

Legally Interviewing, Hiring, and Terminating Employees

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Get The Right People On The Bus








High quality physicians and nurses




- Application process
- Interviews
- Hiring
- Performance evals
- Intervention
- Termination







Overview

-  **It's all about the people.**
-  **Work hard to get the hiring process right.**
-  **Know that sometimes, despite your best efforts you will be wrong.**
-  **Know that you are personally and professionally at risk.**
-  **Learn how to manage this process.**

Reality

-  **There are a lot of impaired emergency physicians. You would prefer not to hire one.**
-  **There are a lot of emergency physicians that are not qualified to work in your ED. You need to figure out who they are.**
-  **One or more of your employed physicians has serious problems with job performance. You need to do something about it.**

Your Employment Attorney

-  **Get one. Get a good one. Check references with another physician if possible.**
-  **Keep this phone number handy.**
-  **Call whenever you have any issue relating to employment.**
-  **This is an individual you, your corporation, or your hospital should be contacting on a regular basis.**

Employment Attorneys








John Murphy:

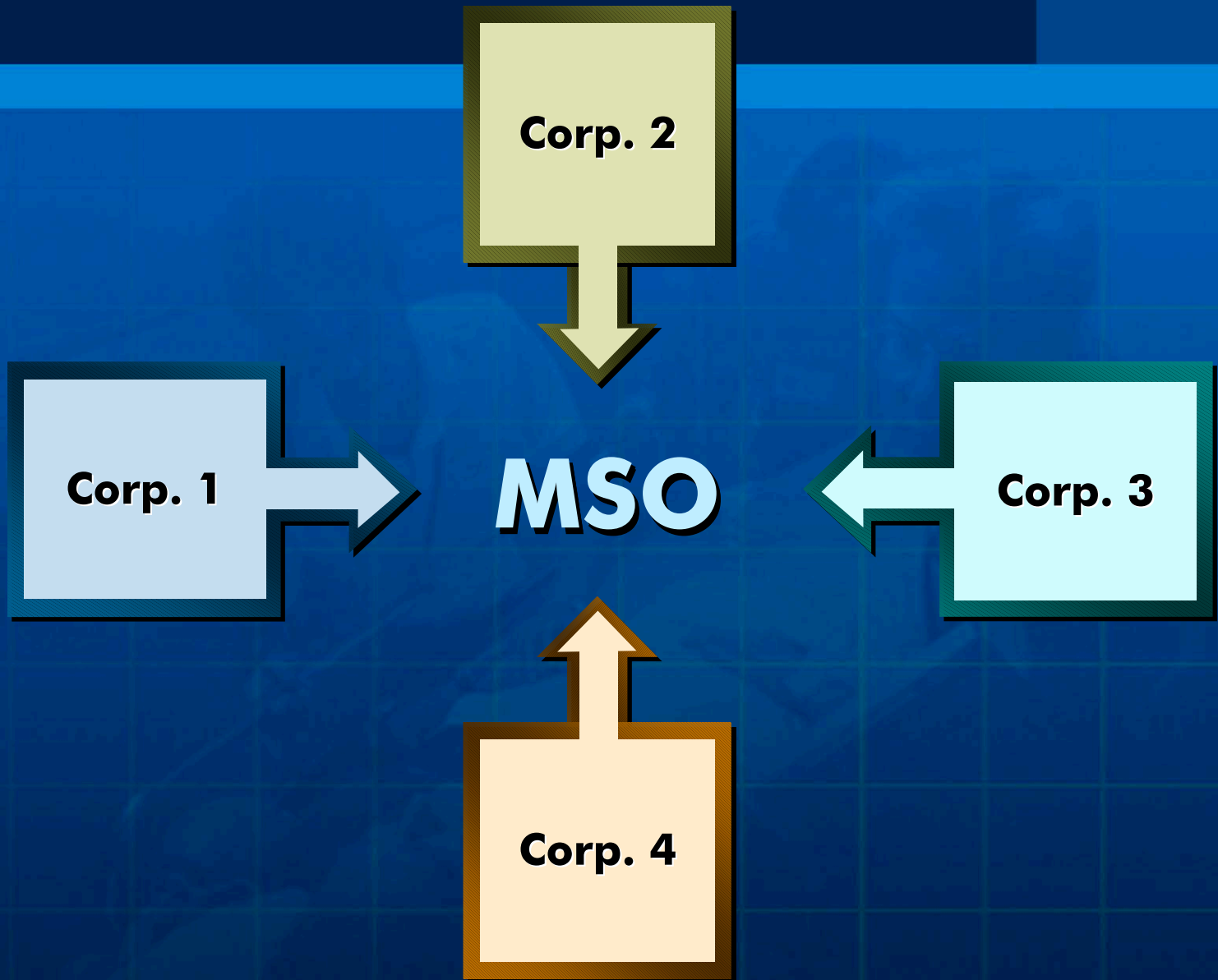
312.346.5328

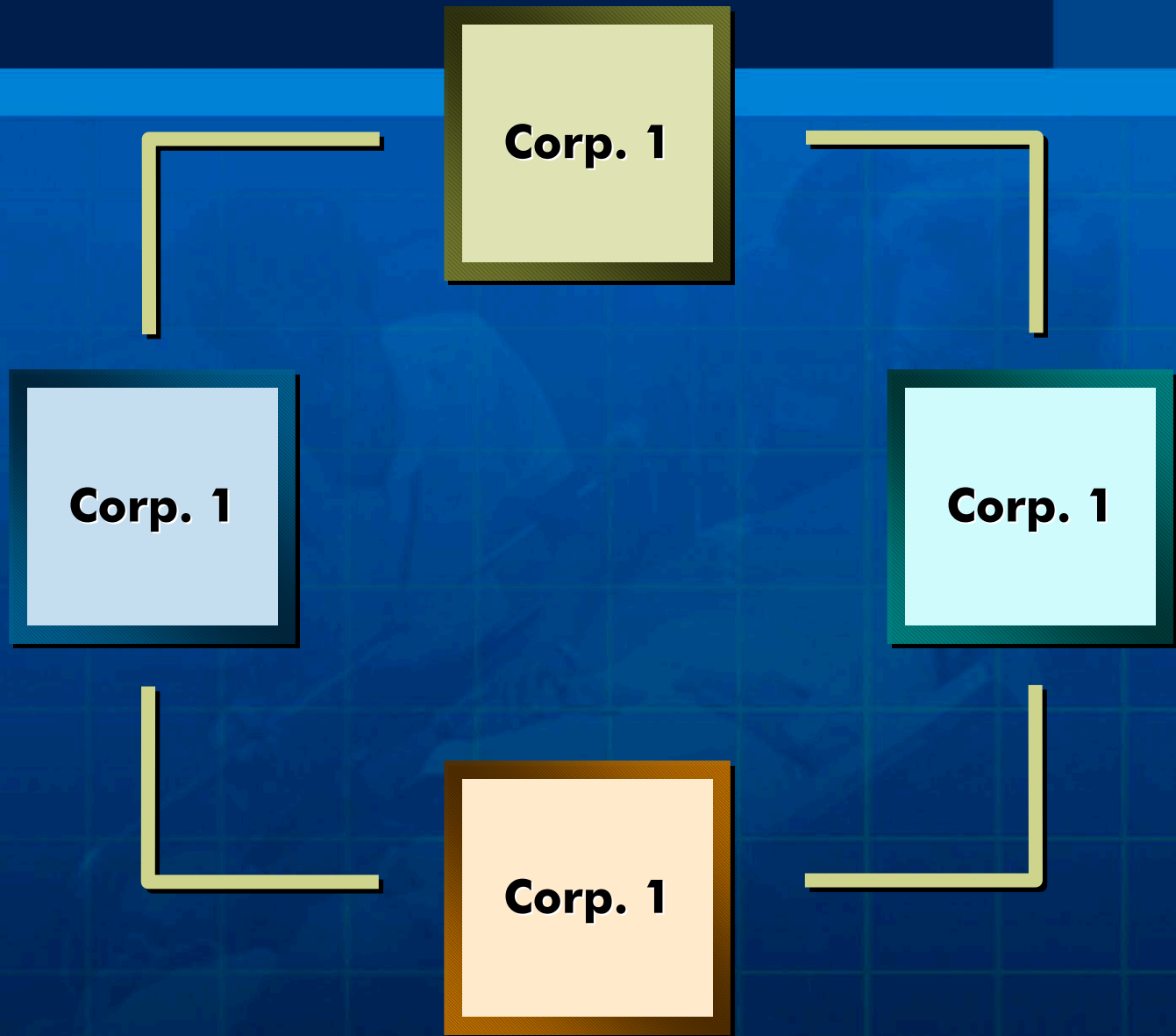
**Jeff Fowler, Laner, Muchin,
Dombrow, Becker Levin,
and Tomberg:**

