



Avoiding Legal Landmines When Hiring and Firing

BY MATTHEW DURHAM, ESQ., AND CHAD OLSEN, ESQ.

Hiring and firing can feel like a legal minefield. Indeed, improperly handled hirings and firings generate a considerable number of lawsuits. However, employers may avoid legal landmines or limit liabilities by implementing the following practices.

HIRING

Do Not Discriminate

There is one overarching directive that all employers should follow throughout the hiring process—do not discriminate. Discrimination on the basis of a protected class is prohibited by both federal¹ and Nevada² law, and opens employers up to significant liability. Following this directive may sound easy, especially since most employers have no intention of engaging

in unlawful discrimination. But even a well-intentioned employer can run afoul of anti-discrimination laws if it does not carefully evaluate and execute its hiring process.

Generally, the first step in hiring is preparing a job posting. Job postings should be as neutral as possible and should not reference a protected class or appear to give preference based on a protected class. For example, the Equal Employment Opportunity Commission notes that job postings seeking “females” or “recent college graduates” may discourage men and people over 40 from applying.

In addition, to avoid potential disability discrimination, job postings should include a complete description of essential job functions. Under the Americans with Disabilities Act, if a disabled applicant is qualified to perform essential functions with (or without) a reasonable accommodation, the applicant is protected from discrimination. As such, it is critical that job postings identify all essential job functions. Otherwise, if an applicant’s inability to perform a

previously undisclosed job function is used as the basis for not hiring the applicant, the applicant may assert that the job function was added after the fact as a pretext for discrimination.

As with job postings, job applications should be carefully reviewed. Requests that elicit information regarding an applicant’s protected class should be avoided. Such questions should also be avoided in job interviews.

Some hiring questions are obviously problematic: *How old are you? Are you pregnant? Are you religious? What country are you from?* However, many problematic questions are less obvious. For example, asking an applicant her age clearly invites a potential age discrimination claim, but so does asking an applicant when she graduated from high school. Similarly, asking an applicant’s religion clearly invites a potential religious discrimination claim, but so does asking a candidate what she did to celebrate Christmas, Hanukkah, or Ramadan. As such, all questions should be evaluated to ensure they do not invite claims of discrimination.

When information touching a protected class is needed, the question should be narrowly tailored to elicit only the required information. For example, to confirm that an applicant is eligible to work in the U.S., an employer should not ask the applicant's citizenship or country of origin. Rather, it should simply ask if the applicant is legally eligible to work in the U.S. Likewise, if membership in a professional organization is required, the employer should not ask the applicant to identify all organizational affiliations, which could include religious-, gender-, and race-based organizations. Instead, the employer should ask the applicant to confirm membership in the required organization.

Do Not Ask About Wage or Salary History

Since October 1, 2021, Nevada employers are prohibited from requesting, personally or through an agent, an applicant's wage history to determine (1) whether to offer employment or (2) the rate of pay.³ Nevada employers also cannot refuse to interview or hire an applicant who does not provide wage or salary history. If an employer violates these laws, an applicant can file a complaint with the Labor Commissioner for engaging in an unlawful employment practice, and, in addition to any other remedy or penalty, the commissioner may impose an administrative penalty of not more than \$5,000 for each violation.

Do Not Request Access to an Applicant's Social Media Accounts

Social media accounts can reveal a lot. For this reason, employers may be tempted to obtain access to an applicant's social media accounts as part of the hiring process. Employers should resist this temptation. In Nevada, it is unlawful for an employer to request, suggest, or cause a prospective employee to disclose any information that provides access to personal social media accounts.⁴ It is also unlawful for an employer to deny employment, or threaten to deny employment, to an applicant who does not disclose such information. Employers are, of course, free to view the public profiles and publicly available information on social media. However, employers should create social media screening policies before doing so to

ensure that the screenings are performed, and hiring decisions are made, in a non-discriminatory manner.

FIRING

Before Termination

First and foremost, employers should track and document employee performance and all employment actions. In addition to serving as a basis for appropriate performance benefits, good written records provide support for sound disciplinary actions and terminations, as well as provide evidence against unfounded claims, including discrimination, unemployment insurance, and wrongful termination claims. In doing so, employers should ensure that employees are evaluated honestly, and evaluators (including managers or supervisors) should be well-trained in company policies, including proper discipline and discrimination policies.

Once termination is necessary, but before it takes place, employers should evaluate potential claims and liabilities. For instance, employers should (1) examine company policies and employment agreements (if any), including termination procedures; (2) assess whether reasonable accommodations were provided (if applicable); (3) determine if any discrimination laws were potentially violated, whether based on race, color, religion, sex, pregnancy, sexual orientation, gender identity, national origin, disability, age, etc.; (4) determine whether any adverse action was taken, or might be taken, in retaliation of the employee's decision to report discrimination, oppose discrimination, or participate in a discrimination investigation or lawsuit; (5) adhere to the WARN Act (if applicable⁵); and (6) review employee pay history for unpaid wages and possible Equal Pay Act⁶ violations. At the same time, employers should also evaluate whether failing to terminate the employee may increase liabilities or undermine company policy.

