will include a listing of the knowledge, skills, abilities, and personal characteristics or behaviors that are required by the job. Accurate information on these can be obtained through interviews with the individual who currently holds the job and the supervisor for the position, as well as from job descriptions or training manuals.
- **Interview pitfalls:** You should remind interviewers to avoid such common errors as "the halo effect," "stereotyping," and "similar-to-me phenomenon." The halo effect occurs when an interviewer is unduly influenced by a single trait that favorably colors his or her judgment of the applicant's other traits. Stereotyping refers to a judgment based on group membership rather than based on the applicant's characteristics. Finally, the similar-to-me phenomenon refers to the attitude of the interviewer that his or her attitudes or opinions are best so that if the candidates have the same attitudes or opinions, they must also be the best.
- **Interview questions:** To ensure consistency the same interview questions should generally be used for each candidate. Further, the questions must be job-related. As an example, candidates can be asked situational interview questions. In other words, a typical



problem of the job can be presented to the applicant for a response. That response can be compared to the effective behavior described by the current job holder, the supervisor, or other sources. The interview questions should be based on the job analysis and the particular characteristics that are sought.

- **Interview rating:** Interview rating sheets should be designed for the particular job. Further, they should be related to the actual characteristics of the job based on the job analysis. For example, if a potential bank teller is being interviewed, the rating should be keyed to knowledge of totaling accounts or the ability to correct deposit errors, in contrast to a rating sheet keyed to broad categories such as job knowledge and ability to correct mistakes.
- **Experience:** Information contained in the interview concerning experience should be related to the job analysis. The interviewer should seek specific job-related past achievements. This past experience should be matched to the KSAs contained in the job analysis.
- **Objective observations:** You should strive for interviewers to obtain objectively observable evidence. For example, rather than rating "personal appearance," the characteristic desired should be clearly defined as "neat and clean in appearance." Similarly, job knowledge should not be a rating category but rather be specific observable job characteristics such as "properly answered questions concerning how to check an account balance."
- **Comparing the applicants:** Your policy should establish a basis that is as objective as possible for comparing candidates. The requirement that the applicant be interviewed by two individuals simultaneously or, if separately, each using the similarly worded questions and rating sheets will certainly help achieve this goal. Other techniques include ranking each candidate on a best-to-worst basis on each job skill, ability, and knowledge.
- **Audit your system:** You should establish a system for auditing your interviewing and selection process. To illustrate, you can review the rating sheets of interviewers to determine if they rank members of protected groups lower and if the sheets are correctly completed. You can require interviewers to take a refresher course on the proper way to interview. You can audit the turnover and promotion rate of employees based on the interviewers. You can review job analysis on a periodic basis.



Reference Checks

The following guidelines regarding reference checks are courtesy of the law firm of Jackson Lewis:

Part of the recent trend toward increased rights for individual employees has been a growing number of defamation actions brought against employers by employees and former employees. Generally, these claims involve allegations of improper communications about the employee either within the organization itself, such as a personnel file memo or an oral statement made by a supervisor, or from a management official to a third party; for example, a prospective employer.

Faced with potential defamation lawsuits, many employers have restricted the information they are willing to give about former employees. While this may serve to protect the interest of the "former employer," it may severely limit the ability of the same enterprise as a "prospective employer" to make an informed decision about a particular job candidate. What should HR do in this "Catch 22" situation? Obviously, internal control of sensitive information is extremely important.

An employer's vulnerability to a lawsuit arising out of reference checks depends in part on the degree of centralization of the reference-checking procedures within the organization. The more centralized the system, the less likely it is that company officials who are not familiar with the proper ways to conduct or respond to reference checks either will be giving or attempting to get information about a job candidate.

The best strategy for safe reference checks is to outsource it to a reputable company, or, if undertaken internally, to delegate the responsibility to a single individual, department, or function within the organization, such as HR, and to provide training to that individual or group on the pitfalls and the procedures. With that precaution in mind, there are steps that management can take to lessen the employer's exposure to defamation claims arising from reference checks.

