Avoiding Legal Pitfalls When Hiring and Performance Management

October 2, 2018
1:15 p.m. to 2:45 p.m.

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The information contained in this document is intended for general information purposes only and does not constitute legal or coverage advice on any specific matter.

The Basics of Public Sector Hiring
- Position Description
- Advertising
- Employment Application
- Screening

- Interviewing
- Reference Checks
- Documentation
Position Descriptions

Avoid Legal Pitfalls in Hiring

Position Description

• Defines expectations of the position for the employee and employer
• Provides baseline objective criteria for performance evaluation
• Defines essential functions and minimum qualifications of the position
• Provides basis for determining categories for VPA 100-point competitive scale

Position Description

• Essential functions
  • The fundamental duties of a position that the individual who holds the position must be able to perform unaided or with reasonable accommodation
  • Reasons a function may be considered essential
    • Job exists to perform the function
    • Limited number of employees who can perform the function
    • Function is highly specialized and the person is hired for his or her expertise or ability to perform the function(s)
Position Description

• Knowledge, skills and abilities
  • Understanding of specific subject areas
  • Competence to perform a learned activity
  • Competence to perform an observable behavior
• Education, experience and credentials
  • Minimum required and preferred

Position Description

• Other sections
  • Federal Labor Standards Act (FLSA) classification
  • Reporting structure/supervisory responsibility
  • Working conditions
  • Physical demands of the job
  • Travel

Pitfalls with Position Descriptions

• No current and accurate position description
• Determining essential functions and standards after advertising the position
  • Could infer intentional discrimination
• Best practice: Create (or revise) the position description prior to advertising the position
Postings, Advertisements and Recruiting Materials
Avoid Legal Pitfalls in Hiring

Pitfall: Relying Solely on Word-of-mouth Recruitment or Referrals

- Could have a disparate impact on a protected class
- Best practice: Advertise or post open positions
  - No legal requirement that the position must be advertised; however, the employer may have a contractual obligation to do so

Protected Class Categories

- Race
- Color
- Creed
- Religion
- National origin
- Sex
- Marital status
- Familial status
- Disability
- Public assistance
- Age
- Sexual orientation
- Local human rights commission activity
- Pregnancy
- Genetic information
Pitfall: References to Protected Class Status in Advertisement

- Could be discriminatory
- Best practice: Advertisement should not include any preference or exclusion based upon protected class status

Avoid

- “Must be U.S. citizen”
- “English must be your first language”
- “Spanish must be your first language”
- “Young” or “Youthful”
- “Supplement your retirement income”
- “Mature adult wanted”

Reason/Alternative

- Could be national origin discrimination
- Successful applicant must show proof he or she can legally work in the U.S.
- Ability to effectively communicate in written/spoken (language)

- Could be age discrimination
- Focus on desired quality rather than the anticipated age of the applicant

Avoid

- “Great opportunity for stay-at-home mom”
- “Able-bodied individual...
- “In good health”

Reason/Alternative

- Could be gender discrimination
- Avoid mention of gender
- Consider using gender-neutral position titles where possible
- Could be disability discrimination
- Focus on the essential job functions
- “Routinely moves equipment weighing up to 50 pounds”
- “Requires frequent movement”
Employment Application

Avoid Legal Pitfalls in Employment Application

Pitfall: Failing to Inform Applicant of Legal Rights and Obtain Release

Best Practice: Use a standardized application
- Collects same information pertinent to the position from all applicants
- Platform for informing the applicant of his or her rights under state and federal laws, including the Minnesota Government Data Practices Act and the Veterans Preference Act (VPA)
- Contains authorization for release of information and a waiver of liability against the employer

Tennessee Notice (MGDPA)

- Must provide whenever asking an individual to provide private data under the MGDPA
- Must include:
  - The purpose and intended use of the data;
  - Whether the individual is legally required to provide the data;
  - Known consequences from either providing or refusing to provide the information; and
  - The identity of other persons and/or entities with statutorily authorized access to the data

(Minn. Stat. § 13.04, subd. 2.)
Pitfall: Requesting Illegal or Problematic Information

- Best Practice: Do not collect the following
  - Any information related to protected class status
  - Social Security number
  - Maiden name
  - Past workers’ compensation claims
  - Litigation or claims against any past or present employers involving a discrimination claim
  - Prior sick leave use
  - Need for reasonable accommodations to perform the job
  - Criminal record or criminal history

Criminal Record or History (Minn. Stat. § 364.021)

