

KACo Leadership Institute

Hiring, Firing, and Everything In Between

June 10, 2021

by:

Regina A. Jackson and
Michael A. Owsley

Strength, Knowledge, Experience.

ELPO LAW

English Lucas Priest & Owsley, LLP

1101 College Street
Bowling Green, Kentucky 42101
(270) 781-6500
www.elpolaw.com

Today's Topics

- Conducting employee interviews
- Creating effective job descriptions
- Following policies and procedures
- Conducting Effective Performance Reviews
- Maintaining Personnel Records
- Employee Discipline and Termination
- EEOC Guidance on COVID-19 Vaccinations

Employee Interviews



- Job applicants are protected from discrimination based on protected categories.
 - Race, color, religion, sex (including pregnancy), national origin, age (40+), disability, and genetic information
- Focus on applicant's credentials and matters specifically related to the job.
- Any notes taken can be used as evidence.



Employee Interviews

Interview Questions to Avoid



- ❖ Age? Date of Birth?
 - Generally cannot ask these questions **unless** age is a requirement of the job
- ❖ Arrests?
 - The EEOC has determined that the mere request for this info tends to discourage minority applicants and is illegal.
- ❖ Convictions?
 - Should be cause for rejection **only** if the number, nature, and recentness would cause the applicant to be unsuitable for the position.
- ❖ Children under 18?
 - Cannot ask this question **only** of female applicants; cannot treat female applicants with children differently than male applicants with children

Interview Questions to Avoid



- ❖ Citizen of what country?
 - Discrimination on the basis of national origin is illegal.
- ❖ Availability to work on weekends?
 - May discourage persons of certain religions
- ❖ Credit Rating? Own your own home or car?
 - Has an adverse effect on minorities
- ❖ Eye/Hair Color?
 - Not related to performance and may indicate race or religion
- ❖ Garnishment record?
 - Has an adverse effect on minorities

Interview Questions to Avoid



- ❖ Height? Weight?
 - Can ask **only** if related to a job requirement
- ❖ Maiden name?
 - Not relevant to job performance and could be an indication of religion, national origin, or marital status
- ❖ Marital Status? Spouse's Name? Spouse's Work?
 - To the extent these questions ask for marital status, they should not be asked.
- ❖ Mr./Mrs./Miss/Ms.? Sex?
 - Federal and state discrimination laws prohibit discrimination on the basis of sex.
- ❖ Do you smoke?
 - ❖ Kentucky law makes it illegal to discriminate against a job applicant who smokes.

Interviewing Persons with Disabilities



- Federal and state law prohibit employers from inquiring as to whether an applicant suffers from a disability.
- You **cannot** ask:
 - Have you been treated for the following listed conditions or diseases? **OR** Please list any conditions or diseases for which you have been treated.
 - Have you ever been hospitalized?
 - Have you had a major illness in the past 5 years?
 - Are you taking any prescribed drugs?
 - Do you have any disabilities or impairments that would affect your performance in the position for which you are applying?
 - Have you been treated for drug addiction or alcoholism?
 - Have you ever filed for workers' compensation benefits?
 - Have you ever been treated by a psychiatrist or psychologist?

- BUT – you **may** ask:
 - Whether a job task can be performed with or without an accommodation
 - How the applicant would perform the tasks and with what accommodations
 - Whether the applicant can meet the job’s work-hour requirements, provided the hours truly apply to the job

Interviewing Persons with Disabilities

Creating Effective Job Descriptions



The Importance of Job Descriptions

- What an employer puts in a job description is considered to be one of the primary determinants of what an employee's essential functions are.
 - Important for ADA claims
 - May help with defending unemployment claims if separation occurred because employees refused to or failed to perform their job
 - Can be useful for justifying an employee's exempt or non-exempt status
- Effective job descriptions help a supervisor measure an employee's job performance.
- Useful in ensuring an applicant is a good fit for the position

How to Develop an Effective Job Description

- A job description should explain the tasks, duties, functions and responsibilities of the position.
- Should specify:
 - **Who** performs the work
 - **How** the work is to be completed
 - The **frequency** of the work
 - The **purpose** of the work in relation to the employer's mission and goals

- Perform a Job Analysis:
 - ❖ Interview employees to determine what tasks are being performed
 - ❖ Observe how the tasks are performed
 - ❖ Document the **knowledge, skills, abilities, physical characteristics, environmental factors and credentials or experience** required for the position

