



Texas
Orthopedic
Administrators Society

Hiring, Firing and Everything In Between

Lawyerly Disclaimer

Jackson Lewis P.C. has prepared the materials contained in this presentation for the participants' reference and general information in connection with education seminars presented by the firm and its attorneys. Attendees should consult with counsel before taking any actions that could affect their legal rights and should not consider these materials or discussions about these materials to be legal or other advice regarding any specific matter.

SMART HIRING

Job Description

- **IMPORTANT:** All involved in hiring must read and agree with the job description for the position



Job Description

- **Begin with a careful analysis of important facts about the job:**
- **Job Analysis**
 - Identifying the tasks, duties and responsibilities that make up a job and the knowledge, skills, and abilities needed to perform the job.
- **Job analysis methods**
 - Observing what current workers do.
 - Having workers and managers fill out questionnaires.
- **Job Description**
 - Focus on qualifications
 - Specify essential job functions
 - Set reasonable educational and experience requirements
 - Describe characteristics desirable for person performing the job
 - Be careful of physical requirements

Job Description

- **Essential Job Duties**

- Any task which is a basic, necessary and integral part of the job
- If removed, would change job fundamentally
- Performed regularly
- Needs special expertise

- **Non-essential Job Duties**

- Performed occasionally
- If removed, job would not fundamentally change
- Feasible to redistribute the work

Job Description

- **Do this BEFORE looking at any candidate- internal or external**
 - Obtain consensus among decision makers.
 - Prioritize skills and experience
 - Determine “ideal candidate”
- **Critical for two reasons:**
 - Provides notice to employees about position requirements
 - Provides defense to selection decision or accommodation issue

Applications

● Centralized Application

- Adopted standard application for all?
- Require all applicants to complete an application?

● Applicant Definition

- How do you define an applicant?

● Applicant tracking

- How do you handle unsolicited applications?
- Do you review previously submitted applications when an open position occurs?

Applications

- Application retention policy
 - How long do you keep applications?
- Analysis of disparate impact
 - Are applicants predominantly one sex or race?

Ban the Box Initiative

- **Several states have passed “Ban the Box” laws:**
 - Passed in California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Mexico, Rhode Island
 - Hawaii, Massachusetts, Minnesota and Rhode Island (includes private employers)
 - Adopted in growing number of cities
 - **Pending legislation in several states**
- **EEOC recommends all employers follow suit**



Interviewing

- **IMPORTANT:** The interview is critical to the hiring process - don't waste it.



Interviewing

- **Interviewers:**

- Are agents of the company
- Should be trained in the legal requirements and prohibitions
 - Update regularly for changes in the law
- Should be prepared (knowing what information they need)
- Must be Skilled at extracting key information and evaluation of the person
- Should be able to advocate for working at the company

Interviewing

- Technical Requirements
- Communication Requirements
- Motivation Requirements
- Behavioral Requirements

Interviewing

Beware of negative indicators at the hiring stage

- Frequent job changes, erratic career path
- Negativity about former employers or co-workers
- Revealing confidential information about former employer
- Demanding or difficult at the pre-hire stage
- Negative information in background checks
- Seems too good to be true
- Trust your instincts

Interviewing

- Don't make promises you can't keep
- Don't oversell the job – be direct, honest, careful and realistic
- No “sidebar” agreements
 - “Do well, and in a year you'll be promoted”
- Don't compromise - keep looking

Interviewing

- **National Origin**: Do not ask whether applicant is a citizen, or applicant's national origin or birthplace.
- It is permissible to ask candidates about foreign language ability if it is job related; do not ask “native” language, where or how the applicant learned a language or whether English is “second” language.
- You may ask whether an applicant can furnish verification of a legal right to work in the United States – but ask all applicants.

Interviewing

- **Criminal History**: If you ask about convictions, make clear that criminal convictions are not an absolute bar to employment but will be considered in relation to specific job requirements.
- **Club Memberships, Associations, Union Memberships**: Only ask about professional or other associations that have a bearing on the job requirements. Never ask about memberships that reveal religion or nationality. Never ask about present or past union membership.

Interviewing

- **Sexual orientation**: Do not ask questions about sexual orientation or questions that might be interpreted as asking about sexual orientation (for example, the gender of someone's roommate.)
- **Scheduling**: If a job requires overtime, travel or relocation, explain what is required and ask whether the applicant can fulfill these requirements.
- It is permissible to ask whether an employee can work on Sundays, Saturdays or Friday nights, or any other schedule, if the job requires it.

Interviewing

- **Military History:** Limit questions to skills and training for the particular job applied for.
- Do not ask whether applicant served in another country's military.
- Do not ask type of discharge received, unless job-related; if so, it cannot be an absolute bar to employment.