Ways to lessen the legal risks in reference checks

1. Maintain a policy of truthfulness and accuracy in making employee evaluations, especially in termination decisions. Truth is a complete defense to a charge of defamation, so the communication of truthful information will not provide grounds for a lawsuit. **Essential to this policy is the documentation of supporting facts of every step in the process of evaluating employees.**
2. Obtain a written release from the employee or former employee before responding to prospective employers. The release should absolve the former employer from all claims that might arise from the response. For the release to be effective, the individual must be informed about what the release means and about the rights that are being waived. You should review it with your attorney.
3. Provide information on a need-to-know basis only. As long as the employer reasonably believes the information to be true and the inquiring employer has a need to know the information being sought in order to evaluate the particular candidate for the particular job, the risk of liability is lowered. Former employers have a qualified privilege to communicate even negative or hurtful information as long as it satisfies these requirements.



4. Train managers and supervisors about the dangers of communicating information regarding employees and former employees. Personal liability of the manager may be an issue in some defamation suits, depending upon the circumstances in which information was communicated and the nature of what was said. Where a centralized system has been developed for reference checks, be sure that all management officials and supervisors know to whom to refer questions for information.

Missouri and Illinois both Numerous states have laws in place that protect employers from legal action for providing reference checks.



Pre-Employment Testing

Consider the following questions as they pertain to how you do business today:

	Yes	No
General		
Is one person or department responsible for your pre-employment testing program?	<input type="checkbox"/>	<input type="checkbox"/>
Do you know the federal or state laws (if any) requiring particular pre-employment tests (e.g., test for food-borne illness in a food server)?	<input type="checkbox"/>	<input type="checkbox"/>
Policy		
Are the skills being tested skills that are required by the job for which the candidate is being considered?	<input type="checkbox"/>	<input type="checkbox"/>
Do you know (if there are) any state laws requiring certain pre-employment tests?	<input type="checkbox"/>	<input type="checkbox"/>
Do you allow an applicant to explain any poor test results (e.g., illness, taking medication)?	<input type="checkbox"/>	<input type="checkbox"/>
Do you permit applicants with a reasonable excuse for poor performance on a test to retake the test?	<input type="checkbox"/>	<input type="checkbox"/>
Do you review all pre-employment tests at least annually, to determine compliance with acceptable law?	<input type="checkbox"/>	<input type="checkbox"/>
Discrimination		
Are all your pre-employment tests job-related?	<input type="checkbox"/>	<input type="checkbox"/>
Do you review the pre-employment tests for adverse impact?	<input type="checkbox"/>	<input type="checkbox"/>
If you test the skills of employees, have the skill tests been validated as a predictor of job success?	<input type="checkbox"/>	<input type="checkbox"/>
Is your pre-employment testing coordinated with your policy concerning:	<input type="checkbox"/>	<input type="checkbox"/>



	Yes	No
Candidate selection?	<input type="checkbox"/>	<input type="checkbox"/>
Interviewing?	<input type="checkbox"/>	<input type="checkbox"/>
Is your pre-employment testing coordinated with your policy concerning:		
Affirmative action?	<input type="checkbox"/>	<input type="checkbox"/>
Equal employment opportunity?	<input type="checkbox"/>	<input type="checkbox"/>
Job analysis?	<input type="checkbox"/>	<input type="checkbox"/>
Job description?	<input type="checkbox"/>	<input type="checkbox"/>
Are the same skills, knowledge, and abilities for which you test also considered when the employee's performance is evaluated?	<input type="checkbox"/>	<input type="checkbox"/>

Drug Testing

If you do pre-employment drug testing, do you:

