

Township Personnel Policies, Part II: Hiring and Firing Issues

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between the public you serve
and the township.*

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Hiring and, when necessary, firing employees can be some of the most important, yet difficult tasks faced by township boards and managers. Your employees are the link between the public you serve and the township. Hiring the best employees possible is a must, just as is terminating those who are not getting the job done.

Both hiring and terminating employees involves complying with an ever-increasing number of state and federal laws and being ever mindful of the hazards of a false step. Gone are the days when a

township could just ask an existing employee if he or she "knows someone" who could fill a vacant job, or where an employee could be fired without risk of a challenge. Nowadays, "doing it right" is a must. Carefully planning and reviewing each step in the hiring or firing process is a necessity.

This article follows up on last month's discussion of employment policies and outlines some "dos and don'ts" in the hiring and firing process. As with employment policies, a township can set a proper tone for its prospective employees, lay out the expectations for those employees it hires, and ward off possible lawsuits by discharged employees through practices and procedures that are well thought out in advance and designed to address current legal requirements. This article provides tips and ideas to get you started and guide you through the process. This is only an outline with a few suggestions, however. Before your township finally adopts any of these practices and procedures, ask your township attorney or someone well-versed in employment issues to review your practices and procedures.

How to Hire the Best Candidate to Meet Your Needs

The hiring process is an inherently unique procedure, for within a very limited time frame a township must evaluate and decide which applicants "fit the mold" of its organization, while each individual applicant tries to convince the township that he or she is the best person for the job. Throw in potential discrimination claims, and the hiring process becomes a minefield of numerous legal restrictions and obstacles. With proper planning and a few precautions, you can manage to hire the best candidate to meet your needs.

The hiring process can be divided into four stages: recruiting, information gathering, selecting, and post-offer. Each stage presents unique opportunities and problems.

I. Recruiting Stage

Federal and state anti-discrimination laws provide the legal framework for recruiting employees. On the federal level, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act prohibit discrimination based on race, color, sex, age, religion, national origin, disability, or veteran's status. On the state level, the Elliott-Larsen Civil Rights Act and the Persons with Disabilities Civil Rights Act provide the framework for hiring.

There are two steps in the recruiting stage during which the township should take careful steps in order to avoid headaches in the future. A good job description is always a "must." It helps the township outline the various responsibilities of the job position, along with the required skills. Creating a detailed job description then helps guide the township in developing a relevant line of questioning for the upcoming interview process, and it also helps in narrowing the applicant pool to those who are qualified. It sets the tone for everything you do later in retaining qualified employees. A job description should contain the title of the available job position, responsibilities of the position, the skills necessary for the position, time commitment, and minimum physical and educational requirements.

How a township posts a job description

is also important in terms of avoiding discrimination claims in recruiting employees. A township should post notices about the job opening in the workplace, advertise about the job opening outside of the workplace, seek recommendations for filling the

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job opening from many individuals and instruct them not to limit recommendations to only individuals with a known interest in the job opening. The township should not rely on word-of-mouth as the principal means of recruiting, not use advertising that indicates a preference based on age, race, sex or any other protected classes, and not confine the search for applicants to individuals already doing the same or similar jobs, or those in the same department.

II. Information Gathering Stage

Employers face an emerging (and seemingly unsolvable) dilemma: On one hand, anti-discrimination laws forbid them from inquiring about many aspects of an applicant's personal life (for example, arrest records); on the other hand, employers are being held liable for negligent hiring on the theory that they knew, or should have known, about the dangerous tendencies of their employees. Hence, employers must gather as much information as the law permits, but must not exceed the legal boundaries.

The township's goal during the information gathering stage should be to gather information about the qualifications of the applicants for the job opening. There are many methods for gathering information

about applicants, including written applications, interviews, employment references, medical examinations, background investigations, fingerprinting, and handwriting analysis.

• The Application

Application forms are the first formal documentation of the employment relationship. The application offers a township an opportunity to establish—from the outset—the parameters and guidelines of the employment relationship. If the township has chosen to be an at-will employer, the application should include an express acknowledgment signed by each prospective employee stating that he or she understands that the employment relationship is for an indefinite period of time and can be terminated with or without cause, and with or without notice. There should also be a "zipper" clause declaring that the at-will relationship may be modified only by an express agreement signed by both the employee and a designated top township official.

