

Hiring, Firing, and Other Personnel Issues

**W.Va. Library Association
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Why You Should Pay Attention

- **Your business or agency is likely to get sued**
 - Employment law is still a growth industry
- **You are likely to get sued**
 - Many employment torts carry supervisory liability
- **Jurors are employees, not employers**

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General Principles

- Put policies in writing
 - **FOLLOW THEM**
- DOCUMENT, DOCUMENT, DOCUMENT!
- If in doubt, call your lawyer


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General Principles

- **Written Policies:**
 - Policies can't cover every situation, but they can cover many
 - Not following your policies can be used against you
 - If your policies do not reflect the way you're doing things, change them

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**If it isn't in writing,
it didn't happen**



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Ready, Aim, Hire

- Hiring is more than filling that open job
 - Identify, recruit, retain quality employees
 - Avoid liability to candidates not hired
 - Avoid negligent hiring claims



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What do you really need in an employee?

- Do you have a job description?
 - Recruiting
 - Performance Management
 - Legal Implications
 - Discrimination Defense
 - Overtime Classification
 - At-will Status

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What do you really need in an employee?

- Content of job description
 - What are the title, duties, and responsibilities of the job?
 - What are the objective pre-requisites?
 - "Must have at least a bachelor's degree"
 - "Must be able to regularly lift at least 20 pounds"
 - "Must be proficient in Microsoft Excel"
 - What are the working conditions?
 - "Must regularly work outdoors in varying and sometimes extreme weather conditions."

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What do you really need in an employee?

- Content of job description
 - What are the essential functions of the job?
 - Three reasons a job function may be “essential”:
 - Because the reason the position exists is to perform the function
 - Because the number of employees available to perform that function is limited
 - Because the function is highly specialized so that the employee in the position is hired for his or her expertise or ability to perform the particular function

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What do you really need in an employee?

- Content of job description
 - Disclaimer:
 - “The preceding description is a summary and is not designed to be a complete list of all duties and responsibilities required of the Assistant to the Branch Manager.”
 - “May be required to perform other duties as assigned.”


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What do you really need in an employee?

- Content of job description
 - Common mistakes
 - Outdated or inaccurate information
 - Language that favors a particular gender, race, age, etc.
 - “Men must be able to perform 30 pushups; women must be able to perform 14 pushups.”
 - Tailoring to the incumbent
 - Focus on the next person to hold the job



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Recruiting 

- Job advertisements
 - EEO tagline
 - EOE or "Equal Opportunity Employer"
 - "We are an equal opportunity employer that values diversity at all levels. All individuals, regardless of personal characteristics, are encouraged to apply."
 - Federal contractors: "EOE/Minorities/Females/Veterans/Disabled"

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Recruiting


- Job advertisements
 - Don't use language that suggests a preference for or against a protected class (race, color, age, religion, sex, gender identity, sexual orientation, pregnancy, national origin, disability)
 - "recent college graduate"
 - "young, energetic go-getter"
 - "native English speaker"
 - "excellent first job"



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Recruiting

- Job advertisements
 - BFOQ
 - Very rare; unlikely ever to apply to race or color
 - A manufacturer of men's clothing could advertise for male models
 - Rest room attendants
 - Religious schools
 - Acting roles?
 - Hooters wait staff?
 - Male nurses in the obstetrics unit of a hospital?




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CONSTRUCTION WORKERS NEEDED: Lake Fork area. Please do not apply if you oversleep, have court often, do not have a babysitter every day, have to get rides to work later than our work day begins, experience flat tires every week, have to hold on to a cell phone all day, or will become an expert at your job with no need to learn or take advice after the first day. Must be able to talk and work at the same time. Must also remember to come back to work after lunch. Should not expect to receive gold stars for being on time. If you qualify, leave name and number at 903-243-5279.

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Recruiting


- Application Forms
 - EEO statement
 - At-will employment
 - Not a contract or offer of employment
 - Falsification or omissions can lead to refusal to hire or discharge
 - How long application will be active



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Recruiting

- Application Forms – Just Don't Ask
 - Attachment of a photograph
 - Gender- or race-related questions (tear-off sheet if required to track applicants)
 - Height and weight
 - Marital status/children/child care arrangements
 - Pregnancy/family plans
 - Dates attended or graduated from high school or college
 - Health/medical conditions/disabilities/genetic information
 - Treatment for alcohol/drug conditions
 - Prescription medications
 - Arrests
 - Religious affiliations or beliefs
 - Maiden name
 - Name/employment status of spouse or children
 - Citizenship
 - SSN




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Recruiting

- Application Forms – OK to Ask
 - Level of education achieved, names of schools attended, degrees received
 - Work history
 - Whether age requirement for employment is met
 - Job references
 - Prior convictions
 - Careful: If criminal record exclusions operate to disproportionately exclude people of a particular race or national origin, must show that exclusions are "job related and consistent with business necessity"
 - Consider nature of crime, time elapsed since conviction, nature of the job

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Interview Process




HAVING NARROWED THE FIELD OF CANDIDATES TO THREE, PERSONNEL GOES THROUGH THE FINAL SELECTION PROCESS.