Have a chain-of-custody procedure?	<input type="checkbox"/>	<input type="checkbox"/>
Use a reliable laboratory?	<input type="checkbox"/>	<input type="checkbox"/>
Provide an opportunity to explain any results?	<input type="checkbox"/>	<input type="checkbox"/>
Safeguard privacy?	<input type="checkbox"/>	<input type="checkbox"/>
Obtain a sufficient amount of a sample to do a second test?	<input type="checkbox"/>	<input type="checkbox"/>
Require a confirmation test when the screening test indicates positive for drug abuse?	<input type="checkbox"/>	<input type="checkbox"/>
Review the lab facilities?	<input type="checkbox"/>	<input type="checkbox"/>
Require the lab to be licensed?	<input type="checkbox"/>	<input type="checkbox"/>
Require all applicants for all positions to be tested?	<input type="checkbox"/>	<input type="checkbox"/>

Yes No



Medical Testing

If you require an employment medical examination, do you:

- Use only licensed personnel?
- Maintain the information in confidence?
- Generally avoid tests for AIDS?
- Generally avoid tests for sickle-cell anemia?
- Generally avoid tests for pregnancy?

If you test for AIDS, can you establish that freedom from the virus is a bona fide occupational requirement because: (If you do not test, respond **no**)

- There is a significant risk of transmission of the disease in the workplace?
- There is a significant chance of contracting the disease on the job and you want to rule out pre-existing conditions for future workers' comp claims?

If you test for sickle-cell anemia, do you have a business reason to justify the test under applicable law? (If you do not test, respond **no**)

If you test for pregnancy, can you establish that the job presents a known medical danger to a pregnant employee or the fetus?

If you give employment physical examinations, do you have in writing physical requirements for the position for which you are testing?

Miscellaneous Testing

If you require polygraphs of an applicant, have you confirmed that it is lawful to do so?

If you use integrity or personality tests, have you confirmed that the tests are valid selection criteria?



Testing concepts

In addition to having reliable information about a person's suitability for a job, the information must be as valid as possible.

VALIDITY refers to **what** a test or other selection procedure measures and **how well** it measures it.

In the context of personnel selection, validity is essentially an indicator of the extent to which data from a procedure (interview, test, etc.) are related to or predictive of job performance or some other relevant criterion. Like a new medicine, a selection procedure must be validated before it is used operationally. Employers who want to conduct their own validation studies should consult the *Uniform Guidelines on Employee Selection Procedures* issued by the EEOC. In general, however, it may be easier for employers to make sure they purchase only validated tests from qualified test suppliers.

Selecting tests

It is important to recognize that there are many different kinds of tests, each of which provides different kinds of information. There are also many different sellers of tests. Some are designed for employers to administer and score themselves. Others require the services of skilled professionals to ensure that they are properly used. It is important for employers to know how the publisher expects the test to be used, and to use it in that fashion. Otherwise, the results may not be valid.

Needs assessment. Employers who want to consider tests should first sit down and determine what it is they are trying to find out about the applicants. The results of this needs assessment can then be used to determine the appropriate test. For example, is there a need to determine if the applicant:

- Has enough native intelligence to be trained for the job? (intelligence test)
- Has typing skills? (an achievement test, i.e., a typing test)
- Will make a good supervisor? (a personality test)
- Has sales potential? (a personality test)
- Is honest? (an integrity test)

Types of tests

The following are the general types of tests that employers use:

- **Intelligence:** These tests measure learning ability, particularly the ability to learn through the use of printed material. Validation studies have shown that these tests can help predict who is likely to succeed in the job.
- **Aptitude:** Aptitude tests seek to measure and predict a person's potential for learning and performing specific skills or activities, e.g., mechanical, musical, and physical dexterity. These tests seek to measure how trainable a person is, rather than how well he or she has been trained.