Developing an Effective Job Description

Knowledge

- The comprehension of a body of information acquired by experience or study

Skill

- An observable competence to perform a learned activity

Ability

- Competence to perform an observable behavior or a behavior that results in an observable product

Physical Characteristics

- The physical attributes an employee must have to perform the job duties with or without reasonable accommodation

Environmental Factors

- Working conditions inside or outside the office

Credentials/Experience

- The minimum level of education, experience and certifications acceptable for the position

- Establish the Essential Functions
 - Ensure that the tasks as part of the job function are really necessary or required to perform the job.
 - Determine the frequency at which the task is performed or how much time is spent performing a task.
 - Determine the consequences of not performing the function and whether it would result in severe consequences.
 - Determine if the tasks can be redesigned or performed in another manner.
 - Determine if the tasks can be reassigned to another employee.

Developing an Effective Job Description

Is It Really an Essential Function?

- Courts will not necessarily accept an employer's written job requirements for ADA purposes **unless** the employer can demonstrate that employees have to **regularly comply** with those requirements.
- Courts have found in favor of the employees who presented evidence that a job requirement, in practice, was merely marginal and not essential.

Pfendler v. Liberty Dialysis-Hawaii LLC

729 Fed.Appx. 593 (9th Cir. 2018)

- The plaintiff, a dialysis technical specialist (DTS), suffered a nonwork-related shoulder injury and was granted medical leave. At the end of his leave, he was given permanent lifting restrictions of no more than 50 pounds.
- The company refused to allow the plaintiff to return to his DTS position, claiming the job description indicated that lifting 75 to 100 pounds was an essential function of the position.
- The Ninth Circuit Court of Appeals found for the plaintiff.
 - The plaintiff provided evidence that he had only to tilt the dialysis machinery and not actually lift it. Tilting required him to lift significantly less than 75 to 100 pounds. Another employee in the DTS position confirmed he lifted only about 40 pounds on a regular basis.
 - The Ninth Circuit held that if lifting more than 50 pounds was not an essential function, then Liberty's refusal to allow the plaintiff to return to the DTS position may have been discriminatory.

- Organize the data so that all job descriptions have the same appearance.
- Consider including the following categories:
 - Job Title
 - Classification
 - Salary Level or Range
 - Reports To
 - Creation or Revision Date
 - Summary / Objective
 - Essential Functions
 - Competency
 - Supervisory Responsibilities
 - Work Environment
 - Physical Demands
 - Position Type and Expected Hours of Work
 - Travel
 - Required Education and Experience
 - Preferred Education and Experience

Developing an Effective Job Description

Developing an Effective Job Description

- Add a disclaimer
 - Include a statement that duties and responsibilities may change or new ones may be assigned at any time with or without notice.
- Include a signature line for the employee.
- Ensure job descriptions are updated when changes are made to the relevant positions.

Following Policies and Procedures



The Perils of Not Following Policies and Procedures



- Not consistently following an organization's policies has ramifications for both the employee and the organization.
- Ramifications for the employee
 - Disciplinary action, including termination
 - Contention amongst co-workers
- Ramifications for the employer
 - No rules = chaos
 - Diminishing culture
 - Ethics and behavioral violations
 - Projects a bad image to customers / clients
 - Higher rate of employee turnover

Preventing Liability



- Ignorance of the organization's policies and procedures is not a defense.
 - Be familiar with your organization's handbook.
 - Do not be **inconsistent** when applying policies and procedures.

When Inconsistency Matters



- An employer does not have to treat all employees exactly the same all the time.
 - Consistency matters most when dealing with two **similarly situated employees**, particularly when they perform the same type of work.
 - Before treating one similarly situated employee different from another, an employer must be able to articulate a **non-discriminatory reason** for doing so.
 - Any deviation from established rules should be the product of a **legitimate and justifiable exception** to the rules.

Employee Performance Reviews



- Conduct at least annually for all employees
- Should be in writing on evaluation forms and in accordance with policy (if applicable)
- Give the evaluated employee assistance, if needed, for becoming more proficient
- Provide a copy to the employee
- Keep the original in the employee's personnel file
- The primary evaluator should be an immediate supervisor who has a working knowledge of the employee's work performance
- Process should include an evaluation conference

Employee Evaluations: General Guidelines

- The form should include a list of performance criteria.
- Under each criterion, specific descriptors or indicators that can be measured and recorded should be listed.
- Standards of performance should be established for each criterion.
- An evaluation form should be specific to each position or job category.

