

# **Personnel Issues ? Hiring, Discipline, And Termination**

*Presented by:*  
Richard Slagle  
Manager of Loss Control Services  
Texas Association of Counties  
Human Resources Assistance Section  
1-800-456-5974



# Personnel Issues: Hiring, Discipline, and Termination

## Employment Liabilities

### **I. The Litigious Workforce**

A. Employment related lawsuits, while once very rare, have become commonplace in our present society.

B. Employers are paying large sums as the result of charges of wrongful discharge, discrimination, retaliation, and other similar claims.

C. As a result, many employers find the processes of hiring, disciplining, or terminating an employee to be very traumatic.

1. In discipline and termination, it is not uncommon for an employer to try to ignore a major problem because of fear of being sued.

2. This often results in a “bad employee” staying on the payroll.

D. Employers have the right to take action against problem employees but the process is somewhat like picking up a porcupine - it can be done but it should be done very carefully.

1. Usually, employment lawsuits are not the result of what was done but, instead, how it was done.

2. To protect themselves, employers need to understand the issues involved in the employer-employee relationship and develop (and follow) policies and procedures that will minimize the chance of a lawsuit and provide part of a defense if one is filed.

### **II. Employment at Will**

A. Broadly stated, the legal doctrine of “employment at will” means the employer can terminate the employment of any employee at any time, for any reason (good reason, bad reason, or no reason), with or without notice. The employee also has the right to terminate the employment relationship at any time.

B. While employment at will seems to remove liability from the employer for terminating an individual, the employer must remember that legislation and court decisions have greatly eroded the employer’s rights under this doctrine.

1. Based on this, the definition of employment at will needs to be expanded to say that the employer can terminate an employee for any reason “except for an illegal reason or where the employee has a property interest in his or her job.”

2. Illegal reasons for termination include terminating an employee because of protected status under federal or state law or retaliation for exercising a legal right.

3. Property interest in a job means that the employee has reason to believe there is some guarantee of duration of employment or that the job cannot be taken away without some form of due process.

### III. Protected Status

A. Under Title VII of the Civil Rights Act of 1964 and later related legislation, it is illegal to terminate an employee if any part of the reason for termination is based on the employee's race, color, religion, sex, national origin, age, or disability.

1. In certain very limited situations, an employer may discriminate on the basis of national origin, religion, or sex where the employer can show that a bona fide occupational qualification (BFOQ) exists.

2. In other situations, the limitations that come with age may prevent a person from meeting job requirements, but age, in and of itself, should not be a job requirement except in the rare instances where it is dictated by law.

B. It is also a violation to discriminate against an individual during the hiring process because of his or her inclusion in one of the protected status groups.

### IV. Retaliation

A. Employees have protection against retaliation for exercising legal rights such as filing a valid workers' compensation claim, filing a complaint with the Department of Labor for alleged violations of the Fair Labor Standards Act, filing a discrimination complaint with the Equal Employment Opportunity Commission, engaging in free speech, voting, and other such actions protected by legislation or the Constitution.

B. Employees also have protection against retaliation for carrying out legal obligations such as jury service or military duty.

### V. Property Interest

A. An individual has a property interest in his or her job when he or she has reason to believe that there is some guarantee of duration of employment, or that the job cannot be taken away without some form of due process.

B. A property interest, and thus an erosion of the employer's at will rights, is usually created through "implied contracts" resulting from verbal statements by the employer or in statements found in documents, such as policy manuals, provided to employees.

C. Examples of statements that could create an implied contract include:

1. "This is a permanent position."
2. "Your salary will be \$12,000 annually."
3. "Employees will only be terminated for just cause."
4. "If you do good work, you have a job until you retire."

D. Rigidly stated disciplinary procedures, or lists of reasons for termination that appear to be all inclusive, can also create a property interest in a job.

E. To reduce the chance for creating a property interest in a job, personnel policy manuals should have a prominent, clearly worded statement that all employment is "at will" and that no contract exists between the employer and employee for any duration. The employment application form should also contain an "at will" statement.

## Hiring the Right Employee

### VI. Goal

A. The primary goal in hiring is to find an employee who can do the job we expect.

B. Secondary, but equally important, goals are to do so without violating, **or appearing to violate**, requirements under Equal Employment Opportunity (EEO) legislation and to prevent giving the new employee the feeling that he or she would have a property interest in the job.