- **Achievement:** Achievement tests take many forms. They range from simple typing tests to sophisticated paper and pencil tests that measure the degree of knowledge in specific fields. They measure not how trainable a person is, but how well he or she has been trained.
- **Personality:** These tests assess traits such as drive, decision-making style, and temperament. These tests can be useful in predicting whether an applicant has the personality traits that are usually associated with success at particular jobs, e.g. sales, supervision, etc.
- **Honesty tests:** Sometimes called “integrity tests,” these are professionally developed psychological tests designed to determine the integrity of people who take them by measuring attitudes toward dishonesty and propensity for theft-type behavior. Employers’ use of these tests has risen dramatically since polygraph tests were outlawed, with a few exceptions, several years ago. A study by the Office of Technological Assessment questions whether honesty tests work as advertised, but test publishers, employers who have used the tests successfully, and some researchers say that the use of honest tests can reduce employee theft and other counterproductive behavior.

Pre-employment drug testing

Pre-employment drug testing is becoming more common, and therefore, more necessary for employers. Because applicants know which organizations test and which do not, employers who don’t test take the risk of becoming a place of refuge for individuals who have dependency problems.

Pre-employment drug testing also may be necessary to avoid negligent hire claims, especially where the employee performs a safety-sensitive function. For example, if the employer does not test the applicant before employment and another employee is hurt due to the impaired employee’s conduct, the employer may be liable. The employer may not be seen as exercising the necessary care to discover an applicant’s drug problem and avoid hiring that individual.

The ADA provides that medical exams may not be done until a conditional offer of employment has been extended. The ADA also provides that drug tests are not medical exams within the meaning of the ADA. However, it is a common practice to extend a conditional offer of employment before requiring the pre-employment drug test. There is no reason to incur the cost of a test if the applicant is not otherwise qualified.

Most organizations that test for drugs rely solely on urine testing. However, hair tests are becoming more popular. That’s partly because hair tests turn up more drug users than urinalysis and counter some of the shortcomings of urine testing. Many job applicants have learned how to “clean up” for a urine test using kits that can be purchased for that purpose. But hair testing has its flaws. It can’t catch recent drug use the way urine tests can because traces of ingested drugs take about five to seven days to show up in hair. On the other hand, hair tests can detect drug use within a 90-day period. Hair tests are also more costly than urine due to the meticulous lab analyses of hair samples.



Making the Employment Offer

Offers for each job should be made immediately in writing after a verbal offer has been made and accepted. The contents of the offer letter should be concise and accurate, with no room for misunderstanding. Be sure to list anything the candidate has already been promised verbally. Even if you neglect to put it in writing, your word can be construed as an implied promise. Candidates can later argue (in court if they have to) that anything you said during the interview phase of the employment relationship is an implied and binding “contract.” That means, if you don’t mean to offer it as an enticement in the first place make sure that no one in human resources or any of the hiring managers implies that there’s something that will be offered that eventually isn’t.

The following information may be included in the offer letter:

- Official job title
- Department and division
- Hours of work
- Employment start date
- Starting salary per hour, per day, weekly, bi-weekly, or per month (NOT annual salary)
- Location
- Person to see
- Arrangements regarding a pre-employment physical, if relevant
- Arrangements regarding pre-employment orientation, if relevant
- Agreement regarding a reference check with the present employer (offer is contingent on satisfactory reference check)
- Identification and instructions for the completion of any literature enclosed (e.g., benefits forms)
- Who to contact with questions
- State if the offer is contingent upon the results of a background check or drug test

Employers should always be careful to avoid language that commits to any specific length of employment. Some experts recommend inserting an employment-at-will clause, similar to the one on the application. Many employers believe it detracts from the welcome being extended to new employees and that reference to the employment-at-will doctrine on the application form and in the employee handbook is sufficient. Any references to benefits offered should be generic and refer the employee to their manager or HR department for details.

Once a candidate has been selected and the job offer has been accepted, it is time to notify the other applicants. Rejection letters should be brief, beginning and ending on a positive note. The letter should refer to the specific position for which an individual applied. The tone of the letter should be professional and sincere without including detailed information about the successful candidate.



