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# HR Bootcamp Johnson McCann Division

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## TOPICS INCLUDE:

Interview Process Pointers

Workers' Compensation Claims Handling Do's and Don'ts

New Overtime Regulation Strategies

Top Talent Acquisition Ideas

Unemployment Claim Defenses

Effective Delegation – Train the Trainer

Motivation – Train the Trainer

How to Discipline or Terminate a Non-Performing Employee  
who may be “Disabled”



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# Hiring – Rules Of Engagement



# Hiring – Rules of Engagement

1. A person's status is generally not a legal basis for action – do not act based upon applicants' or employees' status or who they are, but rather based upon what they can do, what they cannot do, or what they should do, but fail to do.



# Hiring – Rules of Engagement

2. The hiring process should be free of any indication that the hiring decision will be based in any way upon race, color, religion, gender, national origin, age, or disability.



# Hiring – Rules of Engagement

3. Base hiring decisions only on job-related criteria.

# Hiring – Rules of Engagement

4. Be consistent and judge applicants on qualifications, not assumptions or stereotypes.

# Hiring – Rules of Engagement

5. The main thrust of all employment discrimination laws is to make it illegal for employers to treat employees or applicants adversely on the basis of something about themselves that they cannot change, or should not be expected to change. Such factors are called “immutable characteristics”. For example, one cannot change one’s race or color, gender, age, or national origin, cannot readily change one’s disability status, and should not be expected to change one’s religion, as a condition of getting or keeping a job.



# Hiring – Rules of Engagement

6. Notwithstanding discrimination laws, employers may always hire the best-qualified candidate for the job.

# Hiring – Rules of Engagement

7. The important thing is to be able to explain how the one who was hired really had the best qualifications and was the best “fit” for the position in terms of legitimate, job-related factors.



# Hiring – Rules of Engagement

8. That, of course, requires a very close and careful look at the job applications and other information about applicants and a meticulous consideration of all factors that are relevant to the job, such as minimum qualifications, prior experience, availability, and work ethic.



# Hiring – Rules of Engagement

9. A hiring standard that results in exclusion of an applicant on the basis of race, color, religion, age, gender, national origin, disability, or genetic information is suspect and presents a risk of an EEO claim or lawsuit.



# Hiring – Rules of Engagement

10. In general, employers do not have to explain why they are not hiring a particular applicant.

# Hiring – Rules of Engagement

11. It is usually best to restrict any explanations to short and factual, non-inflammatory statements such as, “You seem to have some good qualifications. However, the one we hired better fit the requirements we had at this time. Please check back with us about any openings we might have in the future. Thank you.”

# Hiring – Rules of Engagement

12. Try to avoid ever using the term “overqualified” to explain why a person is not suitable for hire.



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# Best Practices in Interviewing

How to Interview Legally and Effectively:  
Avoid Illegal Interview Questions

# Best Practices in Interviewing

We all know how litigious our society has become in the area of employment-related issues. Every recruiter, hiring manager, executive, and department manager must realize that asking illegal interview questions or making improper inquiries can lead to discrimination or wrongful-discharge lawsuits, and these suits can be won or lost based on statements made during the interview process.



# Best Practices in Interviewing

Thus, it is important to incorporate risk management into your interviewing process to help minimize your firm's exposure to employment practices liability.

# Best Practices in Interviewing

You, or your company, could be accused of asking illegal interview questions or making discriminatory statements or comments that reflect bias. It is also possible to make assurances or promises during an interview that can be interpreted as binding contracts. Recognizing these potential danger areas is the best way to avoid saying the wrong thing during an interview.



# Best Practices in Interviewing

Most companies have at least two people responsible for interviewing and hiring applicants. It's critical to have procedures to ensure consistency. Develop interviewing forms containing objective criteria to serve as checklists. Develop lists of interview questions and illegal interview questions.

These ensure consistency between interviewers, as well as create documentation to support the hiring decision if a discrimination charge is later filed by an unsuccessful applicant.



# Interview Problems to Avoid

To minimize the risk of discrimination lawsuits, it's important for interviewers to be familiar with topics that aren't permissible as interview questions. Avoid illegal interview questions. For example, you shouldn't ask a female applicant detailed questions about her husband, children and family plans.

Such questions can be used as proof of sex discrimination if a male applicant is selected for the position, or if the female is hired and later terminated. Older applicants shouldn't be asked about their ability to take instructions from younger supervisors.

# Interview Problems to Avoid

It is also important to avoid making statements during the interview process that could be alleged to create a contract of employment. When describing the job avoid using terms like "permanent," "career job opportunity," or "long term."



# Interview Problems to Avoid

Interviewers should also avoid making excessive assurances about job security. Avoid statements that employment will continue as long as the employee does a good job. For example, suppose that an applicant is told that, "if you do a good job, there's no reason why you can't work here for the rest of your career." The applicant accepts the job and six months later is laid off due to personnel cutbacks.



# Interview Problems to Avoid

This could lead to a breach of contract claim where the employee asserts that he or she can't be terminated unless it's proven that he or she didn't do a "good job." Courts have, on occasion, held that such promises made during interviews created contracts of employment.



# Interview Problems to Avoid

These practices will help you hire the most qualified candidate using legal, documented interview methods, including avoiding illegal interview questions.

Learn to assess job candidates on their merits. When developing evaluation criteria, break down broad, subjective impressions into more objective factors.



# Interview Problems to Avoid

Obviously, you must prepare for the interview by reviewing the application, resume, cover letter, test results, and other materials submitted by the candidate. Try and put the candidate at ease and ask interview questions that can't be answered with a "yes" or "no" response.

These open-ended questions allow applicants to tell all about their skills, knowledge and abilities. Some examples are: "Why are you leaving your current employer?" "Do you prefer routine, consistent work or fast-paced tasks that change daily?" "And why?"



# Interview Problems to Avoid

Interview questions and issues you want to avoid include the following:

- asking improper, even illegal interview questions,
- making discriminatory statements, and
- making binding contract statements.



# Interview Problems to Avoid

The following are examples of interview questions that should be avoided in interviews because they may be alleged to show illegal bias. This is why they are illegal interview questions.

- Are you a U.S. citizen? (adversely impacts national origin)
- Do you have a visual, speech, or hearing disability?
- Are you planning to have a family? When?
- Have you ever filed a workers' compensation claim?
- How many days of work did you miss last year due to illness?



# Interview Problems to Avoid

- What off-the-job activities do you participate in?
- Would you have a problem working with a female partner?
- Where did you grow up?
- Do you have children? How old are they?
- What year did you graduate from high school?  
(reveals age)

As you can see, these rather simple and seemingly non-threatening questions can easily violate one of the aforementioned dangers when conducting interviews.



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# Good Interview Questions

# Good Interview Questions

The following is an extensive list of questions that will help you to identify the behavior and character of the candidate you are interviewing. These questions are divided into specific areas in order to help you target characteristics or behaviors that are most important to the job or company culture. Using your job description, identify questions within the specific categories that are most important to the position you are hiring for. Asking all of these questions would be too overwhelming and take too long. Highlight those that are the most important and use them as a guideline as you interview your candidate.



# Good Interview Questions

## Skill Set

- What are your most marketable skills?
- What have you learned or what skills have you gained that will benefit you most in this position?
- What skills do you need to develop further?



# Good Interview Questions

## Professional

- How do you build relationships with your peers in the workplace?
- If you found yourself involved in a negative conversation about a peer, your work, or your boss, how would you handle it?
- When you have to deliver upsetting news to someone, how do you handle it?



