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Legal Aspects of Human Resources in the Canada/U.S. Context: A Comparative Look at Hiring, Termination, and Regulation in the Workplace: A U.S. Perspective

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LEGAL ASPECTS OF HUMAN RESOURCES IN THE CANADA/U.S. CONTEXT: A COMPARATIVE LOOK AT HIRING, TERMINATION, AND REGULATION IN THE WORKPLACE: A U.S. PERSPECTIVE

*Robert B. Cottington**

THE TOPIC FOR THIS AFTERNOON is to discuss the legal framework for hiring and firing decisions and general regulation of the workplace in the United States and in Canada and to compare and contrast those for you.

In the United States, the legal framework for hiring and discharge decisions is primarily made up of a broad array of federal, state, and local statutes; laws and ordinances governing the employment relationship. Many of these laws place limits on what employers can and cannot consider in making hiring and firing decisions.

The most obvious of these are the various anti-discrimination statutes that prohibit discrimination in employment on the basis of race, sex, age, disability, and certain other protected characteristics. But even where these statutes do not specifically mandate certain actions or prohibit certain conduct, the limitations that they impose often dictate the manner in which employers carry out the human resource functions. For example, we have long heard the axiom in the real estate business that the three most important things are location, location, and location. In human resource circles, you often hear that the three most important words are documentation, documentation, and documentation.

In most cases this emphasis on documentation has not resulted from specific statutory requirements that employers document the reasons for their decisions, but rather it is a response that human resource professionals have made to the specific limitations that the employment discrimination laws have imposed on what employers can and cannot consider in making employment-related decisions. Employers have found it necessary to document the reasons for their decisions as a means to protect themselves in the event that a disgruntled employee or applicant later contends that the employer acted unlawfully. The documentation enables the employer to show that the decision was made for legitimate business purposes and not for some unlawful reasons.

The statutes that most frequently come into play with respect to hiring and firing decisions are the anti-discrimination laws. The pri-

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mary laws are Title VII of the Civil Rights Act, which prohibits discrimination in employment on the basis of race, color, religion, sex, pregnancy, and national origin. There is the Age Discrimination Employment Act, which prohibits discrimination in employment on the basis of age for individuals who are forty years of age or older. The Americans with Disabilities Act prohibits discrimination in employment against qualified individuals with disabilities. Also, depending upon the location of the employer's operation, there may be state and local anti-discrimination statutes and laws and local ordinances that will come into play.

In some instances, these local statutes and ordinances will apply to employers who may be too small to come within the scope of the federal statutes. Sometimes the local statutes have protected categories that do not exist under the federal statutes, so local employers need to be aware of these laws. For example, you will see some state statutes and local ordinances that protect or prohibit discrimination on the basis of marital status or sexual orientation which are not contained in the federal statutes. In addition to these employment discrimination statutes, there is also Executive Order 11246, which requires that certain government contractors take affirmative action to ensure that applicants and employees are treated during employment without regard for their race, color, religion, sex, or national origin. Contractors who meet certain thresholds are also required to develop and maintain a written affirmative action plan directed at the employment of minorities and females.

Section 503 of the Rehabilitation Act of 1973 similarly requires government contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities.

The Vietnam Era Veterans Readjustment Assistance Act requires certain federal contractors to take affirmative action to employ and advance in employment qualified special disabled veterans and Vietnam Era veterans.

In addition to the anti-discrimination statutes, there is a host of other legislation that impacts upon hiring and firing decisions. The Fair Credit Reporting Act limits employers in the use of investigative consumer reports in making hiring decisions. The Federal Employee Polygraph Protection Act prohibits most employers from requiring or even suggesting that an applicant or employee submit to a polygraph exam. There is the Worker Adjustment and Retraining Notification Act or commonly known as WARN, which requires covered employers to give affected employees sixty days written notice of an employment loss caused by either a plant closing or a mass layoff.

The National Labor Relations Act grants employees the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively, and to engage in other concerted activity. Employees

are protected from discharge or discrimination based upon their rights to engage in concerted activity under the National Labor Relations Act. The other significance that the National Labor Relations Act has in the context of termination decisions is for that portion of the U.S. work force covered by collective bargaining agreements, most generally require that an employer have just cause for terminating the employee. Thus, employers who have unionized work forces generally have less latitude in making discharge decisions than employers who have a non-unionized work forces. There are also the issues of layoffs and plant closings that can raise bargaining issues with respect to a unionized work force that would not exist with respect to non-unionized employees.

There is also the Immigration Reform and Control Act, which requires employers to verify that a job applicant is authorized to work in the United States.

With that quick overview of the more prominent employment-related statutes, I would like to turn our attention to how these statutes impact the hiring and firing process. Obviously, they prohibit employers from making hiring and firing decisions based upon prohibited criteria. But, in addition, in the hiring context, the most obvious impact is on what employers, recruiters, or people who are involved in the hiring decision can do in carrying out that job. The employment statutes to which I have referred impact what employers can ask when they interview applicants, what screening techniques they can use, what they should or should not say during interviews, and what can appear on application forms, or in other documents used in the hiring process.

To decrease the risk of liability for discrimination as a result of employer-screening techniques, employers should ask job applicants only job-related questions. In other words, an employer should only ask questions that will aid in determining whether an applicant is capable of performing the duties of the position. In fact, I always advise my clients, when they have some doubt in their mind whether or not a specific question they want to ask of an applicant is appropriate, to imagine that they are sitting in a witness box and that they are asked, "Why did you ask that question? How was that question going to help you decide whether or not this particular applicant was going to be able to perform the job?" If they cannot come up with a good explanation, then I tell them they should not ask it.

For example, a recruiter may have an applicant who comes in who has a very interesting last name, or a very interesting accent. There may be a tendency at the beginning of the interview to want to break the ice and ask a question such as, "that is a very interesting last name. What is the origin of that name?" Or, "You have a very interesting accent. Where were you born? Where did you grow up?"

Those questions really do not enable the employer to move the pro-

cess forward in determining whether or not the applicant is capable of performing the job. The interviewer did not really ask the question for an illegitimate purpose, but if they are sitting there in that witness box, and they are asked why they asked the question, and they have an employee or an applicant who did not get the job, the applicant, in their mind, is going to remember that one of the first questions asked was where was I born? What was the origin of my name? Where did I grow up? The disgruntled applicant, obviously, is going to think of it as something different than what the employer originally intended.

With respect to most of the protected classifications, the prohibited inquiries are fairly obvious. For example, it is fairly obvious that it is impermissible to ask an applicant to identify on an application form their race, age, religion, or sex unless it is to meet some affirmative action obligation, and then it should only be done voluntarily, and it should appear on a separate form.