C. While the purpose of the recruitment process is to find a good employee, it is also the beginning of the termination process.

### VII. Initial Steps

A. The first step in recruiting is to identify the essential job functions and qualifications, and to use this information to prepare job postings.

B. The next step is to “get the word out” through such recruitment tools as newspaper advertisements, bulletin board postings, and registering with the Texas Workforce Commission.

C. Prior to starting interviews, applications need to be reviewed to eliminate those applicants who do not meet the minimum qualifications and to select those with the strongest qualifications for interviews. (NOTE: It is recommended that a standard application form be used rather than requesting resumes. Resumes often contain information that, according to EEO guidelines, should not be obtained prior to employment. Also, resumes may fail to provide information needed to determine qualifications.)

### VIII. Interview Preparation

A. Planning and preparation are key elements for effective interviewing.

B. Steps in preparing for an interview include:

1. Selecting a time and place for the interview that will minimize the possibility of interruptions;
2. Determining how much time to devote to each interview;
3. Knowing the specific requirements, duties and conditions of the job;
4. Reviewing the application prior to the interview; and
5. Determining what questions will be asked.

### IX. Interview Questions

A. All questions should relate to the requirements for the job and the applicant’s ability to perform the essential job functions.

B. Questions which elicit answers that would directly or indirectly reveal an applicant’s status in a protected category (race, color, national origin, religion, sex, age or disability) under EEO legislation should not be asked unless necessary because of a bona fide occupational qualification (BFOQ). (Examples of appropriate and inappropriate questions are given beginning on page 10 of this outline.)



## **IX. Interview Questions (continued)**

1. Questions which are asked of one category of applicants (such as women or older individuals), but which are not asked of all other applicants, give the appearance of potential discrimination.

2. Under the Americans With Disabilities Act (ADA), all inquiries into an applicant's medical background are prohibited.

C. Since we want to learn as much as possible about the applicant's qualifications, open ended questions - those which require a detailed answer - should be asked rather than those which only require a "yes" or "no" answer. (Examples of open-ended questions are on page 13.)

D. Leading questions - those which give an individual an indication of the response the employer wants to hear - should not be asked.

## **X. The Interview**

A. The steps in beginning an interview normally include:

1. A few minutes of small talk to make the applicant feel comfortable, but it is important to avoid comments or questions that could reveal information not acceptable under EEO standards;

2. Telling the applicant of the interview procedure;

3. Telling the applicant something about the employer; and

4. Describing the job duties.

B. During the "question and answer" phase of the interview, the interviewer's goals include:

1. Determining if the applicant meets the requirements for the job;

2. Exploring any significant unexplained gaps in the applicant's work history;

3. Determining the applicant's actual interest in the job; and

4. Deciding the applicant's overall suitability for the job.

C. Since we want to get as much information as we can about an applicant, the following tricks can be useful to keep the applicant talking:

1. Head nodding;

2. Encouraging words or phrases such as "yes," "that's interesting," and "go on;"

3. Silence - as though you are expecting the applicant to say more; and

4. Repeating parts of the applicant's answer in a questioning tone indicating that you would like more information.

D. If specific training, education, experience, certification, or other job requirements are necessary, be sure to have evidence that the applicant meets the requirements rather than just accepting the applicant's word.

E. During the interview, the interviewer should avoid distracting behaviors such as:

1. Fooling with items on the desk;

2. Looking out the window;

3. Interrupting the applicant;
4. Taking phone calls; or

**X. The Interview (continued)**

5. Making the applicant repeat answers because the interviewer was not listening.

F. Note taking during the interview should be done unobtrusively. If the interview is being recorded, the applicant should be told this.

G. The interviewer also needs to:

1. Let the applicant do most of the talking;
2. Keep the interview on track; and
3. Avoid making “implied contracts.”

H. When closing the interview, the interviewer should:

1. Go over the job duties and expectations;
  - a. Avoid overselling the job.
  - b. Tell the applicant negative as well as the positive aspects of the job.
2. Ask if the applicant has any further questions;
3. Thank the applicant for coming in; and
4. Tell the applicant when a selection is expected to be made.

**XI. Evaluating the Interview**

A. Immediately after the interview, the interviewer should make notes about the applicant’s strong points, weak points and overall suitability for the job.