# Good Interview Questions

## Hardworking

- Tell me about the last time you did something important because it needed to be done, even though it wasn't necessarily your responsibility.
- What is your standard for success in a job?
- What has been your greatest accomplishment to date?



# Good Interview Questions

## Knowledgeable

- What attracted you to your previous employers?
- What did you learn in your most recent position that will benefit you in this position?
- Tell me about your most meaningful work experience.

# Good Interview Questions

## Maturity

- Tell me about the strongest criticism that you received from your most recent boss. How did you react to the feedback? What actions did you take after the discussion?
- How do you build relationships with your peers in the workplace?
- Tell me about a work situation where you had to work with others to achieve a common goal.



# Good Interview Questions

## Positive

- Describe the qualities or skills that you possess that will help you to be successful in this position.
- Who have you enjoyed working for the most in a past job? What qualities did they possess that you would hope to emulate in yourself?
- What is your ideal working environment?

# Good Interview Questions

## Flexible

- Tell me of a situation where you had to adapt to unexpected changes of events. What was your reaction, and how did you adjust?
- How would your fellow workers in your most recent job describe you?
- Tell me about a situation when you worked with others to achieve a common goal. What was most challenging?



# Good Interview Questions

## Goal – Oriented

- What are you looking for in this job? What are your expectations?
- What recent goals have you set for yourself, and how are you progressing to achieve those goals?
- What are your long-range goals and objectives?



# Good Interview Questions

## Dependable

- If you could choose the type of people that you would be working with, what qualities would they possess?
- What is your standard for success in a job?
- Describe a situation at work where people needed to rely heavily upon you.



# Good Interview Questions

## Organized

- How do you organize your work and schedule your own time?
- Tell me about a period of time that was hectic, and what you did to keep things under control.
- What specifically do you do to ensure that you give adequate attention to your various assigned responsibilities?



# Good Interview Questions

## Loyal

- Tell me about the job you held for the longest timeframe. Why?
- Describe a difficult work situation where you had to stick it out through thick and thin.



# Good Interview Questions

## Honest/Trustworthy/Ethical

- Tell me about the job you held for the shortest timeframe. Why?
- What skills do you need to develop further?
- Describe a valuable lesson you have learned that changed your outlook on life.
- Who was your least favorite person to work for and why?

# Good Interview Questions

## Team Player

- Do you like to work alone or in a group? Why?
- Tell me about a situation when you worked with others to achieve a common goal.
- How would you handle a situation where all team members are not contributing 100 percent?



# Good Interview Questions

## Motivated

- Describe a situation that best illustrates your drive to achieve outstanding results.
- What is the most challenging goal you have ever met?
- Tell me about the most long-term, sustained extra-hours effort you have ever put in.



# Good Interview Questions

## Problem Solver

- Describe a time where you were effective at detecting an emerging problem and taking action to resolve it before it became serious.
- Tell me about a recurring or persistent problem you have experienced within the last year that you feel you have now successfully corrected.
- Tell me about the most significant improvements, procedures, or new ideas that you have suggested or implemented.



# Good Interview Questions

## Leader

- Tell me about a challenging situation in which you had to coordinate and motivate several people to achieve a goal.
- Tell me about the time you exerted the most effort to coach or develop another individual.
- Have you ever been in a position of leadership? If so, how did you motivate the group?
- Tell me about the most recent significant task you delegated to someone and were disappointed with how it turned out.





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# Illegal or Inappropriate Interview Questions

# Ask Only Job-Related Questions

- It is illegal not to hire candidates because of their race, color, sex, religion, national origin, birthplace, age, disability, or marital/family status
- Do not ask questions that could elicit such information, and discourage candidates from volunteering personal details



# Illegal/Inappropriate Questions

- Questions related to birthplace, ancestry, or national origin:
  - “How long has your family been in the U.S.?”
  - “That’s an unusual name – what does it mean?”
  - “How did you learn to speak Chinese?”
- Acceptable question:
  - “Are you eligible to work in the U.S.?”



# Illegal/Inappropriate Questions

- Questions related to marital status, children, or pregnancy:
  - “Are you planning to have children?”
  - “What does your husband/wife do?”
  - “What are your child care arrangements?”
- Acceptable question:
  - “Would you be able to work a 9:00 a.m. to 6:00 p.m. schedule?”
    - If asked of all applicants, and a specific work schedule is a business necessity



# Illegal/Inappropriate Questions

- Questions related to religion or religious days observed:
  - “What is your religious affiliation?”
  - “What religious holidays do you celebrate?”
  - “Do you attend church every week?”
- Acceptable question:
  - “Can you work on weekends?”
    - If asked of all applicants, and a specific work schedule is a business necessity

# Illegal/Inappropriate Questions

- Questions related to age:
  - “How old are you?”
  - “What year were you born?”
  - “I went to high school in Oakland, too – what year did you graduate?”
- Acceptable question:
  - “Are you over the age of 18?”



# Illegal/Inappropriate Questions

- Questions related to criminal records:
  - “Have you ever been arrested?”
  - “Have you ever spent a night in jail?”
  - “Have you ever been caught driving drunk?”
- Acceptable question:
  - “Have you ever been convicted of a crime?”



# Illegal/Inappropriate Questions

- Other illegal questions:
  - “Was your military discharge honorable or dishonorable?”
  - “Have you ever brought a lawsuit against an employer?”
  - “Have you ever filed for Workers’ Compensation?”
  - “Have you ever been sexually harassed?”
  - “How much do you weigh?”
  - “Do you use drugs or alcohol?”





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# Workers' Compensation – What You Need to Know

# Introduction

## **A No-fault System**

- Negligence by employer not necessary to establish liability
- Negligence by employee is not a defense

# Introduction

## **Provides Benefits for Work-Related Injuries or Illnesses**

- Traumatic injuries
- Gradual onset injuries
- Occupational diseases

# Introduction

## **Covers Conditions Caused or Aggravated by Employment Activities**

- Employment activities need to be a substantial contributing factor



# What To Do When An Injury Occurs or Is Reported

- Provide prompt medical care, if needed
- Investigate the facts and take action to prevent future incidents

# What To Do When An Injury Occurs or Is Reported

- Fill out the First Report of Injury (FROI); give a copy to the employee
- Give the employee a copy of the “Information Sheet”



# What To Do When An Injury Occurs or Is Reported

- File the FROI with the insurer within 10 days from the first day of lost time or date you were notified of the injury/lost time, whichever is latest
- Do not wait for medical reports before filing the claim

# What To Do When An Injury Occurs or Is Reported

- Stay in contact with the injured worker
- Monitor the insurer's actions; communicate with the adjuster
- Implement return-to-work strategies

# Employer Do's and Don'ts

## DO:

- Prepare ahead of time just in case an injury is reported
  - Know the name, phone number and address of your insurer
  - Communicate injury reporting procedures to all employees
- File First Reports of Injury properly
- Stay in touch with employee after injury occurs
- Plan ahead for return-to-work strategies
- Treat employees as you would like to be treated



# Employer Do's and Don'ts

## **DON'T:**

- Ignore employee disciplinary problems
- Refuse to file a claim even if you doubt the validity
- Ask the employee to fill out the First Report of Injury
- Wait for the medical report before filing the claim with the insurer
- Pay medical bills on your own
- Ignore requests for information from the insurer or state
- Forget to put safety first



# How to Avoid Workers' Compensation Retaliation Claims

Retaliation claims have become increasingly prevalent in recent years, reasonably causing employers to think twice before taking an adverse employment action. In particular, prudent employers often consider all relevant facts and appearances before terminating the employment of a worker who has filed a claim for workers' compensation benefits.

