

# Managing/Supervising Employees in Today's Legal Environment

Presented by:  
Thomas W. Mackenzie  
LINDNER & MARSACK, S.C.  
411 East Wisconsin Ave.  
Suite 1800  
Milwaukee, WI 53202  
(414) 273-3910

[www.lindner-marsack.com](http://www.lindner-marsack.com)

April 10, 2008

## **A. INTRODUCTION**

Employers large and small are being subjected to an ever-increasing number of claims, complaints and lawsuits challenging their employment decisions. Discharged employees, rejected applicants and individuals with a myriad of other grievances are finding ready access and sympathetic ears in our legal system. The unwary and uninformed employer runs a substantial risk of financial liability, distraction from its business operations and loss of control of its employment decisions. In this presentation, we will explore legal pitfalls that unwary employers fall into.

### **TOP TEN REASONS EMPLOYERS LOSE EMPLOYMENT CASES**

- Reason 10:** *Failed to follow own rules.*
- Reason 9:** *Failed to properly utilize probationary period.*
- Reason 8:** *Inability of all management/supervisory personnel to unite behind employment decisions.*
- Reason 7:** *Improper use of layoff or restructuring processes.*
- Reason 6:** *Failed to document performance problems or disciplinary matters.*
- Reason 5:** *Explicit comments by management/supervisory employees relative to employee's protected class status.*
- Reason 4:** *Terminated an employee before a thorough investigation was completed.*
- Reason 3:** *Failed to be internally consistent in discipline.*
- Reason 2:** *Failed to adequately control hiring process.*
- Reason 1:** *Failed to ask question: Is the action we are going to take fundamentally fair?*

## **B. HIRING PROCESS AND DECISIONS**

### **I. INTRODUCTION.**

While traditionally individuals have been less likely to sue employers for failing to hire them than for discharging them, recently, litigation related to hiring decisions are on the rise. Effective and lawful interviewing techniques are therefore twice as important. They can help an employer make informed hiring decisions and therefore reduce the need to discharge employees, and they can help an employer insulate itself against claims of refusal to hire.

The most common source of litigation relating to hiring decisions is the federal and state non-discrimination laws. Federal law prohibits employment discrimination because of race, color, religion, sex, pregnancy, national origin, age and disability. Some state laws, such as Wisconsin's, go further. In Wisconsin, for example, employers are prohibited from also discriminating because of an individual's ancestry, marital status, arrest record, conviction record, sexual orientation, national guard/reserve membership and the non-work related use or non-use of lawful products.

Another growing area of concern for employers are lawsuits often known as negligent hiring claims. In a negligent hiring cause of action, an individual, not necessarily an employee and often a customer or vendor, sues an employer because it failed to exercise appropriate caution in hiring an employee who ultimately caused harm to that person.

### **II. GENERAL LEGAL CONCEPTS AND PITFALLS OF INTERVIEWING.**

#### **A. Uniformity/Comparability (Disparate Treatment).**

In hiring, as in every other facet of the employment relationship, it is necessary that individuals be treated uniformly. The Equal Employment Opportunity Commission and state enforcement agencies will always look at comparable situations to determine whether disparate treatment has occurred.

1. Events in the hiring process that can be the focus of a disparate treatment analysis:
  - a. Who was allowed to submit an application and how are applications accepted?
  - b. How are applications screened?
  - c. What is the procedure and criteria for selection of candidates for interviews?

- d. What questions are asked of applicants?
  - e. How was the interview conducted?
  - f. Why was the applicant hired or rejected?
2. Illustrations of potential disparate treatment issues:
- a. A black applicant receives a 3 minute interview while a white applicant is interviewed for 20 minutes.
  - b. A female applicant is rejected because she lacks heavy industry experience while the male applicant is selected but also lacks heavy industry experience.
  - c. A disabled applicant is rejected for an entry level job because his disability would prevent him from performing a higher rated job even with a reasonable accommodation.
  - d. A Hmong individual is told that applications are only accepted in person on Company application forms, but exceptions are made for friends of current employees.
  - e. Women applicants are asked if they are looking for a career job, while males are not asked this question.
  - f. Women are asked if child care is a problem while men are not asked this question.
  - g. Minorities are asked about criminal backgrounds while white applicants are not.

**B. Job Relatedness.**

Interviewers must focus on obtaining job related information. Job related information means that the information is an accurate predictor of future success in the position being filled. Asking for non-job related information can be evidence that such information was used in the hiring decision; it can increase the risk of litigation and it can have a chilling effect on protected individuals applying for employment.

