

From Hello to Good-bye: Best Practices in Hiring and Firing



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Goals for Hiring

- Select the best possible candidate
- Conduct the selection process in compliance with law
- Maintain the right of the Church to terminate at-will

Potential Risks

- Lawsuit by an unsuccessful applicant
 - Yes, people do sue Churches!
- Future claim for breach of contract
 - Wrongful termination
- Hiring the wrong person for your Church
 - Can effect morale, as well as Church attendance

The Best Defense

- Know the requirements of the job
- Make hiring decisions based upon qualifications for the job
- Know the law and avoid improper questions and discussions
- Carefully document decisions

Audit Documents

- Job description for the position
- Job posting and advertisements
- Employment Application
- Arbitration agreement
- Fair Credit Reporting authorization
- Self-disclosure requirements
- New hire documentation

Review the Qualifications

- Review and update job description
- Job description are used as the standard for measuring qualifications and determining whether the rationale for the hiring decision is credible
- Review all job descriptions and ads with HR to be sure that it accurately reflects requirements of the job

Application

- Ban-the Box Restrictions
- Remove inquiries that review membership in protected class
- Authority to work in United States
- Agreements with prior employer
- Prior experience and reason for termination
- At-will employment statement
- Certification that true and complete
- FCRA as stand-alone Document

The ADA and Applicants

Possible reasonable accommodations during hiring process

- providing written materials in accessible formats, such as large print, Braille, or audiotape
- providing readers or sign language interpreters
- ensuring that recruitment, interviews, tests, and other components of the application process are held in accessible locations
- providing or modifying equipment or devices
- adjusting or modifying application policies and procedures

Here They Come!

- Accept applications only when there is an opening
- Set a deadline
- One application per position sought
- Have a process for collection, review, and storage of applications
- Accommodations during the application process

The Applications Are In...Now What?

- Thin the number
 - Enforce deadlines
 - Consider only those who completed applications
- Screen for minimum qualifications
- Examine each application carefully

Screening For Potential Problem Employees

- Incomplete responses
- Employment gaps
- Job hopping
- Career changes
- Relocation
- “See resume”
- Reasons for leaving
- Laid off/terminated/ resigned/personal
- No references
- Transportation/other job conflicts

Have I Got A Question For You

- Questions should be:
 - Direct – *Was your last job with a Church?*
 - Open-ended – *What were your job duties?*
 - Situational – *Provide an example of a time you were challenged by a new task at work?*
 - Problem-solving – *How would you solve...?*
 - Include follow-up - *Explain what you mean by flexible, team player, goal oriented...?*

Mistakes to Avoid

- Doing all the talking
 - Applicant should do 80% of the talking
- Asking questions that call for a yes or no answer
- Allowing the applicant to distract you from your script
- Not exploring reasons for frequent job changes and gaps in employment
- Basing decision on impermissible basis
- Recording observations that suggest there is an impermissible basis for decision

Making the Decision

- Review documents carefully
- Apply legal, consistent, job-related selection criteria
- Document those criteria
- Could you explain the reason for your decision to a judge and jury?
 - Is it supported by the documents?
 - Would it seem credible?
- Monitor disproportionate exclusion of any protected group

Use of Social Media to Screen



Social Media

- Almost half (45%) of employers report using social networking sites to dig up information about job candidates
- Some employers search Google as part of their regular background checks for applicants
- In response to employers requests that prospective employees provide user names and passwords to access their social media accounts, some states adopted a law prohibiting such requests

Social Media

- Over-reliance on social media sites as a recruiting tool can result in an overly homogenous applicant pool
- Hiring practices that rely heavily on social media sites or that require screening through these sites have the potential to give rise to claims of discrimination

Social Media

- Social Media profiles can indicate an applicant's:
 - Age
 - Disability
 - Race
 - Sexual Orientation
- An important defense for a failure to hire claim is ignorance of the protected characteristic

Guard Against Future Claims

Breach of Contract and Fraud Claims

- Terminated employee claims that general rule of “at will” employment does not apply
 - promises made at interview either
 - created a binding contract
 - prompted employee to forego other opportunity and created an implied contract
- Offer letters should contain “at-will” language
- Former employee claims that quit job or declined another opportunity based upon misrepresentations made during hiring process

Be Careful of Drug and Medical Examinations

- Drug testing
 - Allowed post-offer
- Medical Examinations
 - Allowed if all the examination is part of the standard hiring process used for all newly hired employees.
 - Allowed post-offer, and job offer must be “real”
 - Medical conditions learned through medical exams must be treated confidentially

Rightful Termination



The At-Will Doctrine

- “At will” means an employee can be let go with or without “cause.”
- “At will” does NOT mean employees can be let go for illegal reasons such as discrimination or retaliation.

Exceptions to At-Will Employment

- There are many laws that limit the employer's decision to terminate an employee, including:
 - Title VII of the Civil Rights Act of 1964
 - Age Discrimination in Employment Act
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Employee Polygraph Protection Act
 - Occupational Safety and Health Act
 - Common Law Wrongful Termination in Violation of Public Policy
 - State and Local Law Against Discrimination

Common Red Flags

- “Reduction of Force of 1.”
- Termination for singular poor performance without analysis of similar treatment.
- Usage of non-objective criteria.
- Job not available upon return for leave.
- Absenteeism/tardiness.
- Performance evaluations/raises.
- Protected categories.
- Protected activity.

The “CLEAN” Doctrine

- Consider the facts behind discipline.
- Learn what managers, witnesses, and documents have to say.
- Evaluate what disciplinary action has been taken in the past.
- Analyze risk.
- Narrow down potential options and decide.