In short, before termination, employers should make sure the action is based on legitimate, non-discriminatory reasons—and is supported by documentation. If there is a potential claim, employers may, among other things, consider providing severance pay in exchange for a release. However, this requires careful consideration. An improper severance or termination agreement may backfire.⁷

During Termination

Cooler heads should prevail with terminations. Heightened emotions of all parties may increase employer vulnerability. Generally, employers should not fire an employee in the heat-of-the-moment. They should take time to evaluate and handle terminations respectfully and professionally, regardless of employee reactions. It may help to hold terminations in neutral locations, such as an empty office or conference room.

During the termination, employers should always have at least one other individual present as a witness. Employers should be honest and clear about the reasons for termination, and employers should avoid apologizing, as doing so may be used to suggest wrongdoing. It is also often helpful to prepare a termination letter to present to the employee during the termination. Among other things, a letter (1) allows the employer to carefully consider the language used to convey the termination and reasons for termination; (2) provides a script to read during a potentially emotional termination; (3) may provide a reminder of any post-employment restriction, such as a non-compete or non-solicitation agreement; and (4) may provide notice of any company property that must be accounted for or returned.

After Termination

Immediately after a termination, employers should document the termination and allow the employee to remove personal belongings at an appropriate time or without unnecessary attention. Documenting the termination is

In Nevada, it is unlawful for an employer to request, suggest, or cause a prospective employee to disclose any information that provides access to personal social media accounts.

Avoiding Legal Landmines When Hiring and Firing

crucial and should include details about the conversation, reactions, and emotional tone of all parties. It should also include statements, input, or verifications from all witnesses, and it may include or make note of any audio or visual recording. Careful documentation may be essential to defending your business against a termination-related charge or claim.

After terminations, employers should also retain and produce employment records as required by law. Various federal and state laws relate to the retention of employment records, including personnel and payroll records.⁸ Employers should ensure that records are maintained (either in hard copy or electronically) for the minimum time required. Employers sometimes use a blanket seven-year rule for retaining records, as this time often covers applicable laws and statutes of limitations. Employers should also retain records pending the final disposition of any charge of discrimination or action brought by a former employee.

If any charge is filed, employers should respond promptly, follow the instructions in any charge notice, conduct a thorough and impartial investigation, and take corrective measures (if necessary) to guard against future retaliation, discrimination, or other liabilities. An experienced employment attorney may help an employer through any charge process, but it is not required.

ENDNOTES:

1. 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 623(a)(1); and 42 U.S.C. § 12112(a).
2. NRS 613.330.
3. NRS 613.113.
4. NRS 613.135.
5. See <https://www.dol.gov/agencies/eta/layoffs/warn>.
6. See <https://www.eeoc.gov/equal-paycompensation-discrimination>.
7. See, e.g., <https://www.eeoc.gov/employers/small-business/manager-responsibilities-waivers-discrimination-complaints>; <https://www.eeoc.gov/laws/guidance/ga-understanding-waivers-discrimination-claims-employee-severance-agreements>.
8. See NRS 608.115; NRS 613.075; <https://stratus.hr/2019/10/16/employee-records-chart/>.

MATTHEW DURHAM is a partner at King Durham, where he focuses on employment and business litigation. He received his J.D. from Duke University and can be reached at mdurham@kingdurham.com.



CHAD OLSEN is a business litigation and appellate attorney at Lewis Roca. He received his J.D. from Brigham Young University and can be reached at colsen@lewisroca.com.



MEET YOUR FINANCIAL HEROES

Annually, more than \$600 million is held in Nevada lawyer trust accounts. These financial heroes have agreed to pay favorable rates on all IOLTA accounts under deposit. **Leadership institutions pay premium rates.**

The Nevada Bar Foundation grants more than 97% of the interest earned on these dollars to statewide legal service organizations serving more than 37,000 Nevada families.

American First National Bank

Bank of America

Bank of George

Bank of Nevada

Bank of the West

Chase

Citibank

City National Bank

East West Bank

Financial Horizons Credit Union

First Citizens Bank

First Foundation Bank

First Independent Bank

First Savings Bank

First Security Bank of Nevada

GenuBank

Heritage Bank

Lexicon Bank

Meadows Bank

Nevada Bank & Trust

Nevada State Bank

Northern Trust Bank

Pacific Premiere Bank

Plumas Bank

Royal Business Bank

Silver State Schools Credit Union

Town and Country Bank

US Bank

Valley Bank of Nevada (BNLV)

Washington Federal

Wells Fargo