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Interview Process

- The Interview
 - Ask only questions about job duties, skills, etc.
 - Avoid comments that could be linked to gender, disability, age, etc.
 - Steer away from "volunteered" inappropriate information
 - Explore gaps in employment chronology
 - Explore nature of any criminal conviction, guilty, or no contest plea relevant to the job
 - Focus on conduct and events, not personal characteristics or psychological conditions
 - Avoid small talk



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Interview Process

- The Interview – Just Don't Ask (Part II)
 - When did you graduate from high school?
 - Where are you from?
 - You went to Wesleyan? Isn't that a Methodist school?
 - Do you and your husband plan to have any more children?
 - How many sick days did you use each month at your last job?
 - What country are your parents from?
 - How do you feel about union membership?
 - Have you ever used illegal drugs?
 - What clubs are you a member of?
 - Have you ever filed a workers' compensation claim?
 - Do you have any disabilities?

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Before the Offer of Employment

- Do **not** ask disability related questions or require medical examinations
- May ask about candidate's ability to perform specific job functions
- May ask for a description or demonstration of how applicant would perform the job
- May ask if applicant can meet attendance requirements
- May ask about **current** illegal drug use
- Do **not** ask about Workers' Comp history

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Making the Offer

- Conditional Offer of Employment
 - Once a conditional offer is made, you may ask disability related questions and require medical examinations
 - May ask if employee will require a reasonable accommodation to perform the job
 - Documentation concerning disabling condition and functional limitations
 - After work commences, generally cannot require periodic medical examinations
 - Must be job-related and consistent with business necessity

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Making the Offer

- Reference/Background Checks
 - Negligent Hiring/Negligent Retention
 - West Virginia and most other states now recognize causes of action for negligent hiring and negligent retention
 - Negligent hiring is the failure to exercise reasonable care to ensure that a person hired for a position does not pose a threat to others (clients, customers, other employees, supervisors/managers)
 - Negligent retention is the failure to discharge an employee once you knew that he or she posed a threat to others

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Making the Offer

- Reference/Background Checks
 - Negligent Hiring/Negligent Retention
 - These theories impose liability where vicarious liability doesn't apply -- acts outside scope of employment
 - You can be responsible for the wrongful acts of employees that are related to things you should have known when you hired them.

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References

- Reference Checks
 - Get a release, whether giving or receiving
 - Contact all references, both personal and employment-related
 - Document all reference checks



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References

- Reference Checks
 - Keep a file on every applicant, including the job application, reference-check documentation, and any correspondence or other relevant materials
 - Document any refusal to provide information by applicant or former employer

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References

- Reference Checks
 - Establish clear procedures for reference checks and apply them consistently
 - Maintain confidentiality of information
 - Exclude discriminatory/prohibited questions: race, color, national origin, sex, disability, etc.



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References

- Reference Checks
 - Don't ask about prior workers' compensation claims, EEOC/HRC claims, family status, union organizing, garnished wages, etc.
 - Ask questions related to the job requirements, past job experience, performance, and related matters
 - Don't ask questions "off the record." Ignore responses received "off the record."
 - Use the interview to resolve questions presented by reference checks.

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Background

- Background Checks
 - Can you clearly articulate the need for a background check?
 - Information sought must relate to the position being filled (i.e., credit history for bank teller applicant)
 - Some jobs require background checks in West Virginia


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Background

- Background Checks
 - DIY
 - Private investigation firms
 - Fair Credit Reporting Act
 - Administered by Federal Trade Commission
 - Imposes requirements on employers who use "consumer reports" in making personnel decisions
 - Requirements generally involve notice to applicant or employee at certain stages of process

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Cyber Screening



Forget the resume, son. Let's just take a look at what you have posted on your facebook instead.

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Cyber Screening

Google/Facebook searching of applicants

- Why hesitate?
- Details employers aren't supposed to know:
 - Age
 - Race
 - Religion
 - Disability
 - Etc.

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Social Media Checks

- Best practices
 - Establish a protocol for review of social media sites
 - Include "social media" review as part of release/consent for background check
 - Designate who may conduct social media check and what information can be provided to decision makers
 - Consider only information that serves as a legitimate, non-discriminatory predictor of job performance

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Making the Hire


- Job Offers
 - Put the offer in writing
 - Summarize rate of pay, including day, hour, and place of payment
 - Summarize other terms and conditions of employment
 - At-will employment disclaimer in letter



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Making the Hire

- Employment Eligibility Verification
 - Required for every employee
 - Used to verify employment eligibility
 - West Virginia and Federal requirements conflict



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Making the Hire

- Employment Eligibility Verification
 - Must obtain verification of legal employment status before the employee's first day of employment (W. Va. Code § 21-1B-3)
 - Must obtain an I-9 and review supporting documentation within 3 days after start of employment
 - In W. Va., employers must keep copies of documentation used to prove legal status (not required under federal law)
 - I-9 must be retained until 3 years after the date of hire, or one year after employment ends, whichever is later
 - W.Va. law requires retention of copies of verification documents until 2 years after separation of employment

