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Employee Hiring and Firing: Legal and Practical Guidance for Employment Counsel

Strategies to Minimize Negligent Hiring or Wrongful Termination Claims

TUESDAY, NOVEMBER 2, 2010

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

John E. Quinn, Member, Eckert Seamans, Philadelphia

Keith A. Watts, Shareholder, Ogletree Deakins, Costa Mesa, Calif.

Sidney L. Gold, Principal Shareholder, Sidney L. Gold & Associates, Philadelphia

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Employee Hiring and Firing: Legal and Practical Guidance for Employment Counsel

Presented by:

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OVERVIEW OF ANTI-DISCRIMINATION LAWS

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Applicable Laws Prohibit

- Discrimination based on
 - Race / Ethnicity
 - Religion
 - Gender/Pregnancy
 - Age
 - Disability
 - Veteran status
 - Sexual orientation

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- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act
- Rehabilitation Act of 1973
- Age Discrimination in Employment Act of 1967
- Civil Rights Act of 1866, Sections 1981 and 1983
- Equal Pay Act
- Executive Order 11246 for federal contractors
- Fair Credit Reporting Act
- State laws

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Hiring Best Practices

JOB DESCRIPTIONS ADVERTISING

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Hiring Best Practices

PRE-EMPLOYMENT INQUIRIES (JOB APPLICATIONS AND INTERVIEWS)

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Prohibited Inquiries

- Employers may not ask applicant questions that elicit information that cannot be considered in making a hiring decision
- State laws, such as FEHA, presumes prohibited information was a factor in hiring

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Prohibited Inquiries

- Questions eliciting information about race, sex, national origin, age, religion, disability, marital status, citizenship, color, disability, sexual orientation



Prohibited Inquiries

- Examples:
 - Date of birth or school attendance
 - “are you a citizen?”
 - Name and address of “relative, spouse or children”
 - Organizations, clubs, societies to which applicant belongs
 - Provisions for child care
 - Questions “likely to elicit information about a disability”
 - Age

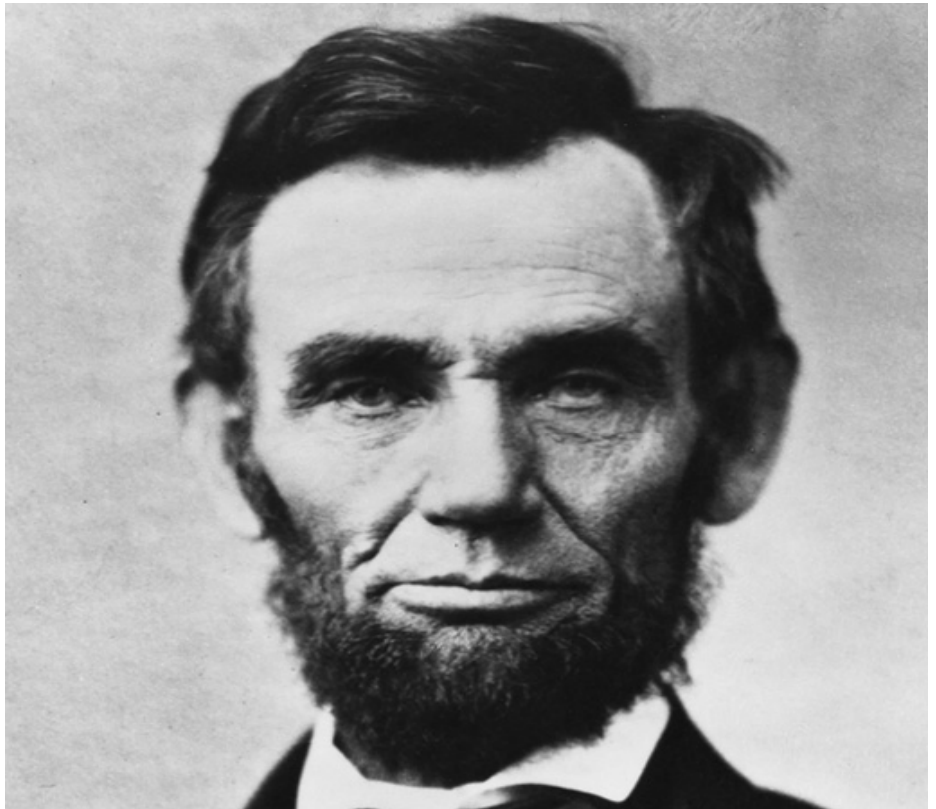
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Prohibited Inquiries

