

## Volume 11 - Issue 3, 2011 - Cover Story

### Litigation-Free Interviewing & Termination Techniques

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This article provides hints for interviewing prospective employees in a way that complies with anti-discrimination laws and shows sensitivity to the interviewees' backgrounds. It also provides you with guidelines for discharging employees for job-related and nondiscriminatory reasons.

#### Interviewing Prospective Employees

It is crucial that the interviewing technique and process is within the bounds of the law, which means that you should avoid doing anything that could lead your interviewed prospective employee to sue you. To avoid being sued when interviewing prospective employees, take a look at the following hints:

#### No Assumptions, Please

Assuming a particular thing about your prospective employee can lead to a lot of problems, especially if your assumption is based on the fact that your interviewee belongs to a certain class or race. Do not assume that certain classes or races are good at doing something as compared to others, and vice versa. It is preferable to base your assumptions on your observations about the person, and not on your perception about certain classes and races.

#### No Discriminatory Remarks, Please

To some people, statements such as "You look too old to be able to pull off this MRI job" may appear harmless, but can be viewed by some as very discriminatory. Make sure that you ask your questions and direct your observations in a manner that is not offensive and discriminatory in either effect and/or use.

#### Prepare for the Interview, Please

One way to ensure that you avoid being sued when interviewing prospective employees is by preparing for the interview that you are about to do. There are certain interview skills training seminars and workshops that you can join in order to be able to ensure that you comply with anti-discrimination laws. By joining these interview skills training seminars and workshops, you will also learn to become more sensitive to your interviewee's situation and background.

#### Know the Law, Please

Before the actual interview, it is best if you or whoever is doing the interview, brush up on local and national employment laws that could help the entire interviewing process. An applicant is protected by both local and national laws, particularly national anti-discrimination laws. The applicant cannot be asked questions related to age, disability, gender, national origin, race, religion, marital status, sexual orientation, or any characteristic of the applicant that the law prohibits from considering in making a hiring decision. The law also prohibits employers from retaliating against applicants who assert their rights under the law.

#### Discharging Employees

From time to time, terminating employees is a necessity – however, it is never a pleasant task, rather an inevitable consequence of managing a business. It is not for the faint of heart, and as a manager, it does not contribute to your popularity among the rank-and-file. Lawsuits today are more common. Anyone and everyone can file a lawsuit. If it gets to court, the judge usually favours the employee.

The decision to terminate an employee may result from a variety of factors including poor performance, inadequate productivity, excessive absenteeism or lateness, dishonesty, insubordination, substance abuse, or illegal conduct. However, the employer must always be careful to ensure that the decision to terminate an employee is for job-related and nondiscriminatory reasons. The employer must ensure the employee's

termination does not violate any contractual commitments and that the termination complies with applicable laws, company policies and procedures.

Unfortunately, even the most careful employer may terminate employees for all the right reasons and still be sued. There are, however, various precautions an employer can take to minimise the number of suits that will be brought.

Once you decide to terminate, you must pay special attention to the actual termination process. If you are not sure about issues such as the timing of termination, whether voluntary or involuntary, or about what needs to be paid such as vacation pay, or what can or cannot be deducted, you should consult labour/employment counsel.

#### **Documentation is Key**

As employment lawsuits often focus on the reasons for an employee's termination, the employer's records can be important evidence in the defense of a termination decision. Ensure that you have solid documentation when terminating a person's employment. You must show the employee had a pattern of offensive behaviour that you addressed repeatedly with disciplinary actions. The documentation should include the employer's disciplinary policies and performance standards; eyewitness accounts of serious employee misconduct; the supervisor's memos in which performance deficiencies are recorded objectively; performance evaluations; and warning memos to the employee. An employer's records can be vital evidence in the defense of a disciplinary decision. Termination documentation should show that:

- The employer had a standard or policy governing the behaviour in question;

- The employee knew of the standard or policy and of the consequences for violating it (dissemination of a policy to all employees, including new hires, should be assured);
- Performance problems were clearly communicated and the chance for corrective action existed;
- The employer applied the standard and/or policy consistently and uniformly (documentation of performance-related situations should not be ad hoc or selective as to a person or an event. Uniformity is very important to dispel notions of setting someone up or singling them out); and
- The employee violated the policy or failed to meet the standard or take corrective action.

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#### **Reviewing a Proposed Termination**

Because of the potential for the discharged employee to mount a legal challenge, it is generally a good idea for employers to establish review policies for all termination decisions, not so much to restrict the authority of supervisors to make decisions as to ensure that those decisions are legally defensible. It should be the responsibility of the human resources manager to review termination decisions or a higher-level manager or by the employer's counsel.

#### **Communicating the Termination Decision / Termination Meeting**

The termination meeting is going to be stressful and uncomfortable for all involved. To reduce the amount of stress, keep it brief and to the point. Terminating an employee is one of the most difficult and challenging tasks a supervisor faces. Unfortunately, some supervisors feel such emotional conflict about firing a subordinate that they handle the matter badly. This can cause problems for a number of reasons, but most notably because an employee whose termination has been poorly managed is more likely to take legal action against the employer. The termination meeting is critical because it often dictates the employee's course of action. It is wise, therefore, for the employer to invest in a careful, concerned approach, which would include offering the employee counseling services, outplacement assistance, and even an agreement with a release.

Clear communication of a termination decision begins well before the employee is actually terminated (unless the employee is being terminated for improper or illegal conduct such as theft or assault). Firing an employee who has been repeatedly warned to improve his/her performance is generally much easier for both employee and employer than firing an employee who was totally unaware that his or her job might be in jeopardy. Honest performance evaluations and written warnings about inadequate performance are all-important components of communicating the termination decision. Any communication regarding termination should be confidential and made with a third person present.

Once the hard task of firing an employee is over, the work is not done. Take care not to disparage the employee in front of his or her former co-workers. An attitude like that will rarely be perceived as professional and can be a serious deterrent to employee morale, particularly if the employee was well-liked by co-workers. As part of the termination, the hospital/practice may want to consider providing severance pay. Providing severance pay to terminated employees is generally not a statutory issue. There is a considerable amount of litigation by employees claiming entitlement to severance pay based on a company policy or practice. It is recommended that the company review its policies, letters, etc., regarding severance pay prior to termination.

#### **Summary**

Interviewing prospective employees is not necessarily difficult if you make sure that you stay within certain guidelines and rules in order to ensure that you do not violate any law, and thereby end up getting sued by them. Terminating employees is not an easy or pleasant task. The employer has to ensure that the decision to terminate an employee is for job-related and nondiscriminatory reasons and that the termination complies with applicable federal, state, and local laws and, of course, company policies and procedures.

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