



5 Reasons You Might Rescind a Job Offer – and Top 5 Ways to Ease the Impact

Insights

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Finding the right match between a job candidate and a critical role in your organization can take time, dedication, and even a little luck – so the need to rescind an offer of employment can be difficult for you and the potential new hire. Even if you rarely rescind an offer, you should be prepared to follow certain best practices before and after the situation arises. What are the five most common reasons for rescinding an offer and the five steps you should consider taking to minimize the impact and your legal risk?

Top 5 Reasons for Rescinding an Offer and Key Points to Consider

1. Failed Drug Test

If your company has a comprehensive workplace safety policy, your process may include making job offers contingent upon passing a pre-employment drug test. From the start, it's a good idea to let job seekers know what to expect during the recruiting, interviewing, hiring, and onboarding process – and this includes mentioning any background screening, drug testing, or other requirements. Additionally, when applicable, you should make it clear that the job offer is contingent upon passing such tests.

While employers can generally rescind a conditional job offer if a potential new hire fails a drug test, many states require employers to follow certain steps before taking adverse action. Therefore, you should understand and follow the rules and guidelines in the applicable state. You should also recognize the state-law trend to protect off-duty use of cannabis and consider whether you want to continue testing for it, and if so, how you will handle positive test results without running afoul of such laws.

2. Background Check Issues

Perhaps you run a criminal background or credit check before an offer is official. If so, you should carefully review applicable rules and regulations if your selected candidate fails to meet your criteria.

Companies that conduct background checks on potential new hires must comply with a host of federal, state, and local laws. For example, under the Fair Credit Reporting Act (FCRA), you must

provide applicants with advance notice (known as a clear and conspicuous stand-alone disclosure) that you will be conducting a background check, and the applicant must provide written consent. Additionally, you must provide the applicant with copy of the report and certain notices before and after taking adverse action.

Moreover, many jurisdictions prohibit employers from making decisions based on arrest records, and the U.S. Equal Employment Opportunity Commission (EEOC) has extensive anti-discrimination guidelines for employers that conduct background investigations, including conducting an “individualized assessment” relating to criminal history records.

You should also be aware of any state or local “ban-the-box” laws that dictate when in the hiring process employers can ask about criminal history and what steps they need to take if they intend to take adverse action.

3. False Statements on a Resume or Application

Although research results vary, many studies have found that about a third to half of job seeker admit to lying or making misleading statements on their resume. Common falsehoods involve prior work experience, skills, and education, according to Entrepreneur. For example, an applicant may imply they received a degree from a university they merely attended for a brief period – or they may fudge their dates of employment to inflate their tenure.

Do you have processes in place to verify such information? What steps do you take when you find a discrepancy? You should ensure your job applications and background screening forms explain what will happen if applicants provide false statements. Give them a chance to explain and follow consistent procedures.

4. Red Flags from References, Social Media, or Other Interactions

Your selection process may include checking references and connecting with a potential new hire on social media platforms. But what should you do if you discover negative information about the candidate while speaking with references or viewing their online activity? What if your post-offer interactions with the candidate raise red flags?

Proceed with caution. Document the reasons you decided to rescind the offer and make sure they are fair, objective, applied consistently, and not based protected characteristics, such as age, disability, race, religion, or sex.

While you can generally rescind an offer or fire an employee for egregious social media posts, you should keep up with National Labor Relations Board (NLRB) guidance – which is subject to change – on what types of postings, statements and exchanges may be deemed “protected concerted activity,” particularly when they pertain to wages, hours, and working conditions.

5. Budgetary Constraints and Business Restructuring

Unfortunately, businesses may need to cut back on expenses, projects, or hiring when there's an unexpected economic downturn, revenue loss, client shift, or other occurrence that impacts the budget. Or perhaps your company had a recent change in leadership or a major restructuring and a few jobs you intended to fill will no longer be needed under the newly structured company regime. Since these situations aren't always predictable, you may need to rescind an offer as a result.

First, think about whether the job candidate may be a fit for another open role in the organization. If there are no other potential positions available, be sure to let them know as soon as feasible so they can shift their focus and make other plans.