“Do you remember when Lincoln was in the White House?”



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Prohibited Inquiries

- Examples from EEOC regulations
 - No questions about ability to perform “major life activities”
 - No questions about whether applicant will need reasonable accommodation to do the job
 - No questions about medical or workers’ compensation history

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Prohibited Inquiries



- No questions about lawful drug use
- “No, I didn’t inhale . . .”

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Prohibited Inquiries

- Examples from EEOC Regulations:
 - May ask if applicant can perform specific job functions
 - If disability is “known” may ask applicant to demonstrate or describe how task would be performed



Employment Applications

- “Arrests” not leading to convictions
- Credit histories
- Inquiries sufficient to avoid “negligent hiring” claims
- No comments that could create an “implied contract”

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The “15-Second Screening” – Is the Application Complete?

- Make sure application is completed before offer extended or employee hired!
- Make sure the applicant lists all five past employers
- Make sure that the applicant states exact reasons for termination
- Make sure that all the boxes are checked
 - Criminal history
 - Never been terminated or asked to resign
- Make sure application is signed

NEVER accept an incomplete or unsigned Application!

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Applicant Interview Forms

- Same restrictions as applications
- Avoid discrimination by establishing uniform standards
- Develop forms/documentation to reflect:
 - uniform questions applicants
 - uniform selection criteria
 - uniform interviewers/decision makers

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Interview “Dos” and “Don’ts”:

- Interview with a Purpose!
 - **DO NOT** ask about “protected” classifications
 - **DO** ask who, what, when, and where questions
 - **DO NOT** write on the Application
 - **DO** use 80/20 rule
 - **DO NOT** hire “on the spot”
 - **DO** look for signs of drug or alcohol abuse



The Interview: Sample Questions

1. Have you ever been fired or asked to resign from a job?

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The Interview: Sample Questions

2. Do you feel your current job is stressful?



The Interview: Sample Questions

3. How do you think your current supervisor will respond to my request for a reference?

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The Interview: Sample Questions

4. What policies of your current employer do you disagree with?

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The Interview: Sample Questions

5. Do you currently use illegal drugs?



Reference & Background Checks:

Social Networking Sites – “The New Frontier” “To Check or Not To Check – That Is The Question”



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Reference & Background Checks:

- Drug testing
- Credit checks
- Criminal background checks
- DMV checks



If you are not doing Reference and Background Checks

**You are hiring the “bad eggs”
that could not get a job with your competitors who do!**

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Reference and Background Checks
are worth the time and money!

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Drafting The Job Offer Letter

- “At-will” reference or disclaimer
- Avoid specific period of employment
- Incorporate terms of handbook
- Do you want to create a contract?



What is “At-Will” Employment?

- Presumption, absent an agreement to the contrary, that employees and their employers are each free to discontinue their employment relationship at any time, for any reason, with or without notice



The Use of Performance Evaluations to Minimize Liability

- Maintain record of employer efforts to provide notice of deficiencies and opportunities for improvement
- Evaluations should be accurate and effective
 - Establish performance standards which are job-related, objective and clear
 - Evaluate at regular intervals

