Fundamentals of Employment Law

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I. Hiring and Terminating Employees in the Current Economy

A. Hiring qualified employees
   1. Credit checks: compliance with the Fair Credit Reporting Act
   2. Criminal background information: what are the rules?

B. Handling terminations and layoffs
   1. Legal considerations, e.g., WARN Act, OWBPA, RIF
   2. Structuring severance and separation packages, COBRA
   3. Tips and traps, e.g., employment agreements, unemployment compensation claims
   4. Termination: strategies for avoiding claims
1. Why Employers want credit checks

   a. Dealing with money and use of financial information is required as essential element of job.
b. Without full history of applicant, Employers might hire alternative applicant about whom they have more or personal information
c. Business necessity

d. Potential negligent hiring claims if employer would have had significantly adverse credit check and mishandles money of customer.
Why Congress intervened to provide restrictions
3. What Credit Checks Show

a. Name, address, previous addresses, social security number

b. Debt incurred, including mortgage, credit cards, car loans, student loans and payment history, including late payments and defaulted loans
4. Companies Need Permission to Obtain Credit Checks and must be on a separate sheet of paper.
Consumer Reports

Employment background checks also are known as consumer reports. They can include information from a variety of sources, including credit reports and criminal records.
When you use consumer reports to make employment decisions, including hiring, retention, promotion or reassignment, you must comply with the Fair Credit Reporting Act (FCRA).

The Federal Trade Commission (FTC) enforces the FCRA.
Complying with the FCRA

You must take certain steps before you can get a consumer report, and before and after you take an adverse action based on that report.
Before You Get a Consumer Report
You must:

➢ Tell the applicant or employee that you might use information in their consumer report for decisions related to their employment.
➢ This notice must be in writing and in a stand-alone format.
➢ The notice cannot be in an employment application.

(You can include some minor additional information in the notice, like a brief description of the nature of consumer reports, but only if it does not confuse or detract from the notice.)
Get written permission from the applicant or employee. This can be part of the document you use to notify the person that you will get a consumer report.

If you want the authorization to allow you to get consumer reports throughout the person's employment, make sure you say so *clearly and conspicuously*.
Certify compliance to the company from which you are getting the applicant or employee's information. You must certify that you:

- notified the applicant or employee and got their permission to get a consumer report;
- complied with all of the FCRA requirements; and
- will not discriminate against the applicant or employee or otherwise misuse the information, as provided by any applicable federal or state equal opportunity laws or regulations.
BEFORE YOU TAKE ADVERSE ACTION

Before you reject a job application, reassign or terminate an employee, deny a promotion, or take any other adverse employment action based on information in a consumer report, you must give the applicant or employee:
• a notice that includes a copy of the consumer report you relied on to make your decision; and

• a copy of A Summary of Your Rights Under the Fair Credit Reporting Act, which the company that gave you the report should have given to you.
Giving the person the notice in advance gives the person the opportunity to review the report and tell you if it is correct.
After You Take an Adverse Action

If you take an adverse action based on information in a consumer report, you must give the applicant or employee a notice of that fact – orally, in writing, or electronically.
An adverse action notice tells people about their rights to see information being reported about them and to correct inaccurate information.
The notice must include:

- the name, address, and phone number of the consumer reporting company that supplied the report;
• a statement that the company that supplied the report did not make the decision to take the unfavorable action and can't give specific reasons for it; and
• a notice of the person's right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get an additional free report from the company if the person asks for it within 60 days.
Disposing of Consumer reports

When you're done using a consumer report, you must securely dispose of the report and any information you gathered from it. That can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed.
A. 2. Criminal Background Checks
1. A recent survey the National Employment Law Project (NELP) reflects that nearly 65 million people or, 1 in 4 U.S. adults have criminal histories.
2. Use of criminal records in hiring is a difficult issue because it involves important America values that can seem to conflict:
   a. Public safety (safe workplace, honest employees, negligent hiring issues, litigation)
   b. Second chances (should your past hold you back forever??)
a. Guidance was issued after a $3.1 million settlement with an employer who had allegedly screened out more than 300 African-American applicants as a result of criminal background checks.

b. These developments have set the stage for employers to closely review their policies for use of criminal records in their hiring procedures.

c. New EEOC charges and similarly broad investigations by the Commission are virtually certain in the next 12 to 24 months.
4. 25 year view of the EEOC:
   An employer’s policy or practice of excluding such individuals from employment has an adverse impact on African-Americans and Hispanics.

a. National data shows African-Americans and Hispanics are convicted at a rate disproportionately greater than their representation in the population.

b. Based on a handful of court decisions from the 1970s, the EEOC views such policies and practices as unlawful under Title VII absent a justifying business necessity.
5. EEOC’s view of such disparate treatment has continued to exist.

