

**B. From the Welcome Letter to the Pink Slip: Hiring
and Firing Legal Lessons**

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Mr. Richard (Rick) W. Pins, Esq.
Shareholder
Leonard, Street and Dienard
150 South 5th Street, Suite 2300
Minneapolis, MN 55410
612-335-7007
Richard.pins@leonard.com

II. The Hiring Process

- Legal objectives in hiring:
 - **Protect company** from:
 - Negligent hiring claims.
 - Discrimination claims.
 - Problem employees.
 - **Protect customers and employees** from poor or dangerous employees.
- Major tools for hiring: applications, interviews, and references.
- Other tools: psychological/personality testing, medical screening, background checks, and drug testing.



II. The Hiring Process (cont)

A. Application and Interviews

- Involve obtaining information from prospective employees about themselves.
- Permissible: Questions that are related to an applicant's ability to perform the job.
- **Questions you *cannot* ask:**
 - Per the Americans With Disabilities Act: questions likely to elicit information about a disability.
 - Permissible:
 - How did you break your leg?
 - Can you perform the essential functions of the job?



II. The Hiring Process (cont)

- **More questions you *cannot* ask:**
- Per the Genetic Information Nondiscrimination Act: questions likely to elicit genetic information.
 - Genetic information = information about an applicant or employee's genetic tests, genetic tests of family members, or the manifestation of disease in family members.



II. The Hiring Process (cont)

- The Federal Rules for GINA contain a "safe harbor" provision if an applicant or employee inadvertently provides genetic information.
- **Questions you *should not ask*** unless necessary for successful job performance:
 - Anything directly related to Title VII-protected classes, including date of birth, religion, and national origin.
 - Anything about marital status, number of dependents, or pregnancy.



II. The Hiring Process (cont)

- Plans for children or child care arrangements.
- English language skills.
- Arrest and conviction records.
 - Some states have strict laws prohibiting employers from discriminating against applicants based on conviction records.



II. The Hiring Process (cont)

- **Best practices:**
 - If a question is not related to the applicant's ability to do the job, do not ask it.
 - Provide basic training to all individuals who conduct interviews on the ADA and GINA.
 - You can be friendly without asking impermissible questions.



II. The Hiring Process (cont)

B. References:

- Problem:
 - Employer 2 asks Employer 1 for reference information.
 - Employer 1 provides accurate information.
 - Employer 2 denies the applicant a job based on this information.
 - Applicant sues Employer 1 for defamation or negligent misrepresentation.
 - **Defamation** = publishing a false statement that causes harm, in the absence of privilege.



II. The Hiring Process (cont)

- **Negligent misrepresentation** =
 - Inquiring party clearly identifies the nature of an inquiry.
 - Responding party (acting within the scope of employment) provides accurate information.
 - Inquiring party relies on that information.
 - Plaintiff is harmed.



II. The Hiring Process (cont)

- **Hypothetical:**
 - Plaintiff hired by Employer 1 as VP of Daily Operations.
 - Plaintiff's desk similar to the desks of regular customer service reps.
 - Plaintiff applies and is hired as a customer service rep at Employer 2.
 - Employer 2 does not identify itself and calls Employer 1, where various customer service reps (who did not know Plaintiff's actual title) say Plaintiff was not a VP there.
 - Employer 2 fires Plaintiff, in part because it now believes she lied about her job title at Employer 1.



II. The Hiring Process (cont)

Result:

- o Court found Plaintiff **stated a negligent misrepresentation claim** and denied summary judgment to the employer. *Singer v. Beach Trading Co., Inc.*, 876 A.2d (N.J. 2005).



II. The Hiring Process (cont)

• Best Practices:

- o Know whether your state has a safe harbor provision for references.
- o Confirm only the employee's name, dates of employment, job title, and in certain circumstances, salary and a brief description of duties.
- o Train non-management employees to direct questions regarding other employees to the appropriate manager.



II. The Hiring Process (cont)

C. Psychological/Personality Testing:

- o Three main concerns with this type of testing: accuracy, intrusiveness, and discriminatory impact.
- Types of Tests:
 - (1) Pen and paper honesty tests: generally lawful.
 - Example: Written questionnaires asking if you believe a person should be terminated if he or she is found to be stealing from the company.



II. The Hiring Process (cont)

- o (2) Polygraph/lie detector tests: generally *unlawful*.
- **1988 Federal Employee Polygraph Protection Act** bans polygraph use in employment other than in investigations targeted at employees reasonably suspected of theft or other economic injury.
- **State laws** generally ban this as well.



