

Recommendations for Planning, Documenting, and Implementing Critical Employment Actions



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Disclaimer

This presentation is intended for educational purposes only. It does not constitute legal advice. Attendees should consult with knowledgeable legal counsel to determine how applicable laws apply to their own specific facts and situations.

This Presentation will Cover:

- Documenting Critical Employment Actions:
 - Recruitment and Selection Considerations
 - Employment Agreements
 - Employee Evaluations and Progressive Discipline
 - Documentation Tips and Pitfalls to Avoid
 - Tips for Terminations
- Avoiding Litigation
- Best practices for Email, Text Messages, and Instant Messaging at Work

Recruiting and Hiring Considerations

- Lawful criteria
- Thorough screening
- Investigation of issues and avoidance of problems on the horizon
- Employee or independent contractor?
- Document the relationship



Documenting the Employment Relationship

Offer Letter:

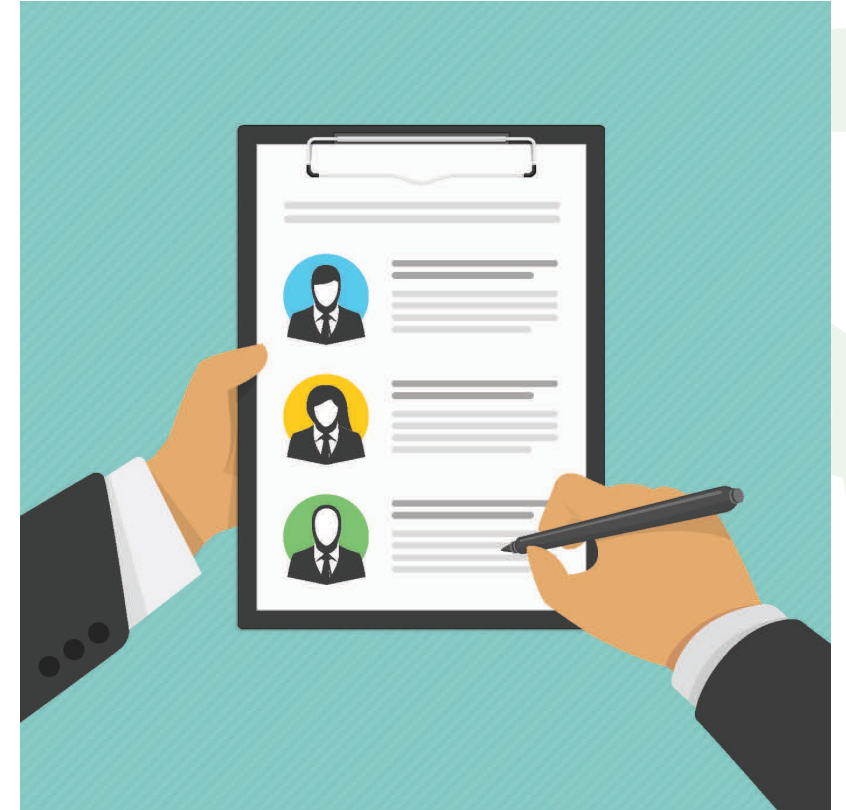
- Confirm key aspects of employment relationship terms:
 - At-will
 - No fixed duration
 - No contractual commitment
 - Subject to satisfaction of screening requirements
 - Employer's discretion to change terms & conditions of employment
- Reference any required employment agreements
- Confirm key compensation and benefits

Documenting the Employment Relationship

Job Description:

- Outline key essential functions of position
- List any physical requirements
- Note employer's right to assign other tasks as needed

Why Does it Matter?



When to Use Employment Agreements

- Which employees do you want to sign agreements?
- What do you want to protect?
 - Your IP / confidential info
 - Your critical relationships
 - Against future competitive conduct, employee raiding, customer solicitation
- What other topics do you want to cover?
 - Compensation and benefits
 - Terms of employment
 - Right to work for your organization
- Key principles for drafting
 - Retain flexibility and discretion
 - Retain control

Goals: Maximize clarity, protect an employer's interests, and reduce risk of avoidable litigation

Employee Evaluations and Progressive Discipline

- New employee orientation – handbooks and policies
- Performance evaluations and other performance management
- Progressive discipline – how, when, why
- Always document effectively
- Training supervisors and giving them tools
- Consider using performance evaluation check lists

Goals: Successful employees and reduce litigation risk

Tips and Traps Related to Employee Terminations

- Evaluation of options
- Criticality of consensus
- Follow values and policies; be consistent
- Documentation
- Implementation
- Post-termination issues



Other Employee Interactions: When to Document

- Are the employee's job duties or compensation changing?
- Is the employee making an unusual request?
- Is the employee using buzzwords? ("discrimination," "retaliation," "harassment")
- Does the employee sound like he or she has been researching what the law is?
- Is the employee subject to pending or imminent corrective action or a layoff?
- Are accommodations for a disability being discussed?
- Encourage reporting of unlawful conduct so it can be investigated and documented

Documentation Mistakes and Pitfalls

- Improperly discussing employee or decisions electronically
- Making vague, unclear statements about what the employee needs to do to improve
- Failing to inform employee that future conduct could result in termination
- Making personal attacks or subjective comments
- Having little or no evidence to support decisions to discipline or terminate an employee
- Not saving documentation in a place future managers or HR can find later
 - If using HR software, avoid inconsistent note-taking / recommendations