Interviewing

- **Health Issues, Disability:** ADA considerations prohibit pre-offer inquiries about disabilities or medical conditions.
- You can always ask about an applicant's ability to perform essential functions. Do not ask how applicant got visible physical characteristic. Do not ask about family illnesses, drug/alcohol history. How many days were you absent from work because of illness last year? Are you taking any prescribed drugs? Have you ever been treated for drug abuse/addiction or alcoholism?
- Post-offer, these questions can be asked in a limited way.

Interviewing

- **Race:** Do not ask any questions about race or indirect questions about race. Where is the nearest soul food restaurant?
- **Age:** Any question that is calculated to elicit information about a person's age should be avoided during interviews. How far away from retirement are you? How many years do you think you will give to this job? What are the ages of your children?
- Liability for discrimination exists, regardless of whether the information was unlawfully solicited or volunteered

Background Checks

Criminal history

Credit History

Employment history

Education

References

Driving records

Professional license verification

Social media or internet searches

Background Checks

Uniformity

- Conduct the same investigation on every applicant for the same or similar positions

Legitimacy

- Tailor background checks to legitimate business interests

Consistency

- In enforcement of policies and practices

Business Necessity Defense: Before & Now

EEOC's Prior Guidance

- An employer can demonstrate business necessity by showing it considered the three “*Green*” factors:
 - The nature and gravity of the criminal offense(s)
 - The time that has passed since the conviction and/or completion of the sentence
 - The nature of the job held or sought.

EEOC's New Guidance

- A narrowly-targeted criminal records screen with a tight nexus to the position in question may in some cases be justified solely under the *Green* factors.
- However, individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees.

Individualized Assessment

1. Accuracy of criminal record
2. Facts and circumstances surrounding the offense
3. Number of offenses for which the individual was convicted
4. Age at time of conviction or release from prison
5. Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, without incidents of criminal conduct
6. Length and consistency of employment history before and after the offense
7. Rehabilitation
8. Employment or character references and other information regarding fitness for the position
9. Whether the individual is bonded

Social Media

Problem:

A search may identify an applicant's protected characteristics such as age, race, sexual orientation, marital status, arrests or other factors that should not be considered in a hiring decision.

Solution:

Have a non-decision maker conduct the search and filter out protected information.



Social Media

The Good

- Community service
- Hopeful statements about working for your company

The Bad

- Drunken pictures
- Bashes prior employer
- Reveals prior employer's confidential information
- "I interviewed for a job today with a meathead! Stupid questions!"

The Ugly

- "Great news! It's a boy!"
- Hope I get a job before MS symptoms are noticeable.
- Race/Age/Disability/Color/Nationality/Religion
- Genetic Information

Legitimate Reasons to Reject

- Cannot work scheduled hours
- No experience with our volume of work
- Not able to fully explain...
- Not sufficiently qualified in ...
- No history of proven interpersonal skills that resulted in favorable results
- Questions about resume, unable to confirm employment history
- Skills set not as good as selected candidate

Document the Decision

- Ensure hiring criteria drives the selection
- Review Interview Guides to determine if aligned with selection of best qualified applicant
- Document specific reason for decision
 - Factual not conclusory
 - “Not the best qualified” = Bad
 - “Lacked experience in...” = Good
- Analyze whether reasons are applied more to a protected class (adverse impact analysis)
- Follow records retention policy

Negligent Hiring

- An employer has a duty to use reasonable care in the selection and retention of employees.
- This duty requires that an employer hire and retain only safe and competent employees.
- An employer breaches this duty when it hires or retains employees that it knows or should know are incompetent.
- The negligence is that of the employer and not the imputed negligence or intentional acts of an employee.

PROACTIVE PERFORMANCE

From Day One

- Notification of at-will employment status
- Establish clear objective performance expectations and job requirements
- Do not assume an understanding of job duties
- Coach the employee from day one to reinforce performance expectations, keep reinforcing if necessary
- Define job mastery and career development goals as part of the performance improvement process
- Train properly and when needed; even the sharpest knife in the drawer will dull over time

Performance Deficiencies



Major Performance Errors

#1 Failure to Act



- **Don't ignore it!**
- **Act promptly**

Common Avoidance Methods

- Transfer problem to another supervisor or department
- Reduce hours, hoping for resignation
- Postpone disciplinary actions, hoping he/she will apply for LTD
- Simply ignore termination, minimizing performance issues
- Demotion

Major Performance Errors

#2 Inconsistency



Enforce Expectations Evenly

- Perceptions of unfairness are a leading cause of litigation.
- Most common reason a terminated employee sues his employer is over conduct for which other employees were not terminated.
- Be consistent: Has this problem arisen in the past? How was it handled?
- Are you suddenly deciding to “crack down” on conduct that was previously tolerated?

Major Performance Errors

#3 Poor Investigation

- **PROMPT**
- **REMEDIAL**
- **ATTORNEY/CLIENT
PRIVILEGE**

got privilege?