# How to Avoid Workers' Compensation Retaliation Claims

Minnesota law prohibits an employer from “discharging or threatening to discharge an employee for seeking workers’ compensation benefits or in any manner intentionally obstructing an employee seeking workers’ compensation benefits.” Minn. Stat. § 176.82.

# How to Avoid Workers' Compensation Retaliation Claims

This anti-retaliation provision provided the basis for an employee's recent civil claim against his employer when he was discharged shortly after experiencing a workplace injury. *See Anderson v. North American Gear & Forge.*

# How to Avoid Workers' Compensation Retaliation Claims

Anderson unfortunately had a small piece of hot metal get behind his safety glasses and slightly burn the skin near his eye. He informed his supervisor who in turn helped Anderson initiate a workers' compensation claim. Seeing the injury as minor, the supervisor allegedly resisted Anderson leaving work to see a doctor. Nonetheless, the supervisor let him go. The doctor cleared Anderson to return to work without restrictions with only a "tiny burn" next to his eye with no eye damage.



# How to Avoid Workers' Compensation Retaliation Claims

Anderson stayed home the next day and saw another doctor who also returned him to work immediately without restrictions. The following day Anderson returned to work, but wanted to leave early to again see the original doctor. His supervisor again allegedly resisted, but permitted him to leave. The doctor again found no workplace restrictions. Anderson did not return to work until the following week.



# How to Avoid Workers' Compensation Retaliation Claims

When Anderson returned, his supervisor terminated his employment for excessive absenteeism. Anderson was already on a final warning regarding his attendance. Anderson then sued claiming violation of Minn. Stat. § 176.82.

# How to Avoid Workers' Compensation Retaliation Claims

The Minnesota Court of Appeals affirmed dismissal of Anderson's retaliation claim. In doing so, the court noted that despite having an allegedly hostile attitude toward Anderson's injury, the supervisor nonetheless assisted Anderson in filing a workers' compensation claim and permitted Anderson to leave work for doctor's visits. The court also noted that in processing Anderson's claim, the company followed its standard policy.



# How to Avoid Workers' Compensation Retaliation Claims

Having done so, the employer was able to show that Anderson's discharge was the result of his unexcused absences following his medical release to return to work without restrictions, in combination with the other absences which had already led to his final warning.

# How to Avoid Workers' Compensation Retaliation Claims

**Takeaway:** Employers should evaluate all relevant circumstances in assessing the risk of a retaliation claim when discharging an employee. In particular, an employer can minimize the risk of a workers' compensation retaliation claim by following its standard policy, promptly assisting the injured employee in filing for benefits, and reasonably permitting the employee an opportunity to seek medical treatment and evaluation.





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# New Federal Overtime Rules



# Plan Ahead

To meet the Dec. 1 deadline, HR professionals must lay the groundwork now.

To do that, experts suggest taking the following steps:

# Plan Ahead

- **Identify** currently exempt employees who earn less than the new annual threshold of \$47,476.

# Plan Ahead

- **Estimate** how much overtime those employees currently work.

# Plan Ahead

- **Analyze** your budget to help assess your compensation options.

# Plan Ahead

- **Review** job descriptions for exempt positions to verify that the duties are accurately listed.

# Plan Ahead

- **Ensure** that employees in the same roles aren't classified differently, because that could prompt discrimination claims.

# Plan Ahead

- **Develop** a communications plan for those moving from exempt to nonexempt status to minimize negative impact on morale.

# Plan Ahead

- **Consider** placing restrictions on overtime and explore ways to track nonexempt workers' hours.

# Plan Ahead

- **Determine** whether changes are needed in other policies such as telecommuting and mobile device usage to curtail overtime and working off-the-clock.

# Five Compliance Options

For each affected employee newly eligible for overtime pay, employers have a number of options, each of which carries risks and opportunities.

# Option 1

## **Option**

Increase salary to minimum level required to retain employee's exempt status.

# Option 1

## Risks

- Could create salary compression and result in higher-than-expected costs as compensation must be realigned up the ladder.

# Option 1

## Opportunities

- Could improve morale by giving additional compensation *and* retention of exempt status.
- Saves employer time by eliminating need to track, record and report hours worked.



# Option 2

## **Option**

Pay overtime premium for overtime hours worked.

# Option 2

## Risks

- Increases costs for employers.
- Could create liability for employer if it fails to track, record and report all hours worked.
- Could damage morale as previously exempt positions may carry less flexibility and offer fewer benefits.

# Option 2

## **Opportunities**

- Could improve morale by giving additional time-and-a-half compensation.
- Promotes concept that all employees are paid when required to spend time away from family and other nonworking pursuits.

# Option 3

## **Option**

Reduce or eliminate overtime hours; hire extra workers as needed.

# Option 3

## Risks

- Could lead to loss of productivity.
- May require training for supervisors of newly nonexempt workers.
- Could damage morale as previously exempt positions may carry less responsibility and flexibility and offer fewer benefits.
- Could create liability if employer bans overtime hours but employees work them anyway. (Employer still must pay the overtime, but may discipline employees.)



# Option 3

## **Opportunities**

- Creates opportunity to reclassify jobs and retool job descriptions and responsibilities.
- Offers chance to be more creative and resourceful in how work gets done.
- Minimizes employer costs so part-time help can be added.

# Option 4

## **Option**

Decrease pay allocated to base salary (provided employee earns at least minimum wage) and add compensation to account for time worked in excess of a 40-hour workweek.

# Option 4

## Risks

- Could create liability for employer if it fails to track, record and report all hours worked.
- Could damage morale as previously exempt positions may carry less flexibility and offer fewer benefits.

# Option 4

## **Opportunities**

- Holds employer costs constant.
- Minimizes employer costs so part-time help can be added.



# Option 5

## **Option**

Restructure the workforce, transferring duties from newly nonexempt workers to those who have had their salaries increased to remain exempt.

# Option 5

## Risks

- Could prompt employee concerns about equity and fairness.
- May require training for supervisors of newly nonexempt workers.

# Option 5

## **Opportunities**

- Creates opportunity to reclassify jobs and retool job descriptions and responsibilities.
- Offers chance to be more creative and resourceful in how work gets done.





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# Top Talent Acquisition Ideas



# Introduction

Creating a world-class talent acquisition effort that incorporates cool recruiting ideas like these may seem unrealistic for many HR professionals. After all, the pressure to fill the ever-larger pile of open requisitions leaves little time for experimentation. And at smaller firms, where recruiting duties often fall to an HR generalist who has to squeeze in interviews among many other daily duties, the bar for new hires is often "good enough," which leaves the best talent undiscovered.



# Introduction

Yet even if you hire just one employee a month, you can leverage many of the same effective strategies as the top companies in talent acquisition, say the folks who lead them. You simply need to learn about the latest trends and then strive to incorporate some of them into your daily hiring routine.

# Introduction

The hiring managers we serve expect that we're bringing in the best talent, but to do that you have to know what the leaders in the recruiting field are doing. You don't need to reinvent the wheel. If a tactic works really well for someone else, copy it, and it likely will work really well for you, too.

# Introduction

Most HR specialists agree that they want to get better at talent acquisition. In a 2016 Society for Human Resource Management (SHRM) survey of more than 2,300 HR professionals, respondents said recruitment was their top business/HR challenge, ahead of compliance, employee training and compensation/benefits. Finding the time to implement new ideas can be as challenging as the work itself.