Orientation

The importance of orientation in helping new employees develop the right attitudes toward their jobs, their supervisors, and their co-workers has long been recognized. Several studies have confirmed that the impressions a newcomer forms during his or her first couple of days on the job can have a significant impact on long-range performance and success as an employee. In other words, an exceptionally willing and well-qualified individual who receives indifferent or brusque treatment at the hands of the HR staff and is practically ignored by his/her new supervisor may defy all expectations and fail to perform up to standard. Why? Because the negative impressions formed when he or she first joined the company prevented him or her from making a successful adjustment to the work environment.

Your policy

An orientation policy should consist primarily of a statement of the reasoning or philosophy behind the company's orientation program and of management's commitment to the program. It does not have to include a detailed outline of the orientation program itself, orientation checklists to be used by supervisors and the human resource department, or other detailed information that more appropriately comes under the heading of "procedures." Most companies today that include orientation in their policy manuals focus on procedures rather than on a policy statement.

The following items are those to consider in developing your policy:

- **Purpose:** You should start your policy statement with a concise summary of why you believe orientation is so important, what you hope to achieve (your objectives) through your orientation program, or some other statement of purpose.
- **Responsibility:** The responsibility for orienting new employees is usually divided between the human resource department and the new hire's immediate supervisor. The former normally handles what is known as "company orientation" or "organizational orientation"--covering basic information about the company as a whole, including history, products, benefits, retirement program, management philosophy, etc. The supervisor, on the other hand, usually handles what is known as "job orientation," covering such information as job description, work rules, location of facilities and supplies, and actual work procedures.
- **Areas of information:** What types of information will be provided to new hires? These can be listed either in a very general or very detailed form. The idea is to standardize and focus on the basic areas of information that should be covered when a new employee first reports to work, and especially to emphasize those areas of information for which the supervisor is responsible.
- **Timing:** How soon should orientation be conducted? For full impact, orientation should occur **before** an employee starts to work at his/her new job.

If you do decide to incorporate some kind of outline of your orientation program, you may want to divide the "areas of information" listed above into categories based on when the information about each subject should be conveyed. For example, you might have one list of information that must be covered during the new hire's first day on the job, another group of items that can



wait for a week, and perhaps some additional items that don't have to be covered until the individual has been on the job for a few months.

- **Paperwork:** What forms must the new hire fill out during the orientation period, and what paperwork must be completed by HR and the immediate supervisor?
- **Handouts:** Indicate what supplementary printed materials will be handed out to the newcomer—for example, booklets on certain benefit programs, employee handbooks, a copy of the relevant union contract, a copy of the job description, ID or registration cards, etc.
- **Orientation checklists:** These can be added as a reference source for supervisors and others involved in orientation.
- **Follow-up procedures:** Orientation efforts can be quickly undermined when HR and supervisors fail to follow up on them. Your company's policy on orientation follow-up, its importance, scope, participants, and timing should be incorporated.



Traditional approaches to orientation to avoid

- **The paperwork approach**
Focus on getting the employee to complete the necessary forms
No individualization
- **The gopher approach**
"No better way to learn the job than from the ground up"
(It won't be long until the employee heads for the nearest exit)
- **The suffocation approach**
The employee is overwhelmed by this "comprehensive" approach
Employee is confused and almost destined to fail
- **Survival of the fittest**
Opposite of suffocation, employee put to work right away
A basic, superficial orientation, and then "sink or swim"



Termination

Here are some of the basic items of information that you should consider in developing your HR policy regarding this volatile area:

Voluntary and involuntary

You should have clear definitions of the various types or categories of termination. Examples of voluntary terminations might include written resignations, extended absences without the proper notification, retirement, failure to return after a leave of absence, and death. Examples of involuntary terminations might include permanent layoffs, firing for poor performance, discharge, and disability.

Notice

If an employee decides to resign voluntarily, how much advance notice must he or she give? Must this be in writing? Is the notice requirement ever waived under extenuating circumstances? What if the employee is taking a job with a competitor?