B. In evaluating an applicant, the interviewer should be aware of, and control, feelings which distort the evaluation, such as

1. The “halo” and “horns” effect;
2. Personal biases; and
3. Personality traits not related to the job.

C. Prior to making a decision, references should be checked.

**XII. Document the Selection**

A. Be specific in listing your reasons for selection.

B. Remember that the term “best qualified applicant” really doesn’t say anything.

**Discipline and Termination**

**XIII. Types of Discipline**

A. There are three basic types of discipline - preventative, corrective and coercive.

1. Preventative discipline includes all steps we take to help eliminate the potential for problems with employees.
  - a. Included in the preventative discipline process are work rules, job performance standards, and other expectations we communicate to employees.

### **XIII. Types of Discipline (continued)**

- b. Preventative discipline begins with the employee orientation process and continues throughout the employment relationship as expectations from the employer change.
- c. Preventative discipline is the mildest form of discipline and is normally not even seen as discipline by the employees.
2. Corrective discipline occurs after an employee's performance, or other job related expectations, does not meet the standards set by the employer.
  - a. Usually, corrective discipline is fairly informal and only involves basic consultation with the employee.
  - b. In meeting with the employee, the supervisor discusses the problem, why it is a concern, and what must be done to meet expectations. The employee should also be given a chance to respond.
  - c. Normally, documentation is not prepared for the employee's personnel records at the consultation level of corrective discipline, but the supervisor should make a note of everything that transpired in case the information is needed later.
  - d. A somewhat higher level of corrective discipline is a written reprimand which is placed in the employee's records
- B. In most cases, disciplinary problems are taken care of at the corrective level.
  1. Often, the problem is the result of the employee not being aware of what is expected.
  2. When corrective discipline fails to solve the problem, the supervisor should move up to the next level which is coercive discipline.

### **XIV. Coercive Discipline**

- A. Coercive, or punitive, discipline normally comes into play when the milder forms of discipline have not been effective.
  1. Coercive discipline involves a formal process which includes preparation of a disciplinary document and a formal consultation with the employee.
  2. At this level, the employee is made aware of specific consequences that will occur if he or she fails to meet defined expectation standards within a given time frame.
- B. It is important that the disciplinary document be carefully prepared to reduce the potential for later liability.
  1. Any statements about the problem should be based on provable facts.
  2. Emotional statements, personal opinions, and vague or unsubstantiated accusations should not be included in a disciplinary document.
- C. A disciplinary document should contain the following information.

1. **A statement of the problem** - This section would include documented incidents about actions on the part of the employee that show how the employee has failed to meet established workplace standards.

2. **A statement of why the problem is a problem** - Here we describe the negative consequences of the problem to further reinforce why it must be corrected.

#### **XIV. Coercive Discipline (continued)**

3. **A description of the previous efforts to resolve the problem** - In this section, we summarize any counseling sessions and other actions already taken to correct the problem. This should be done in specific terms. The notes made about prior counseling sessions can be useful at this point to verify dates and specific statements made.

4. **A statement of what the employee must do to resolve the problem** - This statement must be made in specific terms based on standards that are observable and measurable.

5. **A time frame in which the employee must meet the set standards** - Based on the nature of the problem, the time frame may be immediate (it better not happen again), or up to several weeks to allow the employee time to develop skills, gain knowledge, etc. to meet the standards set by the supervisor.

6. **A statement of what the supervisor is willing to do to help the employee resolve the problem** - This shows a good faith effort on the part of the supervisor to help salvage the employee. The supervisor should not indicate that any assistance will be provided that the supervisor cannot or does not intend to provide.

7. **A statement of the consequences for failure to meet the required standards within the time frame set by the supervisor** - This could include anything from a suspension without pay up to termination. One important thing to remember is to never give a consequence that you cannot or are not willing to carry out.

D. During the disciplinary conference, the supervisor needs to discuss all parts of the disciplinary document and be sure that the employee understands what is expected and what the consequences will be if the expectations are not met.

1. The employee should be given a chance to discuss the content of the document and ask any questions to clarify its content.

2. At the close of the disciplinary conference, the employee needs to sign a statement at the bottom of the disciplinary document saying that he or she has read it and understands it. It is not necessary to have the employee say that he or she agrees with it; only that it is understood.

3. If the employee refuses to sign it, have a neutral third party witness this refusal (someone in a managerial or supervisory capacity) and then document the refusal for the record.

E. If the employee meets the standards you have set, this should be recognized. If not, the consequences should be immediately carried out at the end of the time frame that was set.