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Avoiding Lawsuits After Hire


- Discrimination
- Retaliation
- Harassment/Hostile Work Environment
- Performance Evaluations
- Discipline

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"Adverse Employment Action"

- Failure to hire
- Failure to promote
- Discipline
- Discharge
- Cut in pay or benefits
- Undesirable job duties
- Denying vacation
- Undesirable transfer


ADVERSE ACTION



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"Disparate Treatment"

- Treating one employee better or worse than another
- Example: promoting a male employee over a female employee due to gender
- Requires intent to discriminate



FAVORITISM


ADVERSE ACTION



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Anti-Discrimination Laws

- Age
- Gender
- Race
- National Origin
- Religion
- Disability
 - Actual
 - History
 - "Regarded as"
- Genetic Information
- Union Affiliation
- Sexual Orientation
- Political Affiliation
- Pregnancy
- Tobacco Use



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Anti-Retaliation Laws


- Safety Complaints
- Complaints of Discrimination/Harassment
- Good Faith Report of Waste, Fraud
- Supporting a Union (or not)
- Speech
- Giving Evidence / Testifying
- Bringing a Lawsuit or Claim
- Workers' Compensation Claims



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Public Policy Claims

- Where no statute on point
- Discharge "in violation of a substantial public policy" as embodied in the:
 - Constitution
 - Statutes
 - Rules or Regulations
 - Court Decisions



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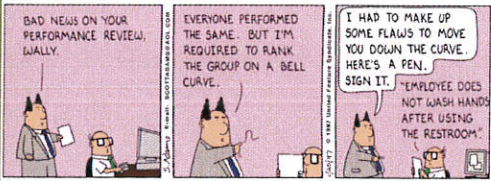
Types of Illegal Harassment

- Sexual Harassment
- Race Harassment
- Disability Harassment
- Age Harassment
- National Origin Harassment
- Religious Harassment
- Any protected class or status



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Performance Evaluations



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Effective Performance Evaluations

- Measures the right things
- Consistent
- Specific
- Frank and open
- Addresses good and bad
- Follows a normal distribution



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Effective Performance Evaluations

False Positive Evaluations:

- Give inflated praise, critique and scores that don't accurately reflect employee's performance
- Do not allow employees to learn what they are doing wrong and to correct it
- Diminish good evaluations of other employees that are performing well
- Create a bad paper trail

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Effective Performance Evaluations

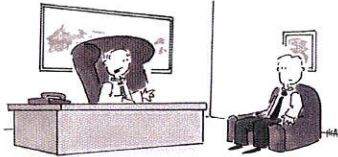
Evaluations

- The evaluation generates a written record that can (and will) be used against the employer
- Avoid the problem by giving fair and honest evaluations of the employee

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Discipline Issues

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"I appreciate your candor, Tim, but you can't keep calling in lazy."

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Goals of Employee Discipline

- Correct inappropriate behavior
- Avoid lawsuit or administrative charge by disciplined employee
- Avoid lawsuit by employee affected by other's bad behavior (hostile work environment)

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General Principles

Complaint/Issue Response

- Timely
- Thoroughly Investigated
- Fairly applied standards
 - Policies followed
 - Consistency in decisions

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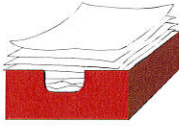
Good Documentation

- Contemporaneous with events recorded
- Focuses on the facts
 - Who, What, Where and When
- Gives context, if necessary
- No generalizations
- Professional in tone/content
- Records directives given

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The Importance of Documentation

- Establishes a record
- Informs employees of expectations and consequences
- Guides future behavior
- Ensures fair treatment



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The Importance of Documentation

Elements of a Good Disciplinary Notice

Use "FOSA" Method

- F**acts
 - Who, What, Where and When
- O**bjectives
 - What is the expectation?
- S**olutions
 - How can the employee improve?
- A**ctions
 - What will happen if the employee doesn't improve?

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Please, No Editorial Comments

- "He'll fall off the wagon again."
- "Let him come back. He'll just crash and burn."
- "I think he was drunk in our meeting today."
- "She acts bi-polar."

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Employee Discipline


- General Discipline
 - In writing
 - Consistent with other discipline
 - Employee given opportunity to be heard
- Progressive Discipline



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Consistency

- Inconsistency is the breeding ground for discrimination cases
- Review previous instances of similar conduct by other employees
- Only vary for a good reason-- and prove it



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Firing

- Consider consulting with attorney first:
 - Ensure firing is legal
 - Help draft discharge letter
 - Reminder of points to avoid future litigation
- Have witness, but not the entire office
- Don't get into debate with employee:
 - Keep it simple
 - Stick to facts, avoid emotion
- Have final pay available, if possible


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General Principles

- Put policies in writing
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- If in doubt, call your lawyer


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Questions?



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Thank you!



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