6. Exclusion based on arrest alone cannot be justified by “business necessity.”
7. Employer can focus on the conduct involved when making an employment decision and can consider 3 factors from *Green v. Mo. Pacific RR* case:

1) Nature and Gravity of Offense or Offenses

2) Time passed since conviction/completion of sentence

3) Nature of job held or sought.
8. Guidance Report recounts increases in incarcerated population percentages after 1990:

- 1 in 17 - White Males
- 1 in 6 – Hispanic Males
- 1 in 3 – African American Males
9. Types of Criminal History Records Accessed:

a. Court records
b. Law Enforcement and Correction agency Records
c. Registries or Watch Lists
d. State Criminal Records Repositories
e. Interstate Identification Index (III) by the FBI
Under the FCRA, a CRA may not report records of arrests that did not result in conviction if the arrests occurred more than seven (7) years ago, but can report convictions indefinitely.
Guidelines/Purposes of Employers’ Use of Criminal History Information

- Combat Theft and Fraud
- Prevent Workplace Violence
- Avoid potential liability for negligent hiring.
EEOC’S INTEREST
AS STATED IN GUIDELINES

- EEOC enforces Title VII that prohibits employment discrimination
- Having a criminal record is not protected
- Therefore, whether an employer’s reliance upon adverse criminal history violated Title VII depends on:
  i. Whether it is a part of a claim of discrimination;
  ii. Either by disparate treatment or disparate impact.
• Disparate Treatment Discrimination and Criminal records obviously exists when

➢ Employer rejects an African American or Hispanic application but hires a similarly situated white applicant.
Specific Kinds of Evidence Related to Criminal Histories to Establish that Protected Considerations Affected Selection Process.

a. Biased statements
b. Inconsistencies in hiring process
c. Comparator reviews
d. Statistical evidence
Disparate Impact Discrimination results

a. When a neutral policy or practice has effect of disproportionately screening out Title VII-protected group, and

b. Employer “fails to demonstrate” that the challenged practice is job related for the position in question and consistent with business necessity.”
Determining the Disparate Impact

a. Identifying the Policy or Practice – any text, assorted documentation, and information about how policy or practice is implemented.

b. Because statistically numbers will almost always result in higher percentages of Hispanics and African Americans excluded based on criminal records, evidence will shift to employer to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity”.

Positions Subject to Federal Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct.

a. Certain Industries – security screeners, federal law enforcement officers, child care workers in federal agencies or facilities, bank employees, port workers

b. Security Clearances

c. Working for Federal Government
Positions Subject to State and Local Prohibitions or Restrictions on Individuals with Certain Criminal Records – unlike Federal law, they are preempted by Title VII considerations.
Employer Best Practices

Develop policy and procedures consistent with Title VII

Policies & procedures
B. 1. Legal Considerations
WARN Act, OWBPA, RIF (T VII)
WARN ACT

• Provides for advance notice of covered
  – Plant closings
  – Mass layoffs
• 100 or more employees, as defined
• Covers private, for profit, not for profit, and quasi-governmental entities
• Does not cover regular governmental entities providing public services
• Notice triggered by
  – Plant closing
  – Mass layoff
• Plant closing
  – Shut down of employment site
  – Loss of employment of 50 or more
    In a 30 day period
• Mass layoff
  – Employment loss at a “site” during any 30 day period of 500 employees
  – OR
  – If less than 500 employees, if they comprise 33% of the active workforce
• Notice must be given to
  – Hourly and salaried
  – Managerial and supervisory but not business partners
  – Bargaining unit representative
  – State dislocated worker unit
  – Chief elected official of local governmental unit
Exemptions to notice requirement

