



EASA 2015 Convention — San Antonio, TX

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# Avoiding Problems When Hiring and Firing

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# I: Hiring Overview

- A: Do you need to fill this job?
  - Is there a real need?
  - Why is the position being filled?
  - Could this be covered by incumbent employees?
  - Could this job be performed by a temporary agency employee?
  - Could this job be performed by a seasonal or summer employee?
  - Is this job part of our core competency?

# I: Hiring Overview

- B: Define Job to be Filled
  - Job description which is compliant with the Americans with Disabilities Act
  - Interview supervisors and incumbents for the most accurate information
  - Make sure the job to be done actually matches the job description

# I: Hiring Overview

- C: Locating Qualified Workers
  - Employee Referrals
  - Advertising
  - Public Employment Office
  - Placement/Employment Agencies
  - Schools
  - Special Training Programs

# I: Hiring Overview

- Selection – Select Candidates for Interviews
  - Good Application Forms
    - Signed application?
    - Criminal question answered?
    - Why did he or she leave past jobs?
    - Explanation for gaps in employment?
    - Sloppy completion of form?
    - Is all requested information provided?
    - Complete past employment information, including phone, address, and supervisor?

# I: Hiring Overview

- Selection – Select Candidates for Interviews (Cont)
  - Initial Screening
  - Person should be an overall good fit for the position
- Selection – Interviews
  - Write out a set of non-discriminatory questions
  - Treat employees equally

# I: Hiring Overview

- Selection – Follow up
  - When will you contact them?
- Selection – Testing
  - Approved tests
  - Drug Testing
- Selection – Background Investigation = Mandatory!
  - See college/school **direct** transcripts
  - Check all employment references

# I: Hiring Overview

- Selection – Background Investigation = Mandatory! (Cont)
  - Check high turnover and breaks in employment record
  - Credit/criminal background checks where appropriate. Note state and local restrictions on background and especially credit checks.



# I: Hiring Overview

- Selection – Background Investigation (Cont)
  - Compliance with Fair Credit Reporting Act (FCRA)
    - Advance Written Notice: “A Document that consists solely of the disclosure.” However, authorization may be integrated into the disclosure document.
    - Before Taking Adverse Action: After obtaining the consumer report for employment purposes, but before taking adverse action, employer must give the employee a copy of the report and a summary of the employee’s rights from the FTC. The unanswered question is how long to take before the next step.
    - Adverse action notice: required when the actual decision not to hire is made. Tracks prior step.

# I: Hiring Overview

- Selection – Background Investigation (Cont)
  - Violations of FCRA
    - FTC suit for up to \$2500 per violation
    - Sued by state protective agencies
    - Individual suits: the greater of \$1,000 or actual damages, can recover attorneys' fees, court costs and punitive damages

# I: Hiring Overview

- Selection – Background Investigation = Mandatory!  
(Cont)
  - Importance of Background Checks:
    - Due to recent intimidation attempts by EEOC, there has been a concern that use of background checks should be reduced or eliminated. The recent case of *Mindi M. v. Flagship Hotel Ltd.* 2014 WL 3734156 (Tex. App. Houston - 1st District) indicates the potential usefulness with regard to tort liability. Hotel bellman accused of sexual abuse of child of hotel guest. No check was run since he was referred by a current employee when hired. There was evidence of sexual misconduct in his background. Court referred for trial as jury might find the failure to run background check was negligence.

# I: Hiring Overview

- Selection – Getting Started
  - Probationary period term explained
  - Orientation - handbook
  - Get required forms completed, including I-9
- Re-Employment (Uniformed Services Employment and Reemployment Rights Act (USERRA))
  - Covered employees: The Act applies to persons who perform duty, voluntarily or involuntarily, in the “uniformed services.” These services include the Army, Navy, Marines Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services. Federal training or service in the Army National Guard and Air National Guard also gives rise to rights under USERRA

# I: Hiring Overview

- Re-Employment (Uniformed Services Employment and Reemployment Rights Act (USERRA)) (Cont)
  - Covered employers: USERRA applies to virtually all U.S. employers regardless of size.
  - Basic provisions: Service members returning from a period of service in the uniformed services must be reemployed by the pre-service employer if they meet five eligibility criteria:
    - The person must have held a civilian job;
    - The person must have given written notice to the employer that he or she was leaving the job for service in the uniformed services unless giving notice is precluded by military necessity or otherwise impossible or unreasonable;
    - The period of service must not have exceeded five years;
    - The person must not have been released from service under dishonorable or other punitive conditions; and
    - The person must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment.

