

# Best HR Practices for Companies Seeking to Hire, Train, and Retain Amazing Talent

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# Hiring & Firing

## Why Does It Matter?

[Two Critical Decisions]



# Two Critical Decisions

Impact on Workplace

- Efficiency
- ...

# Impact on Workplace

- Efficiency
- Effectiveness
- Morale



# What is the Hiring Process?

Matching Candidates with Positions

Matching Candidates with Company Culture

Possible Liability

- Failure to Hire
- Misrepresentation/Inducement
- Invasion of Privacy
- Third-Party Liability



# Recruiting

- Set appropriate and relevant requirements
- Watch the wording in ads
- Be sure to reach broadly with ad placement



# *Application and Interview Process*

- Be sure to avoid questions/topics that violate federal, state and local fair employment laws
- Interviews are not for “chatting”
- Certain topics should be left for post-offer inquiries



# Areas of investigation for applicants

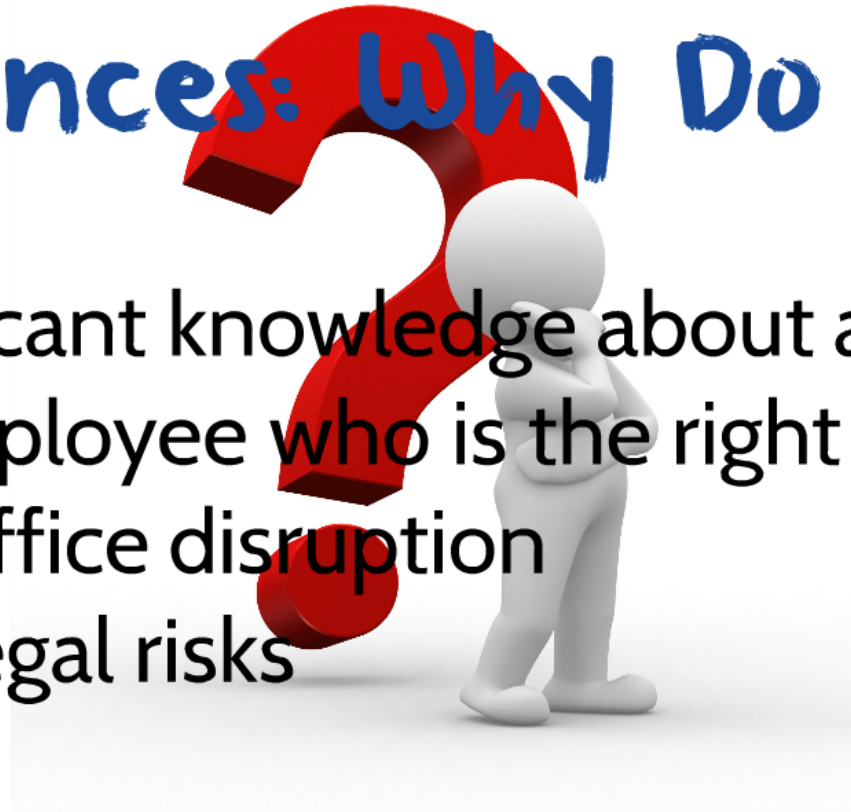
- References
- Criminal and consumer background checks
- Drug testing
- Credit and financial checks
- Social media investigation





# [References: Why Do I care?]

- Gain significant knowledge about an employee
- Find an employee who is the right fit for the job
- Minimize office disruption
- Minimize legal risks





# So Why Won't Anyone Answer?

## Lawsuits by the Employee

- Defamation
- Retaliation
- Discrimination based on disclosing the employee's protected status under the law
- Interference with prospective business relations