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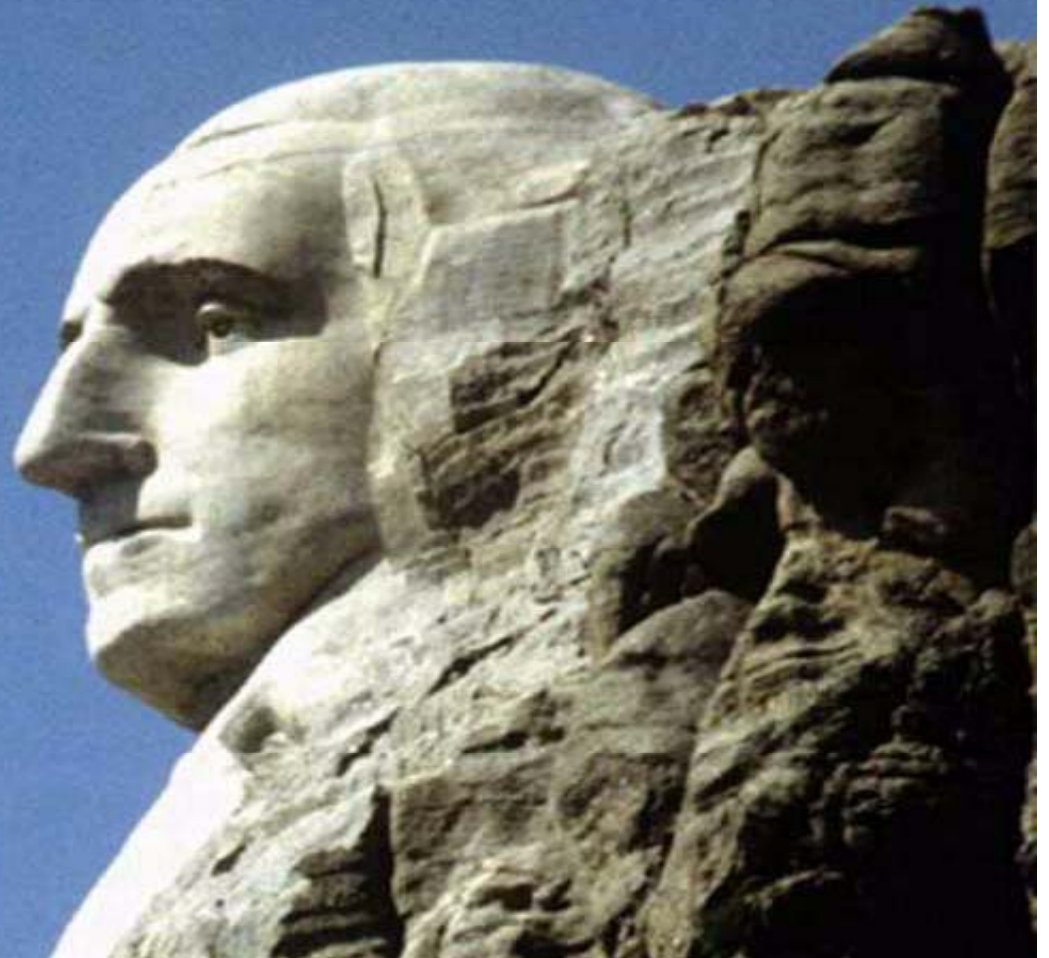
The Use of Performance Evaluations to Minimize Liability

- Managers must know how to properly administer evaluation system
 - Avoid “subjective” criteria
 - Evaluate strictly based on employee’s actual responsibilities



The George Washington Program

**Discipline and Terminating
Without Litigating**



Employee Misconduct

- You can't control what all of your employees do all of the time
- BUT you can implement policies alerting employees to what behavior is unacceptable
- AND train your supervisors and managers!

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Discipline

- Verbal counseling
- Written counseling
- Suspension without pay
- Termination
- May also consider relocation – especially in harassment situation



Termination

The Golden Rule of Discipline:
If it isn't in writing; it doesn't count!