# Introduction

To that end, here are the 12 most meaningful steps to developing a more effective talent acquisition effort.

# Brand your company as a great place to work

## **1. Brand your company as a great place to work.**

If you don't tell your story, others will do it for you—and it likely won't be the narrative you want. Having an attractive careers website was a prerequisite ten years ago, but it's time to up your game. Not only must you use your site as a platform to showcase what makes you special to potential candidates, you also need to carry that brand message through all your marketing materials, across social media channels and in the stories you share in person.



# Brand your company as a great place to work

For example, you might post written and video testimonials on your website and social networks from current employees explaining why they enjoy their jobs. Doing so will create an image among prospective hires of what it's like to work for your company.



# Maximize employee referrals

## **2. Maximize employee referrals.**

An astonishing 80 percent of companies with fewer than 100 workers say referrals are their number one source of new hires.

# Maximize employee referrals

So why are most incentive payments so low? It's widely known that employee referrals are the best source for candidates. Yet many companies offer pitiful 'bonuses' of \$500 or \$1,000 to their employees," he says, "while offering search firms a \$20,000-plus fee for the same position.



# Maximize employee referrals

Encourage workers to tap into their networks to help fill open positions. Every employee should be a recruiter for the company, but few think that way. Companies must offer rewards that make it worth employees' time to reach out to their contacts, rather than expecting them to do it out of the kindness of their hearts. You must truly incent folks, not just say "thank you."



Pay at least as much as your competitors for talent, and be transparent about what you offer

**3. Pay at least as much as your competitors for talent, and be transparent about what you offer.**

Make sure your total compensation package is competitive with your industry and company type. Emphasize what sets you apart from everyone else. At the same time, if any aspect of what you offer is lagging, tell candidates why. Then work with your senior management team to improve your offerings.

# Pay at least as much as your competitors for talent, and be transparent about what you offer

Create a competitive compensation package that reflects your culture, then put the dollars in front of candidates at the start and you'll likely have to negotiate less. It's a brass tacks approach, but be sure to supplement the dollar discussion with the other workplace benefits you offer, including flexibility, autonomy, the workspace and more. By highlighting what makes your offer attractive, you can help deflect attention from what doesn't.



# Consider hiring more part-time contributors, and embrace their flexibility

## **4. Consider hiring more part-time contributors, and embrace their flexibility.**

If the full-time talent you seek is too difficult to find or excessively costly to hire, fill each open position with multiple part-time employees who have embraced the gig economy. And don't punish them if they decide to move on and try something else.



# Consider hiring more part-time contributors, and embrace their flexibility

This approach recognizes that people can make hasty and even poor career choices and then seek to return to their previous job once they realize their mistake. You have to allow people grace in this economy.



# Build strong talent networks

## **5. Build strong talent networks.**

Learn to develop relationships with potential new hires long before relevant job openings are posted. One approach is to create "communities of engagement" online through social media. These are networks through which candidates can learn about your company and see how current employees can make a difference.



# Build strong talent networks

Too often, companies aren't hiring the best of the best; they're hiring the best of who they stumble on based on their poor sourcing strategies. Advocate using social media and networking to build a deep pipeline of potential candidates who you may not have jobs for today but who you can tap into when appropriate openings emerge down the road.



# Learn and implement predictive analytics

## **6. Learn and implement predictive analytics.**

The role of HR metrics has grown dramatically over the past decade. While you may not need to hire a full-time data analyst, you (or your vendors) should be able to measure the effectiveness of all aspects of your recruiting efforts.



# Learn and implement predictive analytics

Employers have to be able to assess the probable yield of a recruitment ad in a certain location, among a certain demographic or at one salary point vs. another, and then instantaneously measure the results and make changes to that ad placement and content on the fly.

# Retain the personal touch

## **7. Retain the personal touch.**

While advances in technology have dramatically changed the efficiency of recruitment, courting top talent still requires a personalized message—as well as a promise that a potential employee’s career will flourish when he or she joins your team.



# Retain the personal touch

In our area, there are a plethora of career opportunities just five minutes up the road for folks to do the same kind of work they would with us, so that says to me “Why don’t we know these people more?” Creating onsite events where prospective hires and senior management can meet each other in a social setting and see if there’s a good fit has worked well for her organization.



# Simplify job applications

## **8. Simplify job applications.**

Online applications that are daunting to complete can result in the loss of top applicants, among other problems. For example, negative word-of-mouth assessments about overly complicated processes—or bad reviews on ratings websites such as Glassdoor—may harm your brand. And companies can even lose money from abandoned applications if they are operating under cost-per-click recruiting models.



# Simplify job applications

Yet despite these consequences, poorly designed online application systems remain a widespread problem. About 60 percent of all job seekers quit in the middle of filling out online applications because of a form's length or complexity.

# Simplify job applications

Fortunately, companies can increase completion rates by more than 300 percent by reducing the length of the process to five minutes or less.

You have to make applying simple, fast and mobile-friendly, or you won't attract the best candidates.

# Embrace mobile

## **9. Embrace mobile.**

Speaking of mobile, recruiting leaders say offering candidates a clean, well-branded mobile presence is now a basic requirement of an effective hiring strategy. Once that's in place, you can focus on ways to grab their attention and differentiate your job opportunities.



# Embrace mobile

Research shows that more than half of all candidates are job hunting exclusively via their mobile devices, so if you don't have an advanced mobile recruiting platform, those candidates won't find you. The cost of implementing a smart mobile recruiting presence has fallen dramatically in recent years.



# Expand the use of remote employees, but have a plan to manage them

## **10. Expand the use of remote employees, but have a plan to manage them.**

Why fight the relocation battle? Talented candidates have myriad career options, and many of them will opt against moving to pursue a job opportunity. So, to expand your applicant pool, consider allowing remote workers to handle tasks that don't require personal interaction with colleagues. But before you start down this path, be sure to create a realistic plan for managing those employees.



# Expand the use of remote employees, but have a plan to manage them

A recent study showed that over 80 percent of today's workforce wants to work remotely in some fashion. But the reality is that most organizations fail to effectively structure and manage remote workers, which can turn a potential solution into a waste of resources as remote workers struggle to understand and complete their duties.



# Forge relationships with relevant colleges and high schools

## **11. Forge relationships with relevant colleges and high schools.**

If you aren't finding the skills you need in the open market, try working with institutions of learning to co-create a curriculum in return for gaining the first shot at new graduates.



# Forge relationships with relevant colleges and high schools

As companies complain about a lack of available skills, the training they offer hasn't been keeping up with the speed of change in innovation, technology and business. Companies need to partner with centers of higher education to help produce the talent they need. Some organizations have underwritten the cost of new courses at local community colleges in return for getting first crack at recruiting new grads as they emerge from those programs.



# Hire more recruiters

## **12. Hire more recruiters.**

Talent acquisition isn't a cost center that should be squeezed during every budget review. Hiring is an investment in the future, and the companies that adopt this belief will attract the best and brightest candidates.

# Hire more recruiters

Most in-house recruiters are underpaid, underappreciated and overworked, so many of the best are transitioning to outside search or contract recruiting. At the same time, “surveys show that recruiting and retaining top talent is one of the top things that keeps CEOs up at night, so making an investment in effective recruiting efforts is critical—and that starts with having top recruiters setting the strategy and driving the results.





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# Dealing with Unemployment Compensation Claims

# Background

- Receipt of notice indicating that a former employee has filed for unemployment compensation benefits.
- Contest or not contest.
- Sometimes the employer will not contest the employee's claim only to wish later that it had.
- Other times the employer contests the claim only to wish later that it had not.