## So What's an Employer to Do?



- Get releases
- Reading tea leaves
- Look to other sources

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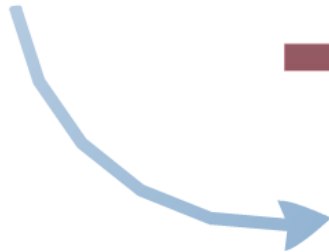
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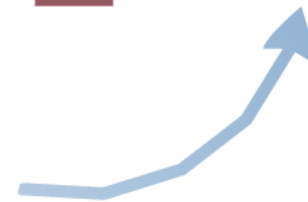
## Getting Releases

- Obtain a release form from applicant
- Consider providing releases in other languages
- Be cautious with respect to whether the release is binding in all circumstances



## Reading Tea Leaves

- Be careful in listening to or reading the responses
- Ask for factual information
- Follow up written requests with a phone call



## Look To Other Sources

- Criminal background checks
- Drug testing
- Credit and financial checks
- Social media checks
- Personal references
- Education records
- Lie detectors

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# Criminal Background Checks

## Federal Law

- Federal law does not prohibit employers from asking about criminal history, but **beware!**
- Per the EEOC, applicants may only be excluded based on criminal history if the conduct is job related and the decision is justified by business necessity
- Relevant factors to that determination are:
  - The nature and gravity of the offense
  - The time that has passed
  - The nature of the job sought
- Arrests carry additional considerations:
  - Arrest is not proof that the person engaged in criminal conduct
  - An arrest may trigger inquiry into the underlying conduct, and the employer must conclude the applicant engaged in the conduct for which arrested
- 2012 EEOC enforcement guidelines recommend that employers not ask about criminal convictions on job applications

### State Law

- Many state law counterparts to Title VII have similar applications to Title VII
- In addition, many states have their own laws on a "protected class" (and hire age, sex, gender etc.) and have protocols that must be followed



## HOT TOPIC: “Ban The Box” Legislation

- Generally, “Ban the Box” laws are fair hiring initiatives that typically require an employer to:
  - Remove the question on a job application about an individual applicant’s conviction history
  - Delay any background check inquiry until later in the hiring process
- “Ban the Box” laws aim to ensure that companies initially:
  - Assess job candidates on their skills and abilities
  - Are not swayed by past incidents that may have no bearing on ability to perform the job

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# Drug Testing



- Pre-employment drug testing is not considered a “medical test” under the ADA
- Check state and local laws for differences from the ADA
- Drug testing results are still governed by privacy laws relating to medical information
- Testing and protocols must be designed to ensure accuracy of results
- Maintain consistency in drug testing policy with respect to which applicants are tested
- It is preferable to obtain written consent

**Caution: alcohol is not a “drug”!**

# Credit and Financial Checks

- Federal law does not prohibit inquiries into financial status/competency of applicants
- However, the EEOC has opined it could result in disparate impact discrimination against certain Title VII-protected minorities, who are below the poverty level in higher proportions than Caucasians
- The EEOC expects decisions based on credit or financial status to be justified by business necessity
- Federal bankruptcy law prohibits private employers from “discriminat[ing] with respect to employment” against an individual who is or has been a debtor



# Social Media in the Hiring Process



## *There are benefits to investigating applicants on social media:*

### *2012 CareerBuilder.com survey:*

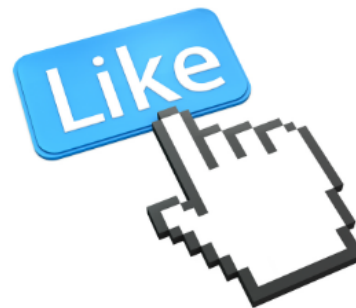
• 29% found information causing them to extend an offer of employment

- Good feel for candidate's personality
- Candidate conveyed professional image
- Information supported professional qualifications
- Well-rounded/wide range of interests
- Good communication skills
- Candidate creative
- Other people posted good references

• 34% found information causing them not to hire candidate

- Provocative/inappropriate photos or information
- Poor communication skills
- Bad-mouthing a previous employer
- Discriminatory comments
- Lies about the candidate's qualifications

- Offers candid insight into applicant's personality, to see if a good fit for the organization
- Reveals candidate's judgment