- Closing of temporary facility
- Workers hired with understanding of limited duration of project
- Not employment loss to a worker who refuses a transfer to a site within reasonable commuting distance, or who accepts a transfer within 30 days
• Penalties for violation
  – Back pay and benefits for up to 60 days
  – Civil penalty of $500 per diem for lack of notice to governmental unit
**OWBPA**

- Older Workers Benefit Protection Act
- Applies to Waivers of Rights under Age Discrimination Act, of which it is a part
- No waiver effective unless provisions complied with
Textual requirements

• Written in a manner calculated to be understood
• Specific reference to rights or claims arising under Act
• No waiver as to claims arising after execution of waiver
Additional Consideration Required

Waiver not effective unless supported by payment of something in addition to anything of value to which the individual is already entitled
Procedural requirements

• Advice in writing to consult with attorney prior to executing

• 21 day period to consider whether to sign (45 days if part of group exit incentive)

• Written designation of 7 day revocation period
Additional requirements for group or class incentive program

• Employee advised as to covered group eligibility and time limits

• Job titles and ages of offerees must be disclosed
Waiver agreement does not affect rights of EEOC to file Commissioner’s Charge
B. Handling Terminations and Layoffs
2. COBRA, severance, separation packages
What is COBRA Coverage?

Applies to Group Health Plan with 20+employees
Temporary Coverage
For Workers and Families losing health benefits
Requires notice by beneficiary of qualifying event – 60 days
• Cost to eligible person is 102% of cost to plan
• Qualifying event – employee
  – Hours of work reduced
  – Employment ends for any reason [except gross misconduct]
Qualifying event – covered spouse
Your Spouse dies or hours reduced
Spouse’s employment ends
Spouse is eligible for Medicare
You become divorced or separated from Spouse
Qualifying Event – dependent child
Parent/employee dies, hours reduced, employment ends, or Medicare eligible
Parents are divorced or separated
Child ceases being dependent
Coverage period – 18 to 36 months, depending on status of beneficiary and nature of qualifying event
Termination or reduction of hours

- QBs are employee, spouse, and dependent child
- Maximum is 18 months
- Under certain conditions may extend to 29 or 36 months
Employee enrolls in Medicare

- QBs are spouse +/- or dependent child
- Maximum is 36 months
Divorce or legal separation

- QBs are spouse +/- or dependent child
- Maximum is 36 months
Death of Employee

• QBs are spouse +/- or dependent child
• Maximum period is 36 months
Loss of dependent child status under group health plan

- QB is dependent child
- Maximum period is 36 months
B. 3. Tips and Traps: Employment Agreements, UC Claims
B. 4. Termination: Strategies for Avoiding Claims
Laws Governing Discipline and Termination

EMPLOYMENT AT WILL

• No contractual duration for employment

• The employee can quit at will; the employer can terminate at will. . . . This is true whether the discharge by the employer was malicious or done for other improper reasons. . . .

• An employee can be terminated for a good reason or bad reason... or no reason at all.

Hinrichs v. Tranquilare Hospital, Ala. Sup. Ct.

BUT...
Laws Governing Discipline and Termination

If more than 3 Employees:

- You cannot discipline or discharge an employee for serving on jury duty
- You cannot fire an employee for filing a Worker’s Compensation claim
- You cannot fire an employee for complaining about safety violations
- You cannot discipline or fire an employee for serving on active military duty

AND FURTHERMORE....
Laws Governing Discipline and Termination

If 15 or more Employees:

- You cannot *discriminate on the basis of race, color, religion, sex or national origin in the terms, conditions or privileges of employment.*

*Title VII of the Civil Rights Act of 1964*

-15 or more employees in each of 20 weeks in the current or preceding calendar year
If 15 or more employees:

- Prevents Discrimination in Hiring, Firing, Promotions, Wages
- Prevents Discrimination in *other Terms and Conditions of Employment*
  - Requires equal treatment in discipline for similarly situated employees
  - Protects against hostile environment, harassment based upon protected class status
- Protection from religious discrimination requires efforts to accommodate employee religious conflicts with work rules
Laws Governing Discipline and Termination

15 or more employees:

*Americans with Disabilities Act*

- You cannot discriminate against an individual because of a real or perceived disability or a record of disability.
  - Cannot inquire about disability or require medical exam until after job offer made
  - Must keep employee info separate from personnel file and limit access

- You must make efforts to reasonably accommodate an employee’s disability to allow them to perform the essential functions of the job.
Laws Governing Discipline and Termination

If you have 20 or more employees:

• You cannot discriminate in hiring, discharge or other terms and conditions of employment on the basis of age 40 or over.