The area that is a little bit less clear, and which seems to be causing employers the most concern and is raising a lot of questions these days is with respect to disability discrimination. Since the passage of the Americans with Disabilities Act, employers have been struggling with the issue of what is lawful on an application form or in an interview. The Equal Employment Opportunity Commission recently issued guidelines in October of 1995 that help with that analysis. Without going into detail on the subject, which is one that really can take up its own conference, the ADA generally breaks the hiring process down into two phases: the pre-offer phase and the post-offer phase.

In the pre-offer phase, employers cannot ask questions that are likely to elicit answers about the existence, nature, or extent of a possible disability. But once a conditional offer of employment has been made, then the employer can require the applicant to undergo a medical examination and the employer can make disability-related inquiries.

However, once the conditional offer of employment has been made, the employer cannot withdraw the offer based upon some information that has developed through a medical exam or disability-related inquiry unless the applicant cannot perform the essential functions of the job without showing that reasonable accommodations enabling the applicant to perform the job could not be made without causing the employer undue hardship.

Congress, in passing the ADA, and the EEOC in enforcing it, basically looked at the employment or hiring process as a two-part process because they have the theory that employers, if left to their own devices, would mask a discriminatory decision based upon disability as some other reason not to hire. And for that reason, they are requiring employers to ask in the pre-offer stage only questions that refer to qualifications and experience. Once they have made that assessment and made an offer, they can get into the questions relating to the disability

and whether that disability would impact the applicant's ability to perform the job.

The statutes also impact the hiring process with respect to employment testing and screening techniques. They do not prohibit employers from engaging in employment testing. In fact, many employers do so, and they find those to be useful techniques. The concern there, though, is to make sure that any tests that are used have been validated to show that they do not have a disparate impact upon one of the protected categories. The EEOC has issued guidelines on that that are worth consulting.

Turning to the termination side of things, and how these laws impact upon that process, again, the anti-discrimination statutes provide the general framework for what employers can lawfully consider. We have all seen reports on the news and in newspaper stories about large jury verdicts in employment discrimination cases. Recent developments with the discrimination laws, including the prospect for compensatory and punitive damages and jury trials, have made it imperative for employers to carefully review and, if needed, revise their personnel policies, practices, and procedures for consistency and fairness.

At a minimum, what employers need to do is to establish clear and objective personnel policies. By having written personnel policies that are clear and objective, the employer not only increases the actual fairness of its employment-related decisions, but it also enhances the perception among employees that the employer is acting fairly.

The other essential thing for employers to do is to train frontline managers and supervisors because they are the ones who actually are bringing these policies to life. They are the ones who need to know the policies and to know how to apply them and to make sure that they are trained in the discrimination laws and know what they are supposed to do.

The third thing that is important, and it is one that I have mentioned before, is the idea of documentation. Documentation can be an employer's most effective tool in discouraging and successfully defending against discrimination claims. Good documentation, especially when it is addressed to or otherwise showed to an employee, will often also dissuade a disgruntled employee from bringing an action against an employer.

Apart from the discrimination laws, there are also certain common-law or judicially developed principles that have great importance with respect to discharge decisions. The most prominent of these is the employment-at-will doctrine. Most states still adhere to this doctrine, which generally means that the employment relationship is presumed to be terminable at will by either the employer or the employee with or without notice, and with or without cause. This means that an employer can terminate an employee for any reason or no reason at all,

provided it does not violate one of the anti-discrimination laws or one of the other statutes that I previously mentioned.

The vitality of the employment-at-will doctrine varies greatly from state to state. In Pennsylvania, where I practice, the employment-at-will doctrine is still very strong and there are only a few exceptions. In other states the doctrine has been eroded to a greater degree by statutory and judicially created exceptions.

Two general exceptions that virtually all states apply to the employment-at-will presumption are the public policy exception and the express or implied contract exception.

Under the public policy exception, a discharge would be unlawful if it violates a clearly mandated and well-recognized public policy. By way of a few examples of public policies that have been recognized in discharge decisions, the courts have recognized that it would be unlawful to discharge an employee who misses work due to performing jury duty service or discharging an employee in retaliation for filing a Workers' Compensation claim or discharging an employee for refusing an employer's instruction to do something that violates state or federal law.

The other means of avoiding the at-will presumption, as I mentioned, is the express or implied contract exception. You can easily avoid the at-will doctrine by specifying in a contract of employment that there is a specific term or duration to the employment relationship or that the employment relationship would only be broken for just cause. Thus, for example, employees who are covered by collective bargaining agreements are not at-will employees. Rather, those contracts generally contain just cause provisions.

Courts also have implied contracts of employment for a reasonable duration based upon representations by employers that the employment relationship would last for a specific duration. The duration can be based upon representations in handbooks or policy statements which specify the reasons for which the employment relationship could be broken, or which declare that the relationship could only be broken for just cause.

To ensure that the employer gets the fullest benefit from the at-will presumption, it is always important that the employer inform employees on application forms, in offer letters, in personnel policies, and in other documents provided to employees that the relationship is an at-will employment relationship.

One final area that I wanted to touch upon with respect to the termination process is the potential for defamation claims by disgruntled former employees who have been discharged.

Human resource professionals and employment lawyers have been seeing these types of suits with increasing frequency over the past few years. They generally arise in two contexts. One context concerns state-

ments made to prospective employers. For example, a former employee may sometimes claim that he or she has been defamed by a bad reference given by a former employer to a prospective employer. To avoid these types of claims, some employers have taken the position that when they get a call for a reference check from another employer, all they will give out is a confirmation that the individual was employed by them for a specific number of years, the dates that the individual worked, and the positions that the employee held. They will not volunteer any other information. Obviously, that cuts down upon the usefulness of reference checks, and the new employer who is trying to get the information does not like that, but most employers are, in fact, following that policy.

The other device to protect against defamation suits in that context is for the employer to give out information in response to a reference check only if the employee has authorized the employer to do so. The employer may require a statement from the employee releasing the employer from any liability that might be associated with releasing information.

The other context in which we often see defamation suits relating to the termination of employment is where statements have been made to co-workers concerning the reasons for an employee's dismissal. Sometimes employers are tempted to flesh out their policies by making an example of somebody. For example, an employee is caught using drugs at the work site or is caught with drugs in a locker, and the employer wants to emphasize its no drug policy, so the employer dismisses that person and announces, "Joe Smith was caught with marijuana in his locker. Let that be an example to all of you." Well, Joe Smith may have a different story. He may claim that it was somebody else's drugs that were in the locker, or that something more was stated about him than was the truth. He may file a defamation suit relating to those statements. The obvious answer is that employers should never flesh out a policy by making an example of an employee who has been dismissed. It can only lead to trouble.

In a quick and whirlwind fashion, that is a brief overview of the legal framework for hiring and firing decisions in the United States and some of the ways in which employers can respond to that framework.