II. The Hiring Process (cont)

- o (3) Psychological profile screening: unclear whether lawful.
- Psychological tests include tests like the MMPI. Questions like: "I believe my sins cannot be pardoned."
- Personality tests assess a person's attitudes, beliefs, and proclivities with respect to various aspects of the job. Questions like: "I would rather meet people than read a book."
- **Watch out for ADA and GINA concerns** if you administer this type of test.



II. The Hiring Process (cont)

- **Best Practices:**
- o Think about what you hope to gain from a test.
- o If you do conduct a psychological or personality test, make sure it contains no questions likely to elicit information about a disability or genetic information.



II. The Hiring Process (cont)

D. Medical Screening:

- Medical exam: a procedure or test that seeks information about an individual's physical or mental impairments or health.
- Rules regarding medical exams vary at different stages of employment:



II. The Hiring Process (cont)

- **Pre-hiring:** can ask about an individual's ability to perform job-related functions, but absolutely cannot ask about disabilities or require a medical screening.
- **After a conditional offer of employment is made:** may conduct a medical exam only if you test *all* individuals given the offer of employment.
- **For current employees:** may conduct medical exams only if job-related and consistent with business necessity.



II. The Hiring Process (cont)

E. Background Checks:

- Criminal record checks mandatory for some positions, i.e. health care employees and child care workers.
- Some states limit an employer's ability to use criminal records to make employment decisions.
- If you want a credit check, the Fair Credit Reporting Act requires:
 - Prior authorization from the employee or applicant.
 - A copy of the report to the employee or applicant.
 - Prior notice to the employee or applicant of adverse action and notice of their rights.



II. The Hiring Process (cont)

- **Best practices:**

- Do not use criminal records as an automatic bar to employment. Think about how particular infractions relate to the position in question.
- Be consistent in utilizing background check information to make employment decisions—avoid disparate impact concerns.



II. The Hiring Process (cont)

- **F. Drug and Alcohol Testing:**

- Largely regulated on a state basis.
- Can be a “gotcha” kind of rule.
- Sample statute: Minnesota Drug & Alcohol Testing in the Workplace.
 - Employers can only test if they have a *written policy* explaining the drug testing, and the employees are made aware of the policy.



II. The Hiring Process (cont)

- **F. Drug and Alcohol Testing: (Minnesota statute example)**

- **Permissible testing:** only in the following circumstances.
 - All applicants.
 - Safety-sensitive employees on a random basis.
 - Reasonable suspicion of use.
 - Following work-related accident or injury.
 - With routine physical examinations, which cannot occur more than once per year.
 - While an employee is in a treatment program and for up to two years afterward.



II. The Hiring Process (cont)

F. Drug and Alcohol Testing: (Minnesota statute example)

- o **Permissible discharge:**
 - Refuses a lawful drug test.
 - Fails the test once and refuses to seek treatment.
 - Fails the test a second time.
 - Commits misconduct *independent* of testing.



II. The Hiring Process (cont)

F. Drug and Alcohol Testing: (cont)

- o **Best practices:**
 - Create a policy to ensure uniform administration of the tests.
 - Have employees review the policy upon hire and regularly thereafter, especially if the policy changes.
 - Make employees execute a signed acknowledgment that they know about and consent to the policy.



III. Negligent Hiring/Retention

- Under *respondeat superior*, employers can be liable for negligent acts of their employees.
- Independently, employer may itself be negligent in hiring or retaining employees.

A. Negligent Hiring:

- o Occurs when Employer owes a duty of care to Plaintiff, Employer breaches that duty, and the breach causes Plaintiff harm.



III. Negligent Hiring/Retention (cont)

- **Hypothetical:**

- Employer hires Trucker as an over-the-road truck driver and equips him with a sleeping trailer.
- As part of his job application, Trucker verified that he had no traffic or criminal record. Employer verified that Trucker had no traffic record, but did not follow up on the criminal record.
- If Employer *had* followed up, would have seen that Trucker had a history of sex-related crimes, including aggravated sodomy for picking up hitchhikers while working as a truck driver within the past year.
- Trucker promised not to pick up hitchhikers in his employment contract with Employer, but picked up Plaintiff and raped her.