5 Quick Tips to Ease the Impact and Keep You Compliant

1. Clearly Communicate

As we mentioned above, you should let job applicants know what to expect from your selection and onboarding process. If you make a job offer, be sure to tell the potential new hire that the offer is contingent upon passing a drug screen, background investigation, and/or any other applicable criteria. As a best practice, you should consider putting all the steps in writing and asking the candidate to sign an acknowledgement in addition to any required forms for initiating and completing a background check.

Likewise, you will want to clearly communicate the reasons for rescinding the offer. Depending on your business, prior interactions, and reason for withdrawing the opportunity, you should decide whether an in-person or Zoom meeting, a phone call, or another form of communication is the best way to break the news.

2. Avoid Knee-Jerk Reactions

You may be shocked to complete a bad reference check, discover a potential discrepancy on a candidate's application, or find egregious posts on their social media accounts. But it's essential to take a deep breath and a step back to evaluate the situation. Is there a reasonable explanation for the mismatch between their resume and the verification? Was the reference credible? Was the candidate's identity stolen? Was their social media post taken out of context or potentially protected by applicable employment and labor laws?

Be polite and be sure to give the candidate an opportunity to explain or provide additional documentation. Also be sure to follow any notice requirements and other steps under federal, state, and local laws.

3. Document Your Reasons

Employment arrangements in most U.S. jurisdictions are “at-will,” which means that you and the worker can terminate the employment relationship for any lawful reason, at any time, with or without notice – and that rule generally applies to job offers as well. For most positions, you will want to include an appropriate “at-will” disclaimer in your job offer that negates any specific job expectancy.

Still, you’ll want to be sure that your decision is not based on any unlawful, discriminatory reasons and that you’re not otherwise obligated to honor the offer for contractual or other legal reasons. In some cases, job candidates have claimed that they relied on the promise of employment to make critical or costly decisions, like quitting another job or making arrangements to move to a new city.

That’s why it’s so important to explain when the offer is contingent and let them know when your pre-employment screening is complete. Even when the offer is rescinded after all conditions are met – such as when there’s an unexpected economic downturn – you’ll want to document the reasons for rescinding the job offer and save any supporting material.

4. Have a Backup Plan

While you should inform the job candidates you didn’t select in a timely manner, you may want to identify your top two or three qualified contenders who could potentially fill the role if your top prospect doesn’t work out. This could save you time and reduce the associated cost of starting the process over again if they are still available.

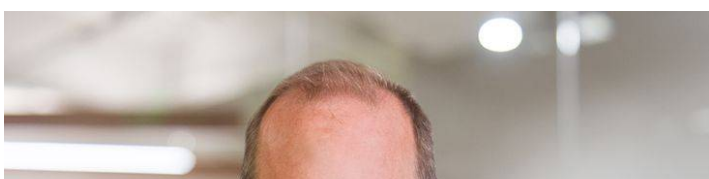
5. Seek Legal Counsel

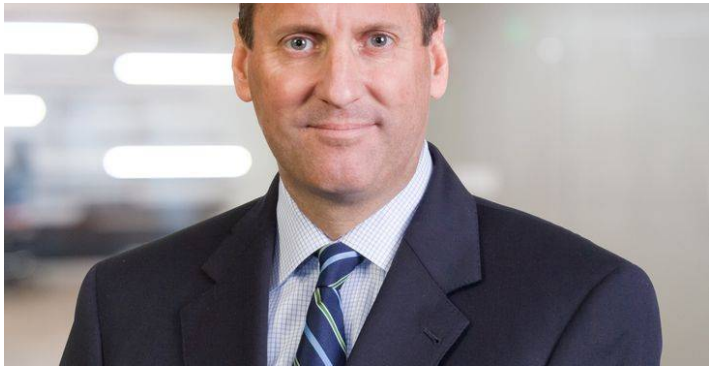
There are a number of legal issues that can arise when you make the difficult decision to rescind an offer of employment. Thus, it’s a good idea to reach out to experienced legal counsel while you are developing your recruitment, selection, and onboarding processes and before you communicate your decision to withdraw the offer.

Conclusion

If you have questions about rescinding an offer or another workplace compliance topic, contact your Fisher Phillips attorney or the authors of this Insight. We will continue to monitor developments in this area, so make sure you are subscribed to [Fisher Phillips’ Insight System](#) to get the most up-to-date information.

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Richard A. Millisor
Regional Managing Partner
440.838.8800
Email

Service Focus

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