- Prohibits employers from inquiring into or considering the criminal record or history of a job applicant until the applicant is selected for an interview by the employer
- Except positions for which employers have a statutory duty to consider criminal history or conduct a criminal background check when hiring, such as law enforcement
- May only disqualify applicants from consideration for a position on the basis of a past conviction unless the crime(s) are directly related to the position for which the applicant is applying

Screening applicants

Avoid Legal Pitfalls When
Pitfall: Failing to Apply the Veterans Preference Act (VPA)

- Minnesota Statutes, Sections 197.447, 197.455 and 197.46
  - Hiring
  - Discipline/Termination
- Who is a Veteran?: Review the DD214 Form
- Note: Merit System may already apply VPA

Apply VPA When Required

- Applicants must be evaluated on 100-point system
- Eligible veterans get extra points added to "passing score"
  - 10 additional points for veteran
  - 15 additional points for disabled veteran
- In some circumstances, spouses may be eligible
- Applied to the screening process for interviews, not at the interview
- May hire any person interviewed

Ranking Applicants

- Create eligibility list
- Determine in advance
  - Number of interviewees?
  - Interview at natural break?
- Must notify in writing all individuals claiming preference of reasons for rejection and file with local personnel officer
Pitfall: Screening Process Is Discriminatory

- Best Practice: Establish criteria used for evaluation before applications are reviewed or applicants are tested
  - Criteria should be objective and based upon actual job qualifications and duties
  - Award criteria in a uniform manner

Interviewing

Avoid Legal Pitfalls When Interviewing

- Standard set of questions should be asked of each applicant
  - Drafted prior to the interview
  - Open-ended, job-related and based upon past behavior or experience
  - Do not ask about protected class status
  - Avoid questions that could infer discriminatory purpose
<table>
<thead>
<tr>
<th>Avoid</th>
<th>Reason/Alternative</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;How many children do you have?&quot;</td>
<td>• Could be pregnancy, gender, familial status discrimination</td>
</tr>
<tr>
<td>&quot;Are you planning on starting a family? Having more children?&quot;</td>
<td>• Focus on availability to work, if this is the concern behind the question</td>
</tr>
<tr>
<td>&quot;What kind of childcare arrangements do you have?&quot;</td>
<td>• Could be marital status discrimination</td>
</tr>
<tr>
<td>&quot;Are you married? Single? Widowed? Divorced?&quot;</td>
<td>• It is best to avoid this type of question</td>
</tr>
<tr>
<td>&quot;Who is your spouse?&quot;</td>
<td>• Could be discriminatory</td>
</tr>
<tr>
<td>&quot;What is your maiden name?&quot;</td>
<td>• Do you belong to any professional groups that are relevant to this position?</td>
</tr>
<tr>
<td>&quot;To which clubs or organizations do you belong?&quot;</td>
<td>• Could be marital status discrimination</td>
</tr>
<tr>
<td>&quot;To which political party do you belong?&quot;</td>
<td>• Avoid this type of question in an interview unless the position requires significant financial responsibility</td>
</tr>
<tr>
<td>&quot;For whom did you vote in the last election?&quot;</td>
<td>• Could be discriminatory</td>
</tr>
<tr>
<td>&quot;Do you belong to a labor union?&quot;</td>
<td>• Avoid this type of question in an interview unless the position requires significant financial responsibility</td>
</tr>
<tr>
<td>&quot;Have you ever been involved in labor union activities?&quot;</td>
<td>• Could be a violation of labor relations law</td>
</tr>
<tr>
<td>&quot;Are you currently in debt?&quot;</td>
<td>• Could be discriminatory</td>
</tr>
<tr>
<td>&quot;Have you ever claimed bankruptcy?&quot;</td>
<td>• Avoid this type of question in an interview unless the position requires significant financial responsibility</td>
</tr>
<tr>
<td>&quot;Have you ever had your wages garnished?&quot;</td>
<td>• Could be discrimination based on First Amendment rights</td>
</tr>
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<td>&quot;Are you available to work Saturdays?&quot;</td>
<td>• Could be religious discrimination</td>
</tr>
<tr>
<td>&quot;Are you available to work Sundays?&quot;</td>
<td>• Avoid this type of question in an interview unless there is a clear business necessity</td>
</tr>
<tr>
<td>&quot;What type of military discharge did you receive?&quot;</td>
<td>• Could get protected status information</td>
</tr>
<tr>
<td>&quot;What days or hours would you be unable or unwilling to work?&quot;</td>
<td>• Avoid questions about type of military discharge unless there is a clear business necessity</td>
</tr>
<tr>
<td>&quot;Will you be able to work the required schedule?&quot;</td>
<td>• Could be discriminatory</td>
</tr>
</tbody>
</table>
Interviews