III. Negligent Hiring/Retention (cont)

- **Result:**

- Court found that Plaintiff **survived summary judgment on negligent hiring claim**. *Malorney v. B&L Motor Freight, Inc.*, 496 N.E.2d 1086 (Ill. App. Ct. 1986).



III. Negligent Hiring/Retention (cont.)

- **Negligent Retention:**

- Occurs when:
 - During the course of employment, Employer becomes aware or should have become aware of problems with the employee that indicated his or her unfitness, and
 - Employer fails to take further action such as investigation, discharge, or reassignment.



III. Negligent Hiring/Retention (cont)

- **Hypothetical:**

- Employer previously employed Custodian. Custodian was imprisoned for six years for strangling a co-worker to death.
- After Custodian gets out of prison, Employer re-hires him. Custodian makes romantic advances toward Plaintiff, which Plaintiff rejects. Custodian shows up on Plaintiff's driveway and kills her.
- **Result:** Court found that Plaintiff survived summary judgment on negligent retention claim (but not negligent hiring claim). *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (Minn. Ct. App. 1993).



IV. Potential Post-Hiring Issues

- Big issues include employee handbooks, job descriptions, performance evaluations, and discrimination.

- **A. Employee Handbooks**

- Pros: inform employees of workplace rules and policies, create guidelines for expectations.
- Cons: are sometimes deemed an "implied contract," binding employers to their terms.



IV. Potential Post-Hiring Issues (cont)

- **Hypothetical:**

- Plaintiff works for Employer as a loan officer. During Plaintiff's first year of employment, Employer distributed a handbook that outlined a specific "job security" policy with steps that would be followed before an employee was terminated.
- Employer terminated Plaintiff for various errors without following the procedure in the handbook.
- Court found that the **handbook was a unilateral contract that Employer broke**. *Pine River State Bank v. Mettillie*, 333 N.W.2d 622 (Minn. 1983).



IV. Potential Post-Hiring Issues (cont)

- **Best practices:**
 - Think about whether you need a handbook.
 - If you have one:
 - Actually *follow* the procedures.
 - Do not use absolute language; make clear that the policies are guidelines from which the employer may deviate.
 - Include a disclaimer that:
 - Clearly states the handbook is not a contract.
 - Specifies that the employer retains the right to change the handbook at any time.



IV. Potential Post-Hiring Issues (cont)

- States that **employment is at-will** and employees may be terminated at any time for any reason
- Is conspicuous within the handbook.
- Have employees sign an acknowledgement that they have read, understand, and agreed to the provisions in the handbook.
- Keep a copy of this document in each employee's personnel file.



IV. Potential Post-Hiring Issues (cont)

B. Job Descriptions

- Written job descriptions helpful for:
 - Attracting job applicants who can fulfill the job functions.
 - Conducting performance evaluations.
 - Determining whether an individual with a disability can perform the essential functions of the job, with or without a reasonable accommodation.



IV. Potential Post-Hiring Issues (cont)

- **Best practices:**

- Identify the job title.
- Identify basic educational requirements.
- Identify basic experience requirements.
- Identify the essential functions of the job.
- Include general workplace rules as part of the essential functions of the job, such as:
 - Maintaining good attendance and being on time.
 - Communicating and working as part of a team.
 - If necessary, ability to work overtime.



IV. Potential Post-Hiring Issues (cont)

- **C. Performance Evaluations**

- Avoid the "halo effect": do not be misleadingly positive.
- Erroneously positive evaluations can create problems in the event of future disciplinary or termination proceedings.
- **Best practices:**
 - Balance comments about an employee's strengths and weaknesses.
 - Use specific examples whenever possible.



IV. Potential Post-Hiring Issues (cont)

- **C. Performance Evaluations (cont)**

- Make sure at least the key points to be addressed at performance evaluation are in writing. Ideally, the employee should sign the performance evaluation.



IV. Potential Post-Hiring Issues (cont)

D. Discrimination

- Anyone can bring a discrimination claim because everyone has a protected status (age, sex, race, etc.)
 - Title VII: race, color, sex, national origin, and religion.
 - Americans With Disabilities Act: disability.
 - Age Discrimination in Employment Act: age (protects workers 40 or older).



IV. Potential Post-Hiring Issues (cont)

D. Discrimination (cont)

- Genetic Information Nondiscrimination Act: genetic information.
- Other state and/or federal laws may include other categories, such as marital status and sexual orientation.
- EEOC received 99,922 charges of discrimination in 2010—up from 79,896 ten years ago (a 25% increase).
- Anyone who makes a complaint regarding one of the above statutes has a potential claim for retaliation.