#### **XV. Termination**

A. While our first goal in dealing with a problem employee should be to salvage the employee, there are times when the employee does not respond to our attempts to do so and it becomes necessary to terminate the employee.

B. If not handled carefully, a termination can create a tremendous liability.

1. Prior to any termination, you need to consider the following questions.

- a. What are my real reasons for wanting to terminate this employee?
- b. Are these reasons work related?

## **XV. Termination (continued)**

- c. How would a jury view these reasons? (Valid, fair, etc)
- d. Do I have specific, objective documentation supporting my reasons for this action?
- e. Does the employee fall into a protected status and is that status any part of my reason for taking this action? Also, have I done anything that would **make it appear** that this status may be part of my reason for this action even though it is not?
  - f. Is this decision consistent with current policy and past practice?
  - g. Have I taken reasonable steps to help the employee identify and resolve the problem?
  - h. Have I warned, or do I intend to warn, the employee that his or her job is in jeopardy?
  - i. What do the personnel files contain that could be a problem if a lawsuit is filed? (Remember that glowing performance review you gave the employee three months ago because you didn't want to hurt his feelings?)

2. If significant problems are expected from the termination, such as the high probability of a lawsuit, you should consult with an attorney knowledgeable in employment law before taking action.

C. To facilitate the actual termination process, these preparatory steps should be taken:

1. Decide when and where the employee will be told of the termination;
2. Have the personnel department prepared to advise the employee of any benefits or rights he or she may have and to have any paper work ready to be completed;
3. Whenever possible, have the final paycheck ready;
4. Have boxes ready for the employee to pack up personal items;
5. Have security personnel available if problems are expected; and
6. Where necessary, have a neutral third party available to take the employee home.

D. During the termination session, it is important that the supervisor or manager retain control.

1. Immediately state the purpose of the meeting. This is not a time for small talk.
2. State the effective date and time of the termination and that the decision is final.
3. In stating the reason for the termination, it is best to give only one valid documented work related reason for the decision. The potential for problems increases with the amount you say.
4. Keep the meeting on track. If the employee tries to talk about the performance or problems with other employees, firmly let the employee know that the only purpose of the meeting is to discuss his situation, not that of others.

5. Remain objective and avoid emotion. In some situations, an employee may show anger, depression, make slurs, or cry. You must remain in control by not overreacting to these emotional displays.

6. Explain what the exit procedure will be and begin it at the close of the interview.

#### **XV. Termination (continued)**

E. It is also important that you help the employee retain his or her dignity during the termination process.

#### **XVI. Immediate Termination**

A. In some instances, an employee's actions may be so severe that immediate termination is necessary.

B. When this occurs, some action should be taken as soon as you become aware of the situation. The longer you delay taking action, the more difficult your defense becomes that it was a terminable offense.

1. If you need to consult with an attorney or other officials before taking final action, you should suspend the employee until you finish the follow-up work.

2. It is important to show that you were not willing to keep the employee in an active status until a final decision had been made concerning the situation.

C. As with all terminations, it is important that thorough, specific documentation be prepared.

#### **XVII. Ongoing Responsibility**

A. Termination of an employee is a management issue and is not to be shared with other employees.

B. Using an employee's termination as "an example to other employees" can possibly lead to a slander lawsuit.

C. Providing references on terminated employees can also create a liability. Any reference requests should be handled by someone who is familiar with these exposures.

***NOTE:** This [paper](#) is provided [for informational purposes only](#). Nothing in this [paper](#) is intended to be, nor should it be construed as, legal advice or guidance. Where legal assistance is needed, the services of a qualified attorney should be sought.*

## PRE-EMPLOYMENT QUESTIONS

*(The following are examples of questions that are generally considered to be appropriate and inappropriate to ask during the pre-employment process. This list is only intended to provide guidance in what questions may be asked and should not be viewed as an all inclusive list of such questions. It must also be remembered that, as new legislation is passed and decisions are made in the courts, there may be changes in what questions are considered appropriate.)*

### **National Origin**

Appropriate:

None unless national origin is a bona fide occupational qualification (BFOQ).

Inappropriate:

What is your nationality? Were you born in the United States? What country are your parents from? Where were you born?

### **Race or Color**

Appropriate:

None

Inappropriate:

What is your skin color? What is your race?

### **Religion**

Appropriate:

None unless religion is a BFOQ.

Inappropriate:

Are you a Christian? What is your religious denomination? Do you attend church? What religious holidays do you observe?