- Take comprehensive notes
  - If protected class status is volunteered, do not document it
- Be careful of "casual conversations" that may bring up information related to protected classes
  - If possible, do not interview alone

Reference Checks

Avoid Legal Pitfalls in

Pitfall: Failing to Do a Reference Check

- Part of due diligence in the hiring process
- May yield additional insight on the top applicants
Pitfall: Reference Check Is Discriminatory or Incomplete

- Ask the same questions to all references
- Draft questions prior to contacting references
- Questions should be job related and consistent with business necessity
- Questions should solicit critical but legal information
- Do not ask about protected class status

Other Background Check Pitfalls

- Unlawful use of criminal background information
- Using social media and the Internet for background checks
- Improper credit history check or pre-employment physical or mental examinations
Pitfall: Failing to Make or Retain Documentation of Hiring Process

- Documentation is crucial in defending against a hiring-related lawsuit
- Best practices
  - Make record of the hiring process
  - Maintain records on applicants for at least 18 months
  - For the individual hired, maintain his or her application materials indefinitely

Performance Management
Making the Most of your Human Resources

Agenda

- Discussing Personnel Issues
- Performance Evaluation
- Dealing With Unsatisfactory Performance
- Veteran’s Preference Act - Discharge
- Police Officers Discipline Procedures Act
- Performance Problems Involving Drugs, Alcohol or Mental Illness
Discussing Personnel Issues

- Care must be taken not to share private personnel data with anyone not authorized to receive the data.
- When seeking input from professional peers, discuss issues in general terms only.
- Omitting the employee’s name may not be enough if the other information provided can be used to identify the employee.

Performance Management Starts with Hiring

- Position description
- Screening applications
- Interviews
- References

Position Description

- Defines expectations of the position for the employee and employer.
- Provides baseline objective criteria for performance evaluation.
- Defines essential functions of the position.
- Defines minimum qualifications for a position.
- Provides basis for determining categories for Veterans Preference 100-point competitive scale.
Interviews

- When done by a quorum of the board, OML applies
- Standard set of questions should be asked of each applicant
- Questions and notes regarding answers should be maintained for at least 18 months

- Make sure questions do not run afoul of anti-discrimination laws
- Avoid questions that could infer discriminatory purpose
- Be careful of “casual conversations” that may bring up information related to protected classes

Protected Class Categories

- Race
- Color
- Creed
- Religion
- National origin
- Sex
- Marital status
- Familial status

- Disability
- Public assistance
- Age
- Sexual orientation
- Local human rights commission activity
- Pregnancy
- Genetic information
Reference Checks

- Part of due diligence in the hiring process
- May yield additional insight on the top applicants
- Be careful of using the Internet or social media to "check out" or evaluate an applicant for employment
- Comply with legal requirements relative to background checks, etc.

Performance Evaluation

Performance Management

- Ongoing process
- Designed to improve the efficiency and effectiveness of the organization
  - Employees significantly affect the organization
- Requires work
  - Planning
  - Managing
  - Evaluating
- Document, document, document!
Plan

- Performance management starts with the position description
- Should already be established per the hiring process

Manage

- The process of working toward the performance expectations established in the planning phase and listed in the position description
- Observing
  - Direct: first-hand knowledge
  - Indirect: learning by reviewing work
- Coaching
  - Provide immediate positive reinforcement
  - Handle problems, deficiencies, trouble spots as they occur

Manage

- Knowledge and skills to monitor
  - Conceptual: ability to see the “big picture,” set priorities
  - Perceptual: understanding mission, goals, structure
  - Interpersonal: ability to work with people
  - Technical: ability to use tools and concepts
  - Personal: ability to take action or responsibility
Performance Evaluation
Benefits

• Opens lines of communication regarding performance and expectations
• Provides employee feedback
• Increases morale
• Assists in managing talent

Performance Evaluation
Benefits (Continued)

• Assists in career development
• Identifies areas of needed training and improvement
• Provides documentation for making fair, objective, legal personnel decisions

Provides Opportunity for Dialogue

• Employees can:
  • Analyze their performance and look for ways to improve
  • Develop their communication skills
  • Find role models
• Employers can:
  • Help employees identify strengths and areas of improvement
  • Provide resources, suggestions, opportunities
Completing the Evaluation