The application form should also authorize the prospective township to do credit and reference checks and include a waiver of liability for anyone responding to the prospective employer's request for information. A note of caution: the Consumer Protection Act states that if an employer rejects an applicant on the basis of any information included in the credit report, the applicant must be so informed. Complying with this act is very tricky. If you want to obtain credit reports from outside agencies for prospective employees, check with your township attorney first.

Also, the application form should include a declaration that, notwithstanding the at-will relationship, if an applicant falsifies, omits or misrepresents information on the application, it may result in a discharge.

Finally, it is improper to require, or even accept, an applicant's photograph.

• Reference Checks

Reference checks from former employers can be the most illuminating source of objective information. It is often very difficult, however, to obtain opinions regarding an applicant's skills and shortcomings. Many employers have adopted a policy of

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simply confirming dates of employment and positions held.

Reference checks will be facilitated if the township can provide the former employer with a copy of the signed written release on the application form allowing personal, employment and education references to respond to requests for information pertinent to the job for which the applicant has applied.

- **The Interview**

Townships rely heavily on the interview as the primary tool to get to know their applicants. You should be aware, however, that the law limits the types of questions you may ask and the methods an employer may use to gather information during this process.

As we noted, federal law protects applicants from discrimination on the basis of age, sex, religion, national origin, ancestry, race, color, and disability. Citizenship and veteran status are also protected by federal law. Protected characteristics under state



law could include height, weight, marital status, familial status or sexual orientation. Interviewers should not ask questions that would reveal an applicant's membership in one of these protected groups.

The following essential information should be obtained from an applicant:

- Identification of the applicant (name, address, and telephone number);
- Applicant's previous employment (job titles, salary levels, etc.);
- Summary of the applicant's background (education, training, work history, special qualifications and skills);
- Applicant's interests.

Beyond this basic information, employers

should design questions to elicit job-related information that will be applicable and useful in deciding which applicant will meet the employer's needs.

Some questions that serve to elicit such useful information may also delve into protected areas, such as national origin or age. Consequently, there are areas about which an applicant should not be asked because they are unlawful or could reveal information that could be used as a basis for a claim of discrimination, such as an arrest record, relationship to a "contact person" named on the application, garnishment record, prior workers' compensation claims, and English fluency. The key is to ask questions that will reveal job-related information.

III. Selecting Stage

The township's goal during the selecting stage should be to determine which applicant is the best qualified for the job opening. Federal anti-discrimination laws require that employers select job applicants based on potential performance in a particular job without regard to any protected characteristic.

There are two theories under which employees may claim discrimination:

1. "Disparate treatment" discrimination occurs if a particular test is applied only to members of a protected class. For example, requiring only female applicants to demonstrate that they can drive a truck with a manual transmission is disparate treatment discrimination.

2. "Disparate impact" discrimination occurs if a facially neutral qualification or test is equally applied to all applicants but has a disparate impact on a protected class. For example, if a technical degree requirement for an entry-level clerical position excludes from consideration a significantly higher percentage of applicants from one race, nationality, or other protected class than other applicants, it could have a disparate impact.

If the qualification or test is challenged, the township must prove that the qualification and test are job-related. In other words, the township must show a "direct and demonstrable relationship" between success or failure on the test and success or failure on the job.

To avoid claims of discrimination in selecting employees, a township should require only those qualifications that are necessary to perform the job, apply job qualifications and selection procedures equally to all applicants, use objective, job-related selection procedures to measure the skills of applicants, and not give one individual absolute discretion to fill job openings based on his or her subjective standards.

- **Pre-employment Testing**

One way employees may incorporate objectivity into the selection process is to test applicants before offering them a position. Pre-employment testing offers many benefits to employers: the tests can be used to screen out unqualified applicants before the interviewing process begins; categorize incoming applicants according to their skills and experience; identify an applicant's strengths as well as skill deficiencies or areas in which training will be necessary; and certify competence.