- Juries will only believe you if you put it in writing
- When its just your word against theirs, you lose most of the time

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Document, document, document

- Convey expectations and motivate
- Train and develop workforce
- Reward positive behavior
- Identify and correct negative behavior
- Provide warning of repercussions
- *Provide legal DEFENSES*

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Document, document, document

- Always document any incident that could lead to discipline
- Include names, dates, times
- Preserve evidence
- Include information obtained through investigation and interviewing



Top 5 reasons why documentation doesn't exist . . .

- 5. Too time consuming (laziness)
- 4. Too confrontational
- 3. Fear of saying something wrong
- 2. Fear of getting sued
- 1. Failure to train supervisors and require it be done



Documentation

- Without documentation, memories fade and personnel changes
- A legitimate piece of paper makes much better evidence than a witness' testimony



Avoid Common Termination Mistakes

- Giving a reason which later proves false or inaccurate
- Termination violates company practice or policy



Assessing “High Risk” Termination Factors

- Employee is in one or more protected groups or is “long term”
- Employee history of claims against the company or others
- Supervisor has a “history”



Assessing “High Risk” Termination Factors

- Is on or has recently returned from a statutorily authorized leave (FMLA/CFRA; ADA, Workers’ Comp)
- Employee has recently complained
- Giving a reason which later proves false or inaccurate



Minimizing Risks of Terminations: Consider Alternatives

- Demotions
- Training
- Lateral transfers
- Delay termination to create better documentation



The Use of Severance Agreements to Minimize Exposure to Wrongful Termination Claims

- Severance agreements
 - General releases
 - Specific release of age discrimination claims
 - Provide consideration
 - Non-waivable claims



Use of Termination Letters to Avoid Liability

- Carefully state reasons for termination
- Dates and subject matter of prior warnings/discipline
- Benefits to which employee is entitled
- Ability to appeal or review
- Last day of work/exit interview
- Final paycheck/company property

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Conduct Exit Interview to Avoid Liability

- Conduct meeting in private
- Avoid having “antagonists” present
- Have a second manager attend



Conduct Exit Interview to Avoid Liability

- Be brief (15 minutes should do it)
- Avoid “escorting”
- Arrange exit interview (if appropriate)
- Provide termination letter (if appropriate)



Email & E-Discovery

- Brave new world
- Shelf life of email – 64,000 years
- “Deleted” doesn’t mean its gone

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Top Ten Employer Mistakes In Hiring, Retaining and Firing

- 1 -- Not conducting background checks or doing inadequate background checks



Top Ten Employer Mistakes In Hiring, Retaining and Firing (cont'd)

- 2 -- Not providing adequate and/or accurate references
 - General rule: neutral reference



Top Ten Employer Mistakes In Hiring, Retaining and Firing (cont'd)

- 3 -- Not following progressive discipline policies and not properly documenting files



Top Ten Employer Mistakes In Hiring, Retaining and Firing (cont'd)

- 4 -- Not updating personnel policies/manuals
 - FMLA
 - Sexual harassment



Top Ten Employer Mistakes In Hiring, Retaining and Firing (cont'd)

- 5 -- Not coordinating decisions and responses to agencies



Top Ten Employer Mistakes In Hiring, Retaining and Firing (cont'd)

- 6 -- Permitting too many “stray comments”
 - Loose lips sink ships!
 - How will this look to a jury?
 - Train supervisors on policies and law



Top Ten Employer Mistakes In Hiring, Retaining and Firing (cont'd)

- 7 -- Making unintended contracts or promises



Top Ten Employer Mistakes In Hiring, Retaining and Firing (cont'd)

- 8 -- Not taking complaints of harassment seriously



Top Ten Employer Mistakes In Hiring, Retaining and Firing (cont'd)

- 9 -- Not complying with record-keeping requirements



Top Ten Employer Mistakes In Hiring, Retaining and Firing (cont'd)

- 10 -- Not recognizing signs of litigation and acting appropriately



We take Hiring, Firing and Discipline seriously. You should too!



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Eh! You got questions?

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Thank you for your time.

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