- 1. Information sought must be related to the position being filled.

2. Attempt to secure objective rather than subjective information and articulate the selection or non-selection objectively and factually.

**C. Disparate Impact.**

When a facially neutral selection policy has an adverse impact on a minority group, it may be unlawful. Can the question or policy resulting in an adverse impact be justified as "serving, in a significant way, the legitimate employment goals of the employer." *Griggs v. Duke Power Co.*, 413 U.S. 717 (1973).

**III. PRE-EMPLOYMENT INQUIRIES THAT ARE PER SE ILLEGAL.**

**A. Americans With Disabilities Act (ADA)**

1. Pre-offer inquiries such as whether an applicant has a disability, the nature or severity of such disability, or questions concerning past worker's compensation claims are unlawful. However, the job and its essential functions can be described and the applicant asked to demonstrate or describe how he/she would perform the job with or without reasonable accommodation. Employers have the right to determine whether applicants can perform the essential functions of the job, but have an obligation to make reasonable accommodation to allow the individual to do so.
2. Pre-employment medical exams are unlawful. Pre-employment drug tests can be performed, but often are more practically performed post-offer. Medical exams can only be required after making a conditional offer of employment and must be required of all candidates for a particular job.
3. Medical exams of current employees are allowed as long as they are job related and consistent with business necessity. With any medical records, be sure they are kept in a separate medical file. Access to the information may only be for those who **need to know** (i.e. supervisors who need to know about restrictions, first aid or management personnel who need to know in case of emergency).
4. Other Physical or Medical related testing.
  - a. *Alcohol/Drug Testing:* Tests for use of illegal drugs are not considered "medical tests" and therefore may be performed at any point in the application or employment process. Tests

for use of alcohol are medical tests and may not be performed during the application process.

- b. *AIDS Testing:* Wisconsin law prohibits all AIDS test, and no employment decision may be contingent upon it.
- c. *Genetic Testing:* Wisconsin law prohibits except when written or informed consent is given in connection with the investigation of a worker's compensation claim or determining employees susceptibility or level of exposure to potentially toxic chemicals or substances in the workplace.

**B. Inquiries Regarding Arrest Record - Wisconsin Fair Employment Act.**

- 1. Exceptions: pending charges and bondability.
- 2. Inquiries regarding conviction record may be made, but such information can be used only if the circumstances of the offense are substantially related to the particular job in question.

**C. Fair Credit and Reporting Act ("FCRA").**

- 1. The FCRA prohibits employers from requesting information regarding an individual's consumer or credit history with prior permission. The provisions of the act protect applicants and current employees. It is unlawful to base an adverse employment action on information through a consumer or credit history without obtaining prior permission for the inquiry. The act very broadly defines what is considered a "consumer report" for purposes of the act. Before using a consumer report, this statute requires an employer to take the following action:
  - a. Certify to the credit agency that the employer complies with FCRA on the disclosure and use of the report.
  - b. Clearly disclose, in writing, to the applicant/employee that the report may be used to make employment decisions.
  - c. Obtain written permission from the applicant/employee to receive the report.
  - d. Before making any employment decision, provide the applicant/employee a copy of the report and a statement of rights under FRCA.

- e. Before making any employment decision, inform the applicant/employee of the name, address and telephone number of the consumer reporting agency from who the report was received so that the individual can address disputed items on the report.
- f. Before requesting an “investigative consumer report,” (one that involves information on character, general reputation, personal characteristics or mode of living), the employer must notify the applicant/employee that such a report is being sought and give the applicant/employee a written disclosure of the nature and scope of the investigation. This does not apply if the employer is doing the investigation themselves; it only applies when the employer is using a consumer agency (very broadly defined) to do the investigation.

#### **IV. WHAT STEPS CAN BE TAKEN TO INSTITUTE A LAWFUL INTERVIEWING SYSTEM - PREVENTATIVE MAINTENANCE.**

##### **A. Be Prepared. Be Prepared. Be Prepared.**

##### **B. Design of the Interview.**

1. Inquiries must be tailored to the job being filled.
  - a. Analyze each job for the knowledge, skills, experience and physical qualifications required.
  - b. Determine how to measure for these attributes as objectively as possible. What should the interview questions focus on to seek this information.
  - c. Don't ask for, seek, pursue or follow-up on irrelevant information.
2. Structure the system for uniformity at every juncture of the interviewing and selection process.
  - a. Each interviewer should be thoroughly familiar with the successful candidate profile previously developed.
  - b. Prepare a checklist of subjects to be covered in the interview.
3. Eliminate questions that either elicit or relate to protected class status.

