

TIPS & BEST PRACTICES
FROM THE EXPERTS

My**HR**Help™

Hiring & Firing: How to Successfully Navigate the Beginning and End of Employment

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Before you even reach the hiring process...

Recruiting

Set appropriate and relevant requirements
Watch the wording in ads
Be sure to reach broadly with ad placement



Application and Interview Process

- Be sure to avoid questions/topics that violate federal, state, and local fair employment laws
- Interviews are not for “chatting”
- Certain topics should be left for post-offer inquiries



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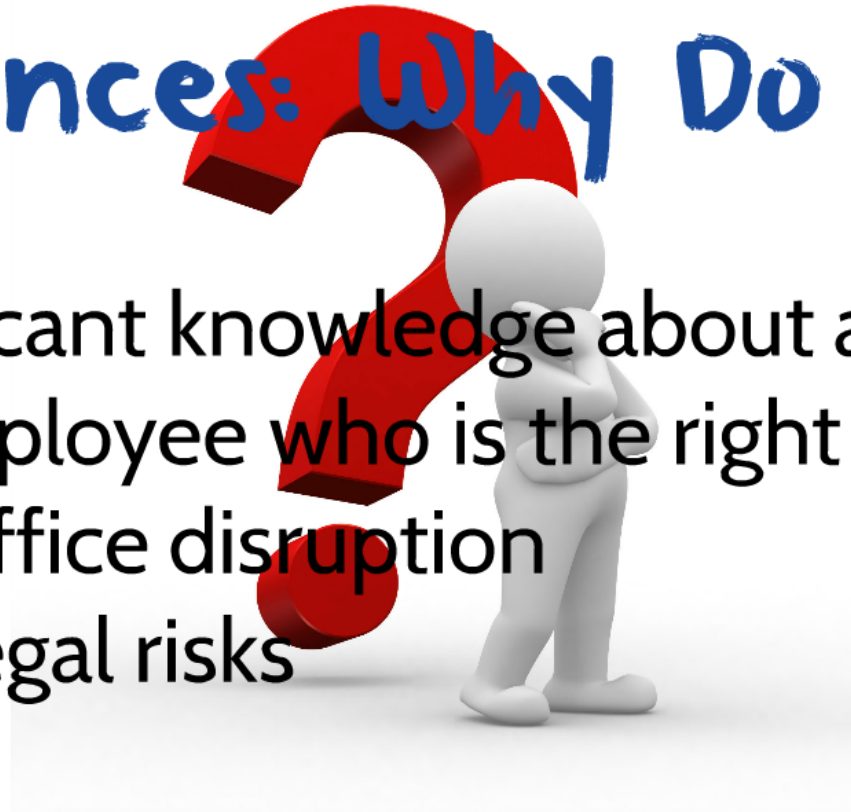
Areas of investigation for applicants

- References
- Criminal and consumer background checks
- Drug testing
- Credit and financial checks
- Social media investigation