Dismissal procedures

If an employee is discharged, what procedures must the supervisor follow? Does the supervisor's decision need to be approved by someone higher up? How and when should the employee be notified?

Supervisor's responsibilities

These usually include notifying (and involving!) the human resource department **before** the decision to terminate has been made. In some cases, they may also be the individuals who are responsible for notifying the payroll department, filling out certain forms, etc.

Sick leave and vacation pay

Does a terminating employee receive pay in lieu of unused vacation time? What about sick leave credits? Does your state require the payout of vacation/sick pay?

Status of other benefits

Sometimes life and health insurance can be continued at group rates for a certain period following termination. Consider your COBRA requirements.



Financial arrangements

Employees are usually required to settle all debts with the company before they leave, including expense reports. You should also state when and how the departing employees will receive their last paycheck. (Don't try to hold back the paycheck past the next regularly scheduled payday.)

Return of company property

Employees who are leaving the company must usually return tools, uniforms, credit cards, keys, and other items belonging to the company. Under the Illinois Wage Payment and Collection Act, deductions for the value of these items from an employee's paycheck are generally prohibited without proper written authorization from the employee.

Security considerations

An employee who has had access to confidential information or operations often poses a security threat when s/he decides to resign or is discharged. Are there any special steps that should be taken to minimize this threat? (Be careful of defamation in escorting the employee from the premises.)

EEO reminder

Discrimination in any form, or the appearance of discrimination, must be scrupulously avoided in deciding to discharge a worker.

Reasons: job performance and unemployment

If, after your best efforts in screening or interviewing applicants, an individual is hired who is unable to perform the job duties as directed by the supervisor, the separation is NOT for misconduct. However, do NOT use an inaptitude or inability as a cause of separation when failure to follow instructions, directions, or training is the real cause. Peaks and valleys of quantity or quality of productivity may be used as an argument for a misconduct discharge. If this may become an issue, be sure to note the employee's improved attendance or improved productivity following coaching or disciplinary discussions with his/her supervisor.



The “Rule of Seven”

Developed in 1970 by Arbitrator Joseph Gentile, here are seven guidelines concerning discipline and an employee's having received "due process" in the eyes of various courts. Even though “due process” is generally not required, these guidelines are still a helpful framework to consider in termination decisions:

1. **Notice.** Did the employee receive an oral warning about the inappropriate or substandard behavior and what the consequences could be? (This is regardless of whether the behavior is covered by a written policy and/or appears in an employee handbook.)
2. **Connection:** Is there a connection between the violated rule or inappropriate behavior and the safe and efficient operation of the business?
3. **Investigation:** Was there an investigation of facts surrounding the situation? Did the person conducting the investigation approach it trying to prove the person innocent?
4. **Objectivity:** Was the person conducting the investigation fair and objective?
5. **Evidence.** Is there evidence? What documentation exists? What evidence exists that notice was given?
6. **Application.** Was the application of the discipline even-handed and without discrimination? Was the rule/policy *consistently* enforced and was the discipline *consistently* applied?
7. **Harshness.** Does the punishment fit the offense? Can the discipline be viewed as too harsh or not harsh enough considering the violation?



Other factors that should be considered in the termination decision include:

- Have I gathered all the facts? Have I asked the employee for an explanation of his or her misconduct?
- Is the recommendation to discharge the employee based on provable facts rather than feelings? Do I have documentary evidence?
- Is the situation covered by our personnel policy rules? Is my decision consistent with those rules?
- Has the employee been informed -- and does s/he understand -- that the misconduct violates company rules? Did the employee understand the consequences of violating the rule?
- Excepting serious misconduct, has the employee had any disciplinary action taken in the past, was s/he told that continuing violations could result in discharge?
- Has the employee been given sufficient opportunity to correct his or her deficiency?
- Has there been proper written documentation of **past** discipline and counseling? Have I examined the employee's entire personnel record? Are there mitigating circumstances that would affect my decision?
- Is it more appropriate to demote or transfer the employee? Is discharge a reasonable penalty? Is discharge consistent with past company policy AND PRACTICE?
- Has management considered whether it would be better to give one final warning to the employee?
- If required, has there been proper management approval with respect to the discharge recommendation? Does the discharge notice include a justifiable basis for discharge?