312.467.9800




Laws You Need To Be Aware Of

-  **Title VII of the Civil Rights Act**
-  **Age Discrimination in Employment Act**
-  **Equal Pay Act**
-  **Immigration and Control Reform Act**
-  **Americans With Disabilities Act**
-  **Fair Labor Standards Act**
-  **Family Medical Leave Act**










Title VII Of The Civil Rights Act Of 1964

-  **Applies to most employers engaged in interstate commerce with more than 15 employees.**
-  **The Act prohibits discrimination based on race, color, religion, sex or national origin. Sex includes pregnancy, childbirth or related medical conditions.**
-  **It makes it illegal for employers to discriminate in hiring, discharging, compensation, or terms, conditions, and privileges of employment.**

Overview

-  **Discrimination laws seek to prevent employers from discrimination based on race, sex, religion, national origin, physical disability, and age.**
-  **Discriminatory practices include bias in hiring, promotion, job assignment, termination, compensation, and various types of harassment.**

Definitions

-  **Race and Color – Those immutable characteristics carried by people of a certain race. Immutable is any characteristic you can't change as a result of your race (e.g. skin and hair color, hair texture).**
-  **National Origin - birthplace, ancestry, culture, native language, accent, association with a group or religious organization.**
-  **The bona fide occupational qualification (BFOQ)**

Title VII – Sexual Discrimination



Title VII's broad prohibitions against sex discrimination specifically cover:

- **Sexual Harassment - This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment. (The "hostile environment" standard also applies to harassment on the bases of race, color, national origin, religion, age, and disability.)**



Definition: Sexual harassment is any unwelcome sexual advance or conduct on the job that creates an intimidating, hostile, or offensive working environment. Any conduct of a sexual nature that makes an employee uncomfortable has the potential to be sexual harassment.

Sexual Harassment Policy (See EM Toolbox)



Should include:

- **Definition of sexual harassment**
- **State that sexual harassment will not be tolerated**
- **State that wrongdoers will be disciplined or fired**
- **Set out clear procedure for filing sexual harassment complaints**
- **State that you will investigate and not retaliate**

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Title VII – Sexual Discrimination



Continued

- **Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.**

Stories From The Workplace




-  **The chapel.**
-  **The back rub.**
-  **The invitation to the call room.**
-  **The touch.**

Good Ideas

- 📖 **Physician / Nurse relationships.**
- 📖 **Take it outside.**
- 📖 **Don't just tell the troops about sexual discrimination, give them examples or they won't understand.**
- 📖 **Keep your hands off.**



Age Discrimination In Employment Act (ADEA)

-  Prohibits employers from discriminating against individuals 40 and older.
-  Must have more than 20 employees (federal).
-  Case study.




Equal Pay Act






Protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.

- **Jobs need only be substantially equal for EPA to kick in.**
- **Equal pay means equal in all things including benefit structure.**
- **May be differences unrelated to sex, for example night differential.**



Immigration Reform & Control Act

-  Prohibits discrimination based upon citizenship or national origin.
-  Makes it illegal for employees to knowingly hire or employ individuals who are not legally authorized to work in the US.
-  Applies to employers with 4 or more employees.



Americans With Disabilities Act (ADA)

-  It was enacted to eliminate discrimination against those with handicaps.
-  It prohibits discrimination based on a physical or mental handicap.
-  Applies to employers with 15 or more employees.