Pre-employment tests are closely scrutinized by the courts. Any test that is used should be validated by the Equal Employment Opportunity Commission (EEOC). The validation information should be available to the township by the test distributor. The EEOC has developed complex uniform guidelines for validating selection procedures that have a disparate impact on protected classes.

If you are going to use pre-employment tests, note that Michigan law prohibits employers from giving prospective employees polygraph tests. Federal law prohibits pre-employment medical examinations. An employee must receive an offer of employment before being required to undergo a medical examination, but the offer can be contingent upon the results of the examination.

IV. Post-offer Stage

At the post-offer stage, a township may require medical examinations. A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health. If a township decides to administer post-offer medical examinations, it must make certain that all entering employees in the same job

category will be subjected to the same examination, and all medical information that is obtained will be kept confidential.

- Necessary Hiring Forms

The entry and employment of foreign nationals in the U.S. is regulated by the federal government. All employers must verify the identity and employment eligibility of new employees.

Pursuant to the Immigration Reform and Control Act (IRCA), the Immigration and Naturalization Service (INS) requires employers to verify that an individual is eligible for employment by completing the Employer Eligibility Verification Form (Form I-9). The INS has published detailed instructions on how to complete the Form I-9 in a "Handbook for Employers." Employees must supply the requested verification within three business days. Townships should make hiring conditional upon the employee's ability to supply the required documentation.

Not only does the IRCA prohibit the employment of illegal workers, but the IRCA prohibits discrimination against individuals who have a legal right to work in this country, based upon either their national origin or citizenship status.

Employers face stiff fines should they be found to have hired unauthorized individuals or failed to meet the record keeping standards. Employers may be fined up to \$1,000 for each record keeping violation, and up to \$10,000 for each unauthorized employee.

Practical Advice for How to Fire an Employee

Being disciplined or discharged can be a traumatic experience for employees because it involves criticism and an acknowledgment that an employee has not been performing acceptably, thus affecting that employee's self-perception. Townships, however, have a constant interest in maintaining an efficient operation for the public's benefit. Effective management is heavily dependent upon an employer's ability to find and keep capable employees, while terminating the non-contributing ones. Practical employers will keep a constructive eye to the future, always ready to defend their decisions against the potential charges

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of the disgruntled, discharged employee. Should a township ever be faced with a lawsuit as a result of an employee's termination, the township should keep in mind that the goal is to walk a fact-finder through the discipline and discharge procedure and lead the fact-finder to the conclusion that there is not an issue present over which to litigate.

Once a decision to discharge an employee has been made, that decision must be carried out promptly and professionally. No matter what the cause, the act of discharging an employee is never easy. Set forth below is legal and practical advice about how to discharge an employee.

Legal Restrictions on an Employer's Right to Discharge Employees

As we already discussed, state and federal discrimination laws protect specified characteristics. Thus, townships are not permitted to discharge employees based on any of those specified characteristics. For example, it is illegal under state law for townships to discharge employ-

ees based on their participation in union-related activities or other types of concerted action in the workplace. It is unlawful to retaliate against an employee because he or she exercised some right protected by a statute or public policy or because the employee refused to participate in criminal activity. Retaliation claims are most often based on the Workers' Disability Compensation Act, civil rights acts, wage and hour statutes, and the Whistleblowers' Protection Act.

The Goal of the Termination Process

The goal of the termination process is to bring about the end of the employment relationship as painlessly as possible for both the employee and the township. Also, part of the desired goal is to place the township in a position where it can successfully defend its employment decisions before a court or other fact-finder. Keeping a defensive eye towards the future can be quite a

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task, considering the multiplicity of potential claims that might arise out of a discipline or termination decision. There are certain fundamental considerations that a township may make at the outset, in order to lay the foundation for a successful defense.

At the very least, a township must ask the following questions:

- What happened? Talk with the employee and a witness to find out.
- Has it happened before? Is there documentation?
- Was the action necessary?
- Was the action appropriate?
- Was the action uniform and consistent with actions taken in similar situations or with policies or practices addressing the issue?
- Has the employee complained of discrimination, harassment or failure to accommodate a disability? If so, have such complaints been properly addressed?
- Does the discharge appear to be in retaliation for any previously filed discrimination claim or charge?