IV. Potential Post-Hiring Issues (cont)

D. Discrimination (cont)

- 36% of charges received by the EEOC in 2010 contained a retaliation claim. That made retaliation the *most commonly asserted* claim.
- Basic elements of a retaliation claim:
 - (1) Employee engages in protected activity, and employer knows about the protected activity.
 - (2) Employee suffers an adverse employment action.
 - (3) There is causal connection between the protected activity and adverse employment action.



IV. Potential Post-Hiring Issues (cont)

D. Discrimination (cont)

- That an employee suffered an adverse action for a legitimate, nondiscriminatory reason is a defense to claims of discrimination.
- **Hypothetical:**
 - Female Plaintiff's male supervisor called one female employee a thug, sent an abusive email to another for being five minutes late, and made discriminatory statements to others about maternity leave.



IV. Potential Post-Hiring Issues (cont)

D. Discrimination (cont)

- Plaintiff reported to her group director that she was unhappy about how her supervisor "handled" certain situations, but did not allege that the supervisor was discriminating in any way.
- Plaintiff was called into a meeting with management about her supervisor, in which she was asked if she agreed with various complaints against the supervisor that the company received in an anonymous letter. The letter identified some incidents where the supervisor allegedly treated male and female employees poorly.



IV. Potential Post-Hiring Issues (cont)

D. Discrimination (cont)

- Plaintiff agreed with most of the letter but did not elaborate and said she had "no clue" who wrote it.
- Employer terminated Plaintiff for poor management. Plaintiff claimed she was terminated in retaliation for complaining about sexual discrimination.
- Court granted **summary judgment for Employer** because a reasonable employer would not have known or believed Plaintiff engaged in protected activity by agreeing with the letter. *Mayers v. Emigrant Bancorp. Inc.*, No. 10 Civ. 2943 (AJP), 112 FEP Cases 177 (S.D. N.Y. Apr. 22, 2011).



V. Employee Discipline

A. Progressive Discipline.

- Progressive discipline is a multi-step disciplinary process involving two or more of the following actions:
 - Oral warning(s).
 - Written warning(s).
 - Probation.
 - Suspension and/or "decision-making leave."
 - Termination.



V. Employee Discipline (cont)

- The law **does not require an employer to implement a system of progressive discipline.**
- Some employers do not use progressive discipline at all, some do pursuant to a collective bargaining agreement, and some do for all employees.
- Pros and cons of progressive discipline:
 - Pros:
 - If followed, provides a fair and uniform way to discipline employees.



V. Employee Discipline (cont)

- Limits potentially (perceived) discriminatory discretion of different managers to make employment decisions.
- Allows employees to see where they "stand" on the discipline scale.
- Cons:
 - May limit an employer's discretion to make employment decisions on a case-by-case basis.
 - If outlined in specific, unambiguous terms in an employee handbook, may expose the employer to lawsuits for failure to follow terms of the policy.



V. Employee Discipline (cont)

- **Best Practices:**

- Clearly communicate to employees that a progressive disciplinary system provides guidelines, but management specifically reserves sole discretion.
- Emphasize at-will status of employees.
- Document all discipline in writing and keep copies in each employee's personnel file.



V. Employee Discipline (cont)

- **B. Disciplinary Procedures and Practices**

- Regardless of the type of disciplinary system your company uses, the following practices are crucial.

- **Best practices:**

- **Training:** human resources personnel, managers, supervisors, and anyone else who will review, evaluate, or critique an employee's performance must be familiar with disciplinary procedures.
- **Statement of policies:** advise employees of workplace expectations, both in terms of performance and behavior/conduct.



V. Employee Discipline (cont)

- **Make a written record** of all complaints, warnings, and/or discipline.
- **Be consistent.** Failure to treat employees consistently will greatly increase the risk of claims that the employer discriminated against an employee who was treated differently.
- **Investigate** before making a decision.



V. Employee Discipline (cont)

C. Investigations

- Before instituting discipline (or termination) for violating a work rule, be sure that the employee has, in fact, violated the work rule.
- Suggested investigation process:
 - When allegations of serious misconduct—such as sexual harassment, theft, or violence—arise, respond *immediately*. Human resources or other management personnel should conduct the investigation.