The Evaluation Form

Tips for Conducting Legally Sound Evaluations



- Use evaluation criteria that are valid and **observable**.
- Provide **timely** notice of specific deficiencies that are related to the predetermined evaluation criteria.
- Train the evaluators.
- Be **honest** about the employee's performance.
- Develop a plan of remediation that is related to identified deficiencies.
- Allow a reasonable period of time to complete the plan of remediation.
- Use **anecdotal records and formal reports** of complaints to supplement the performance evaluation.
- Be fair and **consistent**.

Maintaining Personnel Records



To Keep or Not to Keep



- Keep in the Personnel File
 - Hiring Records
 - Performance Records
 - Job History (promotion, demotion, transfer, etc.)
 - Disciplinary Records
 - Job Descriptions
 - Benefits Information
 - Salary information
 - Handbook and policy acknowledgements
 - Training records
 - Attendance records
 - Medical records (keep separately)

To Keep or Not to Keep



- Don't Keep in the Personnel File
 - Investigation records and reports
 - I-9 forms (recommend keeping all I-9 forms together and not in individual personnel files)
 - Payroll records
 - Personal notes or e-mails about the employee

How to Keep



- Keep Separate
 - Medical records
 - Accommodation requests and decisions
 - Background check records
 - Drug test results
 - Any EEO or affirmative action records with employee self-identifications of race, sex (gender identification), veteran status, etc.
 - Garnishment records
 - Litigation records

Employee Discipline and Termination



Employment at Will

- Employment at Will applies to both employers and employees
 - An employer can fire an employee at any time for any reason or for no reason.
 - An employee may resign at any time for any reason and for no reason.
- Take precautions to preserve
 - Never assure job candidates or employees of job security
 - Avoid words or actions that could imply employment promises as well as discrimination, retaliation, or other improper reasons for discharge

- Act Fairly
 - Make sure the incident or behavior warrants discipline per policy.
 - Ensure that the employee knew and understood the rule that was violated.
 - Find out if there were any circumstances beyond the employee's control that affected the employee's behavior.
 - Determine if the employee knew and understood the penalties for rule violation.
 - Make the discipline match the offense; do not treat minor infractions the same as serious ones.

Practice Good Discipline

- Act Consistently
 - Discipline the same for similar violations.
 - Be sure you are not coming down especially hard on an employee because of personal dislike or other problems.
 - Be sure you are not looking the other way on violations committed by employees you like or who are especially important to your group.

Practice Good Discipline

- Act Legally
 - Act promptly after a violation occurs, even if you are just giving a verbal warning.
 - Be sure to follow the steps of progressive discipline, if applicable.
 - Document what rule was violated, when it occurred, and what disciplinary action was taken and when.
 - Check that disciplinary action was fair and consistent in terms of what has happened with other employees.

Practice Good Discipline

- Act Legally

- Ask whether a reasonable person could interpret this discipline as retaliation for exercising legal rights.
- Ask whether a reasonable person could interpret this discipline as discriminatory.
- Ask whether a reasonable person would feel that the “punishment fit the crime.”

Practice Good Discipline

Progressive Discipline

- Discipline should follow a series of progressive steps:
 - Verbal Warning
 - Written Warning
 - Suspension with or without pay
 - Discharge
- Immediate discharge is appropriate only for the most serious violations.
- Document all steps in writing.
- Never promise that correcting a problem will save the employee's job.
 - You may later have other reasons for discharging the employee.

Progressive Discipline:

The Verbal Warning

- Talk privately with the employee as soon as possible following the inappropriate conduct.
- Explain the rule, the violation, and the possible results if the conduct occurs again.
- Listen to the employee's version of events.
- Give the verbal warning.
- Develop a plan for correction with the employee.
- Prepare dated notes of the meeting.

Progressive Discipline:

The Written Warning

- Give written warnings for repeat violations.
- Review the warning privately with the employee.
 - Emphasize the seriousness of the situation.
- Consider developing a corrective action plan with the employee and attach it to the warning.
- Sign the form and have the employee do so.
 - If the employee refuses to sign, note this on the warning.
- Place the warning in the employee's personnel file.
- Monitor and document the employee's compliance with the corrective action plan.