- a. Design the questions being asked to demonstrate job relatedness.
  - b. Secure benefit related information such as age, sex, and dependents after an individual has been employed.
  - c. Data sought for Affirmative Action Plans or other EEO statistical reporting should be separate from the decision making process.
- C. Develop a Job Applicant Policy Providing When Applications Will Be Accepted and How Long They Will Be Considered Active. Publish the policy.**
1. Every applicant should complete an application for employment and provide a resume.
  2. Include a statement on the application that any omissions, misrepresentations, or falsifications will result in rejecting of the application, or immediate termination of employment.
- D. Truth In Hiring - Do Not Make Written or Verbal Assurances You Cannot Keep.**
- E. Document Your Interviews and Decision Making Process and Keep That Documentation On All Applicants for At Least One Year. BE OBJECTIVE AND ARTICULATE JOB RELATED REASONS FOR DECISIONS MADE.**
1. Every applicant should thoroughly explain any gaps in employment.
  2. Carefully review all information on the application and resume to confirm the applicant's education and employment history.
  3. Employment should not be offered until the screening process is complete.
- F. Monitor the Results of Your Interviewing System and Get Advice at the First Sign of Trouble.**

## **GOOD INTERVIEWING QUESTIONS**

Following is a list of questions that may be used in an interviewing context:

1. Tell me about your background and experience as it relates to the position of \_\_\_\_\_.
2. Describe for me a "typical day" at your most recent job.
3. What would your most recent supervisor say is your greatest strength? Greatest weakness?
4. Of what accomplishment are you most proud?
5. What career-related organizations have you been involved with?
6. What are your career goals?
7. What situations on the job do you find most difficult to cope with?
8. What qualities do you look for in a boss?
9. Describe a tough situation that you were faced with at one of your workplaces, and how you resolved the issue(s).
10. Where would you like your career to be in five years?

**When in doubt ... stick to job-related questions**

## **INTERVIEW QUESTIONS TO AVOID**

1. Age, date of birth, graduation dates?
2. Any arrests?
3. Any questions regarding marriage, children or child care arrangements, pregnancy or plans to have children or adopt, birth control?
4. Citizenship or citizen of what country?
5. Credit record? Own your own home, car or furniture?
6. Color of eyes or hair?

7. Fidelity bond ever refused? (If position requires bonding, can ask if applicant is currently bondable?)
8. Garnishment record, questions regarding finances, or ever filed bankruptcy?
10. Handicapped or disabled, or are any family members disabled?
11. Any health conditions, days missed due to health conditions?
12. Height? Weight?
13. Will you consent to honesty testing?
14. Maiden name?
15. Marital status or Mr., Miss, Mrs. or Ms.?
16. Prior name? (except as relates to whether a different name was used in previous employment for the purpose of reference checks).
17. Sex, and sexual orientation?
18. Any questions regarding the person's spouse?
19. Reserve or national guard duty, and type of discharge?
20. Smoke cigarettes or drink alcohol?
21. Ever filed a Worker's Compensation claim?
22. Religious denomination, affiliation, or religious holidays observed?
23. Memberships in clubs, societies and lodges?
24. Ever filed a discrimination charge?

## **C. PERFORMANCE EVALUATIONS**

### **I. INTRODUCTION**

From the viewpoint of senior executives, performance appraisal systems are generally regarded as a necessary part of the organization's management system. The system provides employees with an opportunity to receive feedback regarding their performance, usually at least once a year and often on an interim basis during the year. This leads to reduced error and waste, increased productivity, improved quality and service for customers, as well as enhanced employee motivation, commitment, and a sense of ownership.

The system provides an opportunity for performance related discussions that include the following aims: setting work objectives for the employee, aligning individual and organizational goals, identifying training and development needs, and discussing career progression opportunities.

The system standardizes performance appraisals and makes them objective by providing uniform processes and criteria. This further results in a fair, valid, and legally defensible basis for rewarding and recognizing individual performance.

The system affords the corporation legal protection against employee lawsuits for discrimination and wrongful termination.

