

Hiring and Firing Employees

In the ever-growing, record-setting U.S. economy, employers face many demands in maintaining a productive workforce. With the unemployment rate recently hitting a 30-year low of 3.9 percent, one of the greatest challenges is hiring competent employees and making sure incompetent employees are terminated legally.

This issue of *Insurance Focus* explains what you need to know when hiring and firing employees and explains an insurance option available. Taking proactive measures to defuse

potential liability will not only save in terms of court costs, but will also help to ensure a more productive workforce.

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Have a clear job description.

Before you interview anyone for an available

position, you should have a clear description of the job. What does it entail? What specific skills are necessary? What hours will be expected of the employee? Are nights or weekends part of the schedule? Is overtime expected? It is usually a good idea to let the potential employee read this description before the interview so that he will have a good idea of the requirements of the position.

The interview: Be prepared.

When conducting interviews, it is important to have a standard set of questions so that all applicants are treated the same. Take notes during the interview so you have a record of the process, should any questions arise later.

As the interview progresses, find out as much as you can about the kinds of skills used in previous positions, whether the applicant interacted with the public, and what the applicant considers his most notable achievement, strengths, and weaknesses. Questions about the applicant's job history and education can be useful in revealing abilities. Frequently, employers require testing for specific areas, such as typing, keyboarding, and other general clerical skills.

If an applicant tells you he was fired from a previous position, attempt in a non-threatening way to find out what it was about the position that was undesirable. Look for patterns,



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especially with regard to reasons for leaving previous employment.

If several people will be conducting the interview, try to seat everyone at a round table. Seating a candidate in a chair facing a panel of interviewers is often intimidating and may make the candidate so nervous that the interview will go badly.

Once the interview is over, check notes and make written observations so you have a record of those candidates who favorably (or unfavorably) impressed you. If many people are being interviewed, names and faces can get mixed up.

Know what kinds of questions you can ask.

A guiding principle behind any question is this: Can you demonstrate a job-related necessity for asking the question? Applicants should only be asked questions that are needed to judge qualifications, skills, and overall competence for the job. Generally, problem areas are discriminatory questions based on the applicant's gender, race, age, national origin, religion, or other basis not job-related.

The list of questions you cannot ask seems to be longer than the list of those you can ask. Although it used to be common to ask a woman if she had children, or if she planned to have any, those questions are now completely out of bounds. Asking whether a woman would prefer to be addressed as Mrs. or Ms. is also off-limits, as is any inquiry about marital status. Also, should the applicant reveal the existence of a

spouse, it is inappropriate to ask what this person does for a living. A general rule to follow is this: If you wouldn't ask a man a particular question, you shouldn't ask a woman, either.

Conduct background checks.

Once you have narrowed the field, check references. The information you receive by calling former employers is usually limited to verification of dates of work. Employers are reluctant to make unfavorable statements about previous employees because of the possibility of a lawsuit for slander.

The entire area of pre-employment screening is fraught with legal landmines, so you should seek legal advice with regard to any sort of background checks and written questionnaires you give to potential applicants.

You should have the applicant sign a release that allows authorization for verification of information. Areas that might be verified include previous employment, education, credit history, criminal history (if any), and, if applicable, driving history. The applicant should be given an opportunity to explain any inconsistencies, such as a bad credit history, which could be a mistake.

You may choose to hire a company to perform a background check on a job candidate. (Ask around and be sure the company you choose is bonded and insured.) The important thing to remember in performing background checks is that it should be a company policy, not aimed at a specific individ-

ual, and that such information should be documented and kept confidential.

When you have hired someone for the job, let the other job candidates know, in writing, that they are no longer being considered for the position.

Know the law regarding workers compensation.

The Americans with Disabilities Act (ADA) prevents an employer from asking about injuries on the job during a preliminary interview; however, once an offer has been made to a potential employee, more information can be asked, such as whether the applicant has a history of workers compensation claims. Although this question cannot be asked before a conditional job offer has been made, it must be asked of every candidate in this category, if it is going to be asked at all.

Although a long history of workers compensation claims may make an employer hesitant to hire an individual, care should be taken to look at the situation objectively, to listen to the applicant's side of the story, and to try to discuss the reasons behind the claims with the previous employer(s).

Use an employee handbook.

Associations should have an employee handbook, which should be used to document legal positions and policies regarding such issues as work hours, email use, sick leave, employee behavior, and disciplinary action employers may take when rules are violated or expectations are not met. Through employee signatures on appro-

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priate documents, employers should require employees to acknowledge that they received the handbook and that they acknowledge the expectations of the employer.

Follow the rules on firing.