APPENDIX

VARIOUS STATUTES AND REGULATIONS AFFECTING HIRING AND DISCHARGE DECISIONS BY PENNSYLVANIA EMPLOYERS

A. *Employment Discrimination*

A vast number of state and federal laws prohibit various forms of employment discrimination. The following is a list of the most prominent of these laws:

1. *Federal Laws*

a. *Title VII of the Civil Rights Act of 1964*, as amended (Title VII), 42 U.S.C. § 2000(e) *et seq.* Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, pregnancy and national origin and applies to applicants as well as employees. Title VII prohibits discrimination concerning all aspects of the employment relationship, including but not limited to recruitment, hiring, compensation, promotion, discipline and discharge. It applies to employers with 15 or more employees.

b. *Civil Rights Act of 1866*, 42 U.S.C. §§ 1981. Section 1981 provides that "all persons . . . shall have the same right to make and enforce contracts . . . as . . . white citizens." The Civil Rights Act of 1991 defines "make and enforce contracts" in Section 1981 to include the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

c. *Title I of the Americans With Disabilities Act* (ADA), 42 U.S.C. § 12101. Title I of the ADA prohibits employment discrimination against qualified applicants or employees who have a physical or mental impairment that substantially limits one or more of the individual's major life activities; has a record of such an impairment; or is regarded as having such an impairment. Under the ADA, employers must make reasonable accommodations that will permit an otherwise qualified individual with a disability to perform the essential functions of the job.

d. *Age Discrimination In Employment Act of 1967*, as amended (ADEA), 29 U.S.C. § 621 *et seq.* The ADEA protects individuals aged 40 and over from discrimination in employment based upon their age. The ADEA's protection extends to hiring, discharge, promotions, compensation, benefits and all other conditions or privileges of employment.

e. *Executive Order 11246.* This Executive Order applies to all nonexempt federal contractors and subcontractors. It requires, among other things, "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." Contractors who meet certain thresholds (based on number of employees and dollar amount of contracts) are also required to develop and maintain a written affirmative action plan (AAP) directed at the employment of minorities and females.

f. *Section 503 of the Rehabilitation Act of 1973*, 29 U.S.C. § 701 *et seq.* Section 503 requires government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with handicaps. Certain contractors must also develop and maintain a written AAP directed at the employment of handicapped persons.

g. *Section 504 of the Rehabilitation Act of 1973*, 29 U.S.C. § 794 *et seq.* Section 504 applies to employers who are recipients of federal financial assistance (*e.g.*, federal grants). It prohibits the recipient from discriminating on the basis of handicap and also requires the recipient to make reasonable accommodations.

h. *Vietnam Era Veterans Readjustment Assistance Act of 1974*, 38 U.S.C. § 2012. This act requires certain federal contractors and subcontractors to take "affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam Era." It also requires the contractors and subcontractors to develop and maintain an AAP directed at the employment of disabled veterans and veterans of the Vietnam Era.

i. *42 U.S.C. § 1983.* Section 1983 prohibits state actors from depriving a person of his/her rights, privileges and immunities secured by the Constitution or laws of the United States. Claims under Section 1983 in the public employment context often involve alleged violations of the equal protection and due process clauses of the Constitution.

2. *State and Local Laws*

a. *The Pennsylvania Human Relations Act* (PHRA), 43 P.S. § 951, *et seq.* prohibits discrimination on the basis of race, color, religious creed, ancestry, age (40 or older), sex, national origin, disability, the use of a guide or support animal because of blindness, deafness or physical handicap, and possession of a general education development (GED) certificate rather than a high school diploma. The PHRA covers employers with four or more employees. The protections of the PHRA also apply to certain independent contractors.

b. *Philadelphia Fair Employment Practices Ordinance*, Philadelphia Code § 9-1103. This ordinance prohibits discrimination because of race, color, sex, religion, national origin, ancestry, age, sexual orientation or handicap. It applies to all employers of at least one person (except parents and spouses) in Philadelphia.

c. *Harrisburg Human Relations Ordinance*, Harrisburg Code § 114-1. This ordinance prohibits discrimination on the basis of race, color, religion, ancestry, national origin, place of birth, sex, age, handicap or disability, familial status, GED, sexual orientation/preference or association with or advocacy on behalf of persons in these categories. It applies to Harrisburg employers of four or more persons.

d. *Pittsburgh Human Relations Ordinance*, Pittsburgh Code § 659.02. This ordinance bars discrimination by employers in Pittsburgh on the basis of race, color, religion, ancestry, national origin, place of birth, sex, sexual orientation, age, and non-job related handicap or disability. This ordinance covers employers with at least five employees.

B. *Workplace Privacy*

The following laws relating to workplace privacy impact upon hiring and discharge decisions:

1. *Criminal History Record Information*, 18 Pa. C.S.A. § 9125. Under Pennsylvania law, an applicant's criminal history record can be considered only to the extent that an individual's felony and misdemeanor convictions relate to the applicant's suitability for the specific position in question. If a decision not to hire is based in whole or in part on an applicant's criminal history, the applicant must be so notified. Employment decisions may not be based upon criminal arrests or other criminal charges that do not result in convictions.

2. *Credit Records* The Federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, requires employers using "investigative consumer reports" from "consumer reporting agencies" to disclose to the applicant that they intend to obtain such a report. If a decision not to hire is based on information in that report, the applicant must be so advised.

3. *Polygraph Or Lie Detector Tests*

   a. *The Federal Employee Polygraph Protection Act of 1988*, 29 U.S.C. § 2001, prohibits most private employers in most situations from requiring, requesting, suggesting, or causing an employee or job applicant to take or submit to a lie detector test, and prohibits disciplining, discharging or discriminating against an employee or applicant for refusing any such test.

   b. *18 Pa. C.S.A. § 7321*. This Pennsylvania law requires an employee's consent before polygraph testing may be used. A polygraph test cannot be made a "term" or "condition" of employment or continued employment. The prohibition against polygraph testing does not apply "to employees or other individuals in the field of public law enforcement or who dispense or have access to narcotics or dangerous drugs."

C. *Examples of Other Important Federal Statutory Requirements:*

1. *Worker Adjustment and Retraining Notification Act* (WARN), 29 U.S.C. § 2101, requires that covered employers (generally those with at least 100 employees) give affected employees, the state dislocated worker unit, and the local government 60 days' written notice of an "employment loss" caused by either a "plant closing" or a "mass layoff," as those terms are defined in the statute. If an employer fails to give such notice, it may be liable for lost wages, benefits, and civil fines.

2. *The Occupational Safety and Health Act*, 29 U.S.C. § 651, created the Occupational Safety and Health Administration (OSHA) to develop and enforce workplace safety guidelines. Employers have the general duty to furnish each employee with a place of employment free from recognized hazards that are likely to cause death or serious physical harm. OSHA has also promulgated numerous specific standards. OSHA monitors employer compliance through workplace inspections.