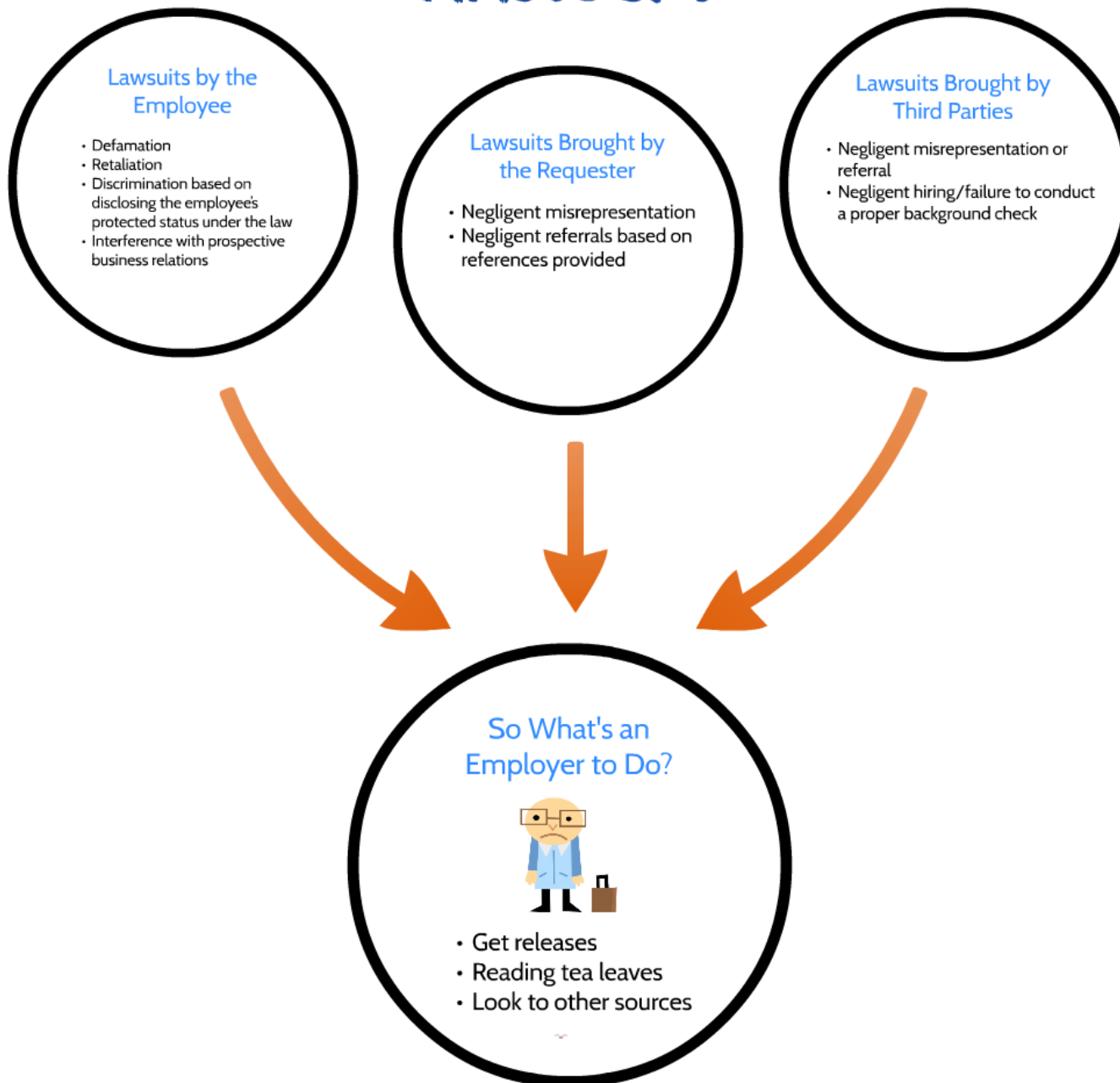


[References: Why Do I care?]

- Gain significant knowledge about an employee
- Find an employee who is the right fit for the job
- Minimize office disruption
- Minimize legal risks



So Why Won't Anyone Answer?



Lawsuits by the Employee

- Defamation
- Retaliation
- Discrimination based on disclosing the employee's protected status under the law
- Interference with prospective business relations

Lawsuits Brought by the Requester

- Negligent misrepresentation
- Negligent referrals based on references provided

Lawsuits Brought by Third Parties

- Negligent misrepresentation or referral
- Negligent hiring/failure to conduct a proper background check

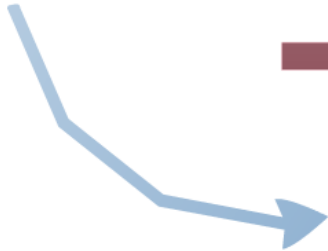
So What's an Employer to Do?



- Get releases
- Reading tea leaves
- Look to other sources

Getting Releases

- Obtain a release form from applicant
- Consider providing releases in other languages
- Be cautious with respect to whether the release is binding in all circumstances



Reading Tea Leaves

- Be careful in listening to or reading the responses
- Ask for factual information
- Follow up written requests with a phone call



Look To Other Sources

- Criminal background checks
- Drug testing
- Credit and financial checks
- Social media checks
- Personal references
- Education records
- Lie detectors