# Background

- Whether to contest is a tough, yet important decision that requires consideration of several key factors.

# Background

- Most employees have the right to file when they find themselves out of work through no fault of their own.
- Eligibility is based on employer termination due to a lay-off or run-of-the-mill performance issue.
- If an employee voluntarily resigns or is terminated for disciplinary “misconduct” (more about that later), the employee will generally not be eligible.



# Eligibility

- Eligibility in a quit situation applies if an average reasonable worker would be compelled to quit.
- Such as sexual harassment.

# Eligibility

- There is ineligibility in two situations:
  - In event of employment misconduct or aggravated employment misconduct – ineligible.
    - Misconduct requires a serious violation of the standards of behavior.
    - Employer can reasonably expect correct standards of behavior or shows serious lack of concern for the employer.



# Eligibility

- Second area causing ineligibility involves gross misdemeanor or felony while working.
  - If the offense had a significant adverse affect on the employer.



# Eligibility

In the following ten situations the Unemployment Commission will generally find the employee eligible even if the employer considers them to some extent misconduct.

# Eligibility

- Mental illness or impairment
- Inefficiency
- Simply unsatisfactory performance
- Conduct average reasonable person would have engaged in
- Inability or incapacity



# Eligibility

- Good faith errors in judgment
- Illness or injury with proper notice
- Illness or injury with proper notice involving a family member
- Chemical dependency
- Domestic violence



# Eligibility

If an employer finds misconduct that does not include one of the ten exclusions we've just noted:

1. You need to prove the claimant was fired for specific act of misconduct – connected with the work – that happened close in time to the discharge.
2. You must show the claimant knew or should've known he or she could be fired for such a reason.



# Eligibility

The employer will need to prove these things with documentation and first-hand testimony from witnesses who had direct personal knowledge.

# Common Mistakes by Employers

The following eight mistakes are ones that employers make that cause difficulty based on discharge:

1. Failing to give a final warning prior to discharge
2. Inconsistent discipline between two similarly situated employees
3. Failing to follow the stated disciplinary policy
4. Telling the Unemployment Compensation Bureau that the claimant was fired for an accumulation of incidents – instead of a specific final incident



# Common Mistakes by Employers

5. Letting too much time pass between the final incident and the discharge
6. Telling the Unemployment Compensation Bureau that the claimant was unable to satisfy performance standards
7. Allowing the impression that the discharge was really based on a personality dispute
8. Failing to present first-hand witnesses for proper documentation



# Setting Up a Defense

- Whistle blower – employee alleges the company engaged in unlawful activity, discrimination or harassment
- Employers should respond to the claim keeping in mind the response will form the basis of a defense for any claim for unlawful activity
- Aggressive and sound response may deter the employee from pursuing additional action



# Provoking Additional Claims

Even if there is no allegation of unlawful activity, it's common for a departing employee to feel that they should be assisted in obtaining unemployment.

If benefits are granted, the employee is more likely to move on.

If an employer contests, if they provoke an employee, then the employee may become angry.

Opposition to a claim may be just enough to provoke an employee to make additional claims against the company.



# Provoking Additional Claims

- For example, employee may file a charge of discrimination
- Make a claim for unpaid overtime
- Pursue litigation against the company
- Regardless of the merit of the underlying claim by the employee
- Or strength of the employer's defenses
- The employer will be forced to spend a great deal of time and money responding

# Provoking Additional Claims

An employer's thoughtful decision not to contest may be enough to forestall such additional claims.

There is a balancing test; both sides of the equation need to be considered.

# Financial Consequences

Assume the claim has been filed, both parties have an automatic right to three levels of appeal:

- Appeal to the Commission
- Appeal to the Commissioner
- Appeal to the Minnesota Court of Appeals



# Financial Consequences

This is true even if each appeal is consistently decided against one party.

Although highly unusual, after obtaining a ruling from the court of appeals each party may petition the Minnesota Supreme Court.

Each time an appeal is filed the employer incurs:

- Substantial out of pocket costs, such as attorney's fees
- Lost employee time
- Travel expenses



# Financial Consequences

The appeal process is expensive, and the decision to contest may also have an adverse financial impact.

Each time an employee received benefits the employer receives a hit to its experience rating.

The experience rating determines the unemployment compensation tax rate.



# People Time

Contesting a claim can be distracting and can be a drain on employer's staff.

The appropriate person may need to spend hours compiling supporting documentation, working with the companies consultant or attorney and preparing appeal papers.

Additionally, witness time takes employees away from their duties.



# Protecting the System

- Employer may choose to contest because it is the right thing to do.
- Benefits are for individuals who are out of work through no fault of their own.
- The system should not be abused by undeserving employees.
- Is in fact illegal for employer to collude with a former employee – for the purpose of assisting the employer received benefits.



# Message to Other Employees

- Employees talk with each other and have a general sense of the company's management practices.
- Employers should bear this in mind when formulating their approach.
- If an employer often contests, employees may be more likely to file only when they have a strong claim for eligibility.
- If an employer rarely contests, employees may be more likely to file claims even when ineligible.





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# Effective Delegation



# Effective Delegation

During this section, we will review the concept of leadership delegation and provide a four-step process for delegation. Specifically, the topics to be covered include:

- Definition
- Process
- Roadblocks
- Benefits
- Pitfalls



# Effective Delegation

Delegation underscores a style of leadership which allows leaders to develop the skills and knowledge of their employees.

The objective of delegation is to have a task completed by a staff person rather than by the leader. Delegation is also about entrusting the leader's authority to an employee. This means that the employee is able to act independently and has ownership with the leader for successful completion of the task.



# Effective Delegation

By delegating a task and the authority to execute against it, the staff person has the opportunity for personal development. Delegation allows leaders to tap into the potential of their employees and prepare them for leadership roles.

Lastly, effective delegation is not a one-time event nor is it “handing off” your least desirable tasks. Effective delegation is a process that can provide learning opportunities to your employees, while having tasks completed for you.



# Effective Delegation

Delegation is important partly because it is something you owe yourself as an effective leader. You have a responsibility to yourself, your peers, and your organization to use delegation.

As a leader, you cannot do everything for the organization. There are only so many hours and only so much work you can get done in a day. Also, you can only be in one place at a time.



# Effective Delegation

Delegation will also keep employees engaged and motivated because they are involved. An effective leader uses delegation to ensure that the organization operates at its fullest potential — instead of leaving potential undeveloped and untapped.



# Effective Delegation

Before we begin to explore delegation, let's take a minute to reflect on four questions. These questions will help you decide if you are ready to use delegation as a leader.

# Effective Delegation

- Are you ready to be receptive to your employee's ideas?
- Are you prepared and willing to accept that your employees will make mistakes?
- Are you ready to share successes with your employees?
- Are you ready to exercise self-restraint and let employees operate independently?



# Effective Delegation

If you can answer “yes” to these questions, you are ready to begin delegating.

Let’s take a look at a process that can help you manage your delegation activities.

# Effective Delegation

We are going to take a look at a four-step process for delegation. The four steps in the process are:

- Plan the delegation.
- Assign the task or tasks.
- Determine if the employee is ready to execute the task.
- Follow up with the employee.

# Effective Delegation

When you begin to plan the delegation, there are five key activities to include:

- List the tasks that are appropriate to delegate.
- List the employees who are ready to take on added responsibility.
- Determine the specific results you expect.
- Determine when you will “check in.”
- Develop expectations for recording/reporting task activity.