# I: Hiring Overview

- Re-Employment (Uniformed Services Employment and Reemployment Rights Act (USERRA)) (Cont)
  - Time limits for returning to work under USERRA, with the exception of fitness-for-service examinations, depend upon the duration of a person's military service. The applicable time limits are as follows:
    - Less than 31 days service: By the beginning of the first regularly scheduled work period after the end of the calendar day of duty plus time required to return home safely and an eight hour rest period. If this is impossible or unreasonable, then as soon as possible.
    - 31 to 180 days: Application for reemployment must be submitted no later than 14 days after completion of a person's service. If this is impossible or unreasonable through no fault of the person, then as soon as possible.
    - 181 days or more: Application for reemployment must be submitted no later than 90 days after completion of a person's military service.
    - Service-connected injury or illness: Reporting deadlines are extended for up to 2 years for persons hospitalized or convalescing.

# I: Hiring Overview

- Re-Employment (Not related to military)
  - Former employee left in good standing – (Required)
  - Went to a competitor – Will this be a problem?
  - Retired, decided to re-employ – Benefits issues?

## II: Proper Interview Approach

- The “Big Picture”: The primary purpose of an employment interview is to elicit information and understand an applicant in order to predict future job performance. Following are tips to help in both areas. The interviewer should have a thorough understanding of the full range of requirements for the target job. The general tips which follow need to be utilized with judgment.



# II: Proper Interview Approach

- A: Conducting the Interview
  - 1: Additional questions from the application
    - Review application, resume, and attachments carefully
    - Frequency of job changes – why?
    - Order of jobs held – increase or decrease in responsibility and pay?
    - Breaks in employment – why?
  - 2: General
    - Be on-time – they, of course, should be early
    - Be consistent with your greeting – shake everyone's hand; formal or informal (Mr. or Mrs., John or Mary)
    - Establish a relaxed atmosphere – give overview of the interview, then ask easy questions first.
    - Maintain an informal and interested atmosphere.
    - Do not criticize.
    - Explain the next step in the process

# II: Proper Interview Approach

- A: Conducting the Interview (Cont)
  - 3: Guidelines for asking questions
    - Be non-judgmental.
    - Ask relevant, open-ended questions.
    - Ask about some value judgments, not just factual questions.
    - Ask some questions on subjects external to the interviewee.
    - Ask basic questions in the interviewee's field of expertise.
    - Maintain an interested, soft, conversational tone.
    - Use short phrases for questions.
    - Do not anticipate your next question.
    - Probe unusual situations.
    - Try not to interrupt unless the interviewee strays from the answer.
    - Reflect the interviewee's statements.
    - Respond with appropriate emotional interest.
    - Avoid any questions which relate to the physical attributes or disabilities of the applicant (see Section III).

## II: Proper Interview Approach

- A: Conducting the Interview (Cont)
  - 4: Questions Concepts
    - Self-appraisal: “Everyone has their strengths and weaknesses. How would you describe yours?”
    - Future plans: “Where do you see yourself in 1 year, 5 years, 10 years?”
    - Ask: “Is there anything we haven’t covered which you feel is important and that you think I should know?”
    - Close the interview by telling the applicant what the next step is. Avoid saying or doing anything which could be construed as a firm offer of employment.

## II: Proper Interview Approach

- B: After the Interview
  - 1: If you are using a list of prepared questions, leave space so that you can write in the answers. You can then just keep the form with the list of answers in the file. If there is anything unusual about a particular search, then prepare a written report as soon as possible after the interview with the following guidelines in mind:
    - Determine relevant vs. irrelevant information.
    - Look for evaluative information – attitudes, values, and reactions
    - Be open-minded – wait until all the information is in.
    - Be aware of your biases – do not stereotype.
    - Look for positive information rather than negative.
    - Compare or contrast the job to be filled with the applicant's previous job experience, preferences and interests.
    - Document as much as possible, and do this with facts, not hunches.

## II: Proper Interview Approach

- B: After the Interview (Cont.)
  - 2: Follow Up With the Interviewee As Promised
  - 3: Use caution when using email and voicemail. These are just as much documentation, and therefore risk, as a written document.
- C: Some Common Problems
  - 1: Interviewer Talks Too Much
  - 2: Interviewee Tries To Run the Interview
    - Refocus the interviewee's attention gently
    - Caution interviewee if it continues.
    - Ask the question until it is answered.
  - 3: Improper Information Volunteered
    - Keep interviewee on track.
    - Do not write it down.