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Criminal Background Checks

Federal Law

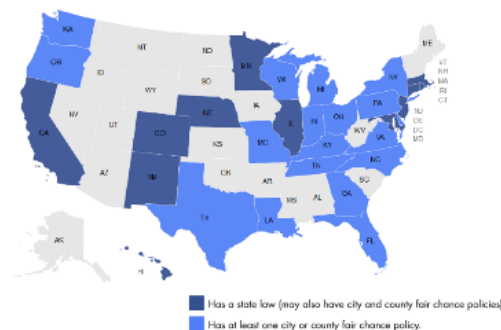
- Federal law does not prohibit employers from asking about criminal history, but **beware!**
- Per the EEOC, applicants may only be excluded based on criminal history if the conduct is job related and the decision is justified by business necessity
- Relevant factors to that determination are:
 - The nature and gravity of the offense
 - The time that has passed
 - The nature of the job sought
- Arrests carry additional considerations:
 - Arrest is not proof that the person engaged in criminal conduct
 - An arrest may trigger inquiry into the underlying conduct, and the employer must conclude the applicant engaged in the conduct for which arrested
- 2012 EEOC enforcement guidelines recommend that employers not ask about criminal convictions on job applications



HOT TOPIC: “Ban The Box” Legislation

- Generally, “Ban the Box” laws are fair hiring initiatives that typically require an employer to:
 - Remove the question on a job application about an individual applicant’s conviction history
 - Delay any background check inquiry until later in the hiring process
- “Ban the Box” laws aim to ensure that companies initially:
 - Assess job candidates on their skills and abilities
 - Are not swayed by past incidents that may have no bearing on ability to perform the job

Thirteen States Have Embraced Statewide Ban the Box Fair Hiring Laws
Total of Thirty States with a Local or State Ban the Box Fair Hiring Policy



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State Law

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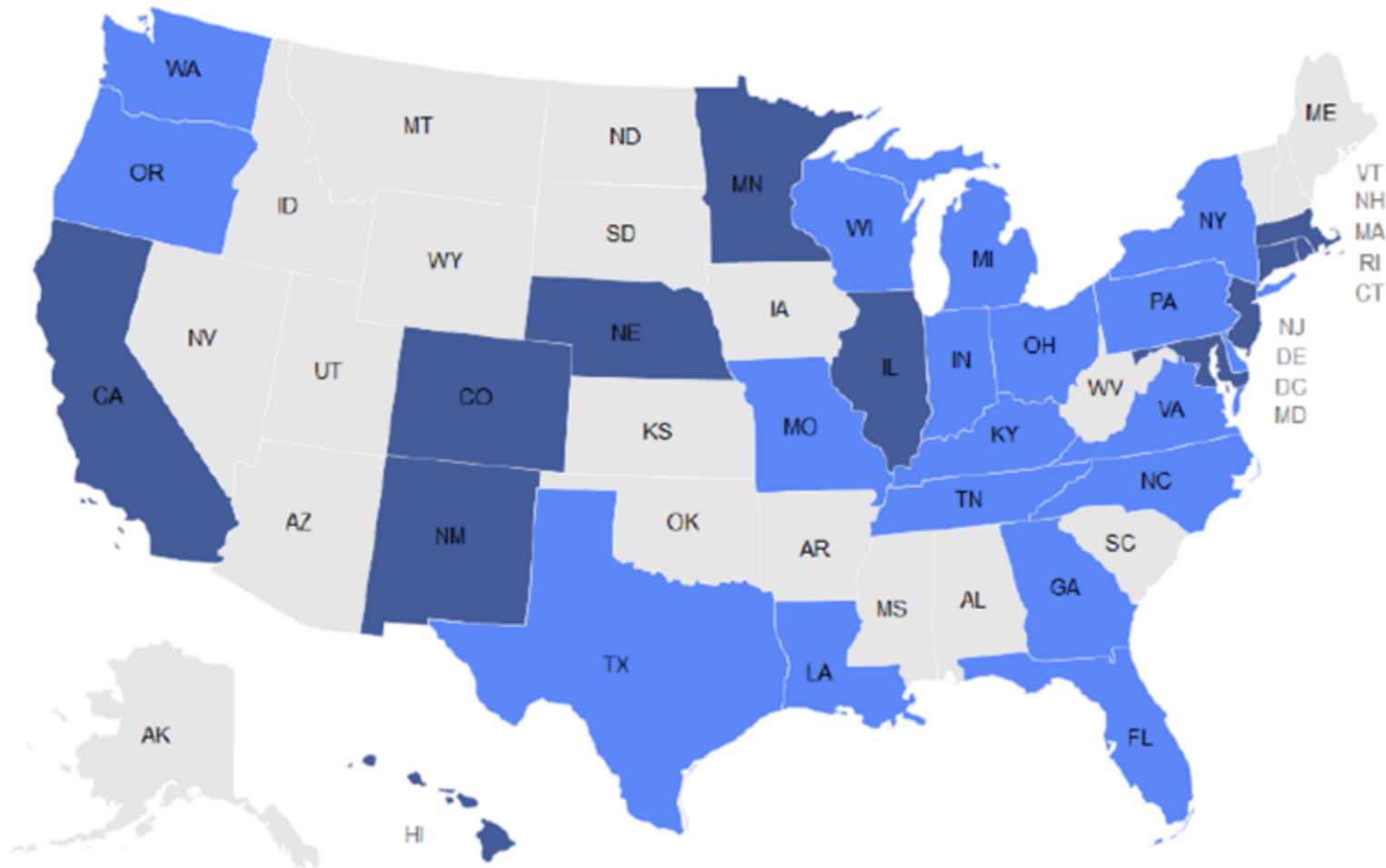
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- Has a state law (may also have city and county fair chance policies).
- Has at least one city or county fair chance policy.