ADA – An Individual With A Disability

-  **Is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.**
-  **Major life activities are activities that an average person can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, learning, and working.**




Qualified Individual With A Disability

-  **Someone who satisfies skill, experience, education, and other job-related requirements of the position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of that position.**
-  **Example: Amplified stethoscope for a hearing impaired physician.**




Reasonable Accommodation

- **Making existing facilities used by employees readily accessible to and usable by persons with disabilities;**
 - **Job restructuring;**
 - **Modification of work schedules;**
 - **Providing additional unpaid leave.**

Reasonable Accommodation

-  **Not required to lower production standards to make an accommodation.**
-  **An employer generally is not obligated to provide personal use items such as eyeglasses or hearing aids.**
-  **Not required to impose an undue hardship on the operation of the employer's business (i.e. significant difficulty or expense)**

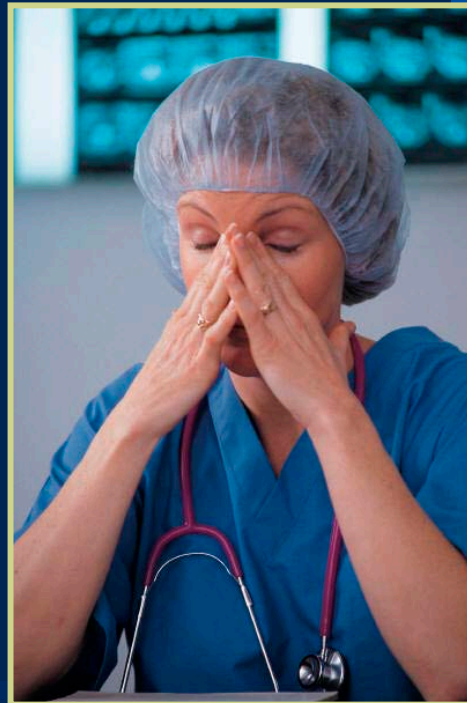
ADA

-  **May not ask about disabilities.**
-  **May ask if able to perform the essential job functions.**
-  **Job may be conditioned on medical exam if it is required for all employees in that classification.**



Stories From The Work Place

📖 **The shaking doctor.**



📖 **Others??**








Drug And Alcohol Use

-  **Employees and applicants currently engaging in the illegal use of drugs are not protected by the ADA.**
-  **Tests for illegal use of drugs are not considered medical examinations and, therefore, are not subject to the ADA's restrictions on medical examinations.**

Drug And Alcohol Use

-  **Contract could call for immediate termination.**
-  **Contract could forfeit right to tale coverage based upon use of drugs or alcohol.**

Fair Labor Standards Act

-  **Primary federal law governing wages and hours.**
-  **Rules for overtime pay.**
-  **Covered if you have over 500K in revenue or are in interstate commerce.**
-  **Overtime is paid at time and a half.
Salary vs. non-salary.**
-  **Professions excluded from this requirement, but probably not allied health professionals.**

Family Medical Leave Act

- 📖 **Applies to employers with more than 50 employees in a 75 mile radius.**
- 📖 **Under the FMLA employer required to allow up to up to 12 weeks of unpaid leave**
 - **To care for a new child**
 - **To care for a seriously ill family member**
 - **To recuperate from employee serious health condition**

Equal Opportunity Employment Commission (EEOC)



Interprets and enforces the:

- **Equal Pay Act;**
- **Age Discrimination in Employment Act;**
- **Title VII;**
- **Americans With Disabilities Act**

Policy & Procedure

Goals

- Don't discriminate
- Create a workplace free of discrimination

Policy

- Policy that prohibits discrimination (sign off)
- What to do if employee sees discrimination
- Investigate allegations of discrimination
- Take effective action

Discrimination Statutes – Summary

- 📖 **Illegal to discriminate in any aspect of employment, including:**
 - **Hiring and firing;**
 - **Compensation, assignment, or classification of employees;**
 - **Transfer, promotion, layoff, or recall;**
 - **Job advertisements;**

Discrimination Statutes – Summary



Continued:

