

Avoiding Traps in Hiring and Termination of Employees

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Where We Are Going

- A Brief Overview of Applicable Laws
- Ministerial Exception?
- Hiring Process “Traps”
- Onboarding Best Practices
- Documentation Recommendations
- Termination Process “Traps”

Brief Overview of Potentially Applicable Laws

- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act (“ADEA”)
- Americans with Disabilities Act
- Pregnancy Discrimination Act
- Fair Credit Reporting Act
- Missouri Service Letter Statute
- Kansas Act Against Discrimination
- Kansas Wage Payment Act

A Brief Overview- Title VII

- Prohibits discrimination or retaliation on the basis of race, color, national origin, sex and religion
- BUT...as you know, religious institutions and organizations are allowed to show hiring preference based on religion (*i.e.* they are permitted to “discriminate” based on religion)
- An employer is covered under Title VII if it has 15 or more employees in each working day in 20 or more calendar weeks in the current or preceding calendar year

A Brief Overview- ADEA

- Prohibits discrimination against applicants or employees 40 years or older
- An employer is “covered” under the ADEA if it has 20 or more employees

Brief Overview-ADA

- Prohibits discrimination against employees or applicants with disabilities
- Requires employers to provide “reasonable accommodations” for qualified employees with disabilities
- Applies to employers with 15 or more employees

Brief Overview-Pregnancy Discrimination Act

- Amendment to Title VII, so applies to all employers with 15 or more employees
- Prohibits discrimination on the basis of an employee or applicant's pregnancy, childbirth, etc.

Brief Overview-Fair Credit Reporting Act

- Federal law that requires employers (and other institutions) to follow certain authorization, disclosure and notice procedures when requesting background check report or taking an adverse action against an employee or applicant based on information in that report.

Brief Overview- Missouri Laws

- Missouri Service Letter Statute
- Missouri-pay upon discharge, or within seven days upon request by mail

Brief Overview-Kansas Laws

- Kansas Act Against Discrimination
- Kansas Wage Payment Act

Ministerial Exception/Exemption

- *Hosanna-Tabor Evangelical Lutheran Church v. EEOC, et al.* 132 S.Ct. 694 (Jan. 11, 2012).
 - Confirmed existence of “ministerial exception”
 - In the words of the Supreme Court, “[r]equiring a church to accept or retain an unwanted minister ... intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving [it] of control over ... those who will personify its beliefs.” *Id.* at 706. This doctrine, the Court stated, is necessary to prevent violations of both the Free Exercise Clause and the Establishment Clause. *Id.*

Avoiding Hiring “Traps” Part 1: Clearly Define Available Role

- Ensure the job description for the role or any posting regarding the role does not contain language which suggests a preference related to age or sex/gender
- Does the job description or any posting accurately and adequately encompass the anticipated duties for the position?

Avoiding Hiring Traps Part Two: The Application

- Review your organization's standard application to ensure it does not inadvertently require an applicant to disclose inappropriate demographic information (including age).
- Do not include any additional questionnaires with the application or biographical portions if they might require that type of disclosure from an applicant.

Avoiding Hiring Traps Part Two: The Interview

- Questions NOT to ask:
 - How old are you?
 - When did you graduate from high school, college, etc.?
 - Have you ever been arrested?
 - Do you have children?/how old are your children?/do you plan to have children?
 - Why are you in a wheelchair?
 - Are you a U.S. citizen?
 - What is your native language?

Avoiding Hiring Traps Part Two: The Interview

- Questions NOT to ask (continued):
 - Are you married?
 - What organizations, clubs, do you belong to (CAVEAT-it's probably fine to inquire specifically about any church-related organizations or clubs he or she belongs to)
 - Have you ever taken FMLA leave?

Avoiding Hiring Traps-Part Two: The Interview

- Questions you can ask:
 - Are you at least 18 years old?
 - Can you meet attendance requirements or are you available to work overtime?
 - Are you lawfully eligible to work in the U.S.?
 - Do you have a driver's license?
 - What languages do you speak and write fluently?
 - What days are you available to work?

Avoiding Hiring Traps Part Three: Background Checks!