Drug Testing



- Pre-employment drug testing is not considered a “medical test” under the ADA
- Check state and local laws for differences from the ADA
- Drug testing results are still governed by privacy laws relating to medical information
- Testing and protocols must be designed to ensure accuracy of results
- Maintain consistency in drug testing policy with respect to which applicants are tested
- It is preferable to obtain written consent

Caution: alcohol is not a “drug”!

Credit and Financial Checks

- Federal law does not prohibit inquiries into financial status/competency of applicants
- However, the EEOC has opined it could result in disparate impact discrimination against certain Title VII-protected minorities, who are below the poverty level in higher proportions than Caucasians
- The EEOC expects decisions based on credit or financial status to be justified by business necessity
- Federal bankruptcy law prohibits private employers from “discriminat[ing] with respect to employment” against an individual who is or has been a debtor



There are benefits to investigating applicants on social media:

2012 CareerBuilder.com survey:

• 29% found information causing them to extend an offer of employment

- Good feel for candidate's personality
- Candidate conveyed professional image
- Information supported professional qualifications
- Well-rounded/wide range of interests
- Good communication skills
- Candidate creative
- Other people posted great references

• 34% found information causing them not to hire candidate

- Provocative/inappropriate photos or information
- Poor communication skills
- Bad-mouthing a previous employer
- Discriminatory comments
- Lies about the candidate's qualifications

- Offers candid insight into applicant's personality, to see if a good fit for the organization
- Reveals candidate's judgment



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There are also risks to social media investigations:

- Information about membership in protected classes (e.g., religion, disability, affiliations) abounds
- Cannot “un-know” protected information



Know your state's social media privacy laws:



- States with social media privacy laws include Arkansas, California, Colorado, Illinois, Maryland, Michigan, New Jersey, New Mexico, Nevada, Oregon, Utah, and Washington
- Generally prohibit companies from forcing employees and applicants to disclose password and/or other private/protected information
- Typically do not prohibit accessing and viewing publicly-available information



Other tips if you plan on using social media to background check applicants:

- Consider advising applicants of your intentions
- Have a person not involved in the decision-making process screen social media sites for information
- Take all results with a grain of salt
- Consider giving applicants a chance to explain



APPLICATION


- Applies only to background checks done for an employer by an outside entity that “regularly engages” in the business of providing
 - background, financial and personal information
 - to evaluate an employee or applicant
 - for employment, promotion, reassignment or retention
- Can apply to retention of independent contractors, not just employees

APPLICATION

- Applies to two forms of reports:
 - Consumer report – a report containing information on the person’s credit history, character, general reputation, personal characteristics, and/or mode of living, but based on information obtained from public records
 - Investigative consumer report – consumer report information obtained from personal interviews with the person’s acquaintances, as opposed to records
- Since 2013, enforced by the new Consumer Financial Protection Bureau




PROCEDURAL REQUIREMENTS

- Notice requirement before obtaining a consumer report:
 - Disclaimer that consumer report may be obtained
 - Include signed authorization to obtain report
 - Additional notice requirements for investigative consumer report:
 - Disclose that report may include in-depth information
 - Mail or deliver to individual within 3 days of requesting
 - Inform of right to request additional disclosures and to receive written summary of legal rights
- 



PROCEDURAL REQUIREMENTS

- Required disclosures before and after taking an adverse employment decision based on information learned
 - Before taking the adverse action:
 - Copy of the report
 - Written statement of rights under the FCRA
 - After taking the adverse action, an adverse action notice containing:
 - Contact for the reporting agency
 - Statement that the agency did not make adverse decision
 - Right to obtain free copy of report and to dispute it
- 