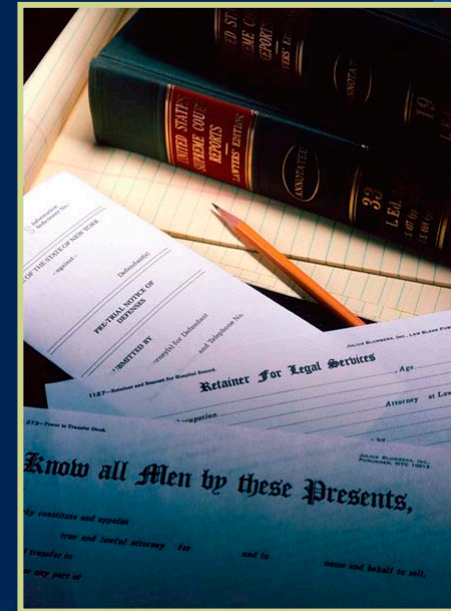
- **Recruitment;**
- **Testing;**
- **Use of company facilities;**
- **Training and apprenticeship programs;**
- **Fringe benefits;**
- **Pay, retirement plans, and disability leave; or**
- **Other terms and conditions of employment.**

Discrimination Statutes – Summary



Discriminatory practices include:

- Harassment on the basis of race, color, religion, sex, national origin, disability, or age;
- Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;



Discrimination Statutes – Summary



Continued:

- **Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and**

Discrimination Statutes – Summary



Continued:




- **Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability.**
- **Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.**

Religious Accommodation







An employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship.

State Statutes




-  **State statutes also provide extensive protection from employment discrimination.**
-  **Some laws extend similar protection as provided by the federal acts to employers who are not covered by those statutes.**
-  **Other statutes provide protection to groups not covered by the federal acts.**

Application & Interview




Advertise The Position

-  **Wrong words will cause legal trouble.**
-  **Anything other than a posting for a position obtain opinion from counsel.**
-  **“Only males need apply.”**
-  **Focus on the essential skills of the job.**




Recruiting

-  **Like advertising, be careful what you say.**
-  **Statements made during recruiting efforts must be conservative and accurate.**
-  **Inaccurate statements and claims about the job position could be determined to be contractual provisions if the employee take the position in reliance on the statements and claims.**






The Job Interview

-  **A skillful interview is an integral tool in the hiring process.**
-  **A poorly conducted interview is a waste of time and a potential liability.**
-  **Hiring decisions should be based upon objective criteria.**
 - **Establish interview guidelines and procedures**

Permissible Scope Of Inquiry

-  **Questions should be focused on whether the applicant meets the job requirements.**
 - **Education**
 - **Expertise**
 - **Training and work experience**
-  **Written job descriptions are helpful.**
-  **Be able to articulate an objective basis for hiring.**

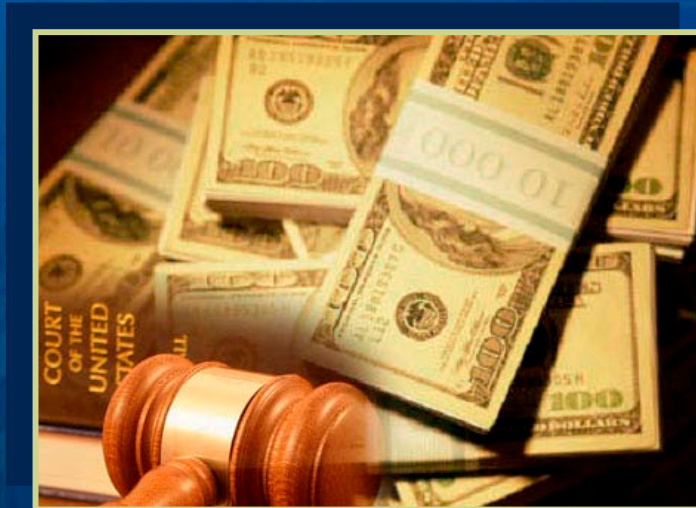
Casual Comments

-  **“So tell me about your home life.”**
-  **“So how many children do you have?”**
-  **“Are you married?”**
-  **“How many children do you intend on having?”**
-  **Right to privacy issues: “So tell me about your sexual fantasies.”**