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*There are also risks to social media investigations:*

- Information about membership in protected classes (e.g., religion, disability, affiliations) abounds
- Cannot “un-know” protected information





## *Other tips if you plan on using social media to background check applicants:*

- Consider advising applicants of your intentions
- Have a person not involved in the decision-making process screen social media sites for information
- Take all results with a grain of salt
- Consider giving applicants a chance to explain





# APPLICATION

- Applies only to background checks done for an employer by an outside entity that “regularly engages” in the business of providing
  - background, financial and personal information
  - to evaluate an employee or applicant
  - for employment, promotion, reassignment or retention
- Can apply to retention of independent contractors, not just employees


# APPLICATION

- Applies to two forms of reports:
  - Consumer report – a report containing information on the person’s credit history, character, general reputation, personal characteristics, and/or mode of living, but based on information obtained from public records
  - Investigative consumer report – consumer report information obtained from personal interviews with the person’s acquaintances, as opposed to records
- Since 2013, enforced by the new Consumer Financial Protection Bureau






# PROCEDURAL REQUIREMENTS

- Notice requirement before obtaining a consumer report:
    - Disclaimer that consumer report may be obtained
    - Include signed authorization to obtain report
  - Additional notice requirements for investigative consumer report:
    - Disclose that report may include in-depth information
    - Mail or deliver to individual within 3 days of requesting
    - Inform of right to request additional disclosures and to receive written summary of legal rights
- 



# PROCEDURAL REQUIREMENTS

- Required disclosures before and after taking an adverse employment decision based on information learned
  - Before taking the adverse action:
    - Copy of the report
    - Written statement of rights under the FCRA
  - After taking the adverse action, an adverse action notice containing:
    - Contact for the reporting agency
    - Statement that the agency did not make adverse decision
    - Right to obtain free copy of report and to dispute it
- 

# SUBSTANTIVE LIMITATIONS

- Limits to the content of a consumer report, unless the annual salary of the position is expected to equal \$75,000 or more:
  - Bankruptcy more than more than 10 years old;
  - Paid tax liens more than 7 years old
  - Accounts placed for collection or charged to profit and loss more than 7 years old
  - Other adverse item of information other than convictions.
  - Arrests more than 7 years old that did not result in conviction
  - Civil suits, civil judgments more than 7 years old

**\*Note, no FCRA limit on reporting convictions**



# The Interview



Small text block, possibly a footnote or reference.

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Improper  
questioning,  
even at the  
interview stage  
can form the  
basis of  
liability...

# Which Questions Should I Avoid?



## In general, avoid questions related to protected characteristics, such as...

- **Age** How old are you? Are you at least 18 years of age? What are your long-term career goals?
- **Disability**
- **National Origin** What country are you from? Can you provide proof of authorization to work in the US?
- **Race/Color**
- **Religion** What religious holidays do you observe? Are you able to work weekends or our work schedule?
- **Gender**
- **Sexual Orientation** Are you married/have a family? Are you able to work overtime? Travel?
- **Genetic Information**



If protected  
information does arise,  
move directly on to  
another topic

# Testing and Examinations

Drug and Alcohol  
Medical Examinations  
Medical Marijuana

# Handling Discovered Information

Is it private?

Is it protected?

Is it necessary?

Have a plan .

## The Final Step: Extending the Job Offer

- Offer letter – memorialize offer in writing
- Reaffirm at-will status
- Establish conditions and meaning of applicant's acceptance, e.g.:
  - No prior limitations restrict ability to perform
  - Obligation to sign restrictive covenant, if any
  - Obligation to sign arbitration agreement, if any



