



HIRING AND FIRING IN 2010: SEVEN TIPS ON HOW TO IMPROVE YOUR PROCEDURES AND INSULATE AGAINST LIABILITY

by Pamela Howland, Holland & Hart LLP

The challenge of finding the right employees for your business frustrates even the most experienced human resource specialist.

The hiring and firing decisions you make on a regular basis impact your business in a wide range of ways. Hire the ideal employee and watch as customer satisfaction rises and operations improve. Hire someone who interviewed well, but whose post-interview performance leaves something to be desired, and watch as employee morale dips and overall efficiency suffers. Indeed, the challenge of finding the right employees for your business – especially when you have limited time and resources – frustrates even the most experienced human resource specialist. Couple that with the legal issues and potential exposure that accompany these decisions and the hiring and firing process can seem downright overwhelming at best.

This article is designed to provide you with some basic tips to consider as you maneuver through the hiring and firing process; sprinkled throughout are also some legal pitfalls to watch out for, as well as the documentation that can help to insulate your business from legal liability.

1. Keep Your Job Descriptions Up To Date

A well-crafted job description contains information such as the title of the job, the essential functions, the salary range, physical requirements, written/verbal requirements, general job duties, and minimum job qualifications. Unfortunately, many employers ignore job descriptions as positions, and the duties that accompany them, change. Don't count yourself as one of them. Instead, keep your job descriptions up to date and utilize them throughout both the hiring and the firing process. Use them during the interview process to make sure that applicants are confident they can perform the job, that they are aware of different functions that will be expected of them, and that they satisfy the minimum qualifications. If used properly, job descriptions can eliminate employee complaints, at a later date, that they did not know what was expected of them. In the event of performance problems, a job description is a handy, and objective, tool to demonstrate that certain minimal functions are required and that, when measured against them, the employee's performance is lacking.

2. Don't Under-Utilize Employee Applications

Requiring perspective employees to submit a completed job application tailored to your business is critical. Unlike a resume, which can omit critical information such as previous supervisors and reasons for leaving previous jobs, an application can be tailored to ensure that applicants detail information regarding the special skills, traits, personality, and experience you are looking for. It can also require applicants to verify and agree to the terms of the application and to other important policies, such as employment at will (when appropriate). Use the completed application to get to know, and understand, the candidate and utilize it during the interview process to question applicants about any unusual responses or unexplained gaps. Watch out for misuse of words, poor spelling, and improper grammar, and consider how it reflects on the candidate, and whether that impacts your hiring decision. The completed application should become part of the employee's personnel file and ensures that, if problems arise later, you have a written document, signed by the employee, representing that they meet the essential requirements of the job and that all of the information contained within it is truthful.

3. Obtain Check References

Although most employers require references, many make the mistake of failing to check them. This step is an important one: can there be a bigger red flag than one that arises in the event gaps and inconsistencies exist between the information provided by the applicant and that confirmed by the reference? References can also provide interesting insight on such issues as why the employee left their job, how the employee handled pressure, and what type of duties their prior employment covered. At the time the employee submits their application, obtain a release from them enabling you to inquire into past job performance and to verify references. *Note: Although somewhat of a different issue, your business should have a policy in place regarding the manner in which it gives out references for former employees since Title VII liability can arise from negative employment references.

Many employers make the mistake of failing to check references.

4. Maintain and Utilize and Employment Handbook

It is essential that your employees understand your company's employment policies and procedures. This is why the employee handbook is a must. Your handbook should include policies such as an at-will disclaimer (when appropriate), a policy noting that "honesty is essential," policies regarding discrimination in the workplace, your policy on paid time off and other types of leave, your FMLA policy (assuming FMLA is applicable based on the number of employees) and the termination procedure. Require your employees to read the handbook, follow it, and sign an acknowledgment that they understand and have done so. In the event changes are made, get signed forms from all existing employees acknowledging that they have reviewed and are aware of the changes. This documentation should all be kept in the employees' personnel files. Although it seems simplistic, following this procedure can save your business time and

money down the road if legal issues arise. For situations where employment is at will, a signed acknowledgement can prevent an employee from later arguing that they were guaranteed employment or that a different employment relationship existed. Likewise, it is difficult for an employee to argue that they were subjected to unlawful discrimination if they never reported it and otherwise failed to follow your written policies on what to do if discrimination arises.