3. *The National Labor Relations Act* (NLRA), 29 U.S.C. § 151, grants employees the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. The NLRA protects employees from discharge, discrimination, interference with or retaliation because of the exercise of their rights under the NLRA. The NLRA also proscribes certain other conduct by employers and/or unions which constitute unfair labor practices.

4. *The Family and Medical Leave Act of 1993* (FMLA), 29 U.S.C. § 2601, entitles eligible employees to take family care and/or medical leaves of up to 12 weeks in a 12-month period. While the FMLA does not require an employer to continue an employee's wages or salary during the leave where the employer would not normally do so, it does require employers to continue to maintain coverage under any group health plan at the level and under the same conditions had the employee not been on leave. Also, the FMLA requires that employees be restored to their same or equivalent position upon completion of the leave, and it prohibits discrimination against an employee because he or she has exercised rights under the FMLA.

5. *Immigration Reform and Control Act of 1986*, 8 U.S.C. §§ 1324a-1324b. This statute requires employers to institute procedures to verify that a job applicant is authorized to be employed in the United States. Virtually all employers are obligated to complete Immigration and Naturalization Form I-9 for all new hires. The Act also prohibits "unfair immigration-related employment practices," such as discrimination on the basis of citizenship or national origin.

HIRING NEW EMPLOYEES: WHAT CAN I ASK AND CAN I TEST FOR ANYTHING ANYMORE?

I. THE ANTI-DISCRIMINATION FRAMEWORK

A. *General Prohibitions*

Various federal and state laws prohibit employers from making adverse employment decisions on the basis of certain protected classifications such as sex, race, national origin, religion, age, or disability. As such, these laws regulate various aspects of the hiring process, including what an employer can ask on application forms, on tests, and in interviews. For example, the Pennsylvania Human Relations Act specifically states that it is illegal for any employer to elicit any information or make or keep a record of or use any form of application or application blank containing questions or entries concerning the race, color, religious creed, ancestry, age, sex, national origin or disability of any applicant for employment or membership. 43 P.S. § 952.

To decrease the risk of liability for discrimination as a result of employer screening techniques, employers should ask job applicants only job-related questions (*i.e.*, questions that will aid the employer in determining whether an applicant is capable of performing the vacant job). To determine whether a question is job-related, the employer representative should ask himself or herself why the information requested is pertinent to whether a particular applicant is capable of performing the particular job for which he or she applied. If an employer cannot defend a question as job-related, the question should not be asked.

B. *Differentiating Between Suspect and Lawful Inquiries*

1. *Age Discrimination*

The ADEA and the PHRA protect employees or applicants for employment who are age 40 or older. Thus, unless age can be proven conclusively to be a bona fide occupational qualification for a particular job, employers should not inquire about an employee's age when interviewing.

In addition, employers may not place advertisements for employment that suggest age is a job restriction. The following words or phrases are considered unacceptable because they indicate age preference; (1) age 20-35; (2) young; (3) college student; (4) recent college graduate; (5) boy or girl; (6) young, aggressive, company seeking . . .; (7) age 40-50; (8) age over 65; (9) retired person; (10) supplement your pension. 29 C.F.R. § 1625.4(a).

a. *Suspect Inquiries*[1]

- What is your birth date?
- What is your age/age group?
- What year did you graduate from high school?

b. *Lawful Inquiries*

- If you are hired, can you provide proof that you are of legal age to be employed?
- Are you 18 years of age or older?
- After hiring an applicant, an employer may inquire about the date of birth of the employee or covered dependents for pension and fringe benefit eligibility purposes.

2. *Sex Discrimination*

Title VII of the Civil Rights Act of 1964 and the PHRA prohibit employment decisions based on an individual's sex.

a. *Suspect Inquiries*

- Do you use or believe in using birth control?
- Application blanks that ask the applicant to indicate whether he or she is male or female.
- Do you prefer Mrs.? Miss? or Ms.? (to determine marital status)

[1] The lists of "dos" and "don'ts" set forth in this Appendix are not exhaustive, but are merely illustrative of inquiries that are either unlawful *per se* or evidence of discrimination.

- What is your marital status?
- What is your maiden name?
- What is your husband's name?
- How many children do you have?
- Who cares for your children?
- Will child care be a problem?
- Do you plan to have children?
- Are you pregnant?
- What day care provisions have you made for your children?

b. *Lawful Inquiries*

- Are you willing to relocate?
- Will you be able and willing to travel as needed by the job?
- Marital status *after* applicant is hired.
- An employer may ask about the number and ages of dependents and the age of an employee's spouse *after* the employee is hired (for insurance and tax purposes).

3. *Race Discrimination*

Employers may not refuse to hire an applicant because of his or her race. Thus, inquiries that relate to a person's race or color should be avoided.

Suspect Inquiries

- What is your race?
- What color is your hair, eyes, skin?

4. *Religious Discrimination*

Title VII and the PHRA also prohibit employers from refusing to hire individuals because of their religion.

Suspect Inquiries

- What is the name of your pastor or minister?
- Are you active in any church?
- To what church do you belong?
- What is the name of your church?
- What religious holidays do you observe?
- Do not tell the applicant "this is a (Catholic or Protestant) organization."[2]

[2] Several exceptions exist, however, for certain church-related organizations and specific jobs within those organizations.

- Do not ask for recommendations or references from church officials.

An employer concerned about staffing on weekends should set the required work schedules and then invite applicants to specify any problems that they may have with meeting the schedule. Employers are, however, obligated to make "reasonable accommodations" to an employee's religious observations as long as the accommodations do not cause the employer "undue hardship."

5. *National Origin Discrimination*

Employers may not deny employment to an individual because of the individual's place of origin, his or her ancestors' place of origin, or because the individual has physical, cultural, or linguistic characteristics of a particular national origin group. Employers also may not discriminate on the basis of citizenship status.

a. *Suspect Inquiries*

- What nationality is your name?
- Where were you born?
- What nationality are your parents/spouse?
- What is your mother tongue/native language?
- What is your maiden name?
- Where were you/your parents born?
- What is your lineage/ancestry/national origin/ descent?
- When did you become a citizen?
- Are your parents native born or naturalized?
- Are you a United States citizen?
- Do not ask for proof of citizenship before the applicant is hired.
- Inquiries about the applicant's membership or association with organizations identified with a particular national origin group.

b. *Lawful Inquiries*

- What languages do you read, speak, or write? (Only ask this question if a second language is required to perform the job.)
- Are you a United States citizen, a national of the United States, an alien lawfully admitted for permanent residence or an alien authorized to be hired for the job(s) for which you are applying? (Do not ask which).