# Effective Delegation

A good starting point for deciding which tasks to delegate is to determine which tasks you were doing prior to becoming a leader. These tasks would probably be good ones to delegate.

However, tasks such as motivation, training, performance reviews, and promotions are not appropriate to delegate. Keep in mind that you should not be delegating only the tasks you don't enjoy doing, but tasks that can be successfully completed by your employees.

# Effective Delegation

Remember, delegation is a development opportunity for your employees so you may need to provide coaching or mentoring to ensure the successful completion of the task.

Assess the skills and knowledge of employees to determine which tasks will be challenging and stretch their skills, yet still be attainable. Depending on the work distribution within the team, other tasks may need to be shuffled to ensure adequate time to complete the delegated task.



# Effective Delegation

Determine the results during the planning stage to ensure you are clear on the outcomes that constitute success.

It is imperative to the success of the delegation to set clear expectations and deliverables prior to allowing the employee to work on the task. As you analyze the task to determine the desired results, remember that the results need to be specific, measurable, attainable, and time-bound.

# Effective Delegation

Since part of delegation is giving an employee authority, it is not appropriate to be checking in constantly. This will undermine the ownership of the task.

The employee may perceive constant checking in as a leader's lack of trust and may undermine the employee's confidence. Instead, determine when it is appropriate to "check in" based on the difficulty, importance, and timeline of the task, and adhere to the schedule.

# Effective Delegation

It is important to be clear on how you want the employee to document and report on the task's progress.

If there is a template or project plan that is expected, have a sample document for the employee to refer to as a guide. Plan the recording and reporting expectations prior to meeting with the employee to ensure adequate preparation time for you to create the documentation.



# Effective Delegation

After you have determined the task you are going to delegate, the next activity is to schedule a meeting with the employee to discuss the delegation. During this meeting it is important to discuss:

- The task that is being delegated.
- The expected outcomes of the assignment.
- Why the employee was chosen.
- The details of the task.



# Effective Delegation

Describe the task that you are going to delegate. First, explain to the employee why you have decided to delegate the task. Next, explain the task from a high-level perspective to give the employee an overview of what the task is. Confirm that the employee understands the task.



# Effective Delegation

During the planning activities, you decided on the expected outcomes or results the employee is expected to deliver. Now is the time to introduce them to the employee. Discuss the specifics of the results, how they will be measured, and the timeline for completion. Confirm that the employee understands.

# Effective Delegation

Thank the employee for considering performing the task. Tell the employee why you decided to delegate this task to him or her. Identify the skills or knowledge the employee has that will lend to the successful execution of the task. When possible, state this in behavioral terms so the employee is clear on why he/she was chosen.



# Effective Delegation

The last discussion point in the meeting is to elaborate on the details of the assignment. Provide the employee with all the information needed to ensure success.

Specifically, discuss:

- Problems that may be encountered.
- The scope of the employee's authority or decision-making ability.
- Your "check in" schedule.
- Recording/reporting process.

Ensure the employee understands the details of the assignment and the expectations you have for the task.



# Effective Delegation

At this point in the process, you have provided the employee with detailed information regarding what is expected. Now it is time to determine if the employee is ready to take on the task. To do this:

- Solicit the employee's input — Ask probing questions to determine if the employee is confident the task can be completed successfully. Allow the employee the opportunity to identify any concerns with the assignment.



# Effective Delegation

- Provide answers to any questions — Provide answers regarding the task to the employee; or, if necessary, capture the questions and follow up with the employee at a later date.
- Determine if formal training is necessary — Based on the task requirements and the skills of the employee, determine together if there is any formal training that will be necessary for the employee to be successful. Discuss options and timing for receiving the needed development.



# Effective Delegation

- Offer an “open door” policy — Although the process of delegation transfers authority from the leader to the employee, it is imperative that you are available to provide assistance. The employee needs to feel confident you are available if questions or problems arise.



# Effective Delegation

Delegation is a process; therefore, it is imperative to follow up on a regular basis. Follow-up meetings should be scheduled based on the “check in” process you created during the delegation planning. These are the formal follow-up meetings; however, the task or assignment may be discussed at any time. During the formal follow-up meetings, discuss these items:



# Effective Delegation

- The employee should report on the progress of the expected outcomes.
- Ask the employee what obstacles or problems have been encountered and offer suggestions on how to overcome them.
- Provide any additional information the employee needs to be successful. This may include coaching, mentoring, or additional training.



# Effective Delegation

Delegation can be a difficult process, especially if you have tried it before and the results were not what you expected. As a leader, you are ultimately responsible for the success of the task.

The three types of delegation “roadblocks” that can stop a leader from delegating or take them off course are:

- Excuses.
- Obstacles.
- Resistance.



# Effective Delegation

As a leader, it can be difficult to delegate to others. Some of the more common excuses for not delegating include:

- “I can do it better” — In reality, your employees are talented and have the potential to successfully complete delegated tasks. It may take them longer, or they may take a different path, but in the end, the task will be completed successfully.

# Effective Delegation

- “My employees won’t respect me.” — Employees will respect you more as a leader if you are willing to develop them and help them become prepared for future roles in the organization. As a leader, it is your responsibility to delegate and challenge your employees.



# Effective Delegation

- “I will lose control.” — As the leader, you are ultimately responsible for the successful completion of your tasks. Although you and the employee share authority for the task, you still have control since you are accountable for the task.
- “What about my personal satisfaction?” — There is a sense of personal satisfaction when you complete a task by yourself. However, there is also great satisfaction in helping an employee stretch and reach his or her potential.

# Effective Delegation

In addition to excuses, there are obstacles that hinder a leader's ability to delegate. These obstacles may be personal or organizational and include the following.

## **Personal obstacles:**

- Having a negative attitude toward delegation.
- Having a leadership style that doesn't lend toward employee development.
- Having difficulty communicating clear expectations.
- Lacking knowledge on how to delegate.

# Effective Delegation

## **Organizational obstacles:**

- Hierarchy.
- Procedures or rules.
- Organizational culture.
- Unidentified skills and talents of the employee population.



# Effective Delegation

The last delegation roadblock to be aware of is resistance. As a leader, you may be open and willing to delegate only to find your employees are resistant to the idea. Employees have reasons why they fail to cooperate or participate.

Those reasons include:

# Effective Delegation

- **Fear of failure** — Employees are afraid to make mistakes and have a fear they will fail. As the leader, it is important to understand that mistakes may happen, and a mistake needs to be looked on as a learning opportunity, not a failure. As the employee has small successes with the task, celebrate those to increase the employee's confidence and lessen the fear.



# Effective Delegation

- **Perception of the task** — If the employee has the perception that the task has only been delegated because the leader doesn't want to do it, there may be resistance. Prior to introducing the task, be sure you are prepared to discuss the task in a positive manner, and explain how this can be a learning and development opportunity.



# Effective Delegation

- **Fear of hurting someone** — An employee may resist a delegated task assignment if he or she perceives someone may feel hurt in the process. For example, if accepting the task means someone will have to take on more work or that someone may be disappointed that he or she wasn't chosen, there may be resistance.



# Effective Delegation

When you overcome the roadblocks to delegation (excuses, obstacles, and resistance) you will reap the benefits of the process. Not only will you have more time available to work on different tasks, your employees will experience added responsibility and the organization will benefit in terms of results.



# Effective Delegation

As you use the delegation process, keep the following potential pitfalls in mind:

- **Overloading one employee** — Spread the responsibility to the entire team to keep everyone involved. This may mean shifting team responsibilities to allow time for delegated tasks. Delegate tasks based on employees' skills, knowledge, time availability, and willingness to participate.



