

# ORANGE COUNTY BUSINESS JOURNAL

## HOW TO HIRE/FIRE W/O FEAR!

by Greg S. Labate, Esq., Sheppard, Mullin, Richter & Hampton LLP

In 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 résumé. 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. Be aware of the risks of using social media to research the applicant. Obtain the applicant's written

consent before conducting any detailed background investigation. Comply with the Fair Credit Reporting Act and the California Consumer Credit Reporting Agencies Act when doing so.

**Interviews:** Prepare for the interview by reviewing the position sought, as well as the applicant's résumé, application, and references. Reconcile any inconsistencies in the résumé 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.



Greg S. Labate

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. Include a social media policy in your handbook. Update the handbook regularly, preferably every year.

**Orientation:** Schedule orientation for new employees, preferably on the first day of employment, in order to distribute employee handbooks, obtain signed at-will

*Continued on Page 2*

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. Determine whether the arbitration agreement should include class actions.

**Classification:** Ensure that you have properly classified your employees as either exempt or non-exempt. Have experienced labor counsel conduct an audit. Both single employee lawsuits and class actions often include claims for overtime, meal and rest periods, paystub violations, waiting time penalties and more, usually 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 punishment must fit the crime. The reasons for the discipline should be clearly communicated to the employee in writing. Carefully document any disciplinary action. Even if it is only a verbal warning, 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 will determine whether the terminated employee will first look for another job or hire an attorney to file a lawsuit. 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 if necessary. 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 both the federal WARN Act and the California WARN Act where required.

**Severance:** Have a written policy that the payment of severance is at the sole discretion of the employer. Only provide severance if the employee signs a release of all claims. Have legal counsel draft any severance agreement.

**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. Designate a specific employee to be the contact person for all such inquiries, and train managers not to make any "off-the-record" comments about former employees.

**Conclusion:** If you follow these simple guidelines, you will protect your company from significant liability when making these very important employment decisions. But always consult with experienced labor counsel before doing so, just to be safe.



---

Contact Greg S. Labate at 714-424-2823 or [glabate@sheppardmullin.com](mailto:glabate@sheppardmullin.com). For more information about Sheppard, Mullin, Richter & Hampton LLP please visit [www.sheppardmullin.com](http://www.sheppardmullin.com).