6. *Disability Discrimination*

Employers may not deny employment to an otherwise qualified applicant with a disability on the basis of the applicant's disability. Likewise, employers may not discriminate against a qualified individual on the basis of that individual's relationship with someone who is disabled. Employers also are required to provide reasonable accommodations to qualified individuals with disabilities.

General Rules: Pre-Employment Inquiries

a. At the pre-offer stage, you may not ask questions likely to elicit answers about the existence, nature, or extent of a possible disability.

b. At the pre-offer stage, you may ask questions about the applicant's ability to perform a specific job function (marginal or essential), with or without accommodation.

c. At the pre-offer stage, you may require applicants to demonstrate or describe performance of a specific job function if you ask all applicants to do so.

d. At the pre-offer stage, you may ask applicants if they have relevant experience, degrees, certification, or licenses.

e. An employer may describe the hiring process (e.g. interview, timed written test, or job demonstration) and then ask applicants whether they will need a reasonable accommodation for this process.

f. In general, an employer *may not* ask questions about whether an applicant will need a reasonable accommodation to perform the job. *Caveat*: An employer may ask whether an applicant needs a reasonable accommodation to perform the job and what type of accommodation is needed, if and *only if*:

- the employer reasonably believes the applicant will need reasonable accommodation because of an obvious disability;
- the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed; or
- an applicant has voluntarily disclosed to the employer that he or she needs reasonable accommodation to perform the job.

g. At the pre-offer stage, you may not require applicants to submit to medical examinations.

h. At the *post-offer stage*, you may ask disability-related questions and you may subject applicants to medical exams, provided all applicants for the same job face the same medical examination, regardless of disability, and the results are kept confidential.

i. If you reject an applicant after you have extended an offer conditioned on a medical examination, you must be able to prove that you did not reject an applicant who is both (a) disabled and (b) qualified to perform the essential functions of the job with or without reasonable accommodation.

On October 10, 1995, the EEOC issued extensive guidelines setting forth the EEOC's position concerning what employers may and may not ask applicants under Title I of the Americans with Disabilities Act. The following are some examples of permissible and impermissible questions for interviewing applicants.

PERMISSIBLE QUESTIONS

1. This job requires (list essential job functions). Can you perform the essential functions of this job with or without reasonable accommodation?

2. Please describe (or demonstrate) how you would perform the functions of this job?

3. Do you have a cold? How did you break your leg?

4. Can you meet the attendance requirements of this job? How many days were you absent from work last year? How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?

5. Do you illegally use drugs? Have you used illegal drugs within the last six months? Do you drink alcohol?

IMPERMISSIBLE QUESTIONS

1. Do you have a disability which would interfere with your ability to perform the job?

2. Have you ever filed for workers' compensation? Have you ever been injured on the job?

3. Do you have AIDS? Do you have asthma? Have you ever been treated for mental health problems? How did you become disabled? Do you ever expect to walk again?

4. How many days were you out sick last year? Were you sick? Why were you absent so much last year?

5. How much alcohol do you drink each week? Have you ever been treated for alcohol problems? What prescription drugs are you currently taking?

C. *Testing*

1. Title VII expressly permits employers to use employment tests. Tests include paper and pencil and performance measures as a basis for employment decision, as well as formal, scored, quantified, or standardized techniques of assessing job suitability. The principal concern under the discrimination laws, however, is whether the testing or qualifying devices disproportionately screen out members of protected groups.

2. Employers should consult the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 and 41 C.F.R. § 60.3, and should validate all tests to ensure that they do not have a disparate impact on a protected class before utilizing a testing process or device.

3. Also be aware that "race norming" or "sex norming" in testing, i.e., any action taken to adjust test scores, use different cutoff scores, or otherwise adjust results on the basis of protected class membership, is now prohibited.

4. The ADA presents some unique issues with respect to testing:

   a. First, it may be necessary to modify, adjust, or make other reasonable accommodations in the manner in which tests are administered to applicants with disabilities. These accommodations could include, for example, reading tests aloud or furnishing Braille tests to sight-impaired applicants.

   b. Second, under the ADA, medical examinations may be conducted only after an offer of employment has been made. Thus, an issue may arise whether a particular test constitutes a medical examination or inquiry. The EEOC's October 10, 1995 guidelines on disability-related inquiries and medical examinations state that physical agility and physical fitness tests generally do not constitute medical exams and therefore may be required at the pre-offer stage. Psychological tests or honesty tests will be reviewed on a case-by-case basis and, in some instances will be considered to constitute medical exams prohibited at the pre-offer stage. With respect to psychological tests, the EEOC guidelines state:

      "Psychological examinations are medical if they provide evidence that would lead to identifying a mental disorder or impairment (for example, those listed in the American Psychiatric Association's most recent *Diagnostic and Statistical Manual of Mental Disorders* (DSM)).

"Example: An employer gives applicants the RUOK Test (hypothetical), an examination which reflects whether applicants have characteristics that lead to identifying whether the individual has excessive anxiety, depression, and certain compulsive disorders (DSM — listed conditions). This test is medical."

"On the other hand, if a test is designed and used to measure only things such as honesty, tastes, and habits, it is not *medical.*"

'Example: An employer gives the IFIB Personality Test (hypothetical), an examination designed and used to reflect only whether an applicant is likely to lie. This test, as used by the employer, is not a medical examination."

5. It also is necessary when utilizing psychological tests to be cognizant of privacy law concerns.[3]

II. CONTACTING APPLICANT'S PREVIOUS EMPLOYER

A. A prior employer's recommendation is probably the best means of discovering more about an individual's ability to perform. However, employee privacy concerns pose some potential problems.

1. First, suppose you contact an applicant's current employer and that employer becomes incensed upon learning that the individual is interviewing for a new job and fires the person. The applicant might sue you for invasion of privacy, breach of an implied contract of confidentiality, and intentional infliction of emotional distress.

[3] *See Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991) (California Appeals Court found pre-employment psychological test that included questions relating to religious beliefs and sexual preferences violated the state's constitution and labor laws).

2. Second, suppose the former employer informs you of instances of misconduct which could prompt you to reject the individual for employment. Should you refuse to hire the applicant based on this bad reference, the previous employer may be liable for the tort of intentional interference with employment contract. If those instances of misconduct did not actually take place (or if they involved conduct outside the workplace), the former employer could very well be subject to defamation liability (*i.e.*, libel, if written, slander, if spoken). If you pass along the incorrect reference to other people, you could also be subject to defamation liability.

3. Another privacy issue to be aware of is false light privacy. Employees have a right to be left alone (as opposed to defamation which concerns the employee's reputation). "False light" exists when management publicly attributes to the employee characteristics, conduct, or beliefs that are false, so that the employee is placed in "false light."