Documentation Best Practices

- Clearly describe expectations
- Describe the behavior at issue; describe the conduct, not the individual
- Include the employee's explanation and efforts of manager and employee to work together to find solutions
- Prepare a detailed action plan
- Set deadlines for correcting the behavior or performance
- Describe the consequences if the behavior or poor performance continues
- Avoid vague phrases that could provide grounds for future disputes or discrimination lawsuits

Other Tips for Avoiding Litigation

- Periodically re-read / revise anti-discrimination, anti-harassment, and anti-retaliation policies set forth in employee handbook and/or Code of Conduct
- Encourage reporting of improper conduct through the various channels available
- When improper conduct occurs in the workplace, notify HR and/or Legal immediately so that information can be gathered, and evidence can be preserved
- Ask employees to be specific and detailed when providing information to HR and/or Legal about the improper conduct that has occurred (and consider whether it should be provided orally or in writing)
- Document all disciplinary action effectively – including coaching memos, performance improvement plans, and termination decisions – supported by objective evidence if possible
- Implement document retention policies and practices for employment documentation
- How to handle handwritten summaries of events / complaints
- How to respond to threat letters, truthful reasons letters, etc.

Dangers of “Discoverable” Electronic Communications

- Emails, texts, and IMs can easily be misconstrued after the fact
- Emails, texts, and IMs can be used as evidence in court
- The use of emails, texts, and IMs can compromise your privacy and confidentiality
- Emails, texts, and IMs can be misaddressed and sent to unintended recipients
- Backup copies of emails and texts may exist even after the sender and/or recipient have deleted their copies
- Emails, texts, and IMs can be intercepted, altered, forwarded, or used without authorization or detection
- Emails, texts and IMs may not be secure, and therefore it is possible that confidentiality of such communications could be breached by a third party

Issues with Sending Sensitive Communications Electronically

Offensive
messages or
pictures

Confidential
information

Important
administrative
matters

Offensive Messages: Never Allowed

- Vulgar jokes
- Petty, disparaging remarks
- Comments perceived as discriminatory/retaliatory
- Sending or receiving sexually explicit images
- Requests for improper (e.g., sexual) favors for career advancement
- Unwanted flirting and teasing
- Sexually-threatening messages



Confidential Information: Send With Care

- Personal credit card numbers, passwords, DOBs/SSNs
- Private health information (including if someone has Covid)
- Personal and business financial account numbers
- Documents protected by attorney-client privilege
- Insider trading information (i.e., financial data, product release date, merger date)
- Trade secrets

Important Administrative Matters: Avoid Sending Informally

- Offering criticism
- Noting concerns with work product or job duties
- Announcing personnel change, lay-offs, or terminations
- Describing job changes
- Conversations related to compensation raises/cuts or promotions/demotions



CRITICISM

Best Practices for Email Use



To send and provide feedback on formal documents



To formally communicate decisions



To confirm or schedule formal appointments/meetings



To document important conversations



To send company-wide announcements where it is important for all staff to receive the same message at the same time

Best Practices for Text Message Use



Sending emergency communications via text system for business



Providing employees with COVID-19 updates



Scheduling shifts



Sending short updates



Sending last minute reminders



Communicating with non-desk workers



Communicating when computer systems are unavailable

Best Practices for IM Use



Team building



Sending last-minute reminders or informal requests



Communicating quick, non-formal thoughts about a project



Scheduling fewer formal meetings or gatherings



Non-work-related messages

Electronic Communications at Work: Key Takeaways

- Emails, texts, and IMs are not actually private
- Emails, texts, and IMs may be obtained (via document request or subpoena) and used as evidence in court
- Emails, texts, and IMs are permanent -- even if deleted or wiped out by hard drive software, some may still be recoverable by a computer forensic expert
- Implement email policies (covering business and personal use)
- If texts and IMs are allowed or tolerated in the workplace, having a policy in place is also advised
- Know what your retention policies are for emails, texts, and IMs

Reminders About Privilege

- The attorney-client privilege protects communications in which legal advice is sought or received (and sometimes also communications providing information for the purposes of seeking or receiving legal advice)
- Mark all communications that you believe are privileged with a “PRIVILEGED” notation (e.g., in the email subject line)
- Inviting an attorney to a meeting or phone call does not make it privileged
- Copying an attorney on an email does not make it privileged
- One good practice when copying an attorney on an email is to specifically ask the attorney for their thoughts at the end
- Emails with HR staff (without any attorney present) are not confidential and are not privileged – they can and will be evidence in court
- Each state has different parameters for how to determine if something is privileged or not
 - e.g., Minnesota’s new “predominant purpose” test

Reminders About Confidential Info

- Follow company confidentiality policies
- Follow computer and electronic communication use policies
- Don't disclose confidential information outside company without permission
- Only share confidential information with other employees on a need-to-know basis
- Carefully follow confidentiality agreements or NDAs with third parties
- Mark/label documents and materials confidential
- Carefully store, handle, and dispose of confidential documents and materials
- Employ physical security measures (keycard access, locking offices, or cabinets)
- Carefully handle material on USBs, external hard-drives, in cloud storage, and on smartphones and tablets
- Use unique computer logins/passwords, document access passwords, encryption, etc.
- Be aware of scam/phishing schemes

Thank You!



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