Investigations

Note-taking

- New page, each interview
- Date/Time/Place
- List witnesses
- Identify author, include signature & date
- Include facts only
- No interpretations, assumptions, or beliefs
- Document reasons for deviations
- Document follow-up
- “Is that everything?”
- “What would you like to see done?”

Major Performance Errors

#3 Dumb Stuff

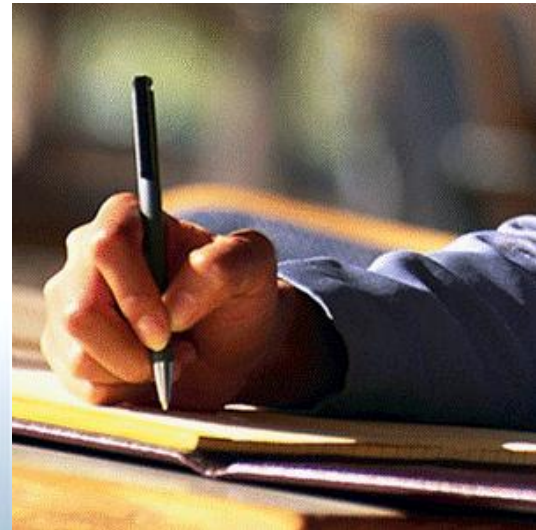
Supervisor Notes:

- “He is depriving a village somewhere of an idiot”
- “She is really not so much a has-been, but more of a won’t be”

Major Performance Errors

#4 Failure to Document

- **57%: Written evaluations = best evidence of performance**
- **74%: Must give fair warning to employees before firing**
- **100%: Employer is or has been negligent if there is no documentation of problems**



The Characteristics of Good Documentation

- Timely
- Specific, Plain language
- Objective
- Limited to performance and behavior
- Accurate and verifiable
- Complete record for basis of decision
- Includes corrective steps, not just infractions
- Separate pages for each interview
- Avoids extreme or conclusory statements
- Free of hearsay, innuendo, supposition, emotion
- Free of references to protected characteristics
- Dated, identifies author and witnesses, if any
- Logically communicates information to employee

Demonstrates that the employee was treated fairly.

FEARLESS FIRING

- Employees ultimately fire themselves.
- If termination is a surprise, you have done something wrong.

Termination Protocol

- Involve higher chain of command
- Ensure investigation establishes decision is based upon facts and not perception, hearsay or speculation
- Establish clear, non-discriminatory basis for termination
- Review documentation for completeness
- Review personnel file for inconsistencies

Termination Protocol (cont'd)

- Determine if a reasonable accommodation is required
- Conduct protected class analysis
- Conduct retaliation analysis
- Determine if termination is consistent with company policy
- Determine if termination violates public policy
- Evaluate impact on vesting of benefits

Considerations for Terminations

- Was the rule/expectation known to the employee?
- Was the employee told of deficiencies, and advised how to improve and when?
- Is the deficiency capable of objective measurement, or are the criticisms specific?
- Did the employee have an opportunity to take constructive action to change the situation?
- Did the employee ask for help to improve and was denied?
- Was the employee ever told his/her failure to improve would result in termination
- Have appropriate disciplinary steps been followed?

Considerations for Terminations

(Cont'd)

- Was the information regarding the deficiency/infraction obtained lawfully?
- Are the witnesses/supervisors credible?
- Employee given opportunity to tell his/her side of the story?
- Do past performance evaluations support the decision?
- Does the employee's overall documented record support the decision?
- Is the articulated reason for the termination the real reason?
- Is the termination decision timely?
- Is this action consistent with prior incidents of a similar nature?
- Do mitigating factors justify lesser disciplinary action?

Termination Meeting

- Thank the employee for the contributions to the office...sincerely, there must be some.
- Do not assess blame or make apologies. Explain what the job or policy requires, and the employee's failure to meet the requirement or adhere to the policy. You can explain that it didn't work out, but DO NOT apologize.
- Let the employee respond and speak their mind. Don't interrupt, contradict or defend their firing.
- Acknowledge their points, but don't admit any wrongdoing on your part.
- End on a positive note. Wish them the best luck for their future.
- Tell them (depending on the situation) you have boxes available to help them move their personal stuff out of the office.
- Obtain company property & discontinue access to electronic systems.

Termination Payment

- Upon termination, employees shall be paid all wages/salaries due for work performed prior to termination.
- Payment shall be made on or before the date on which the employee would have been paid had he not been terminated
- Employer who knowingly fails to make payment shall be subject to a penalty
- An employer may not withhold any part of an employee's wages (except for payroll wage or withholding taxes) without the written and signed authorization of the employee

Questions



Thank You!

Ruthie White
Jackson Lewis P.C.
ruthie.white@jacksonlewis.com
1415 Louisiana Street, Suite 3325
Houston, Texas 77002
(713) 650-0404



All we do is
work

Workplace law. In five time zones and 55 major locations coast to coast.

jackson|lewis

Preventive Strategies and
Positive Solutions for the Workplace®