## II: Proper Interview Approach

- D: File Development
  - 1: After the selection, particularly if there were protected class candidates, but a non-protected class candidate is selected, a file should be set up for all relevant candidates for this position.
  - 2: The purpose is to be prepared in case a candidate files an EEOC charge regarding the selection process. In most states, a charge may be filed up to 300 days after the employment decision. **Therefore, files should be maintained for at least one year. Applicant logs are generally kept for the current year, plus one prior year.**
  - 3: All other information related to the process of selection should be in this special file. For instance, copies of advertisements and the publications where these advertisements ran, position description, interview notes, and any documentation that explains why this candidate was selected.
  - 4: What the EEOC wants to see is a rational, non-discriminatory selection made. Factors such as previous employment with the company, seniority, or prior performance for an internal candidate, experience in this type of work, education, references, are all relevant to the selection process.

# III: EEO Considerations in Interviews

- A: Specific Questions - Do not ask questions which indirectly reveal the applicant's age, race, color, religion, concern about a disability or national origin and more recently, marital status and sexual preference, such as:
  - 1: Age or Date of Birth
  - 2: Comments About Names, Including Maiden Names
  - 3: Possible Country of Origin
  - 4: Religious Activities
  - 5: Membership in Religious or Ethnic Organizations, Clubs, etc
  - 6: Police Arrest Records
  - 7: Financial Situation - Owning a Car, Financing Education
  - 8: Medical History
  - 9: Marital Status or Family Situation, including GBLT issues
  - 10: Employment, Occupational, or Educational History About Parents, Spouses, etc.
  - 11: Child Care Arrangements
  - 12: Demographic or Geographic information
  - 13: Sexual Preference
  - 14: Foreign Languages, Unless Job Related
  - 15: How Someone Became Disabled
  - 16: Do not comment about the above issues, either

# III: EEO Considerations in Interviews

- B: Approaching the issue of disability
  - 1: Your application may have a space giving the person a chance to volunteer such information. Generally, if there is no information in this space, you should not discuss disability.
  - 2: However, if the applicant has an obvious disability, (came to the interview in a wheelchair), it is appropriate to refer to the question on the application and again ask if the person will require an accommodation to perform the position for which they have applied. Make note of how the applicant responds.
  - 3: In the alternative, if the applicant has noted a need for accommodation, you should discuss this with the applicant to make sure you are all on the same page. In general, it is best not to make a decision on ability to either perform the job with or without accommodation during the interview. Review what you have learned with the HR Manager and follow the advice provided to you at that time.



## IV: Best Approached to Discipline - Overview

- A: Hire them right - reduces terminations.
- B: Regard all employees as protected:
  - 1: By classification - Age, Sex, Race, National Origin, Disabled, Veteran.
  - 2: Many protected under more than one classification or law.
  - 3: Many types of legislation covering the employment relationship.

# V: Legal Risks in Discipline

- A: Employment at Will?
  - 1: Dying out - tradition - once favored.
    - Too many protected by specific laws or union contract. Biggest issue – EEO Considerations
    - Public policy exceptions - BEWARE - even Texas
    - Contract Issues
    - Recent Employment-related injury
    - Recent FMLA request
    - Employment Commission - Unemployment claims.
    - Heightened concern about 401k and benefits in general
    - Polygraphs
      - Employee Polygraph Protection Act
      - There are alternative psychological tests.
  - 2: Risk - big court awards, \$158,000 median award, average as high as \$732,000.00.

# VI: Approaching Discipline

- A: You can minimize potential problems by assuring that the same standards are applied to all your subordinate employees. By applying the guidelines below and documenting their actions, you will effectively minimize the likelihood of termination and discipline decisions escalating into successful EEO suits.
  - 1: Questions Regarding Poor Performance
    - Is the same performance required of this particular employee as has been required of all others? Are there other employees with a similar record who were treated differently? What will the documentation show?