4. Due to these privacy concerns and potential pitfalls, an employer should always obtain an applicant's written authorization for the employer or its agents to make whatever inquiries it deems necessary of any person, institution or organization to verify the information given on the employment application and to determine the applicant's qualifications and skills. The authorization should also explicitly release any person contacted from any liability for providing information. If the applicant refuses to provide such authorization, it would be permissible to ask why. However, if the applicant continues to refuse, the employer should not contact the applicant's prior employers.

III. PRIOR ARRESTS/CONVICTIONS

In Pennsylvania, an applicant's criminal history record can be considered only to the extent that an individual's felony and misdemeanor convictions relate to the applicant's suitability for the specific position in question.

A. If a decision not to hire is based in whole or in part on the applicant's criminal history, the applicant must be so notified.

B. Employers in Pennsylvania may not base employment decisions on criminal arrests or other criminal charges that do not result in convictions.

IV. CREDIT RECORDS

A. *The Federal Fair Credit Reporting Act*, 15 U.S.C. § 1681b (1976), as well as laws in several states (although not Pennsylvania) require that employers using "investigative reports" from "consumer reporting agencies" disclose to the applicant or employee that they intend to obtain such a report.

B. Also, applicants who are denied employment either wholly or in part because of consumer credit report information must be so notified by the employer and provided with the name and address of the reporting agency.

V. MANDATORY DRUG TESTING OF APPLICANTS

Testing of *job applicants* for substance abuse poses fewer problems than testing *employees* since drug testing of applicants has been challenged in the courts, generally without success. The prevailing view is that applicants choose to take a test to obtain a job. Under the ADA, drug testing is not considered to be a medical examination and therefore does not violate the ADA's prohibition on pre-employment medical examinations or inquiries.

HIRING HINTS:

A. *General Advice*

1. Remember that any statements made during the hiring process may and will be used against employers in any subsequent litigation. Such a statement may be used as a measuring stick to determine the reasonableness of subsequent employee and employer conduct.

2. Decide, in advance, what you are looking for in a candidate and develop a skills profile that lists the duties and responsibilities of the available position.

3. Every question asked or piece of information gathered should relate to job qualifications and have some direct and demonstrable relevance to the employment decision. If the information is not likely to help in assessing the applicant's qualifications, don't ask for it!

4. Review the recruitment methods used to obtain applicants. Word-of-mouth and its potential for creating "sameness" among employees (called homogeneity) in the work force may open the door to allegations of both intentional or disparate impact discrimination. Consider other methods available for soliciting applicants, such as general circulation advertising, posting, and using head hunters or employment agencies.

B. *Application Forms*

1. Screen and update application forms to ensure that they contain no direct or indirect inquiries regarding an applicant's age, race, sex, religion, national origin, marital status, disability, or ancestry.

2. Be careful of inquiries regarding arrest and conviction records. If rejection is based upon a conviction, even in part, you must advise the applicant of this information.

3. Avoid questions regarding the applicant's physical condition or whether the applicant has any "disability" or has ever received workers' compensation.

4. Be careful of questions that may ascertain the prohibited information through indirect inquiry. (For example, asking an applicant to state the years he/she attended high school may raise an inference of age discrimination.)

5. Ask only for information closely tied to, and justified by, a job-related need. Be especially careful in using "canned" purchased forms.

6. Develop a policy for handling unsolicited applications. If no vacancies exist, communicate this information to the applicants.

7. Consider implementing a rule limiting the duration that an application remains active and discard out-of-date applications.

8. Application forms should contain both the applicant's specific signed consent to contacting the listed references and a release from liability for the prospective employer and for those individuals and/or previous employers who are contacted.

9. Application forms should state clearly an employer's position as an equal opportunity employer.

10. Application forms should plainly state that if the applicant is hired the employment will be terminable at will at any time with or without cause.

C. *Testing*

1. Do not apply any test unless it has been previously validated for disparate impact (unless it's clearly work-related like a typing test for a typist.)
2. You MAY use employment tests, which include paper-and-pencil tests, performance measures, as well as all formal, scored, quantified, or standardized techniques of assessing job suitability.

3. You may NOT use "race or sex norming" in testing, which is any action to adjust test scores, use different cutoff scores, or otherwise alter results on the basis of protected class membership.

4. Consult the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. § 1607, 41 C.F.R. §60.3) before utilizing any testing process or device.

5. Consider the following questions:

   a. Does the test measure or predict job performance?
   b. Is every candidate tested?
   c. Does the test measure significant duties and/or responsibilities of the job?
   d. Does the test have an adverse impact on protected classes?
   e. If so, is there a business necessity?
   f. Even if there is a business necessity, is there another way to obtain the information with less or no adverse impact?

6. Establish a follow-up mechanism that measures whether the test accurately assesses job performance (that is, whether successful test takers become successful employees).

7. You may conduct medical examinations *after* an offer of employment is made. In addition, *pre-offer* drug screens are permitted.

D. *Contacting Applicant's Previous Employer*

1. On your employment application, have the individual give a written consent to having his current and former employers contacted.

2. The employment application should also indicate that the employee consents to having his or her former employers provide information pertaining to the employee's performance and work history.

3. Confine questions to areas pertaining to the individual's employment relationship; do not ask questions pertaining to the employee's private life.

4. Once a reference is obtained, make it available *only* to individuals who are participating in the selection process.

E. *Interviews*

1. Know the equal employment opportunity laws and attempt to eliminate inquiries into subjects that run afoul of these laws.

2. Develop objective guidelines and accurate, current written job descriptions for interviewers to follow when evaluating applicants.

3. Make and record only job-related comments. Design interview appraisal forms that encourage this goal.

4. Do not write on or in any way mark up applicant resumes or the application forms themselves—only the interview evaluation forms should be used.

5. Avoid making promises or misrepresentations because today's "sales pitch" becomes tomorrow's promise in a wrongful discharge lawsuit.

6. Confirm detailed job offers in writing as proof in case of dispute.

7. Provide cultural diversity training to help interviewers interview protected class members without engaging in behavior that inadvertently offends certain groups.

8. Inform all unsuccessful applicants of the decision.

9. The Human Resources or Personnel Department should review all hiring decisions before they are final to ensure comparative consistency and fairness.

TERMINATIONS: THE HUMAN RESOURCES DEPARTMENT'S MOST DIFFICULT JOB!

I. DISCRIMINATION LAWS

A. A panoply of laws at the federal, state and local level prohibit discrimination against individuals because of their membership in a protected class. These laws make it unlawful, among other things, to discharge an employee because he or she is a member of a protected class. At both the federal and state levels, the protected categories include race, sex, age, religion, national origin, color, ancestry, and disability. Some state laws and local ordinances expand protection to include prohibitions against discrimination on the basis of additional classifications such as marital status and sexual orientation.