The township should be able to articulate, and support with evidence, a legitimate, non-discriminatory reason behind the decision. At the end of the termination process, the township should be able to show that the township had legitimate expectations of performance or behavior, the employee was aware of those expectations, the employee failed to meet those

expectations, the employee was informed that he/she failed to meet expectations, the employee was given the opportunity to improve, and the employee failed to improve to the point of meeting expectations. This does not mean that you can't be an "at-will" employer, or that you have to have "just cause" to discharge an employee. It does, however, mean that you should be able to state a non-discriminatory basis for your decision.

Once these issues have been addressed, the steps for ending the relationship are straightforward:

1. Notify the employee of the discharge and remove him or her from township property.
2. Cut off the employee's access to township property and information.
3. Pay the employee all wages and benefits due and owing for services rendered up to the time of the discharge.
4. Notify the employee about all benefits that he or she has the right to continue after the discharge or that will be settled up after the discharge.
5. Refresh the employee's memory concerning his or her contractual obligations that survive the discharge.
6. Return all personal property that belongs to the employee.
7. Obtain all property belonging to the township.
8. Obtain all monies due and owing to the township.

9. Notify all coworkers who need to know about the discharge.

10. Notify all third parties (those outside the township) who need to know about the discharge.

Is There a Right Way to Discharge an Employee?

There are many wrong ways to discharge an employee, but there is no one right way to do it. What is the right way for one township may not be the right way for another. The reason for this is that the law speaks in volumes about a township's *motives* for discharging an employee, but it says little about *how* a township should carry out a discharge.

For the most part, the question of what is the right way to carry out a discharge is a matter of contract (either a collective bargaining agreement or an individual employment contract) or township policy. Thus, the first rule in carrying out a discharge is to honor the employee's contractual rights and abide by the township's policies.

As we've mentioned, every township should have a policy setting forth its procedures for disciplining and discharging its employees. Such a policy should not be distributed to all employees. Instead, distribution should be limited to management employees. In the unionized setting, the policy must be consistent with the collective bargaining agreement.

Issues a township might want to consider including in a termination policy are:

- Notice
For routine dismissals for cause, employers typically do not give advance notice, although they may provide two weeks' pay in lieu of notice.

In general, the law does not require an employer to give a discharged employee written notice of the reason for the discharge. If written notice is required by contract or policy, it should be given, but need not be elaborate. It should include a brief description of the employee's conduct that led to the discharge, list the rule or rules the employee violated, and unambiguously state the effective date and time of the discharge.

Care must be taken in preparing the



written notice so that it accurately sets forth all the reasons for the discharge. If you assert a reason that was not included in the written notice to the employee, the township may later have difficulty in a lawsuit persuading the finder of fact (be it judge, jury or arbitrator) that the reason being asserted was truly a factor in the decision to discharge.

- Wage and Hour Issues

Often wage and benefit issues are not properly handled at the time of discharge. The federal law regulating wage and hour issues is the Fair Labor Standards Act. Michigan has wage and hour laws that cover issues not addressed by the Fair Labor Standards Act. For example, Michigan's Payment of Wages and Fringe Benefits Act requires a township to pay all wages due and owing to an employee who has been discharged "as soon as the amount can with due diligence be determined."

- Health Care Benefit Continuation

Under the federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), many discharged employees must be offered health care continuation coverage.

- Township Property

A termination policy should include a notice to employees that they must return all tools, uniforms, keys, etc. to the township on their last day of work.

- The Exit Interview

It is a common practice in many large townships for the human resource department to conduct an exit interview with terminating employees to gather information from departing employees that can be used to improve the township's work procedures, supervisory practices and training efforts.

An exit interview should be conducted with a discharged employee whenever possible. Such an interview is an effective tool for completing many of the tasks necessary to bring about the end of the employee and employer relationship.

Two township representatives should be present during the exit interview. One representative should conduct the interview. The second is present as an observer and should take thorough notes about what happens at the interview. Statements made by an employee during an exit interview are often helpful in defending against an employee lawsuit. ■

For more information about hiring and firing decisions, attend the "Employment Pitfalls: Hiring & Firing Issues" workshop, offered on Thursday, January 17, at the 2002 MTA Annual Educational Conference in Grand Rapids.

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