- Do not allow personal biases to affect your judgment; be objective
  - Focus on concrete examples
- Do not use almost meaningless rating scales
- Do not rely on memory
  - Track both positive and negative examples

Completing the Evaluation

- Avoid common rating errors
  - Recency effect
  - Horns effect
  - "Big surprise"
- Do not avoid tough issues

Employee Development Plan

- Appropriate for all employees
- Address employee’s strengths and weaknesses
- Establish employee’s performance factors and goals for the next evaluation cycle
Performance Goals

- Specific: not general
- Measurable: quantifiable
- Attainable: achievable in the context of present realities
- Realistic: capable given existing resources
- Timely: date by which the goal must be accomplished

Conducting the Evaluation

- Establish meeting location, date and time well in advance of the meeting
- Prepare the employee for the meeting
- Consider a self-evaluation
- Consider providing a copy of your evaluation prior to the meeting
- Prepare yourself for the meeting

Conducting the Evaluation

- Avoid phrases such as:
  - You’re wrong
  - What was your problem
  - You did a really great job, but...
  - Negative: compliment
  - I understand
  - Following an excuse for poor performance
Conducting the Evaluation

- Review the job description with the incumbent
  - Identify the most important job functions
- Discuss performance standards
- Discuss performance goals

Conducting the Performance Evaluation

- Listen to what the employee has to say
- Focus on the employee and keep your mind open
- Try not to interrupt
- Utilize nonverbal and verbal signals to show you are listening

Performance Evaluations

- Should be written
- Signed by the employee
- Placed in the employee’s personnel file
Warning Signs of Systemic Performance Evaluation Issues

- Surprise ratings during review
- Inconsistent application of rating system
- Ratings don’t reflect actual employee performance
- Productivity/Morale decreases during evaluation time

DEALING WITH UNSATISFACTORY PERFORMANCE

Performance Management

Options/Strategies

- Informal Coaching
- Formal Coaching
- Performance Evaluations
- Performance Improvement Plan (PIP)
- Directives
- Discharge
Performance Improvement Plan

- Can be initiated at any time
- Should be:
  - Written
  - Signed by the employee
  - Placed in the employee’s personnel file

Performance Improvement Plan

- Performance evaluation notations have been unsuccessful
- Problem is of a nature that it cannot be addressed properly in a performance evaluation
- Problem is serious and needs immediate attention

Elements of a Performance Improvement Plan

- Identify the specific problem(s), including examples
- Explain why the employee’s conduct/ performance is not acceptable
- Identify the specific areas to be improved
- Establish expectations for improvement including timeframe and date to revisit the issue
Elements of a Performance Improvement Plan

- Include directives that are clear and concise
- State the consequences for failing to improve performance
- Provide the employee an opportunity to present ideas for coaching or training
- Offer and identify assistance/resources for employee to improve performance

Elements of a Performance Improvement Plan

- State that you will assume the employee understands the PIP unless he or she seeks clarification
- Warn the employee, failure to follow through on PIP may be subject to discipline, up to and including discharge

Directives

- Directives to employee seek to change a certain behavior
  - You will arrive to work at X
  - You will follow directions given by your supervisor
  - You will not swear at work
- Typically address concrete concerns
- Failure to abide by directives leads to discipline
Notification

• Meet with the employee to discuss the PIP/Directives
• Have the employee sign the Notice
• Send a follow-up memo to the employee memorializing any verbal clarifications
• Place all documents in the employee’s personnel file

Note of Caution

• Do not issue letters or evaluations praising the employee for an improvement in performance immediately following a disciplinary incident or poor evaluation until a reasonable amount of time has passed

Note of Caution

• Referring the employee to an employee assistance program (EAP) should only be done as an option and should not be made mandatory
• Never suggest to the employee that he or she may have a physical, mental or emotional problem that is affecting his or her work
Discipline

• Consider any terms or conditions outlined in the organization’s personnel policy or collective bargaining agreements

• Be wary of inconsistent application of rules

Last Chance Agreement

• Often times agreement between employer and employee (often involving union) that says if employee violates agreement will be terminated

Note of Caution

• Contract language or policies that mandate progressive discipline can adversely affect the employer’s disciplinary plan

• Preserve the option to discharge an employee or skip steps for egregious conduct even when it is the first violation
Note of Caution

• Do not agree to remove the discipline from the file after a specific period
• If removed, the employer will have to start over to develop the record and will have lost the ability to argue there is a continued pattern of misconduct or poor performance by the employee