### **Age**

Appropriate:

Are you at least 18 years of age? If not what is your age?

Inappropriate:

How old are you? What is your date of birth?

### **Sex**

Appropriate:

None unless sex is a BFOQ.

Inappropriate:

Are you male or female? Do you plan to have children? Do you practice birth control?  
Do you feel like that a woman can handle this job?

## **Disability**

### Appropriate:

None

### Inappropriate:

Are you disabled? Have you ever been treated for any of the following injuries or illness (followed by a list)? Have you ever filed a workers' compensation claim? Have you ever had any mental or psychological problems? How long have you been in a wheelchair?

## **Marital Status**

### Appropriate:

None

### Inappropriate:

Are you married? Do you preferred to be called Miss? Mrs? Ms? What is your spouse's name? Have you ever been divorced?

## **Arrest Record**

### Appropriate:

Have you ever been convicted of a felony? (NOTE: In most jobs, a felony conviction cannot be the sole basis for failure to hire.)

### Inappropriate:

Have you ever been arrested?

## **Driver's License**

### Appropriate:

Do you have a current driver's license (if driver's license is required for performance of the job)?

### Inappropriate:

Do you have a driver's license (where a driver's license is not required for the job)?

## **Citizenship**

### Appropriate:

Are you a citizen of the United States? If not a citizen, are you legally authorized to work in the United States?

### Inappropriate:

Of what country are you a citizen? Are you a native born or naturalized U.S. citizen? Are your parents citizens?

## **Languages**

### Appropriate:

Do you speak Spanish (or other language required for the job)?

### Inappropriate:

What foreign languages do you speak or write? How did you learn those languages? What is your native tongue?

## **Military Experience**

### Appropriate:

Have you served in the Armed Forces of the United States? If so, what were your duties?

### Inappropriate:

Have you ever served in the Armed Forces of a country other than the United States. Have you ever received a discharge under less than honorable conditions?

## **Education**

### Appropriate:

Any questions pertaining to educational requirements that are truly a requirement for the job.

### Inappropriate:

Any questions about an applicant's educational background that is not a true requirement for the job.

## **Photograph**

### Appropriate:

None

### Inappropriate:

Any requirement that an individual provide a photograph before being hired.

## **Personal Characteristics**

### Appropriate:

None

### Inappropriate:

What color are your eyes? What color is your hair? What is your height and weight?

## **Comments**

Generally, any question that has direct bearing on an applicant's ability to do the job is acceptable. However, questions asked of only certain applicants, and not of all applicants, can make an otherwise valid inquiry appear to be discriminatory. An example would be asking a woman if she could meet the physical requirements of the job but not asking the same question of male applicants. The key to staying out of trouble in the interview and selection process is to ask questions that pertain only to the job and avoid any questions that pry into an applicant's personal background.

Once an employee is hired, it may be necessary to obtain information for benefit programs or government reporting that should not be sought during the pre-employment process. This is okay but, before obtaining any such information, be sure that there is truly a need to have it and, once obtained, keep it separate from the employee's personnel file.

## Examples of Open-Ended Interview Questions

1. Why do you want to work for the county?
2. What hours are you available to work?
3. What are the things you look for in a job?
4. How did your previous jobs prepare you for the position for which you are applying?
5. Describe (or show me) how you would perform the functions of this job.
6. In what areas do you feel that additional training would be beneficial to you in performing the duties of this job?
7. Tell me about your qualifications for this job and how you developed them.
8. What machinery (equipment, tools) do you operate that would be used in this job?
9. How do you keep your knowledge current in your profession?
10. Why do you want to change jobs at this time?
11. Describe your duties in previous jobs.
12. What did you like most and least about your last job?
13. If you could have changed something in your last job, what would it have been?
14. What were you doing from the time before you started your most recent job and the time you left your previous job?
15. Tell me about your level of responsibility in previous jobs.
16. What do you feel are the safety considerations in the job for which you are applying and how would you handle them?
17. What do you feel you accomplished in your previous jobs?
18. Describe your relationship with your supervisors in previous jobs.
19. What makes a job interesting to you?
20. What irritates you in the workplace?
21. What do you expect from your supervisor?
22. What are your long term career goals?
23. What do you think an employer should expect from an employee?
24. Why do you feel you are the best qualified applicant for this job?
25. What information haven't we discussed that would help in considering your application for this job?