# Effective Delegation

- **Delegating only disliked tasks** — Don't delegate only the tasks you don't like or tasks that are simple. Choose tasks that will tap into the potential of your employees and help them develop for future roles in the organization.
- **Seeing delegation as a weakness** — Delegating is not a weakness in a leader. Instead, it is an opportunity to develop others while freeing up your time to work on more important tasks.



# Effective Delegation

To summarize, we discussed what delegation is, why it is important, and a four-step process for delegation.

The four steps to the delegation process are:

- Plan the delegation
- Assign the task(s)
- Determine employee readiness
- Follow up





NORTH RISK PARTNERS™

# 12 Easy Ways To Motivate Your Employees

And Get the Performance You Want

# Employee Motivation

## 1. Think about your employees' strengths!

Most managers worry about what their people are doing *wrong*. A natural concern, but it kicks off a de-motivating spiral. To build motivation, remind yourself what each employee's greatest *strength* is.



# Employee Motivation

## **2. Don't use motivation methods that don't work.**

When you keep telling employees what to do and they keep messing up, who's being stupid? Some might say doing the same thing over and over, when it obviously doesn't work, isn't too sharp. Yet we often do just that, trying the same supervisory behaviors over and over and getting more and more frustrated when they don't work.



# Employee Motivation

## **3. Re-calibrate your motivation scale.**

We routinely accept mediocre motivation at work, forgetting that everyone is capable of high motivation levels. By looking at non-traditional benchmarks, we can re-calibrate our sense of what truly high motivation is. Sharing this realization throughout the organization helps create a vision of motivation for everyone to pursue.



# Employee Motivation

## 3. **Re-calibrate your motivation scale.** (continued)

How? Ask employees and managers for examples of exceptional motivation. Seek out and share stories of exceptionally motivated explorers, athletes, musicians, artists, volunteers, inventors and entrepreneurs. Find out what activities or pursuits have created maximum motivation in the past for employees.



# Employee Motivation

## **4. Teach employees to measure their own success.**

Employees who keep track of their performances are able to notice and document their development. They create their own scoreboards and are able to track their wins more effectively than any manager.



# Employee Motivation

## **4. Teach employees to measure their own success.** (continued)

How? Every performance goal can be reduced to a simple, easy-to-track measurement. If the goal is not inherently quantitative, create a judgment scale to rate performance against. Today, only employees operating machinery in quality-oriented factories track their own performances routinely. Tomorrow, every employee should be measuring their own success.



# Employee Motivation

## 5. Measure and track motivation levels.

How can you manage something you don't measure? Yet most organizations and managers have no idea how motivated their people really are. The typical employee satisfaction poll does not measure motivation. If you start to measure *motivation*, you can realistically expect to learn how to manage it. Without good measures, you'll never get any better at managing it.



# Employee Motivation

## **5. Measure and track motivation levels.** (continued)

How? Use a simple, repeatable instrument such as the Job Motivation Level (JML). Take periodic measures of overall employee motivation. And encourage supervisors to track motivation within their own spans of control on a routine basis.

# Employee Motivation

## 6. Ask employees what they want.

Employees are motivated by...what motivates them! Employees have different goals and desires, and therefore need different performance and development opportunities. You can't motivate individuals with generic programs. To maximize motivation, ask each employee what turns them on.



# Employee Motivation

## **7. Learn to recognize and eliminate threats.**

Employees often feel that their managers use threats to try to motivate them, yet managers routinely deny it. They don't mean to threaten employees, but if that's how it feels to the employee, then it is a threat and it's damaging to motivation levels. So managers need to learn to recognize the things that employees see as threats and work on eliminating or reframing them. Opportunity is an effective motivator. Fear is not.



# Employee Motivation

## **8. Stop Distracting Employees.**

Most employees want nothing more than to focus on doing their jobs better and better. But from their perspective, critical incidents distract them, leading to worries about communication, security, fairness, respect and other key job criteria that managers rarely recognize. If you first take care of employees' most fundamental intangible requirements, you can then shift the focus from their concerns to your motivation and performance agenda.

# Employee Motivation

## 8. **Stop Distracting Employees.** (continued)

How? Ask employees what bothers or worries them about their work and workplace.



# Employee Motivation

## 9. Communicate!

Open communication is most employees' #1 priority. And the majority of employees say their managers don't communicate openly with them. But a majority of managers say they do. Who's right? Wrong question. If employees feel you are withholding information they need about their work or workplace, they will lose motivation and develop resistance to your management. Time to communicate more openly.



# Employee Motivation

## 9. **Communicate!** (continued)

How? Since employees and managers generally see this issue differently, the simplest fix is to ask employees what they want to know. Ask them one-on-one, by email, in meetings. Give employees at least one chance a week to ask you for information. And then give them the information.

# Employee Motivation

## **10. Ask employees for information about their performance.**

This method turns on the power of informative feedback, which is information about how you are doing. The more information, the more intrinsic motivation. So good managers try to offer informative feedback. But do you always know the details? Probably not. So instead of telling them, ask them for information about their performance.



# Employee Motivation

## **11. Explain your reward systems.**

Arbitrary rewards generate cynicism, not motivation. Employees feel their managers don't respect them when a new program is announced out of the blue. They complain that the employer treats them like children. Show your respect for employees and appreciate their need to know by informing them fully about any new rewards.



# Employee Motivation

## **12. Carry an idea notebook.**

What do employees think? Do they have any good ideas? Who cares! At least, that's the attitude many employees assume their managers take. Yet most managers wish employees would share more of their ideas and insights. They just aren't very good at asking. They tend to interrupt or overrule ideas without really meaning to, accidentally discouraging the very behaviors they desire.



# Employee Motivation

## **12. Carry an idea notebook.** (continued)

*How?* A simple way to overcome this common problem is to carry a blank notebook reserved for recording employee ideas. Managers who make a practice of collecting at least a page of ideas each day become great listeners overnight, and their employees suddenly seem to be full of ideas.





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# Terminating the Disabled Employee Who is Not Performing Without Inviting Lawsuits

# Introduction

Those of us who work regularly in the human resources/labor and employment arena wish we could discuss terminating "disabled" employees by only discussing the Americans with Disabilities Act ("ADA"). Unfortunately, this topic covers much more than just the ADA. When considering terminating an employee who is, or may be "disabled," Minnesota employers must also consider: the Minnesota Human Rights Act ("MHRA"), Minnesota's workers' compensation laws, the Family and Medical Leave Act ("FMLA") and reprisal issues.



# Introduction

To effectively navigate this treacherous area, the human resources professional must be familiar with each of these statutory frameworks, and mindful of a plan to avoid running afoul of any of them. This presentation focuses on the basic tenets of each of these statutory frameworks, a strategy for approaching terminations involving employees who are or may be disabled, and how to use an employer's own policies and the various statutes to benefit the employer in disability discrimination and related claims.



# Introduction

## **Know The "Enemy" - That is, The Various Laws Under Which The Terminated Employee May Make A Claim**

Planning the best approach to terminate a non-performing employee who may be disabled should start with a working knowledge of the recovery avenues available to that employee if she/he makes a claim. Below is a list of the issues that should be considered when assessing a termination strategy for such an employee.

# The Americans with Disabilities Act

As a practical matter, the ADA applies to employers who in any way engage in interstate activity. With respect to "size" limitations, its provisions apply to employers who employ 15 or more employees 20 weeks of the calendar year (current or preceding).