Areas of Increased Risk

• Discipline/Termination immediately after
  • Protected leave
  • Disclosure of a disability
  • Election/Protected first amendment conduct
  • Whistleblower Conduct
  • Worker’s Comp report of injury
• Discipline/Termination may be warranted, but the file should warrant a legal review

Discharge
Performance Management
Discharge

• Investigate and document the actions that necessitate the discharge

Areas of Risk-Investigation

• “Neutral” investigator
• Tennessen Notice/Garrihy Warning
• Offering “confidentiality”
• Who may have access

Discharge

• Provide the employee with due process
  • Notice of expectations and work rules
  • Notice of performance deficiencies
  • Notice of charges for egregious conduct justifying termination
  • Conduct a Loudermill Hearing
Prior to being discharged, a public employee has the right to an informal pre-termination meeting to respond to the allegations against him or her. The hearing is generally informal.

Some employees may have recourse to have the employer's decision to terminate reconsidered, which may include arbitration proceedings pursuant to a CBA or a hearing required by a personnel policy.

Typically arises when employee says information released by government entity in support of termination raises a "liberty interest." Example: X said Y to the public, which has tarnished my reputation. Employee demands name clearing hearing in front of governing board.
Veteran’s Preference Act

Discharge

Veterans’ Rights

- Right to notice and a hearing prior to removal from a position or employment
- Can only be removed for incompetence or misconduct
- **Recent statutory change now allows for a probationary period for veterans under certain conditions**

What Is a Removal?

- Discharge, demotion or “resign or be terminated”
- Disciplinary suspension will constitute a removal, if:
  - Conditions imposed for return to work make it unlikely that the veteran will be able to return
  - Is in conjunction with a proposal for termination
Notice of Charges

• Employer has an obligation to provide notice of charges
  • Includes statutory grounds and factual basis for removal
  • Informs veteran that he or she has 30 days to request a hearing
    and of other hearing rights
• If no hearing request, veteran waives right to a hearing
  and all other remedies for reinstatement

Compensation

• During this 30-day period, the public employer is obligated
  to compensate the veteran
• If the veteran requests a hearing, compensation continues
  until the arbitrator panel makes its decision

Importance of Notice

• If employer fails to give notice of rights, the 30-day period
  is indefinitely extended
• A veteran successfully asserting a right to a hearing could
  be entitled to back pay from the date of discharge, even
  if removal is upheld
Best Practice

- Include a veterans preference notice with all discharge, layoff or demotion notices, regardless of whether you think that the person is a veteran

Right to a Hearing

- The hearing is held before a neutral decisionmaker
- Public employer has the burden at the hearing to show that it acted reasonably and that there is just cause for the discharge or demotion
- Veterans covered by a CBA must choose between grievance procedure or Vets Pref hearing

Nondisciplinary Layoff or Demotion

- Not considered removal when done by seniority and current position abolished
- Veteran can challenge if he or she believes the action is being used to avoid VPA rights
- Notice of right to challenge should be given in the layoff notice
Peace Officer Discipline Procedures Act (Minn. Stat. 626.89)

Termination

- Establishes regulations when investigating allegations against a licensed peace officer and a formal statement is required of that officer.

- Notice of formal statement must include:
  - Interview location
  - Written complaint signed by complainant
  - Witness list, upon request
  - Copies of witness statement or investigation report, upon request
  - Length of session
  - Electronic recording
  - Notice of use of admissions
PODPA

- Requires CLEOs to have written procedures re: investigating complaints of misconduct
  - May result in disciplinary action
  - Investigation process
  - Imposition of sanctions
  - Appeal process
  - Notification of complainant
  - Effective date

MINNESOTA FAMILY SUPPORT & RECOVERY COUNCIL

2018 ANNUAL CONFERENCE

PERFORMANCE PROBLEMS INVOLVING DRUGS, ALCOHOL OR MENTAL HEALTH ISSUES

Performance Management

Handling Performance Problems

- Document the performance issues, not the disability
- Never assume to know what is affecting the employee’s job performance
- Treat the employee like any other employee whose work fails to comply with the job description or to meet expectations
- Bring performance issues to the attention of the employee
Handling Performance Problems

• Provide the employee the opportunity to correct his or her performance
• Never suggest to the employee that he or she may have a physical, mental or emotional problem that is affecting his or her work

Conclusion

• Attempt to correct and improve employee performance deficiencies
• Be prepared to deal with employee misconduct or performance that does not improve

Conclusion

• Have an effective performance management system
• Consult with legal counsel or labor/employment specialists
Questions?