5. Review Performance on a Regular Basis

Employee reviews provide an opportunity for both you and your employees to explore performance, goals, challenges and overall satisfaction. An effective review should include input from both the employer and the employee and should measure areas such as strengths, areas of improvement, areas of concern, and accomplishments against objective criteria. This input should take the form of a written document, acknowledged by both the employer and the employee. Performance reviews are frequently analyzed with scrutiny when a disciplinary or termination decision morphs into a lawsuit. Accordingly, it is critical that the employer reviews performance on a regular basis and documents problems or concerns, especially if termination is likely in the future.

It is critical that the employer reviews performance on a regular basis and documents problems or concerns.

6. Document Disciplinary Action

Undocumented disciplinary actions provide unnecessary legal exposure for your business. Conversely, documentation of disciplinary action can be an invaluable tool for the employer to show that the employee was on notice of their inadequate performance, that they were given the chance to remedy it, and that they failed to do so. Such action can take the form of a simple document detailing the reason for discipline, the plan of action, the desired behavior, a timetable for improvement, the employee's side of the story, and the employee's acknowledgement that they have reviewed the written document. Your document should stick to the facts, rely on first-hand knowledge, and should relay all of this word for word. If all else fails, even an oral warning, which can subsequently be documented in a confirming email sent to the employee, is better than nothing. Regardless of the form, take the time to make sure that some documentation of the disciplinary action and the opportunity that you gave the employee to cure their inadequacies has ultimately landed in the employee's personnel file.

7. Follow a Thoughtful and Deliberate Process When Terminating Employees

Gone are the days of split-second firing decisions based on emotion or suspicion. Instead, today's business must undertake various considerations when terminating an employee and must do so in a manner that minimizes liability. This process involves many of the issues previously discussed. For example, following termination policies and procedures, as outlined within the employment handbook, is important and can show consistency with past practice. Ensuring that evaluations are up-to-date and that inadequate or unacceptable performance has been documented is critical. Disciplinary actions, such as written warnings, further documenting the complained-of conduct and demonstrating that the employee has



For more information regarding employment law, please contact Pamela Howland at 208-342-5000 or phowland@hollandhart.com

Holland & Hart LLP
U.S. Bank Plaza,
101 S. Capitol Boulevard, Suite 1400
Boise, ID 83702-7714

had the chance to remedy their deficiency – but has failed to do so – should now be contained within the personnel file. Considerations of actual or apparent unlawful discrimination must be made. Would the company be able to justify its decision if a claim of discrimination or unjust dismissal is brought? Is the decision based on facts from a credible source? Does the business fully understand the employee’s perspective and have personal difficulties or special circumstances been taken into account? Once everything is in order, proceed with the termination through a face-to-face private meeting with the employee. Do not sugarcoat termination explanations out of sympathy – failure to state the true reason behind the termination could be later used to suggest pretext. Only cite to terminable, provable, behavior. Finally, document the termination through a written memorandum detailing the termination decision, all related facts, and the procedures which lead up to the termination decision.

About the Author

Pamela Howland is a partner in Holland & Hart’s Boise office. As part of her employment defense practice, Pam counsels employers on how to apply recent legal developments in the employment arena to their business. For matters relating to retaliation and discrimination on all levels, she helps employers avoid trouble before it starts, protects them once it does, and gets them the best outcome if it ends up in court.

Ms. Howland is an author of Holland & Hart’s Idaho Employment Law blog - www.idahoemploymentlawblog.com.

This article first appeared in Catering Magazine and is posted with permission of International Media Group, Inc.