SUBSTANTIVE LIMITATIONS

- Limits to the content of a consumer report, unless the annual salary of the position is expected to equal \$75,000 or more:
 - Bankruptcy more than more than 10 years old;
 - Paid tax liens more than 7 years old
 - Accounts placed for collection or charged to profit and loss more than 7 years old
 - Other adverse item of information other than convictions.
 - Arrests more than 7 years old that did not result in conviction
 - Civil suits, civil judgments more than 7 years old

***Note, no FCRA limit on reporting convictions**



The Final Step: Extending the Job Offer

- Offer letter – memorialize offer in writing
- Reaffirm at-will status
- Establish conditions and meaning of applicant's acceptance, e.g.:
 - No prior limitations restrict ability to perform
 - Obligation to sign restrictive covenant, if any
 - Obligation to sign arbitration agreement, if any



Firing Employees

Key Considerations

Business decision for employer, but can be very personal to employee

- Loss of income/benefits
- Reputation
- Identity/Self-esteem

Potential Liability

Wrongful Termination	Breach of Contract	Discriminatory/Retaliatory Discharge	Impact Wages
<p>Termination without just cause or without notice (B.C. Employment Standards Act, s. 57)</p> <p>Notice and pay in lieu of notice (Employment Standards Act, s. 57)</p> <p>Wrongful dismissal (Common Law)</p>	<p>Termination without notice (B.C. Employment Standards Act, s. 57)</p> <p>Termination without notice (B.C. Employment Standards Act, s. 57)</p>	<p>Termination without just cause or without notice (B.C. Employment Standards Act, s. 57)</p> <p>Termination without just cause or without notice (B.C. Employment Standards Act, s. 57)</p>	<p>Termination without just cause or without notice (B.C. Employment Standards Act, s. 57)</p> <p>Termination without just cause or without notice (B.C. Employment Standards Act, s. 57)</p>

Decision-making Process

Single decision maker vs. Team process

Objective Review

- Reason for "Termination"
- Termination consistent with employer's practice?
- Is termination supported by appropriate evidence/documentation?
- Is the employee being terminated for something the employer deemed unacceptable in the past? (Change in approach or policy?)
- How clear is the evidence on which termination was based?
- Are there legitimate reasons for termination and/or have reasonable steps been taken?
- Individual to complete Performance, Dismissal
- Necessary for employee's survival, Operational?
- Is employee being treated the same as similarly situated employees?
- Is the termination of that quality and individual who may have a discriminatory or retaliatory nature?
- Termination is any protected activity?

Termination Meeting

- Who?
- Where?
- How presented?
- Security concerns

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Wrongful Termination

State laws vary (Example: Arizona Employment Protection Act, A.R.S. §23-1501 et seq.

May be premised on exercising rights under federal or state laws, such as the Family and Medical Leave Act, Workers' Compensation, etc.

Breach of Contract

Express or Implied

Discriminatory/Retaliatory Discharge

Elements

- 1) Is a member of a protected class;
- 2) Was performing the job adequately and meeting the employer's expectations;
- 3) Was fired; and
- 4) Similarly situated employees outside of the protected class were not fired.

Unpaid Wages

Fair Labor Standards Act, 29 U.S.C. §201 et seq.

- Minimum wage
- Overtime

State wage payment laws

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Objective Review

- Reason for Termination?
- Termination consistent with employer's practice?
- Is termination supported by appropriate evidence/documentation?
- Is the employee being terminated for something the employer deemed acceptable or tolerated in the past? Change in approach or policy?
- Would an unbiased observer think termination was reasonable?
- Are there legitimate, non-discriminatory and/or non-retaliatory reasons for termination?
 - Individual to employee (Performance : Discipline)
 - Necessary for employer (Financial : Operational)
- Is employee being treated the same as similarly situated employees?
- Is the termination influenced by an individual who may have a discriminatory or retaliatory motive?
- Timing in relation to any protected activity

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CONCLUSION



- Be mindful of federal, state and local fair employment laws
- Set appropriate and relevant requirements for recruiting
- Applications and interviews gather preliminary qualifications based on same questions
- References and background checks provide more particularized information about candidates
- Know when it's appropriate to ask for certain information such as disability, criminal background
- Use offer letter to document terms of position