Fifteen steps to consider before discharging an employee:

1. Suspend the employee and initiate a thorough investigation to get all the facts (unless there are absolutely no facts in dispute and the conduct calls for summary dismissal).
2. Get *all* the facts including any remarks the employee in question might care to make.
3. Determine whether there is a rule or policy that calls for dismissal based upon the facts involved.
4. Determine whether there have been any exceptions to the rule or policy.
5. If there have been exceptions, determine if the factual situation at hand fits any of the exceptions.
6. If this is the first discharge case under a particular rule, double check the original purpose and intent of the rule and confirm that it is still a timely and proper one.
7. If the employee in question is a minority or some other class-protected employee, ensure there are no disparate applications of the rule relating to the protected characteristics.
8. If the discharge has been brought about because the last step in the progressive disciplinary procedure has been reached, recheck to make sure that all steps or procedures have been properly followed.
9. Make sure the employee is not engaged in any type of protected concerted activity.
10. Determine whether the discharge will make the employee a "martyr" and, if so, set up communication plans to overcome the effect of such "martyrdom" on the rest of the workforce.
11. Make sure that the employee's file has proper documentation and witnesses to support the discharge case.
12. At the time of actual discharge, make sure there is another managerial employee present.
13. At the time of discharge, be short and brief without references to sympathy or "passing the buck."
14. If at all possible, reference the specific rule of conduct that has been violated, but otherwise draft the description of the reason for discharge in very general terms.
15. Make sure that the procedures utilized in conducting the discharge and exit of the employee are the same as those utilized in previous discharges.



Plaintiff's attorney's view of conditions that can contribute to a successful wrongful discharge case

The following are questions that a plaintiff's attorney would ask before deciding whether or not a case against an employer for wrongful termination could be successful. You and your management team need to ask and should ask yourselves these questions when evaluating a potential termination.

- How many promotions did you receive from the employer?
- How many raises did you earn at this company?
- Did you ever receive a monetary performance bonus?
- Did the employer promise or suggest anything about job security when you were hired?
- How have your performance evaluation ratings and comments been?
- Did you ever receive anything in writing that said you were doing or have done a good job?
- Did you ever train or help train others?
- Did you ever attend trade, professional or industry meetings on behalf of the employer?
- Were you ever suspended, put on probation or given warnings?
- When and how did you first learn things were not going well?
- Before being terminated, were you specifically told that your job was in danger?
- Before you were fired, did you file a complaint, a grievance, or exercise your statutory rights?
- Where were you told you were being fired?
- Did other persons see or overhear you being fired?
- Did anyone replace you in your last position with the company?
- Have any other employees or ex-employees sued the company?
- Did you apply for unemployment benefits?
- Did the employer oppose your application for unemployment benefits?



Layoffs and Recalls

A layoff or reduction of force involves the company's decision to discontinue employment for a certain number of employees during a period when no work is available, and the layoff may be permanent. It may or may not be possible to determine ahead of time if or when these employees will be allowed to return to work and the conditions under which they will do so.

Layoffs are obviously a very sensitive subject for employers and employees alike. No one enjoys contemplating the prospect, let alone experiencing it. To make what can be a traumatic experience for both parties as painless as possible, you should consider at least the following:

Purpose

Do you have a statement justifying your layoff and recall procedure on the basis that it enables the company to continue operating as efficiently and effectively as possible while at the same time making necessary reductions in the workforce?

Definition of "temporary" layoff

What do you regard as a temporary layoff? At what point does a temporary layoff become permanent?

Impact of length of service

Layoffs are often decided on the basis of company service with the least senior person in a department or job grade being the first laid off. If this is not the case at your company, be sure to clearly state the criteria used.