Casual Comments

 **Discussion regarding pay increases in light of the malpractice and managed care crunch.**





 **Discussion regarding bonuses.**







Impermissible Scope Of Inquiry

-  **Direct or indirect inquiries related to age, race, color, national origin, disability and sexual orientation.**
-  **Inquiries concerning marital status, number and age of children, future childbearing plans and plans for childcare.**
-  **Inquiries concerning applicant's history of alcohol or drug abuse.**






Impermissible Scope Of Inquiry

-  **Applicant's disability, health or medical condition or any question that would elicit this information.**
-  **Applicant's worker's compensation history.**
-  **Applicant's medications.**
-  **Birthplace, relatives, height, weight, religion, citizenship, native language, prior health problems or hospitalization.**




Impermissible Scope Of Inquiry

-  **Membership in organization related to race or religion.**
-  **Information concerning prior arrests.**
-  **Applicant's financial status including home ownership.**
-  **Graduation dates for education (i.e. age).**

Pre-Employment Screening

-  **Obligated to use due care in the hiring process.**
-  **Collect and review CV, licenses, board certification, CME, previous employment.**
-  **Query the national practitioner data bank.**
-  **In depth interviews.**
-  **Reference checks.**

Pre-Employment Screening

-  **Carefully evaluate malpractice and job history.**
-  **Analyze for trends.**
-  **Make sure that the candidate is insurable under your malpractice policy.**



Pre-Employment Screening






Background check:




- **Fraud and Abuse**
- **Criminal**
- **Credit Checks**



Resources: State police website for sex offenses; OIG website for fraud and abuse; DPR for license issues.

-  **Have you ever had a problem getting credentialed by a managed care organization.**
-  **Have you ever been denied medical malpractice insurance.**
-  **How many malpractice lawsuits. Analyze them.**







Corporate Carelessness

-  **Duty to use reasonable care in hiring employees.**
 - **Negligent hiring**
 - **Negligent retention**
-  **Third party can sue you for failing to use reasonable care in hiring employees.**
-  **Example: Conviction for sexual offense.**





A blurred background image showing two people in a meeting. One person is on the left, wearing a light-colored shirt, and the other is on the right, wearing a dark shirt. They appear to be looking at something together. The image is overlaid with a faint grid pattern.

Hiring An Employee







What's In A Contract

-  **What you put in writing.**
-  **What you promise.**
-  **What is in the employee handbook.**
-  **Possibly what is implied.**
-  **Statements like “this will be the last job you ever have.”**
-  **“Your stock will be worth a fortune in no time.”**






What's In A Contract

-  **“Partnership is available to employees.”**
-  **“You can become an owner of this company.”**
-  **“Administrative positions are available.”**
-  **Are female physicians doing more nights and weekends than your male physicians?**








Orientation

-  **Common statement during discovery: “I did not know we had a policy on”**
-  **Performance Evaluation**
-  **Scheduling**
-  **Paid time off policies**
-  **Equal Opportunity Employment**
-  **Policy on progressive discipline or termination without cause (e.g. peer review)**

Orientation






-  **Sexual harassment policy.**
-  **HIPAA.**
-  **Every employee has an orientation.**
-  **Orientation is signed and the employee knows it is in the personnel file.**
-  **Resource: download sample orientation checklist at www.thesullivangroup.com from the EM Toolbox.**

Yearly Performance Evaluation

-  **Clinical skills**
-  **Communication skills**
-  **Professionalism**
-  **Department contribution**
-  **Overall Comments**
-  **Opportunity to express discrimination or harassment.**
-  **Reviewed, signed, and placed in the personnel file**







The Course Of Employment






-  **Regular evaluations.**
-  **Personnel file on each individual.**
-  **Employee should be aware of all documents in the file.**
-  **If termination contemplated, this should be no surprise to anyone.**
-  **There must be adequate documentation to support any action (e.g. probation, termination)**

Termination





Termination

-  **You are considering termination: what is the risk?**
-  **The performance history and documentation of that history are critical.**
-  **What is in the personnel file. Does it support termination?**
-  **Often the performance is poor and the personnel file is filled with glowing performance evaluations.**