As difficult as it is to find the right person for a position, it is even harder to get rid of the wrong one. You must document instances where the employee

broke association rules. Such instances can include making many personal calls from work, taking time off without permission, writing personal correspondence on association time, selling drugs,

“Ask The Expert” is a regular column in *Insurance Focus*, featuring an interview with an expert about an important insurance issue facing community associations. This month our expert is Richard G. Vernon, Esquire, who chairs the Labor and Employment Law Department for Lerch, Early & Brewer in Bethesda, Maryland. He and the department represent management exclusively in all matters that concern employment and the workplace. He may be reached at 301-907-2818 or 1-800-264-8906.

Q: What do employers need to know before firing an employee?

A: Termination. Discharge. Firing. Whatever word is used to refer to the ending of an individual’s employment, it is probably the most dangerous thing a manager can do, from the standpoint of creating potential liability for an association. In discharging an employee, an association should review five major points before it takes action. These questions are referred to as “the Fundamental 5.”

Is the person who is to be fired in a protected statutory class? Federal Equal Employment Opportunity laws protect employees from being terminated on the basis of race, color, religion, sex (including sexual harassment), national origin, disability, and age (40 years old and above). An association must be certain that its decision to terminate an employee has not been based, in any respect whatsoever, on the individual’s protected status. Many states, counties, and cities have EEO laws that are even broader than these federal laws, and they, too, must be followed.

Does the action under consideration comply with common law requirements? Common law is essentially “judge-made” legal principles that have developed over the years. One that arises frequently regarding terminations is whether an association has followed its own published rules—in particular, its employee handbook. In most states, an employee handbook—and even consistently-enforced

unwritten rules—are held to create contractual obligations of the association, unless the handbook specifically says that none of its provisions are intended to create an express or implied employment contract between the association and the individual.

Does the association have documentation that justifies the termination? Documentation is generally viewed by EEO agencies as the most effective proof of an employer’s reason for taking action against an employee. As a result, it is important to have documentation—particularly in annual performance evaluations and in a progressive disciplinary procedure—that creates a paper trail showing justification for the association’s action.

Is the association being consistent in its action? That is, has the association previously fired other individuals for the same reasons? A showing that other individuals have been similarly treated in the past helps to prevent a recently terminated employee from successfully claiming that he has been a victim of discrimination.

Is the action the association taking fair? Many cases are won or lost not on the basis of a technical analysis of EEO laws and common law principles, but on the basis of whether the action that the association took appears to have been fair in light of all relevant events and circumstances.

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or embezzling money. By keeping written records of such actions, employers protect themselves against lawsuits.

Also important are regular reviews of employees' performance and set disciplinary action if they are not meeting expectations. Such action includes additional training and constructive feedback to help employees improve performance.

If, after repeated warnings, an employee continues to break employment rules, doesn't complete assigned tasks, and becomes a drag on the productivity and morale of the community association, termination may be necessary. It is important, however, that published association policies are followed; otherwise, you may invite a wrongful termination lawsuit.

Proper training of supervisors and managers is essential. Supervisors are often in the best position to spot problems, so they should be thoroughly educated about procedures on firing.

See the "Ask The Expert" column for more advice on firing.

Keep good documentation.

Good documentation is essential. This includes everything from getting employees' signature when they are

given the employee handbook to writing down conversations with employees regarding their need for improvement.

A clear understanding on both sides will make the resolution of employment problems easier for everyone.

Explore the available insurance coverage.

A relatively new form of insurance is available to protect companies from employment practices lawsuits. Employment Practices Liability Insurance (EPLI) protects employers from claims, suits, and/or allegations from employees arising from violations of the many federal, state, and local employment laws and regulations. Virtually unheard of in the early '90s, this form of insurance is gaining in popularity. In fact, more and more businesses are coming to see Employment Practices Liability Insurance as an indispensable part of their insurance and risk management portfolio.

In most employment practices lawsuits, defense costs equal or exceed the cost of the insurance. This alone should be a prime motive for inclusion of EPLI as an integral part of your overall business insurance program. Your assets should not be put in jeopardy by the

uninsured expense of defending an employment related claim, suit, or allegation.

EPLI is offered as a stand-alone policy or included in some Directors & Officers Liability Insurance (D&O) policies. Coverage varies significantly from carrier to carrier, so associations should work closely with their insurance representatives to choose the best policy for their circumstances.

Know where to go for more information.

Hiring and firing employees is an increasing area of concern for community associations. It is critical to review your association's legal responsibilities and insurance needs with qualified professionals, including your association's legal counsel. This is an area in which legal advice is probably warranted, if only to avoid expensive pitfalls. If you have any questions, please call Steve Dickerson at Morgan & Cheves (703-739-2346).



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