# VI: Approaching Discipline

## – A1: Questions Regarding Poor Performance (Cont)

- Have I communicated what is expected of the employee? Is the expected performance reasonably achievable?
- Has the employee been given adequate OJT training and been counseled on how to improve his/her performance? Has this all been documented?
- Is there **objective** documentation of poor performance?
- Has the employee been warned of the action that will be taken if performance fails to improve? Has the employee been given adequate time and opportunity to improve? Has this been documented? ("Opportunity to Succeed.")
- Has consideration been given to other types of action besides termination if performance fails to improve? Has this been documented?

# VI: Approaching Discipline

- A2: Policy Violations - Supervisors should ask themselves:
  - Does the action of the employee violate a written policy? Has the policy been communicated clearly to all employees?
  - Is the action to be taken against the employee consistent with the action taken against all other employees who committed similar policy violations?
- B: A Reduction in Force
  - 1: Do not cut the wrong people
  - 2: Cut everyone you need to RIF at one time.
  - 3: Avoid the rumor mill – announce as soon as you can.
  - 4: Anticipate near term needs so you stay out of the job market for a while.

# VI: Approaching Discipline

- B: A Reduction in Force (Cont)
  - 5: Develop a termination grid and evaluate in this fashion:
    - Most critical skills
    - Best performers
    - Seniority (rarely best approach)
  - 6: Stick by you prior policies if at all possible.
  - 7: Tell people the truth about the reason they were selected. Remember, if you begin hiring again, the loser that you “laid off” will be back at your doorstep. If it was performance related, tell them!

# VI: Approaching Discipline

- C: Investigation of Possible Disciplinary Incidents
  - 1: Consult management promptly
  - 2: Collect all immediate information:
    - Who was involved?
    - Any witnesses?
    - If not employed by the Company, how do we find them?
    - Physical evidence?
  - 3: In case of injury
    - Is a doctor or ambulance required?
    - Is drug testing required?
    - Were non-employees involved?

# VI: Approaching Discipline

- C: Investigation of Possible Disciplinary Incidents (Cont)
  - 4: Interviews:
    - Attorney-Client and Investigative Privileges.
    - Do them in private.
    - Do them “one-on-one”.
    - Do them as soon as possible.
    - Prepare interview reports.
    - Do not prepare statements for witnesses to sign unless reviewed by an Attorney.
  - 5: Review Investigative Results with Management



# VI: Approaching Discipline

- D: Follow Your Company's Procedures for Discipline
  - 1: Oral Reprimands for all disciplinary problems and violations of Company policies and procedures.
  - 2: Repeat and/or serious violations require a written reprimand.
  - 3: Where at all possible, an employee at a level above the employee should be present as a witness when a reprimand is discussed with an employee. Where possible, a same sex witness is preferred.
  - 4: A reprimand must include a statement as to what took place.
  - 5: All written reprimands should include: "Further violations of this or any other policy may lead to termination."
  - 6: Do NOT put probationary periods on reprimands.
  - 7: The number of warnings/reprimands before termination depends on the type of offense. Usually two or three reprimands will result in termination, except something that is so serious that you cannot take a chance on another incident, such as theft, injury or safety violations.
  - 8: If a reprimand is considered "sensitive", it should be discussed with your supervisor prior to issuance. (EEO or legal issues).

# VI: Approaching Discipline

- D: Follow Company Procedures for Discipline (Cont)
  - 9: The following words **SHOULD NOT** be used in warnings:
    - ✓ “Excessive”
    - ✓ “Chronic”
    - ✓ “Habitual”
  - These are general and imply that the employee can not change or that the Company has tolerated the behavior in the past.
  - **If an employee cannot or is unable to do something, it is not his fault. If the employee will not do something, it is his fault.**
  - Avoid words like: “Can not,” “Could not,” “Incapable of,” “Inability to” and “Poor or unsatisfactory performance.”
  - Be very specific in stating the violation.
  - Use “**will not**” or “**failure to**”
  - Example: Instead of, “Inability to load trucks properly,” which is unclear, use: “Will not fasten loads down tightly inside the delivery trucks.”
  - Example: Instead of, “Ray has a bad attitude,” use: “Ray had three tardies during the last 14 days, fails to return to the office after completing deliveries, and doesn't always follow instructions.”