B. Recent developments in employment discrimination law, including the prospect for compensatory and punitive damages and jury trials, have made it absolutely essential that employers carefully review and, if needed, revise their personnel policies, practices, and procedures for consistency and fairness. At a minimum, employers need to:

1. *Establish clear and objective guidelines.* Well-established, written policies will make uniform and consistent treatment of employees easier. Such guidelines will reduce discrimination claims not only by increasing the actual fairness of an employer's employment decision-making processes, but also by increasing the perception of fairness.

2. *Train Frontline Managers and Supervisors.* To benefit from well-established, written policies, employers must apply their policies fairly and consistently to all employees. Therefore, it is crucial that those who bring the policies to life, the frontline managers, are trained in the equal employment opportunity laws.

3. *Documentation.* Documentation can be an employer's most effective tool in both discouraging and successfully defending against discrimination claims. Good documentation—especially documentation addressed to or otherwise shared with the employee—generally dissuades disgruntled employees from suing. In addition, in litigation, such documentation is essential to substantiating the employer's claims.

II. *EMPLOYMENT-AT-WILL AND TERMINATING EMPLOYEES*

A. *The Employment-At-Will Doctrine.* Most states, such as Pennsylvania, are employment-at-will states. This means that, generally, the employment relationship is *presumed* to be terminable by either party at any time with or without notice and with or without cause.[4] In Pennsylvania, for instance, there are two primary categories of exceptions to the at-will rule—*public policy exceptions* and *express and implied contract exceptions.*

1. *Public Policy Exception*

a. A discharged employee can avoid the employment-at-will rule if he or she establishes that the discharge violated a clearly mandated and well-recognized public policy. Pennsylvania courts define a public policy as one which "strikes at the heart of a citizen's social right, duties and responsibilities." *Turner v. Letterkenny Fed. Credit Union*, 351 Pa. Super. 51, 55, 505 A.2d 259, 261 (1985).

b. Pennsylvania courts have set strict and narrow limits on the public policy exception. Indeed, to date, in only a very few cases have the courts recognized public policy claims. These cases involved such matters as discharges for jury service; discharges in retaliation for filing a workers' compensation claim; discharges for refusing to submit to a polygraph; discharge for reporting violations of federal regulations to the Nuclear Regulatory Commission; discharges for filing unemployment compensation claims; and discharges for refusing to violate state or federal law. In contrast, Pennsylvania courts have dismissed cases alleging a wide range of public policy claims, including, for example, protesting or criticizing allegedly unsafe products, whistleblowing (absent a statutory duty or obligation to report alleged improper behavior), exercising free speech rights, self-defense, and even where the employee has been falsely accused of a crime.

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[4] The employment-at-will rule does not apply to illegal employment discrimination under local, state, and federal laws or where the discharge or discipline is in retaliation for exercising rights or engaging in protected activities under various statutes that specifically prohibit such retaliation.

c. Plaintiffs raise a number of other tort theories in an effort to overcome the employment-at-will rule. The Pennsylvania courts reject most of these theories, but nonetheless, they can cost the employer time and money in defending frivolous cases. Moreover, some of these theories continue to be successful in federal court decisions. These theories include termination with specific intent to harm, civil conspiracy to wrongfully terminate, misrepresentation (usually based upon statements made to an employee during the hiring phase), intentional interference with contractual relations, and intentional infliction of emotional distress. In addition, terminated employees may base claims of defamation or invasion of privacy on the manner in which they were terminated, as well as the reasons for terminations.

2. *Express and Implied Contract Exceptions*

a. The surest way for an employee to avoid the employment-at-will presumption is to enter into an *express* contract specifying the term or duration of the employment relationship. In addition, courts may uphold the existence of a binding *implied* contract from such circumstances of the employment relationship as oral or written representations of job security, length of employment, and discipline standards and procedures such as "just cause."

b. Pennsylvania courts have stated, however, that overcoming the employment-at-will presumption "will not be unheedingly inferred." *Veno v. Meredith*, 357 Pa. Super. 85, 99, 515 A.2d 571, 578 (1986), *appeal denied*, 532 Pa. 665, 616 A.2d 986 (1992). In other words, the evidence must be strong that the parties intended to alter the at-will rule. Indeed, the current strength of the at-will rule in Pennsylvania is reflected by Pennsylvania law that generally refuses to recognize an employee handbook as having contractual significance. *See, e.g., Reilly v. Stroehmann Bros. Co.*, 367 Pa. Super. 411, 419-20, 532 A.2d 1212, 1215-16 (1987), *appeal granted*, 520 Pa. 577, 549 A.2d 137 (1988). For a handbook to be a contract, courts currently require that it "must contain unequivocal provisions that the employer intended to be bound by it and, in fact, renounced the principle of at-will employment." *Reilly*, 367 Pa. Super. at 416, 532 A.2d at 1214.

c. Pennsylvania courts may also inquire whether "additional consideration" exists to support a claim that the at-will rule does not apply. Under this theory, courts ask whether the parties intended an employment relationship other than at-will from the presence of special considerations, including relocating, employee hardship, special recruiting efforts by the employer, or the uniqueness or special talents of the employee and the special need for such abilities by the employer. It is generally insufficient for the employee to have resigned from one job to accept another or to suffer detriments "commensurate with those incurred by all manner of salaried professionals." *Veno*, 357 Pa. Super. at 96-97, 515 A.2d at 580. Simply put, the employee must have done more than take the necessary steps to be in a position to accept the new employment.

d. Related to the implied contract exception is a claim based upon "promissory estoppel." In this kind of claim, there must be reliance by the employee, to his or her detriment, upon the employer's promises or conduct. In a 1990 case, *Paul v. Lankenau Hosp.*, 524 Pa. 90, 569 A.2d (1990), the Pennsylvania Supreme Court held that such a claim did not constitute an exception to the at-will rule.

III. LIABILITY FOR DEFAMATION OR INVASION OF PRIVACY

A. Requests for information relating to former employees can raise potential defamation and invasion of privacy concerns. These concerns are heightened when the request relates to an employee who has been discharged. *As a general rule, what do you do when you are on the receiving end of a request for a reference or recommendation*?

