



How to Hire and Fire

Envision the scenarios before making a decision.

By **Linda Stein**, Contributing Writer

As Abercrombie & Fitch learned from a recent US Supreme Court opinion, hiring practices can lead to litigation. In that case, the high court ruled against the retailer, which failed to hire an otherwise qualified woman who wore a headscarf for religious reasons.

Smaller businesses without human resources departments also need to stay on their toes when hiring or firing, since the myriad of employment laws can have costly ramifications.

Lawyer David Rapuano, a partner with Archer & Greiner P.C. who specializes in labor and employment law, says the Abercrombie case does increase the chance for litigation, “when you’re using some action by the employee that could be part of a religious practice.” Another example of discrimination might be firing an employee who can’t work on Saturday because it’s the Sabbath. Employers need to make accommodations for religion unless they can show “undue hardship,” Rapuano says.

A new twist in hiring is the “ban the box” law that went into effect in New Jersey on March 1. That law requires employers with 15 or more employees not to ask whether a job applicant has a criminal history on the job application or dur-

ing the first interview, with exceptions permitted for some occupations such as law enforcement. Later on in the hiring process, an employer can ask about criminal convictions and have a background check performed. Now the law in 17 states, ban the box is supposed to yield a fairer hiring process.

"We don't want employees knocked out of contention without an employer ever meeting them or seeing them as a human being," Rapuano says.

Also, "under equal opportunity laws, you're not supposed to hold irrelevant convictions against any employee, especially a minority employee," Rapuano says. For example, a forklift driver could not be barred because of a misdemeanor unrelated to the performance of that job.

On the other hand, a bank would be justified rejecting someone convicted of embezzling because that would be relevant to the job, he says.

"Any employer has to strive to be fair and to look fair," Rapuano says.

Attorney Catherine Wells, chair of the employment group for Chiesa Shahinian & Giantomasi, says employers should be "very careful" about what they ask or promise during the interview process. Don't ask someone if they are married or have children, or whether they have a criminal history. And, even though the "ban the box" bill received a lot of news coverage, many smaller employers are not aware of it yet, Wells says.

"In terms of hiring, the biggest mistake is employers don't spend enough time talking about skills and the job and the precise requirements," Wells says. Another common mistake is failing to tell an employee who is not meeting expectations that they need to improve, documenting that discussion and providing training. She's seen cases where a new employee who performs poorly is "meandering along for six or nine months." Then, that person



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might get sick and need a leave of absence. But the employer is frustrated that they have a less than stellar employee and then they must comply with other laws and give them an accommodation, she says. They can't terminate that employee without running into problems, which could have easily been prevented, she says.

Thomas C. Senter, an employment law expert and partner at Greenbaum Rowe Smith & Davis LLP, recom-

mends that employers make it clear from the start that an employee is hired "at will," meaning "either the employer or the employee can terminate the relationship without cause." He suggests putting the terms of a job offer into writing.

"It's important for the employer not to promise what they may not deliver," he says. Examples might be yearly raises or annual reviews, which might not happen if circumstances change. That's "hiring 101," he says.

Employers should make sure individuals are eligible to work, that they are American citizens or have proper visas and work papers.

Both Wells and Senter advise clients to give only the dates of employment and job title when asked for a reference for a former employee.

"Stick to that," Senter says. "Avoid an issue." Otherwise, "people say too much. Somebody in HR might say something that's not consistent with what was told to the employee," he says.

Beware of speaking ill of a former employee. An employer who gives a past employee a negative reference risks a defamation lawsuit by the former employee, Wells says.

With the popularity of social media sites like Facebook or Twitter, there's a whole new way for employers to check out a potential employee, but again, lawyers say to use caution.

"I would not recommend that any employer forcibly require an employee to give up their password," Rapuano says. But, checking on what is posted in the public sphere is not illegal, although an employer might then discover the candidate's religion or that they have a disability, which could come back to haunt them.

"Sometimes ignorance is good," Rapuano says. The employer can then say they never knew that attribute so they couldn't have discriminated against the worker, he says.

Termination

Honesty is the best policy when it's time to part ways with an employee, the lawyers counsel.

The reasons that block terminations are "vast and growing," Rapuano says. If the worker is a whistleblower and the employer fires them, even if they had no cause to report something, they are protected.

"The fact that the employee was wrong does not give you a reason to terminate the employee," Rapuano says. "Really go overboard in treating employees fairly." And if someone has to be fired, "make sure you have a good, solid, demonstrable reason for terminating. Small employers misunderstand the difference between knowing they are right and being able

to prove they are right. ...The question is, what is a jury going to believe?"

Again, "documentation is a key factor in proving things," Rapuano says. "Many times I get calls from employers who want to terminate the worst employee in the world, but they are 75 years old and have a disability. There are no evaluations. They haven't been disciplined."

In one case, an employer wrote on a form that they were terminating a person for medical reasons.

"That's a terrible thing," Rapuano says. "That's very dangerous. Small businesses need to be very aware there are a whole variety of protections for employees with medical conditions. Be very wary."

In another example, an employer

called Rapuano and told him they took action based on "outmoded thinking."

"He calls me up and says, 'If they can't work, they should be fired.' But 'at will' does not mean 'at will.' There are huge caveats for termination, for any reason," Rapuano says.

"Wrongful termination claims are fairly easy to bring even when they're not justified," Rapuano says.

If an employee is not performing well, the employer should be sure to document that fact, Wells says. The employer also should be honest about why they are letting someone go and be specific, rather than trying to sugar coat it or saying that business is slow when it's not, she says.

"Any time an employer does not communicate the accurate and real reason for termination, that creates a problem in the event of subsequent litigation," Wells says. "By giving them a false reason for their dismissal, the employer has 'helped them with their proofs.'"

Senter also stresses documentation, and notes that people can't be fired for reasons that violate the law. Laws against discrimination protect workers who are over 40, or a different race, sex, or national origin.

"An employer can be sued for any reason or no reason at all," Senter says. "Nothing's perfect. Sometimes an employer has to make business decisions, but it may come back to bite them. If somebody is not doing their job and they are spoken to, that should be documented." In addition to making a record, employers should give the employee a chance to "take corrective action," before letting them go.

For more information check the websites for the federal Equal Employment Opportunity Commission and the state Department of Labor and Workforce Development at www.eeoc.gov or www.eeoc.gov. **NJB**

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