

# ORANGE COUNTY BUSINESS JOURNAL

HUMAN RESOURCES GUIDE

## Hiring & Firing Without Liability

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**I**n order to protect your company from employee lawsuits and significant liability, you should take these simple steps when hiring or firing:

### Hiring

An employer's decision to hire or reject an applicant must be based entirely upon lawful criteria. This requirement applies to all aspects of employee selection, including advertising, recruiting, applications, interviews, and hiring. Avoid obtaining information that identifies the protected class of an applicant, such as the applicant's gender, race, color, national origin, ancestry, citizenship, age, religion, sexual orientation, gender identity, marital status, pregnancy, disability, U.S. military status, political affiliation or genetic characteristics. Also, do not inquire about arrest records or workers' compensation claims.

### Ads

The law prohibits advertisements that specify a preference based upon any protected class. Use neutral language in advertisements. For example, avoid the term "salesman" and instead, use "salesperson" since it is gender neutral. Avoid the use of code words, such as "all-American type," "unattached," "energetic," etc.

### Applications

Applications should be updated frequently to comply with the law. Avoid any questions on the application that reveal the applicant's protected class. Require that the applicant provide complete responses to all questions. Do not allow the applicant to simply attach a resume. Ensure that the applicant states the reason for leaving previous employers, and explains all periods of unemployment. Include a statement that any misrepresentation or omission is grounds for immediate termination. Also include an at-will employment acknowledgment in the application.

### Background Checks

Contact all references provided by the applicant. However, avoid invading the applicant's privacy. Obtain the applicant's written consent before conducting any detailed background investigation. Comply with the Fair Credit Reporting Act when doing so.

### Interviews

Prepare for the interview by reviewing the position sought, as well as the applicant's resume, application, and references. Reconcile any inconsistencies in the resume and application. Avoid general questions, personal questions, or questions that identify the protected class of an applicant. Questions should be specifically related to the position for which the applicant is applying.

Allow the applicant to do most of the talking during the interview.

### Hiring Decisions

Always be able to state with certainty the reasons for the hiring decision. Carefully document the reason for this decision, especially where an applicant is not hired, and retain these records.

### Handbooks

It is strongly recommended that all employers have an employee handbook. Ensure that all employees sign an acknowledgment of receipt of the handbook, which includes an express at-will employment agreement signed by the employee. Make sure that there are no employment policies that conflict with the at-will employment policy. Update the handbook regularly.

### Orientation

Schedule orientation for new employees, preferably on the first day of employment, in order to distribute employee handbooks, obtain signed at-will agreements, review key employment policies, distribute job descriptions, and identify specific grievance procedures. Document the employee's attendance at the orientation.

### Arbitration

Consider the benefits and risks of requiring all employees to sign arbitration agreements. Confirm that any arbitration agreements comply with the special rules regarding arbitration for employees, since there have been significant changes in California law on this issue recently.

### Classification

Ensure that you have properly classified your employees as either exempt or nonexempt. Most employee lawsuits and class actions now include claims for overtime, meal and rest periods, pay stub violations, waiting time penalties and more, due to misclassification. Failure to classify employees properly can lead to significant liability.

### Evaluations

Employees should have regular performance evaluations. The evaluation should notify employees of their strengths and weaknesses, and provide them with an opportunity to improve their performance. The person preparing and presenting the evaluation should be the person most knowledgeable about the employee's performance during the evaluation period, and should review the employee's personnel file before preparing the evaluation. Use objective criteria in evaluating an employee's performance whenever possible. The evaluation should be fair, yet brutally honest. Always offer the employee an opportunity to respond in writing to the evaluation. Ensure that the employee signs the performance evaluation.

### Disciplinary Actions

Always be fair and consistent concerning any discipline. Discipline should be based upon specific acts, such as poor performance, misconduct, or violations of company policy. The disciplinary action should be appropriate to the facts of each case. The reasons for the discipline should be clearly communicated to the employee in writing. Carefully document any disciplinary action. Even if the warning is verbal, the employer should document the fact that a verbal warning was given to the employee. Have the employee sign any such documentation.

### Termination

Employers must realize that the manner in which an employee is terminated may mean the difference whether a lawsuit is filed against the employer. Treat employees with fairness, consistency, dignity, and respect when terminating. Even though employment is at-will, the decision to terminate should always be based upon legitimate business reasons, supported by ample documentation, consistent with the employer's policies, conducted in good faith, and for good cause. Provide the true reasons why the employee was terminated, but leave yourself room to expand upon these reasons. Have a witness present at the termination meeting. Conduct exit interviews whenever possible.

### Layoffs

Follow your written policies when conducting layoffs. Never use an economic layoff as an excuse to terminate a problem employee. Be sure to comply with the WARN Act where required.

### Severance

Have a written policy that the payment of severance is at the discretion of the employer. Only provide severance if the employee signs a release of all claims.

### References

Only provide the employee's date of employment and position. Any additional information provided may lead to litigation by the former employee and/or the third party provided with the information. Also avoid any "off-the-record" comments. Designate a specific employee to be the contact person for any such inquiries.

### Conclusion

If you follow these simple guidelines, you will protect your company from significant liability when making these very important employment decisions.

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