### **II. DEVELOPING AND PERFORMING EVALUATIONS**

- A. Develop and agree on OBJECTIVE AND MEASURABLE standards for performance.
  - 1. Do not compare employees to other employees in the workplace, but use an objective standard
  
- B. Each performance review should set GOALS and PRIORITIES for the next review.
  - 1. This means that performance evaluations must be done consistently and in a timely manner.
  - 2. If you really want an effective performance evaluation, there is no use in doing a performance evaluation months after the fact.
  - 3. Developing a plan for the employees growth and development within the organization is a positive goal for both the employee and you.

- C. Periodically monitor and review progress toward goals WITH THE EMPLOYEE. AN EMPLOYEE SHOULD NOT BE SURPRISED BY THEIR PERFORMANCE REVIEW!
- D. Performance reviews must NOT be treated as counseling or discipline.
- E. Performance reviews must accurately reflect performance for the ENTIRE review period and should be constructive.
- F. Note specific shortcomings, provide direction and suggestions for correction, include reference to discipline, note achievements and progress and encourage communication. This approach assumes employees will be motivated to better their behavior and gives them the opportunity to do so. Coaching and support for improvement should be offered.
  - 1. Do not say things in the performance evaluation that are not memorialized in the documentation of the evaluation.
  - 2. When noting positives and negatives, use objective language.
- G. Unsatisfactory, Needs Improvement, Meets Requirements, Exceeds requirements.
- H. Do not condone unsatisfactory work performance. Demand improvements and set specific goals and time tables for completion.
- I. Keep documentation, recognize achievement and improvement and point out deficiencies on an ongoing basis.
- J. Do not be discriminatory in evaluating employees.
- K. Describe in detail any work habit that concerns you, how it affects the department and recommendations for improvement as well as the desired performance.
- L. Ask the employee for input, comments and reactions and listen to the explanations.
  - 1. You want the employee to buy into the purpose of the performance evaluation, so you must give them a chance to participate.
  - 2. Be sure you provide the employee a copy of the performance evaluation, with a signature of all parties involved.

- M. Avoid personal attacks and emotional outbursts. Emotional behavior and personal attacks prevent the discussion from being productive and diverts attention from the real issue. Do not let your emotions, or emotional behavior of the employee interfere with your managing.

## **D. DISCIPLINE**

### **I. INTRODUCTION**

Most employers do not enjoy discharging employees. But it is a fact of corporate life. The costs to replace discharged employees are high. If employees are improperly discharged, the costs are dramatically increased by the cost of litigation. Learning to effectively discharge employees starts with learning to properly hire, train, counsel and discipline employees.

### **II. DRAFT APPROPRIATE WORK RULES**

- A. Work rules are a written guide of conduct for employees. Putting them in writing helps assure understanding and notice of job requirements and standards of behavior.
- B. Make sure the rules are reasonable. Rules should be related to the orderly, efficient and safe operation of the business.
- C. State the penalty generally and match the penalty to the violation. Usually the penalty will apply progressive discipline.
- D. Communicate and distribute the rules broadly.

### **III. IMPLEMENT THE WORK RULES**

- A. Rules should be applied fairly and consistently.
- B. Documentation is important. Be factual, not personal, offensive or vindictive. Don't be merely conclusory. Record keeping is an important aspect of discipline. Record everything related to employee problems and discipline. Be as specific and as factual as possible. Do not be vindictive, discriminatory, defamatory or offensive. Keep the records well-organized.

Employee personnel files and information placed in those files is confidential. This means you do not discuss or release the information to anyone other than Company administrators and supervisors with a need to know. If you are not sure if something belongs in a personnel file, seek assistance from your supervisor or human resources in deciding if the material is properly placed in the personnel file. One personnel file should be kept for each employee. Medical documentation should be kept in a separate medical records file. One person should keep track of the personnel files and what goes into those files.

- C. Be proactive in applying the rules. Don't ignore them. If there are exceptions, limit the exceptions and document appropriately. If need be, republish the rules.

#### **IV. INVESTIGATION IS CRITICAL**

- A. Investigate before you impose discipline. Consider suspension pending investigation if appropriate.
- B. Reference the supervisor's investigation guide.

#### **V. UNDERSTANDING JUST CAUSE FOR DISCIPLINE**

- A. The employee has been advised of the problem and the need to take corrective action (counseling);
- B. The employee knows how to do the job (training);
- C. Nothing prevents the employee from doing the job properly (obstacles);
- D. It makes a difference whether the job is done right, done wrong, or done at all (consequences);
- E. The employee knows exactly how well he or she is doing (feedback).
- F. Ask yourself these questions:

- 1. Was the employee forewarned of the possible consequences of the conduct?