Termination

-  **Have you followed company policy?**
-  **Is firing consistent with management of similar problems in the past?**
-  **If this person likely to sue?**
-  **Consider alternatives to firing.**
-  **Should I talk to a lawyer?**




Documentation

-  **Personnel files should contain hiring, promotional, disciplinary, orientation and termination paper work.**
-  **All paper work should be acknowledged by employee before being placed in file.**
-  **Refusal to sign should be witnessed by two managers.**
-  **Keep files for 6 years in the event of breach of contract claim.**





Wrongful Termination – 3 Circumstances

-  **Violation of a statute (e.g. the discrimination statutes). Remedy provided by the statute.**
-  **Breach of contract. Remedy is lost wages, future wages and consequential damages less mitigation.**
-  **Tort action involving bad faith or tortious discharge. Violation of public policy (something most people would find morally or ethically wrong). Remedy is actual and possibly punitive damages.**





At-Will Employment

-  **Employee has no contract or oral, written, implied assurances about employment.**
-  **Employee handbook may establish a contractual relationship.**
-  **Multiple state and federal statutes apply to the at-will employee.**




Steps To Termination

-  **Process not written in stone but should be fair and applied equitably.**
-  **Oral warning, written warning, counseling, probation period, termination.**
-  **If the employe is surprised by the decision, not enough ground work has been done.**
-  **A surprised employee is a litigious employee.**






Employment Agreement

-  **Evaluate carefully for duties, job description and 'for cause' termination.**
-  **Review 'severance' agreements.**
-  **Giving notice in a pre-arranged notice period is very different than terminating with cause.**
-  **Liquidated Damages – The sum a party agrees to pay if he breaks a promise.**




Employee Handbook

-  **Review is imperative.**
-  **It may establish a progressive disciplinary policy.**
-  **The employee handbook is of little value in the absence of an acknowledgment of receipt form the employee.**



Who Is Likely To Sue?

-  **Employee has already threatened to sue.**
-  **Will not be able to find another job quickly.**
-  **Financially strapped.**
-  **Can't support family.**
-  **Psychologically unstable or volatile.**


Legal Analysis

-  **Member of a protected class.**
-  **Protected classifications include race, color, religion, sex, pregnancy, sexual orientation, national origin, ancestry, citizenship, age and physical or mental disability.**
-  **If an employee is pregnant, any termination decision is suspect.**

Protected Activity





-  **The employee may have filed a claim with an administrative agency resulting in a claim of retaliation or whistle blowing.**
-  **Charges may have already been filed with the EEOC alleging discrimination on the basis of a protected classification.**

 **Termination issues are complex.**






 **Once the decision is made,
contact an
expert in
employment
law.**







How To Fire

-  **Termination decision should be communicated in person.**
-  **Two employer representatives should be present to ensure that there is a witness.**
-  **Document the discussion immediately after its conclusion.**
-  **No positive comments regarding job performance.**



How To Fire

-  **Don't debate the decision.**
-  **No detailed discussions of the reason for termination.**
-  **Allow the employee to leave at any time, avoid false imprisonment accusations.**
-  **Make assurances about benefits owed.**
-  **Employee must be paid immediately all wages through the date of termination.**

How To Fire

-  **Have the check prepared prior to the meeting.**
-  **Have any set-offs reviewed by counsel.**
-  **Provide information regarding COBRA health benefits, stock information, etc.**
-  **Severance package consideration in exchange for a Settlement Agreement and Release. The release should be inclusive.**

Termination

-  **Except in the most egregious cases, establish a probationary period instead of proceeding with a termination.**
-  **Provide an opportunity for resignation. This is a far better result. The cost of litigation is far more than a separation agreement.**



Resources

-  **The Employer's Legal Handbook
5th ED NOLO by Fred Steingold.**
-  **Everyday Employment Law, Legal
Basics by
Lisa Guerin.**



Someone Else Is Hiring An Employee

References

-  **What can or what should you say? Especially if the physician is leaving your ED?**
-  **Create a policy. Verify the fact of employment and years of employment. Unless of course you have good things to say.**



The End