# VI: Approaching Discipline

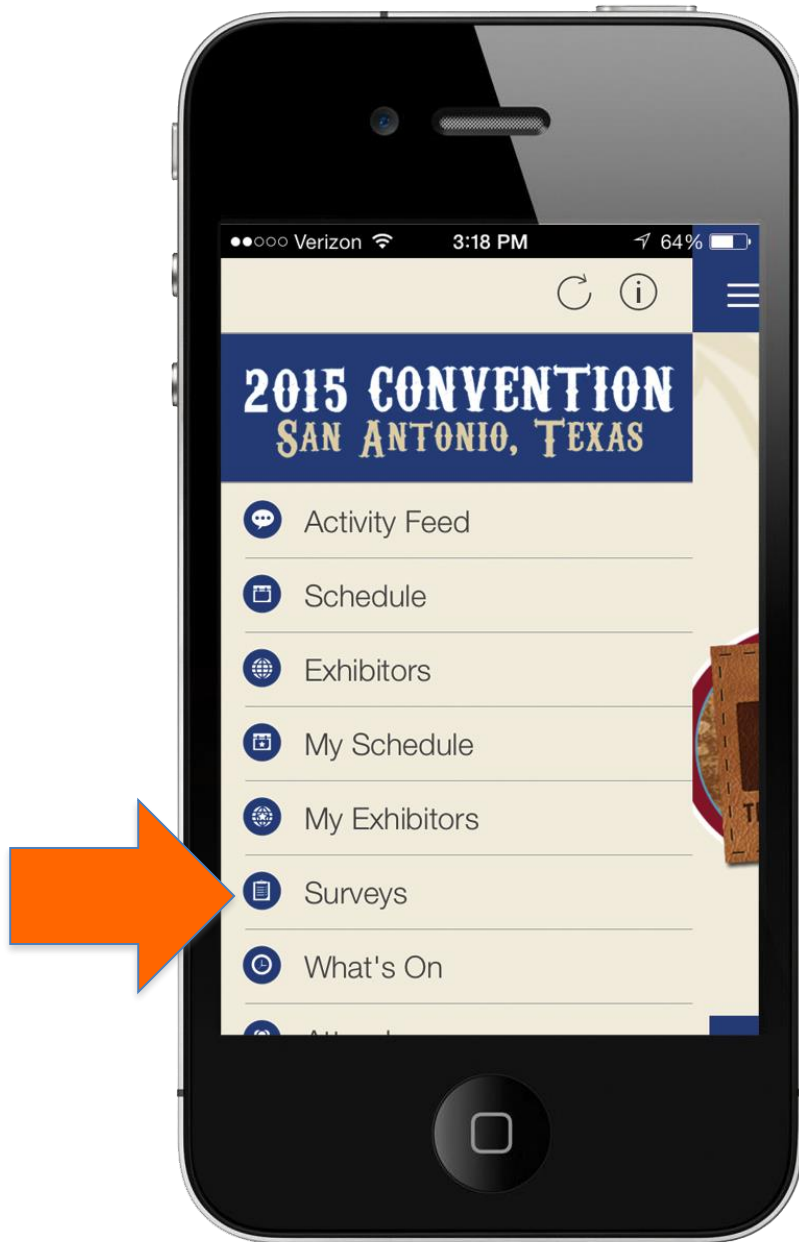
- D: Follow Company Procedures for Discipline (Cont)
  - 10: Reprimands –use where applicable: “Violations of Company Policy”
  - 11: If an employee is repeatedly absent or tardy, you should require documentation as to the reason for being late or off work. Watch for Monday, Friday and near-holidays absences.
  - In an unemployment hearing, the claimant’s statement has precedence over that of the Company, unless you have written documentation or a witness. Generally, if it is just your word against the employee’s, you lose.

# VI: Approaching Discipline

- E: Documentation
  - 1: Do it yourself
  - 2: Keep it confidential
  - 3: Do not make employee sign
  - 4: Record Keeping:
    - Employee succeeds
    - Employee is terminated
  - 5: Work closely with designated Management
  - 6: Cautions about email and voicemail

# VII: Termination Sessions

- A: List of Recommendations
  - 1: Make sure company policies and documents regarding terminations are up to date. Live by them!
  - 2: Check applicable exposures noted above.
  - 3: Work with HR or Senior Management.
  - 4: Documentation of problems.
  - 5: "Opportunity to Succeed" - Performance counseling.
  - 6: Progressive discipline.
  - 7: Termination report - honest, confidential and non-defamatory.
  - 8: Rational, witnessed termination session.
  - 9: No adverse reports to outsiders.



Be sure to visit EASA's mobile app to submit a survey for this session.



**Thank you for attending  
EASA's 2015 Convention**