This can be oral or written. Some conduct is so serious an employee is assumed to know that the conduct is offensive and heavily punishable. Such conduct includes, theft, insubordination and drinking on the job.

- 2. Was the rule or order reasonably related to the orderly, efficient and safe operation of the business and the performance of a nature the company might properly expect of the employee?

Obey now, grieve later is a commonly applied concept in industrial relations unless to obey the rule or order would seriously and immediately jeopardize the employees personal safety or integrity.

3. Prior to administering the discipline, did the Company make an effort to discover whether the employee did violate or disobey the rule or order?

Suspensions pending investigation are very common practices.

4. Was the investigation conducted fair and objective?
5. Is there substantial evidence that the employee engaged in the prohibited conduct?
6. Has the rule, order and penalties been evenhandedly applied to all employees?

A "no" answer to this question is fatal, unless the Company had notified the employees beforehand of its intention to enforce the rules as written in the future.

7. Was the degree of discipline reasonably related to the seriousness of the offense and the employee's record?

With some offenses, the employee's record may have little or no importance.

## **VI. COUNSELING AND DISCIPLINE**

- A. One of the most difficult responsibilities of the supervisor is the application of discipline. Discipline must be firm, fair and consistent. It must be documented and in accordance with Company policy to withstand the test of grievance and arbitration. While each discipline situation must be reviewed and resolved on its own merits, giving full consideration to the background and circumstances of the particular incident, discipline must be handled uniformly for similar factual situations.
- B. Most incidents should be handled with progressive discipline. The normal procedure for handling discipline situations is first an oral warning, then a written warning, then a step or two of suspension and finally termination. This approach assumes employees will be motivated to better their behavior and gives them the opportunity to do so. Coaching and support for improvement should be emphasized rather than the punishment. At the same time, by progressively more severe treatment, it discourages repeated offenses and protects the right of the Company to sever completely the relationship if the employee proves to be irresponsible.

- C. Do not condone violations of the rules. Some discipline should be imposed in each case even if not the full penalty. If the Company has been lax in enforcing a rule, the rule should be eliminated or changed rather than ignored. If enforcement has been lax and the Company seeks to tighten up enforcement, employees should be given full advance notice of the Company's intent in this regard.
- D. Avoid arbitrary or hasty action when confronted with a discipline situation. If you need time to investigate and fully review especially a discharge situation, suspend the employee pending the investigation. The degree of discipline should be consistent with the stated penalties for the violation, and should match the severity of the offense or record in the case of progressive discipline.
- E. Do not be discriminatory in applying the severity of discipline.
- F. Confront an employee immediately upon uncovering a rules violation. This is true whether or not you are the employee's immediate supervisor. You can always bring the employee's supervisor into the discussion.
- G. Effective counseling is a crucial aspect of discipline. Some guidelines to remember include:
  - 1. Describe in detail the work habit that concerns you.
  - 2. Indicate why it concerns you. Remain factual and state the problem specifically in terms of actual performance and desired performance.
  - 3. Ask the employee for reasons, comments and reactions and listen to the explanations.
  - 4. Explain the full rationale for the policy or rule that was violated.
  - 5. Tell the employee the changes that need to be made and the time frame for making them as well as the specific action you will take if the changes are not made and the conduct not corrected. Offer any suggestions you may have for correcting the conduct -- i.e. observed improper methods, offer training or advice on the proper method.
  - 6. Ask the employee for input. Does the employee know how he or she can make the necessary changes to correct the conduct? Ask if the employee needs assistance and what that assistance may be? Perhaps additional training is necessary.

7. Avoid personal attacks and emotional outbursts. Emotional behavior and personal attacks prevent the discussion from being productive and diverts attention from the real problem. Do not let your emotions, or emotional behavior of the employee interfere with your management performance.

## **VII. DON'T STOP MANAGING**

### **ACTION CHECKLIST (review before taking action)**

When faced with the potential for any dispute, before taking action, know the following:

1. Check all the written rules, policies and language relating to or arguably related to your issue.
2. Ask advice from or the input of others, if necessary.
3. Check previous applications of the rule or language by yourself or others. Does that application coincide with your intended application. If not, what factual differences are evident between the scenarios.