# The Americans with Disabilities Act

The ADA protects qualified disabled employees from discrimination. The ADA has two separate components: (1) a prohibition against differential treatment of disabled employees; and (2) an affirmative duty to reasonably accommodate disabled employees, who can perform the essential functions of their position, unless doing so would impose an undue hardship on the employer.



# The Americans with Disabilities Act

Absent direct evidence of discrimination, the initial measuring stick for differential treatment is the same prima facie case applicable in any employment discrimination matter. The employee must show: (1) she/he is disabled; (2) she/he suffered adverse employment action; (3) she/he is qualified to perform her/his job; and (4) non-disabled employees are not subject to such adverse employment action (as a result, a court can infer discrimination).



# The Americans with Disabilities Act

## **Disabled**

- A physical or mental impairment
- that substantially limits
- one or more major life activity;

OR

- a record of such impairment;

OR

- is regarded as having such an impairment.



# Disability Discrimination under the Minnesota Human Rights Act

Employers with one or more employees are bound by the anti-discrimination provisions of the MHRA, and employers with 15 or more employees are bound by the duty to reasonably accommodate employees under the MHRA. The MHRA protects a "qualified disabled person" from discrimination and entitles such an employee to reasonable accommodation.



# Disability Discrimination under the Minnesota Human Rights Act

## “Disabled”

- A physical, sensory or mental impairment
- that *materially* limits
- one or more major life activity;

OR

- a record of such impairment;

OR

- is regarded as having such an impairment.



# The Family and Medical Leave Act

The FMLA applies to private sector employers of fifty (50) or more employees. Covered employees are employees who have worked more than 1250 hours in the 12 months preceding the leave, and who work at a facility with 50 or more employees within a 75 mile radius.



# The Family and Medical Leave Act

Like the ADA, the FMLA offers qualified employees two separate entitlements: (a) the employer must grant the employee the leave and return the employee to the same or similar position upon return from the leave; and (b) not discriminate because of the employee's exercise of his/her rights under the FMLA.



# The Family and Medical Leave Act

The FMLA entitles qualified employees to a total of twelve (12) weeks of unpaid leave per 12-month period for:

- the birth of a child of the employee, and the placement of a child with the employee for adoption or foster care;
- the care of the spouse, child or parent of the employee if such spouse, child or parent has a serious health condition;
- a serious health condition that makes the employee unable to perform the functions of his/her position.



# Minnesota's Workers' Compensation Laws

The statute applies to any person who employs another person to perform a service for hire. The statute entitles employees injured in the course and scope of employment to recover certain damages for those injuries. Employees are entitled to payment of medical expenses, rehabilitation services and lost wages reasonably and necessarily incurred as a result of the work-related injury.



# Minnesota's Workers' Compensation Laws

What is a work place injury for which the employee is entitled to recover? The employer is liable to pay compensation for “personal injur[ies] or death of an employee arising out of and in the course of employment . . . .” “ ‘Personal injury’ means injury arising out of and in the course of employment and includes personal injury caused by occupational disease; but does not cover an employee except while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of such service at the time of the injury and during the hours of such service.”



# Reprisal (aka Retaliation)

Each of the statutory frameworks outlined above prohibits retaliation for the exercise of the rights provided for therein. This prohibition is common for most discrimination statutes and the legal term that generally is used to refer to such retaliation is "reprisal."

Absent direct evidence of an intention to retaliate, to prove a prima facie case of "reprisal," the employee must show: (a) statutorily protected conduct; (b) an adverse employment action by the employer; and (c) a causal connection between the two.



# Practical Tips

1. Do not ask whether the employee is disabled. Ignorance of a disability is bliss. Duty to reasonably accommodate only relates to known disabilities. In addition, there can be no intentional discrimination when there is no evidence the employer knew the employee was disabled. Once an employer does know of the disability, the employer has a duty to reasonably accommodate.



# Practical Tips

2. Keep a list of the statutes that apply to your company.

# Practical Tips

3. Make a checklist for each and/or all applicable statute[s].

The list below might be helpful:

# Practical Tips

- a. Do we (the managers and the employer) have any knowledge that the employee is "disabled"?
- b. What rights, if any, available to disabled/injured employees have been asserted by the subject employee?

# Practical Tips

- c. If we have knowledge that the employee is or may be disabled, have we considered the obligations to reasonably accommodate, if any?
- d. Is the employee on workers' compensation leave, or has she/he recently filed for workers' compensation benefits?
- e. Does the employee suffer from a serious health condition? If so, have we afforded her/him all the rights to which she/he is entitled under the FMLA?

# Practical Tips

- f. Even if the employee is not disabled, has anyone made any comments that would suggest that we believe she/he is disabled? If so, who made the comments, and was prompt remedial action taken in response to any negative comments? Is the employee on workers' compensation leave, or has she/he recently filed for workers' compensation benefits?



# Practical Tips

- g. If the employee is disabled or we have knowledge that she/he may be, have we made the employee aware of her/his rights under the FMLA, and, if the employee is out on a leave that qualifies as an FMLA leave, have we given her/him notice of the fact that we are considering her/his leave as an FMLA leave?



# Practical Tips

- h. What documentation do we have that there is a legitimate, nondiscriminatory motive for the termination? If we have knowledge that the employee is disabled, is the legitimate nondiscriminatory reason something unrelated to the disability and/or serious health condition?



# Practical Tips

- i. If we are taking the position the employee is not "qualified," what documentation do we have that she/he is not qualified? And, does her/his lack of ability to do the job have anything to do with our inability/refusal to reasonably accommodate a disability from which she/he suffers?



# Practical Tips

- j. If we are taking the position we could not reasonably accommodate the employee because of an undue hardship, what documentation do we have that we attempted and/or considered reasonable accommodations and the costs of such accommodation(s)?



# Practical Tips

- k. Have I advised the individual manager that she/he may be individually liable for any failure to comply with the law (if applicable)?

# Practical Tips

- I. Have we closely considered the timing? If the employee asserted any protection under these various statutes, when did she/he do so in relation to the first act (or last act) taken by the employer along the chain of events leading to termination?



# Practical Tips

Have I also considered whether all the time off entitlements have been exhausted? For example, employers cannot require an employee on FMLA and workers' compensation simultaneously to use his vacation pay or other paid time off. Minn. Stat. §176.221, subd. 9 provides that an employee cannot be required to take paid time off. As a result, even if an employee's 12 weeks of FMLA is exhausted, and the employee is still on workers' compensation leave, there will be a question of whether there is additional leave entitlement.



# Practical Tips

m. Because of the timing, can the employee claim there is a connection? (i.e., when did the employee give notice of injury under Minn. Stat. § 176 or request leave and begin to exercise or inquire about rights under the FMLA?) If so, what documentation do we have to demonstrate there was a concern about the employee's performance before the employee complained and/or asserted his rights?



# Practical Tips

- n. If we are taking the position that attendance at work is a problem, what do our policies say about attendance and have they been uniformly enforced?

# Practical Tips

- o. If we are taking the position that attendance at work is a problem, have we taken into account any FMLA-protected time to calculate the failure to adequately attend? FMLA time may not count towards any attendance warnings.

# Practical Tips

- p. If we are taking the position that the attendance at work is a problem requiring termination, does our job description say that attendance at work regularly is an essential function of the job?



# Practical Tips

- q. If we are taking the position that the attendance at work is a problem requiring termination, does our job description say that attendance at work regularly is an essential function of the job? Is the personnel file “ready” for production? Does it contain any materials which violate any of the above statutes and is it consistent with Minn. Stat. §181.961, subd. 2?



# Questions?

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