# Firing Employees

## Key Considerations

Business decision for employer, but can be very personal to employee

- Loss of income/benefits
- Reputation
- Identity/Self-esteem

## Potential Liability

Wrongful Termination	Breach of Contract	Discriminatory/Retaliatory Discharge	Impact Wages
<p>Termination without adequate notice                      (California: 90 days for 10+ employees)</p> <p>Public policy violation (California: 1 year)</p> <p>Retaliation (California: 1 year)</p>	<p>Written or implied contract</p>	<p>Protected classes: Race, Religion, Sex, Age, Disability, National Origin, Genetic Information, Military Service, Pregnancy, etc.</p>	<p>Unpaid wages and benefits</p>

## Decision-making Process

Single decision maker vs. Team process

## Objective Review

- Reason for "Termination"
- Termination consistent with employer's practice?
- Is termination supported by adequate evidence/documentation?
- Is the employee being terminated for something the employer deemed unacceptable of individuals in the past? (Change in approach or policy?)
- How clear is the evidence on which termination was based on?
- Are there legitimate, non-discriminatory and/or non-retaliatory reasons for termination?
- Individual's complete Performance: Disregard
- Necessary for employee's survival, Operational?
- Is employee being treated the same as similarly situated employees?
- Is the termination of that quality an individual who may have a discriminatory or retaliatory motive?
- Termination related to any protected activity?

## Termination Meeting

- Who?
- Where?
- How presented?
- Security concerns

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# Potential Liability

## Wrongful Termination

State laws vary (Example: Arizona Employment Protection Act, A.R.S. §23-1501 et seq.

May be premised on exercising rights under federal or state laws, such as the Family and Medical Leave Act, Workers' Compensation, etc.

## Breach of Contract

Express or Implied

## Discriminatory/Retaliatory Discharge

### Elements

- 1) Is a member of a protected class;
- 2) Was performing the job adequately and meeting the employer's expectations;
- 3) Was fired; and
- 4) Similarly situated employees outside of the protected class were not fired.

## Unpaid Wages

Fair Labor Standards Act, 29 U.S.C. §201 et seq.

- Minimum wage
- Overtime

State wage payment laws

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- Termination consistent with employer's practice?
- Is termination supported by appropriate evidence/documentation?
- Is the employee being terminated for something the employer deemed acceptable or tolerated in the past? Change in approach or policy?
- Would an unbiased observer think termination was reasonable?
- Are there legitimate, non-discriminatory and/or non-retaliatory reasons for termination?
  - Individual to employee (Performance : Discipline)
  - Necessary for employer (Financial : Operational)
- Is employee being treated the same as similarly situated employees?
- Is the termination influenced by an individual who may have a discriminatory or retaliatory motive?
- Timing in relation to any protected activity

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# CONCLUSION



- Be mindful of federal, state and local fair employment laws
- Set appropriate and relevant requirements for recruiting
- Applications and interviews gather preliminary qualifications based on same questions
- References and background checks provide more particularized information about candidates
- Know when it's appropriate to ask for certain information such as disability, criminal background
- Use offer letter to document terms of position

# Employee Retention

- Ensuring that employees are encouraged to remain with the company for a maximum period of time or until the completion of a project.
- Employee attrition is expensive- according to a 2017 Work Institute Retention Report, recruiting replacement talent can cost as much as 33% of a worker's annual salary.
- Turnover has an adverse effect on morale, as those employees left behind may have to shoulder the burden of additional duties

# Comprehensive, Ongoing Training

- Proper training and professional development
  - Builds trust and loyalty with employees by showing you're willing to invest in their success
  - Equips your employees to do the work you want them to do
- Training should not be a “one and done” effort
  - On-boarding training
    - Educating employee about the company's mission & culture
  - Continuing training, tailored to fit an employee's changing roles and responsibilities

# Supervision and Feedback

- Provide hands-on guidance and open and constructive feedback
- Employees like knowing where they stand
  - Avoids “surprises” at review time
  - Allows the employee to sharpen his or her skills and become more valuable as a contributor
- Constructive criticism benefits the employer, as well
  - Strengthens workplace performance
  - Improves productivity
  - Train supervisors in how to communicate and effectively supervise

# Workplace Mentoring

- Structured program
- Organic, “informal” workplace mentoring
- Ideally- BOTH approaches
- Considerations
  - Should mentor serve in a supervisory role?
  - Often, interactions in a mentorship are more open, authentic, and valuable when the mentor is not a direct supervisor of the mentee.



