

**2013 IAPD/IPRA
Soaring to New Heights Conference
January 24-26, 2013
Hyatt Regency, Chicago**

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Attorneys*

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SATURDAY, JANUARY 26, 2013

10:15 A.M. TO 11:30 A.M.

SESSION #318

**HIRING AND FIRING
WITHOUT LITIGATION**

PRESENTERS:

ROBERT K. BUSH, ESQ.

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DIAMOND BUSH
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HIRING AND FIRING WITHOUT LITIGATION

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Session 318

Robert K. Bush
Robert T. McCabe

Ancel Glink Diamond Bush DiCianni & Krafthefer, P.C.



1. No Illegal Hiring Criteria

► Know the illegal bases for making hiring decisions:

- Race
- Color
- Religion



Illegal Bases cont'd.

- Sex
- National Origin
- Ancestry
- Age
- Marital Status
- Physical or Mental Disability



Illegal Bases cont'd...



- Military Status
- Sexual Orientation
- Unfavorable Discharge from the Military



2. Avoid Discriminatory Searches

- Be sensitive to advertising that could result in exclusion of certain groups of candidates
- Always utilize the park district facilities or park district's website for advertising



3. Avoid illegal or inappropriate application questions

- It should contain:
 - Employment at-will statement
 - Accommodation request

Are you pregnant?





- Conviction (not arrest) information
- Certificate of accuracy
- Notice of pre-employment testing
- EEOC statement

o It should not contain:

- Request for arrest information
- Request for dates of graduation
- Inquiries about disabilities



4. Don't ask about disabilities

- o Provide a job description which contains all requirements of the position - including physical requirements



5. Don't accept resumes for most positions

- ▶ Should you accept a resume if you require completion of a job application?



6. Avoid questions that sound discriminatory



▶ Avoid Interviewing Traps

- There are no illegal questions, only potential land mines

- Avoid all questions which look like they are really about age, marital status, gender....



- Take notes during the interview and keep them in the file



- Have a defensible method of narrowing the applicant field

▶ Panel Interviews

- Ask the same questions of all applicants
- How to “score” applicants



7. Don't ask about drug use but do conduct pre-employment tests



▶ When to Conduct Pre-Employment Tests

- Test only those to whom a conditional offer is made

- Conduct only those tests that are job related:
 - A drug screen is always appropriate



- A criminal background check is almost always appropriate
- Physicals must be related to the specific job duties



8. Don't forget to follow the rules for background checks

▶ The Four Steps to Lawful Background Checks

- Initial disclosure to the applicant in a separate document that a background check will occur
- Written authorization from the candidate



- Notification to the candidate if adverse information is revealed in the report along with a summary of the report and summary of rights to contest findings



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- Notice to candidate if employment is denied as a result of information gathered in the background check



9. Don't rely on the Internet for

▶ References

- Can you "Google" applicants or review social web sites, and if so, can you make a job decision based on this information?



10. Don't keep inappropriate information on applicants

- The Illinois Personnel Records Review Act prohibits an employer from gathering or keeping records on “an employee’s associations, political activities, publications, communications or non-employment activities.”



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- ▶ It's risky but oh so tempting!
- ▶ Include notice of such on applications.

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11. Termination of Employment: Strategies for Avoiding Litigation

- ▶ Wrongful termination cases are costly
- ▶ Financial Costs
 - 3 million dollar verdict for employee fired six days after expressing her support of a co-worker who filed a racial and sexual harassment action
 - 2 million dollars in damages to two suburban Chicago police officers who spoke out about a fellow officer's cocaine use
- ▶ Damage to the reputation of the employer



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12. Know the Law

- ▶ All employees with the authority to terminate employment should have a basic understanding of legal and illegal reasons for terminating employment
- ▶ Supervisors should understand basic legal concepts that will help in avoiding pitfalls



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13. At-Will – What Does This Really Mean?

- ▶ Most employees who are not members of a collective bargaining unit are “at-will” employees
- ▶ They can be fired for any reason and regardless of whether or not they have done something wrong as long as they are not being terminated for an illegal reason



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14. Discrimination



- ▶ Race; Age; Nationality; Sex; Sexual Orientation
- ▶ In the current economy, terminated employees are raising discrimination claims with greater frequency
- ▶ Good documentation is key to defending these claims

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- ▶ Burden Shifting Analysis:
 - Plaintiff - Prima Facie Case
 - Employer - Legitimate non-discriminatory reason for termination
 - Plaintiff - Proof that employer's reason is pretext
- ▶ Again, documentation is key here



15. Retaliation

- ▶ Don't fire people because they have sued you
- ▶ Don't fire employees who are sympathetic to employees who are suing you
- ▶ Don't fire witness employees who have provided adverse information



16. Be Careful When Employees Are Under Contract

- ▶ If an employee has a contract (Directors, etc.), it is likely that the contract states that the employee may only be fired for certain reasons
- ▶ Termination for unspecified reasons may result in a wrongful termination suit



- ▶ **Collective Bargaining Agreements**
 - Must provide for termination for “just cause”
 - These employees are not at-will and will likely be able to challenge termination of employment through their grievance procedures



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17. Reporting Illegal Acts for Failure to Commit Illegal Acts

- ▶ **Whistleblowers**
 - Cannot retaliate against employees who reasonably believe that they are reporting violations of state or federal law
- ▶ Cannot retaliate against employees who have refused to engage in illegal conduct



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18. Follow Your Own Policies

- ▶ Yes, Virginia, this does actually happen
- ▶ Be aware of what your policies and procedures say about termination of employment and follow your own procedures



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19. Be Careful When Terminating An Employee Who Has Been Receiving Workers' Compensation Benefits



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20. Union Activities

- ▶ Union organizing is a protected activity
- ▶ Cannot terminate employees for union activities/organization



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21. Document, Document, Document



- ▶ Good documentation is all that stands between you and a swearing contest where a jury may have to decide who it believes
- ▶ Too often juries side with unemployed workers
- ▶ Good documentation will save you here

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THANK YOU!

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