Decision maker

If you do not use length of service as a guide, you should set forth who will decide which employees are laid off or discharged. Will it be the first-line supervisor who selects the individual or will upper management? The person who decides who should be terminated probably ought to be different than the person who establishes the criteria for termination. Once a decision maker has applied the criteria and determined who should be let go, those who established the criteria should review the decision. In this fashion there are two levels of management involved, and the possibilities of bias are reduced.

Criteria for terminating employees

Your policy may indicate that you will terminate persons based on performance. If you have used a ranking system in your performance review process, that may be most helpful in establishing which employees will be terminated. It will permit you to let the poorest performers go first.



Voluntary retirement

Will you offer voluntary retirement as the first step in your reduction in force? Or are you concerned that if you offer voluntary retirement you may lose too many good people and retain employees with the lowest performance abilities?

"Bumping" sequence

If bumping is permitted, does it allow an affected employee in a higher job classification to displace the least senior employee in that classification, or if there is no such person, then to "bump" the least senior person(s) in the next lowest job classification? Be as specific as possible in outlining any bumping procedures.

Introductory period, temporary, and part-time employees

These are usually the first to be laid off. Do these employees have recall rights?

Outplacement service

What outplacement service is available to the employees? Such services can include counseling, resume preparation services, photocopying services, office space, phone answering services, and the like.

Maintenance of service and benefits

How long will employees who are on layoff be allowed to maintain their service and benefits?

Recall procedures and privileges

These are also based on service in many cases; in other words, employees are usually recalled in the reverse order of layoff, with the most senior employee being recalled first. But recall privileges are often terminated after a specified length of time. Under what other conditions might an employee lose his or her recall rights?

Short-term layoffs

Do layoff procedures vary when the layoff is very brief? Sometimes a company will ask for volunteers or lay off employees on the basis of the equipment or shift involved when the layoff is expected to last only a few days.

Notification

How much advance notice do you give to employees who are being laid off? How will they be notified that they are being recalled? (Review state and federal WARN requirements).



Union contract provisions

Layoff and recall procedures are usually governed by the union contract. If some or all of your employees are unionized, it is obviously imperative that the terms of the appropriate union contract be followed to the letter.

Other contractual claims

If you have taken care to avoid the creation of a contract with most of your employees, you will not have to fear this type of claim. On the other hand, if you have made promises to employees that they will not be laid off, that they will be laid off only under limited circumstances, or that particular procedures will be followed in the course of a layoff, you may have created a contractual obligation to follow that policy. If you vary from it, you may be subject to a claim for violating that contractual obligation.

Employee morale

If you drag out the process of reducing your workforce you will find a tremendous negative impact on your employees. Each will be waiting for the bad news. Instead, you should consider terminating all employees to be laid off at once. In that fashion, the shock to the employees will be occurring only once rather than day after day or week after week. Further, those who remain can be reassured to some degree by the fact that there are no plans for a further reduction in force. With that reassurance they can then focus on doing their jobs rather than focus on whether or not they will be able to retain their jobs.

Age discrimination

Often, a reduction in force leads to age discrimination claims. Management focuses on reducing cost and thereby seeks to eliminate the highest paid positions. Quite often, the higher the pay is, the older the employee is. For that reason, the policy concerning reduction in force must be applied consistently. Once the list of individuals to be laid off has been determined it should be reviewed for possible claims of age discrimination.

ERISA claims

The Employee Retirement Income Security Act forbids the discharge of an employee in order to avoid paying employees benefits such as group medical benefits. For that reason, care should be taken to avoid the possible inference that you are discharging employees who have expensive illnesses. Thus, if one of the criteria you use in determining who to terminate is attendance, you need to review that item carefully.

Neither should you eliminate benefits such as severance pay just before you initiate a reduction in force, as employees may be able to successfully sue you to obtain those recently discontinued benefits under ERISA.



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