



# DO'S AND DON'TS OF HIRING AND FIRING

By: Dana M. Svendsen, Esq.

1099 18th Street, Suite 2150, Denver, CO 80202

Phone: (303) 390-0011 • Fax: (303) 390-0177 • Cell: (303) 929-1216

E-mail: [DMSVENDSEN@jacksonkelly.com](mailto:DMSVENDSEN@jacksonkelly.com) • [www.jacksonkelly.com](http://www.jacksonkelly.com)

Client Focus | Industry Insight | National Reputation

**Confidentiality Note:** This presentation from the law office of Jackson Kelly PLLC is for the sole use of the intended viewers and contains confidential and privileged information. Any unauthorized review, use, disclosure, distribution, or other dissemination of this presentation and/or the information contained herein is strictly prohibited.



# Discussion Today

- Hiring process
  - Interview
  - Social Media
  - Medical/Drug Testing
- Firing process
  - Decision-Making
  - Documentation
  - Ten-Step Checklist



## Hiring Process

## Hiring Process: Getting a Good Employee

- Thorough interviews
- Background check
- Post-offer, pre-employment physical
- Drug/alcohol testing



## Hiring Process: Avoiding Claims

### Six Steps:

1. No solo interviews
2. No “forbidden” questions
  - *prior workplace injuries*
  - *marital status*
  - *age*
  - *care for young children*
  - *pregnancy*
  - *disabilities*



## Hiring Process: Avoiding Claims

3. No improper comments
  - Race, sex, national origin, religion, age, disability, etc.
4. No promises
  - “We’ll never have a layoff”
  - “You can work here as long as you want to”
  - “The benefits we have now are here to stay”



## Hiring Process: Avoiding Claims

5. Criminal convictions can't be absolute bar
  - Must be job-related
6. HR does its part
  - Clear disclaimer in application and handbook
  - Signed acknowledgment of handbook



# PRE-EMPLOYMENT CHECKS

## Internet / Social Media Investigations

- Treat these like an interview
  - You cannot ask certain questions in an interview, and you cannot attempt to obtain that information from social media
- Establish policies and procedures for Internet and social media research
- Don't base your decisions entirely on social media searches



## Medical Tests

- Medical examination = procedure or test that seeks information about an individual's physical or mental impairments or health
- Tests not considered a medical examination include:
  - Drug tests;
  - Physical agility tests and physical fitness tests
  - Tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions
  - Voluntary medical exam as part of an employee health program



## Medical Tests

- Employer may require an applicant to undergo a medical exam which is job-related and consistent with business necessity
- Under ADA, employer cannot require an applicant to undergo an exam prior to making a conditional job offer
- However, employer can ask on application or in interview whether an applicant can perform the job functions with or without accommodation, and if so, how he or she would perform those duties



## Medical Tests

- After an offer has been made, an employer can condition the offer on the successful completion of an exam if two conditions are met:
  1. Exam is applied uniformly to all entering employees in the same job category
  2. Medical info is kept confidential
- Keep private medical records separate from an employee's general personnel file to respect privacy and prevent inadvertent unlawful disclosure



## Drug Testing

- Federal government requires testing by employers in a few safety-sensitive industries
  - Transportation, aviation, and contractors with NASA and the Department of Defense
  - Federal law does not otherwise require or prohibit drug tests.
- State and local laws govern whether an employer may test applicants and employees for drugs
- As a general rule, Colorado employers are permitted to require applicants and employees to take a drug test, and take adverse action against employees who test positive for illegal drugs.



## Firing Process

### Anatomy of a Discharge

- Investigation
- Decision
- Documentation





## The Decision Making Process

- Who needs to be involved in the decision to terminate the employee's employment and what is the role of each person?
- Does each person have all the information he or she needs to make an decision?
- Is there a consensus that discharge is appropriate?



## Some Basic Considerations

- What is the employee's length of employment?
- What do the employee's past performance appraisals show?
- Is there any record of discipline or counseling?



## Why You Should Document

- Provides defense in litigation
- Prevents later denials
- Aids your memory
- Minimizes misunderstandings
- Reveals patterns



## How Good Documentation Helps

- Ensures written record of what employee was told
- Creates record for evaluating future conduct.
- Better decision making
- Avoids disputes
- Counters claims of unlawful conduct
- Good records strengthen live testimony



## How Bad Documentation Hurts

- If facts are left out, how can you prove those facts later?
- Use against witness testifying
- Creates uncertainty – if you have to explain what it meant, it was not thoroughly prepared
- Remember, if it isn't documented, it didn't happen



## Tips for Documenting Discharge

- Complete in timely manner
- Define the problem
- Explain how it affected the company
- Be accurate
- Use explicit time frames
- Be consistent
- Be objective



## Fairness is the Key

- “At will” employment becomes something more when you are defending a lawsuit
- Bottom line: you need a reason to discipline or discharge an employee
- At the end of the day, a jury or judge will look at an employment decision and ask, “was it fair?”



  
JACKSONKELLY  
ATTORNEYS AT LAW  
P.L.L.C.

## Why Do We Care?

- Employer will always provide a nondiscriminatory reason for the disciplinary action
- When a court instructs a jury in a discrimination or wrongful discharge case, the judge will tell the jury that it must decide whether the employer took disciplinary action for an unlawful reason



  
JACKSONKELLY  
ATTORNEYS AT LAW  
P.L.L.C.

## Ten-Step Checklist for a Good Firing

- ❑ 1. Employee violated reasonable expectation?
- ❑ 2. Employee aware of expectation?
- ❑ 3. Heard employee's side of the story?
- ❑ 4. Considered aggravating/mitigating circumstances?
- ❑ 5. Consistent with past treatment of similar conduct?
- ❑ 6. Considered "red flags" (protected class/protected activity)
- ❑ 7. Gotten second opinion / checked with HR?
- ❑ 8. Underlying facts can be proved?
- ❑ 9. Everything documented?
- ❑ 10. Does it seem fair and reasonable?



For more information on these and other  
occupational safety and health topics, please  
visit:  
<http://safety-health.jacksonkelly.com/>