UNDER FCRA:

- Describe background check information being requested and/or reviewed
- Do not include extraneous information in disclosures

Avoiding Hiring Traps Part Three: Background Checks!

Common Extraneous Information

- “Release of liability” sentence(s)
- *If you don’t complete this form, you will not be able to complete the application.*
- *Have you ever been convicted of a felony?*
- *I authorize courts and other entities to release information about me to Employer.*
- *I agree that if hired I will be an at-will employee*

Avoiding Hiring Traps Part Three: Background Checks!

- Finally, remember, the disclosure and authorization form **MUST** be in a standalone form. They cannot be combined with other text of your application.

Avoiding Hiring Traps Part Three: Background Checks!

- Understanding that any position that will be working with children includes additional state-specific background check requirements, think about the type of background check you should request from your vendor relative to the type of position (e.g. credit checks for positions that will be working with the church's financial information).

Avoiding Hiring Traps Part Three: Background Checks!

- What if the background check reveals issues?
 1. The FCRA requires the distribution of a Pre-Adverse Action Letter, which must be given to the applicant or employee before the individual is suspended, terminated, *etc.*

 2. Reasonable waiting period

Avoiding Hiring Traps Part Three: Background Checks!

- What do you need to provide in a Pre-Adverse Action Letter?
- Need to include “invitation to provide information” language
- Can use bifurcated approach/language in PAAL
 - Contact CRA for accuracy issues
 - Contact employer to provide additional information

Avoiding Hiring Traps Part Three: Background Checks!

- To allow applicant or employee to dispute report (under the FCRA)
- To conduct **Individualized Assessment** (under the EEOC's April 2012 Guidance)
- Must wait “reasonable” time (under the FCRA)
- No definition of “reasonable” time
 - 5 business days = typical

Avoiding Hiring Traps Part Three: Background Checks!

- Name, address, telephone number of Consumer Reporting Agency (“CRA”)
- “May obtain a free copy of the consumer report from the CRA within 60 days of the adverse action”
- CRA disclaims role in or knowledge of decision-making
- “Individual may dispute with the CRA the accuracy or completeness of any information in a consumer report.”

Avoiding Hiring Traps Part Three: Background Checks!

- Why the mention of the EEOC 2012 guidance?

“National data . . . supports a finding that criminal record exclusions have a disparate impact based on race and national origin.”

Exclusions must therefore be **job-related and consistent with business necessity.**

- i.e., criminal conviction must directly relate to job duties and/or environment

Avoiding Hiring Traps Part Three: Background Checks!

The EEOC strongly recommends individualized assessment of 3 factors:

- (1) The nature and gravity of the offense or conduct;
- (2) The time that has passed since the offense or conduct; and
- (3) The nature of the job held or sought

Onboarding Best Practices

- Provide any new employee with all relevant copies of employee handbooks, church guidance, expectations regarding conduct, etc.
- Consider either a formal orientation, or an orientation checklist to be completed and signed at the end of a specific time period (e.g. seven days).

Onboarding Best Practices

- Clarity and transparency are your friends when onboarding new employees. Explain any unwritten cultural norms or expectations for the staff as well (e.g. we typically eat lunch together, we address members of clergy in a particular way)

Documentation Recommendations

- Consistency is key. When you are documenting performance or attendance issues for one employee, are you doing so for longer-tenured or other employees as well?
- Develop a standard practice or a standard set of documents/forms to use to document performance issues so that later review would not imply inconsistency or “papering the file.”

Documentation Recommendations

- Familiarize yourself with federal and state document retention requirements.
 - Some best practices:
 - Personnel: 7 years after termination.
 - Medical/benefits: 6 years after plan year. *
 - I-9 forms: Not more than 3 years after termination.
 - Hiring Records: 2 years after hiring decision.
 - Payroll/time cards or sheets- 3 years

Avoiding Termination “Traps”

- Provide the employee with the truthful reason for their termination. Shifting reasons or explanations should be avoided.
- Reference documented instances of performance, conduct or attendance issues during the termination conversation.

Avoiding Termination “Traps”

- Consider payment of last paycheck and timing relative to termination.
- Vacation pay due at time of termination?