# Transparency

- Being open and honest with employees is critical
  - Boosts credibility
  - Builds trust and confidence in the management
  - Increases employee engagement
  - Regular communication allows your employees to understand what is expected of them and where they fit into the organization's big pictures
    - When are company-wide goals being met?
    - Honesty regarding past mistakes and challenges the company is facing
    - Allows employees to have the opportunity to express opinions and get questions answered
      - Suggestion box
      - Employee engagement surveys
      - "Open Door" policy

## Opportunities for Growth and Advancement

- Employees will stay if they envision a clear path for upward mobility at your organization
  - Be sure employees are feeling challenged in their everyday work
  - Expose employees to a broad variety of experiences to expand their skill set
  - Interactions with internal and external clients, vendors, etc.
  - Seeing colleagues being promoted helps reinforce confidence, since it demonstrates that the employer is committed to helping employees grow and succeed

# Alternative Work Arrangements

- Employees prize work-life balance and desire flexibility to juggle work with personal commitments
- Avoid time commuting back and forth to work
- Telecommute on certain days
- Non-traditional schedules
- These policies demonstrate trust in employees to get work done and understand and value their lives outside of the office
  - Also reduces stress levels, making people more productive in the office and when telecommuting
  - Put in place Remote Work/Telecommuting Policy

## Coronavirus (COVID-19)

- How can employers mitigate the effects of a local COVID-19 outbreak?
- Employers will face increased employee absences
- Devise plans now to address personnel shortages to avoid disruptions to operations
- Cross-train employees to handle new tasks in case of absent coworkers
- Implement Remote Work Policies
- Remind employees of sick leave policies and be transparent regarding the company's plan to respond to a possible outbreak

# Coronavirus (COVID-19)

- Reductions in Force and/or Furloughs
  - Reductions in force are permitted if not discriminatory
  - Furloughs are permissible, BUT employers must consider the exempt or nonexempt status of their employees before furlough
- Exempt employees (not entitled to overtime)
  - For any week in which an exempt employee performs at least one job duty (drafting work email)- full weekly salary
  - Consider enabling exempt employees to work remotely without a furlough
- Nonexempt employees
  - Consider allowing nonexempt employees to work remotely, as well
  - Strict compliance with wage and hour rules, including timekeeping and meal and rest breaks
  - Overtime, working off the clock

## Coronavirus (COVID-19)

- Be mindful of the optics of refusing to pay employees who live paycheck to paycheck
- Consider implementing a policy for nonexempt employees to have some form of compensation, even if they're unable to carry out their duties
- Consider state law pay rates and adjustment notice requirements

## Coronavirus (COVID-19)

- Employers should encourage employees who seek time off from work to use paid vacation and sick days.
  - If an employee has no remaining time remaining, employers should consider allowing Family Medical Leave Act leave.
  - Employers should allow FMLA leave when a nonexempt employee or qualified depending contracts COVID-19 and has no remaining paid time off
  - Exempt employees should be continued to be paid salaries
- If a nonexempt employee who exhibits no symptoms but is concerned that they might have contracted COVID-19 seeks time off, employers should be very cautious prior to initiating FMLA leave
  - Instead, consider allowing employee to work remotely

# Coronavirus (COVID-19)

- When an employee who exhibits no symptoms is required to self-quarantine and has no remaining paid time off, consider allowing an unpaid leave and then convert to FMLA leave if the employee exhibits symptoms of having contracted COVID-19
  - Exempt employees, if they're able to work, should be paid
  - For nonexempt employees, consider some form of compensation, if only to avoid bad optics
  - Consider local and state laws that may require employers to compensate employees or self-quarantine or provide care for a qualified family member