The “CLEAN” Doctrine

- **C**onsider the facts behind discipline.
 - What happened?
 - Policy violation?
 - Altercation?
 - Performance issue?
 - Who are the witnesses?
 - What is the documentation?
 - Timeliness?

The “CLEAN” Doctrine

- Learn what managers, witnesses, and documents have to say.
 - First collect information from managers and review relevant documentation.
 - If appropriate, talk to witnesses who may have seen the event or may have knowledge about the issue (other managers about employee’s performance).
 - Talk to the employee and get his/her side of the story.
 - Document EVERYTHING.

The “CLEAN” Doctrine

- Evaluate what disciplinary action has been taken in the past.
 - Most commonly forgot part of the analysis.
 - Must do church wide analysis because that is what the trier of fact will look at.
 - How has the manager reacted to similar situations in the past (differential treatment reasons)?
 - “Didn’t we only do “X” to Sally for this just last month?”
 - How is Sally’s situation different (new hire, different situation, etc.)?

Failure to Enforce Church Policies Consistently

- In litigation, inconsistency = disparate treatment
- Disparate treatment + complaint = A prima case of retaliation
- Lawyers and government agencies will ask about application of the policy to others
- Consistent enforcement also suggests fairness

The “CLEAN” Doctrine

- **Analyze risk.**
 - Who is the manager (short-tempered)?
 - What is the support we have?
 - Protected Categories?
 - Recent Medical Leave?
 - Employee Moral Effect?
 - Will the employee challenge the termination?
 - Are there other issues he could raise only because we discipline him (wage/hour, safety, etc.)?

The “CLEAN” Doctrine

- **Narrow down potential options and decide.**
 - Terminate and, if so, severance?
 - Training, policy acknowledgment?
 - Suspension, reduction in pay, change in schedule or position or office location?
 - How are we treating similarly situated individuals?

The “NEAT” Rule

- **N**otice
- **E**xplanation
- **A**ssistance
- **T**ime to Improve

Termination Documentation

Describe the Reason for Termination

- Needs to be detailed; checking a box is not enough.
- Refer to warnings and use the same language as before if possible.

Describe the Reason for Termination

- Be truthful!
 - Don't sugarcoat it.
 - Don't say it was a downsizing if it wasn't.
 - Don't say anything you wouldn't testify to in court.
- Make Sure Immediate Supervisor Understands Reason for Decision
 - Danger of a Supervisor Commiserating With “Wronged” Employee
- Make Reasons Broad Enough To Cover All Possible Factors
- Choose Least Inflammatory Wording
- Understand that you might have to “prove” that conduct matches reason

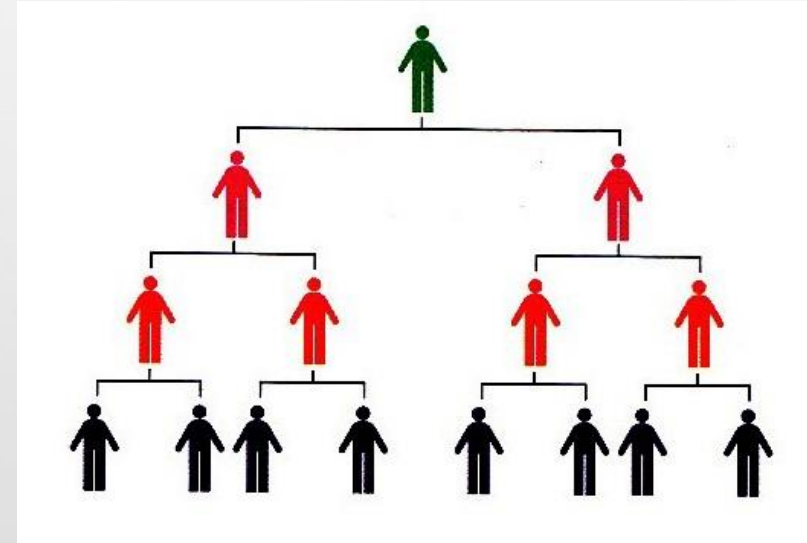
Severance Payments and Releases

- Review of Severance Plan to determine eligibility
- Review of Medical Plan to determine eligibility following termination
- Review of Release and Waiver documents
 - Compliance with OWBPA for employees over 40
 - Special rules apply for group terminations (more than 2)
 - Include state requirements

Discharge Procedures

Discharge Procedures

- Get all the requisite approvals.
 - Failing to follow the approval process creates the appearance of impropriety.



Discharge Procedures

- Deliver the message with dignity.
 - Most wrongful termination lawsuits are caused by disrespectful treatment.
 - Find ways to maintain the employee's dignity (e.g., provide an opportunity to resign).

Termination Meeting

- Recommendations:
 - Have someone other than the employee's supervisor conduct the meeting to minimize conflict.
 - Have at least two people attend the meeting so there are multiple witnesses.
 - Briefly state the performance issues or conduct that lead to the discharge decision.
 - Be matter of fact and not argumentative.
 - Be brief.
 - Provide required termination information (i.e. exit interview, benefits).
 - Be mindful of wage concerns.

The Exit Interview

- Recommendations:
 - Should be conducted by human resources and not the employee's immediate supervisor.
 - Review the personnel file and documentation supporting discharge decision.
 - Be prepared to discuss COBRA, 401(k) and other benefits issues.
 - Be prepared to address reference questions.
 - Deliver the final paycheck.
 - Be polite and courteous.

The Exit Interview

- Recommendations: (cont.)
 - Discuss any confidentiality agreements signed by the employee.
 - Provide and discuss any severance agreement.
 - Give the individual an opportunity to comment on the job, the Church, and the supervisor.
 - Document all matters discussed with employee.

Final Questions?



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