Progressive Discipline: Suspension

- Take this step only as a last resort prior to discharge.
- Meet with the employee to discuss the suspension, and have another supervisor or HR representative present.
- Explain the problem, its seriousness, the suspension, and the next step that will be taken if the conduct does not improve or occurs again.
 - Listen to the employee's version of events.
- Sign and have the employee sign the necessary paperwork.
 - Make note if the employee refuses to sign.
- Upon the employee's return to work, meet with the employee and prepare a corrective action plan.
 - Monitor the employee's compliance.

Progressive Discipline: Termination

- Prior to discharging an employee, thoroughly investigate the charges – even for the most serious of offenses.
 - Document the investigation and all prior related actions in writing.
- Meet privately with the employee.
 - Have another supervisor or manager present.
- Explain the reasons for the discharge.
- Explain the procedures for terminating employment.
- Document the meeting.

Termination Checklist



- Justification
 - Identified, legal, non-discriminatory reasons
- Discrimination / Retaliation
 - Is employee a member of one of the protected categories?
 - Ensure reasons are non retaliatory
- Defensible Reasons
- Policies or Work Rules
- Progressive Discipline
 - Was employee given notice of the problem and given a chance to fix it?

EEOC Guidance on COVID-19 Vaccinations



EEOC Guidance

May 28,
2021



U.S. Equal Employment Opportunity Commission

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on May 28, 2021.

INTRODUCTION

- All EEOC materials related to COVID-19 are collected at www.eeoc.gov/coronavirus (<https://www.eeoc.gov/coronavirus>).
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available on EEOC's [disability page \(https://www.eeoc.gov/disability-discrimination\)](https://www.eeoc.gov/disability-discrimination).
- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the [guidelines and suggestions made by the CDC or state/local public health authorities \(https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html\)](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html) about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the**

EEOC Guidance on Covid-19 Vaccinations

- Guidance applies only to certain federal anti-discrimination laws
 - Americans with Disabilities Act
 - Title VII
 - Pregnancy Discrimination Act
 - Genetic Information Nondiscrimination Act
 - Age Discrimination in Employment Act
- Employers can encourage employees to be vaccinated
 - Provide vaccination incentives (*i.e.* cash, prizes, perks)
 - Can require vaccinations
- Employers can require proof of vaccination
 - Don't ask for or accept any documentation that would reveal employee's answers to vaccination questions

- Must make reasonable accommodations for employees who cannot be vaccinated due to:
 - Medical condition protected by the ADA
 - Sincerely held religious belief, practice or observance
 - Pregnancy (maybe)
- EEOC discourages employers from hiring health care providers to come onsite and administer vaccinations.

Requiring Vaccinations

- If an employee requests to be excused from a vaccination requirement:
 - Refer the employee to Human Resources or appropriate member of management
 - Engage in an “interactive process”
 - May be necessary to confirm the employee’s condition and consult with employee’s health care provider to determine potential accommodations
- Recommendation for employer to include a statement in vaccination policy that a request for reasonable accommodation (based on disability or religion) will be considered on an individualized basis

Reasonable Accommodations

- Wear a mask and socially distance
- Work a modified shift
- Undergo periodic Covid-19 testing
- Telework
- Reassignment

Examples of Reasonable Accommodations

What If Employee Refuses to Be Vaccinated?

- Generally, at-will employees can be terminated for refusing to comply with a mandatory vaccine requirement.
- **BUT** – be sure you have communicated the following:
 - All details of your organization’s mandatory vaccine policy;
 - How to request an exemption and the deadline for submitting requests;
 - The deadline by which they must have received the vaccine; and
 - Any consequences for failing to get vaccinated

Vaccination Incentives

- The rules differ depending on whether:
 - The vaccinations are administered by the employer or a third party
 - The incentive is for the vaccination of the employee or for the vaccination of the employee's family member

Questions?





Regina A. Jackson, Partner
E-mail: rjackson@elpolaw.com



Michael A. Owsley, Partner
E-mail: mowsley@elpolaw.com

Strength. Knowledge. Experience.



English Lucas Priest & Owsley, LLP
1101 College Street
Bowling Green, Kentucky 42101
(270) 781-6500
www.elpolaw.com

Strength. Knowledge. Experience.