V. Employee Discipline (cont)

C. Investigations (cont)

- May include a temporary suspension of the employee accused of wrongdoing.
- Meet with the accused employee.
- Meet with other identified employees and supervisors who have knowledge of the allegations.
- Reach a final determination of whether the misconduct occurred, and issue any appropriate discipline



V. Employee Discipline (cont)

C. Investigations (cont)

- **Best practices:**
 - Have a policy in place for investigating workplace allegations.
 - Involve and consult with supervisors during the investigation process, but do not give them the final authority to terminate the employee.
 - Never rely solely on a first-line supervisor's recommendation for discipline, especially in the case of a recommended discharge.



V. Employee Discipline (cont)

C. Investigations (cont)

- o Human resources is in the best position to ensure that any discipline:
 - Complies with applicable law.
 - Is consistent with the company's policies and procedures.
 - Is in the best interest of the company.
- o Follow up on the issues that led to the initial complaints.
- o Maintain confidentiality. Involve only the individuals who must be involved in an investigation.



VI. Termination

A. Reductions-in-force

- The Worker Adjustment and Retraining Notification Act ("WARN") requires 60 days' notice to unions or employees of a plant closing or mass layoff.
 - o Mass layoff = a reduction-in-force that results in an employment loss at a single site of employment during any 30-day period of either:
 - 33% of employees at the site (must be at least 50 total employees) or
 - 500 employees, regardless of the percentage affected.



VI. Termination (cont)

A. Reductions-in-force (cont)

- WARN applies to employers with 100 or more employees.
- **Best practices:**
 - o Give notice when required by WARN.
 - o Make sure to clearly document the reasons why employees were or were not part of a reduction-in-force to avoid claims of discrimination.



VI. Termination (cont)

B. Timing the Termination

- Two basic types of individual terminations:
 - Based on **misconduct**, where proper investigations are crucial.
 - Based on **poor performance**, where notice of the problem is key.
- **Best practices:**
 - Do not make the termination decision prematurely. Make sure the employee's legal rights have not been violated and that grounds for termination are well-supported.



VI. Termination (cont)

B. Timing the Termination (cont)

- Do not make the termination decision too late.
- Make sure the file properly reflects that the employer understands to be the situation.
- Decide how quickly to terminate the employee, whether to give the employee several weeks' notice, and whether the employee must leave on the spot.



VI. Termination (cont)

• Hypothetical:

- Plaintiff sales representative missed sales quota in two consecutive years.
- Employer did not terminate Plaintiff's employment after either of these years of poor performance.
- Plaintiff made her sales quota in the third year, but her sales were still not profitable due to the external resources she used to make those sales.



VI. Termination (cont)

- **Hypothetical: (cont)**

- Employer terminated Plaintiff's employment based on a history of poor performance.
- Plaintiff sued Employer, claiming she was terminated because of her race.
- Plaintiff stated at her deposition that, had Employer terminated her after one of the years when she did not make her quota, she likely would have accepted that her termination was based on poor performance and not sued for discrimination.
- Case is still in litigation.



VI. Termination (cont)

- **Termination Procedures**

- Conduct an exit interview as a face-to-face meeting between the terminated employee and at least two representatives from the employer.
- Keep the meeting brief.
- Provide honest, clear, and direct reasons for the termination

- **Best Practices:**

- Tell the employee what you expect in terms of performance.



VI. Termination (cont)

- **Best Practices (cont)**

- Discuss what company property must be returned and arrange for the employee to collect his belongings.
- Explain what the employee can expect in terms of post-termination compensation, i.e. final paychecks, COBRA rights, and any severance.
- Write a simple letter confirming the termination and expectations to the employee.



VI. Termination (cont)

D. Post-Employment Issues

- Consult state law regarding when a terminated employee must receive his or her final paycheck.
- State law ranges from requiring immediate payment to payment at the next regularly scheduled pay period.



VI. Termination (cont)

D. Post-Employment Issues (cont)

- The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") imposes duty on employers to provide continuing group health coverage to most terminated employees.
- Provide written notice to employee of right to continue participation in the employer-sponsored program at his or her own expense.
 - ◆ A logical place for this notice is in the employment termination letter.



VI. Termination (cont)

D. Post-Employment Issues (cont)

- Responding to an employee's post-employment requests:
 - ◆ Some states may require employers to provide the truthful reason for the employee's termination in writing upon request.
 - ◆ Some states may require employers to provide a former employee with a copy of her personnel file upon request.



Thank You

Questions?



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Richard Pins • (612) 335-1500 • richard.pins@leonard.com

www.leonard.com



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