  Federal Age Discrimination in Employment Act

  Alabama Age Discrimination Act
Laws Governing Discipline and Termination

RETAIATION

• Employees who complain about any type of discrimination or harassment are protected from retaliation.

• Employees who participate or testify in a discrimination or harassment investigation or proceeding are protected from retaliation.

• Employees who complain about a company’s violations or participate in a proceeding related to wage and hour violations are protected from retaliation.
Laws Governing Discipline and Termination

RETAIIATION

• Employees who complain about violations or participate in Federal investigations under most Federal Regulatory statutes (i.e. OSHA), are protected from retaliation.

• Employees who make a claim for Worker’s Compensation are protected from retaliatory discharge.

• Employees who complain about a company’s violation of safety rules are protected from retaliatory discharge.
Why Worry about Discipline?

Effective Discipline Policy – A Building Block

- Establishes expectations and predictability
- Applies consequences fairly and consistently
- Corrects inappropriate behavior and poor performance
- Helps rehabilitate employees with potential
- Protects against complaints and lawsuits
Discipline Policy

- Reassures “good” employees
- Puts potential offenders on notice
- Protects employees from inappropriate actions of co-workers
- Gives violators the opportunity to improve
Employee Handbook

• Informs employees of policy

• Advises that the policy will be enforced

• Allows some flexibility
Common Discipline Problems

• Attendance

• Performance or behavior

• Safety
Common Discipline Problems (cont.)

- Equipment and materials
- Substance abuse
- Harassment, fighting, or violence
Consistency

Managing the Discipline Process

- Always follow the company’s discipline policy
- Respond to all rule violations immediately
- Use discipline only for genuine violations
CONSISTENCY (cont.)

- Discipline all similar offences in the same way

- Make discipline *appropriate* to the offense

- Give the employee an opportunity to correct

- HR oversight and guidance

- HR should also monitor “consistency” of supervisors
Investigations

• Make sure you have all the facts
• Give workers the chance to explain
• Interview witnesses
• No hearsay (gossip)
• Avoid opinions
• Support conclusions with facts
• Document findings
Disciplinary Meetings

- Talk privately and promptly after offense
- Be calm and objective
- Let the employee explain
- Have a witness
Disciplinary Meetings (cont.)

- Determine the facts
- Emphasize the seriousness of the situation
**Disciplinary Meetings** (cont.)

- Determine the best discipline
- Agree on a plan of action
- Document the meeting

*Note: If you have progressive discipline policy, follow it!*
Documenting Discipline

- Include key information
- Keep records for as long as policy mandates
Key Points to Remember

Be **consistent** and follow company policy

- Help employees correct discipline problems
- Protect yourself and the organization by **documenting** disciplinary actions
**Discharge**

- Use only as a last resort or for very serious violations
- Consult with HR and investigate carefully
- Follow required termination procedures
- Meet with the employee
- Document the meeting in a signed report
**Practical Advice**

**TERMINATION**

- Get your Ducks in a Row
  - Check documentation (disciplinary memos, evaluations, etc.)
  - Red Flags?
    - Protected class protection?
    - Can you articulate reason?
    - Consider precedent/consistency.
Practical Advice

TERMINATION

• Conduct Termination Interview
  - Be honest and specific
  - Have witness
  - Consider some severance if reason for termination is not egregious conduct

• Carefully consider response to unemployment claim

• Refer all reference calls to one person
  • Stay neutral in references
Practical Advice

Leave of Absence/Return to Work Issues

- If more than 50 employees, FMLA governs
- If no FMLA, follow policy – treat everyone the same... surgery, childbirth, etc.
Practical Advice

- Can treat Worker’s Comp injured employees differently
- No legal obligation to provide light duty
- If no policy, consider past practices
  - what have you done before?
Practical Advice

ADA issues

- If permanent impairment upon release to work, conduct job accommodation analysis

  - Can job be modified to accommodate disability?

  - Is there another available position which employee can perform even with disability?
Questions