Consider the following:

1. Look for employee consent, which would be a complete defense in any defamation action. Restatement (Second) of Torts § 583 (1977). In the prospective employer's employment application, did the employee consent to your giving out information concerning his or her work performance? Is there any indication of employee consent in papers signed by the individual during his or her exit interview from your company? 2. Limit any disclosure by the "need to know" principle — specifically consider *who* needs to know, and *what* does the prospective employer need to know. 3. *What do you do when you only have unfavorable things to say about an employee's work performance*? A couple of suggestions . . .

   a. Make sure that everything you say is true and provable.

   b. Specifically inquire about employee consent to the reference. If the employee has consented to your recommendation, good or bad, then you may have an absolute defense in any defamation action filed by the employee.

c. If the individual has not consented to your giving a recommendation (remember, this is not exactly the same thing as agreeing to the prospective employer's request for a recommendation), you may wish to adopt a strict policy of providing only objective facts (e.g. confirm only the employee's name, position and dates of employment) absent written consent, and explain this to the prospective employer.

d. *Do not* give an individual an artificially favorable recommendation and do not under any circumstances misrepresent or guess at any fact concerning the individual's employment. Here, you may be exposing yourself to fraud or misrepresentation to the prospective employer. You do not have to undertake the duty of providing a reference to a prospective employer. However, once you do, you may be held to an implied obligation to give a reference or recommendation that is truthful.

C. *Defamation and the treatment of employees charged with misconduct.*

1. If individual employees are specifically accused or charged with misconduct, you must be particularly careful about disclosing information associated with the charges. A few thoughts . . .

a. Enforce policies against certain types of specific misconduct — don't ever "flesh out" a policy by making examples of specific employees.

(1) This can be a fatal mistake in terms of possible defamation liability. For example, in one Pennsylvania case, twenty-six truck drivers were found to have a cause of action for libel when a memo distributed by a trucking company, sent to truck terminals in seven states, accused the employees of being "breakdown artists" — that is, truck drivers who intentionally have their vehicle "break down" on the road to trigger an additional hourly wage while their truck is being "repaired" to get back on the road. The memorandum, which the Superior Court held

presented at least a jury question of libel, read: "Listed below are the top thirty (30) men (and I use the term loosely) who have broken down the most since the first of the year. They are the ones who are delaying your inbound or outbound, spending the corporation's money. Do not hesitate to give these individuals my fondest regards upon their arrival at your station."[5]

(2) If an individual engages in, or is accused of engaging in, misconduct such as theft, excess absenteeism and so on, it is better to rely upon the strength of your policies against the misconduct, rather than using disciplined employees as examples.

b. The focus of attention with the problem of sexual harassment has, until now, been on the victim — the complaining employee — and the obligations owed by the employer to discipline the accused employee and redress the victim. But the accused employee may also be a victim, and employers should recognize the possibility of a backlash reaction from the alleged aggressor. It should not be surprising that employees who have been accused of sexual harassment are beginning to bring suit to remedy perceived wrongs. If a supervisor, for instance, is accused of sexual harassment and, out of an overabundance of "caution," the company takes strong outward action against the supervisor (i.e. suspension or discharge) to avoid a sexual harassment lawsuit, the company could very well set itself up for liability under a defamation action by the supervisor instead.

Consider taking the following steps:

(1) Have a clearly stated policy against sexual harassment (again, promulgate policies, do not make examples). In fact, make it a BROAD

[5]*See Raffensberger v. Moran*, 336 Pa. Super. 97, 485 A.2d 447 (1984).

POLICY, including but not limited to harassment on the basis of sex, race, religion, age, national origin, or disability.

(2) Encourage employee reporting of alleged instances of harassment.

(3) After any report, conduct a prompt, full, and confidential investigation.

(4) Only discuss any investigation "as an investigation," and only disclose the investigation to those who absolutely "need to know."

(5) If your investigation is inconclusive, do not jump to conclusions and assume that the supervisor is guilty. Instead, go to the complaining party, tell them of everything that you have done, tell them that you have insufficient evidence to know whom to believe, indicate that you have reminded the supervisor of your policy against harassment, and emphasize that the employee is to return if any questions or further instances of harassment develop.

HINTS REGARDING TERMINATION:

1. *Suggestions for maintaining at-will status:*

   a. Include an at-will disclaimer in your employment application and employee handbook. The disclaimer should state, at a minimum, that the employment relationship is at-will and can be terminated at any time without prior notice and without cause. A handbook should state that it merely provides guidelines and does not constitute a binding contract.

   b. Avoid making statements or representations to employees that are durational in nature or imply any heightened sense of job security. Avoid terms like "permanent" or "just cause."

   c. Avoid "lifetime" or other "puffing" promises such as "You will never have to worry about a layoff here" to recruit potential employees.

   d. Consider using documentation, but be careful when drafting offer letters. Advise an employee of his or her at-will status and detail the terms and conditions of employment to avoid misunderstandings and provide more of a "paper trail."

e. Avoid unwarranted praise to employees or inflated performance evaluations.

f. Avoid the use of "probationary periods" which may imply job security once the probation is completed.

g. Make sure your employees understand what is expected of them, especially regarding rules of conduct and performance standards.

h. Always be *fair* and *consistent* when dealing with personnel issues.

i. Document and copy the employee on problems or instances of misconduct as they occur. In other words, build a "paper trail."

2. *Before implementing discipline or discharge:*

a. Fully investigate and document the facts. Get signed statements, if possible. On the spot discipline or discharge is often risky. Where necessary, suspend the employee pending investigation.

b. Advise the accused employee of the allegations and afford the employee the opportunity to present his or her version of the events.

c. Always check entire personnel file, including prior evaluations, before making a termination decision.

d. Review your company's past practices and ensure that they are consistent with your choices of discipline/termination. How did you treat similarly situated employees?

e. Clear all terminations with human resources, the personnel department, and/or an experienced employment attorney.

f. If your management peers cannot easily understand the basis for a termination, a jury clearly will not.

3. *To avoid or minimize wrongful termination suits.*

Once the decision to discharge has been made, hold a confidential meeting with the employee. But make sure that at least one other appropriate person is present as a witness and:

a. Keep the meeting brief.

b. Get the bad news across at the outset — avoid platitudes.

c. Speak the truth — do not sugarcoat the reasons for the decision. If you gloss over the truth, real reasons advanced at a trial appear "after the fact" and false.

d. Don't argue; don't threaten.

e. Limit information regarding the discipline and discharge on a "need to know basis."

f. In a discharge situation, explain all rights and benefits, including final payroll checks, vacation pay, etc.

g. Never terminate someone with a phone call or by memo because this bothers judges and juries. It must be a face to face presentation.

h. Develop a specific list of instances leading to this decision and gather documentation.

i. Define and document a triggering event. If there isn't one, give the employee thirty days, for instance, to change his performance.

j. Have two articulate people present at the meeting: one a spokesman with authority and the other a note taker who can act as a witness later if needed.

k. Give the employee the opportunity to talk. After hearing what the employee has to say, you can investigate without announcing a decision, or simply inform the employee of termination.

More than anything else, however, the best way to avoid employee problems, and the lawsuits they inevitably generate, is to create and maintain a *positive working environment*. Although it is a well-worn cliche, treat your employees the way you would like to be treated if you were in their place. And always remember the fundamentals: Common Sense, Consistency and Fairness.