

## The Two Most Difficult Employment Decisions:

### Hiring and Firing Employees

Linda D. Walton  
Brian M. Flock

February & March 2008



### Today's Presentation

- Interviewing and Selection Criteria
- Verification of Authorization to Work
- Background Checks
- Wrongful Discharge
- Lay-offs
- Getting to Discharge – "Look Before You Leap"
- Discharge Logistics
- Post-Discharge Considerations

## Statutorily Prohibited Discrimination – Where Employers Stumble

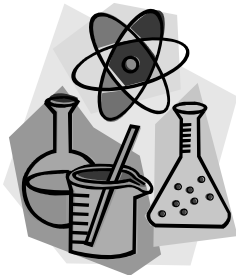
- Pre-Employment Inquiries
- Testing
- Subjective Selection Criteria
- Medical Inquiries

3

Perkins  
Coie

## Subjective Criteria

- "Warm and Fuzzy"  
versus "Chemistry"



4

Perkins  
Coie

## Verification of Work Authorization

- It's the employer's **duty** to verify identity and work authorization

## The Revised "A" List

- U.S. passport
- Permanent Resident Card
- Unexpired foreign passport with a temporary I-551 stamp;
- Unexpired foreign passport with an unexpired Arrival-Departure Record (Form I-94) for nonimmigrant aliens authorized to work for a specific employer
- Unexpired Employment Authorization Document that contains a photograph



## Verification of Work Authorization

- It's the employer's **duty** to verify identity and work authorization
- But IRCA makes it unlawful for an employer to discriminate against an individual (other than an unauthorized alien) because of the individual's **citizenship** status

7

Perkins  
Coie

## IRCA Discrimination Provision Exemptions & Exceptions

- Employers of 3 or fewer employees are exempt from coverage
- Employers may employ a national origin BFOQ
- Employers may discriminate is necessary to comply with federal, state, or local laws, regulations, or contracts
- Employers may give hiring preference to a U.S. citizen or national over an equally qualified authorized alien.

8

Perkins  
Coie

## An Employer May Not Discriminate Against an Employee Because She has Initiated or Participated in:

- Workers' compensation proceedings
- Proceedings alleging wage violations
- Proceedings alleging discrimination
- Proceedings relating to the Washington Industrial Safety and Health Act



9

Perkins  
Coie

## When Can You Ask About an Applicant's Criminal Background

- Can only ask about **past convictions** if:
  - Crime inquired about relates to applicant's prospective job duties; and
  - If the conviction or release from prison occurred within last 10 years



10

Perkins  
Coie

## When Can You Ask About an Applicant's Criminal Background

- Can ask about **arrests** if:
  - Also ask about status of charges—pending, dismissed, conviction
  - Crime involves behavior that will negatively impact job performance
  - Inquiry limited to last 10 years



## May Conduct a Criminal Records Check in Following Circumstances

- Necessary to secure a bond required for employment
- Employee's job requires access to trade secrets, money, items of value, information affecting national security, or confidential or proprietary information
- Check will further an investigation of employee misconduct that may constitute a crime



## When Must You Check an Applicant's Criminal Background

- School Districts and their Contractors must perform a criminal records check – for all employees who will have regular unsupervised access to children



13

Perkins  
Coie

## When Must You Check an Applicant's Criminal Background (cont.)

- Licensed agencies and organizations that provide services to children, the developmentally disabled, or vulnerable adults must inquire into an applicant's criminal background – for all employees who will have regular unsupervised access to such individuals



14

Perkins  
Coie

## Credit Checks



- Cannot obtain a consumer report unless:
  - Required by law
  - Or substantially job related
- Before obtaining the report
  - Notify individual in separate stand-alone document
  - Obtain written authorization

15

Perkins  
Coie

## Credit Checks

- Before and After taking adverse action, give individual notice
- Beware of Bankruptcies: federal law prohibits discrimination on basis of filing bankruptcy or being associated with someone who has



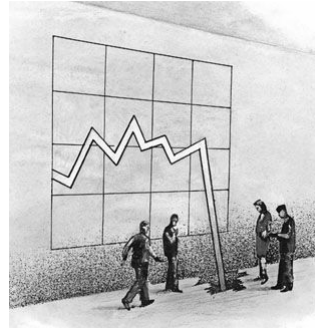
16

Perkins  
Coie



## Beware of Bankruptcies

- Cannot take adverse action against applicant for filing bankruptcy or being associated with someone who has



## Pre-Employment Medical and Drug/Alcohol Screening

- An employer may require a medical examination **only after making a firm offer of employment.**
- May condition offer of employment on medical test
- All individuals entering same job category must be required to have medical exam



## Post-Offer Exams Need Not Be Job-Related

- **But** if applicant is then denied employment employer must show reason was job-related or there was a business necessity
- Conditions discovered through pre-employment genetic screening are subject to the ADA



19

Perkins  
Coie

## Google, Facebook & MySpace

- More Information Than You Bargained For
- Don't Pretext



20

Perkins  
Coie

## Negligent Hiring



- Analyze job duties carefully
- Obtain a release for background checks
- Conduct an investigation
- Check criminal records when applicable
- Expand the scope of the investigation as needed
- Document, document, document
- Remember the rules regarding convictions and arrests

## Wrongful Discharge

- Discharge in Violation of Public Policy
- Discharge in Violation of Employer's Policies
  - Promises of specific treatment in specific situations
- Breach of Contract
  - Discharge in violation of CBA "for cause" provision

## It is Unlawful to Discharge an Employee Because:

- The employee refuses to do an illegal act
- Performs a public duty or obligation such as serving on a jury
- Saves another citizen's life
- Exercises a legal right or privilege



## Exercise of a Legal Right or Privilege (examples)

- Filing a worker's compensation complaint under RCW 51;
- Filing a discrimination complaint under RCW 49.60;
- Filing a whistleblower complaint under RCW 42.40;
- Filing a complaint under the Washington Industrial Safety and Health Act (WISHA), RCW 49.17;

## **Exercise of a Legal Right or Privilege** (cont.)

- Filing a community-right-to-know complaint under RCW 49.70;
- Reporting nursing home abuse under RCW 70.124;
- filing a minimum wage claim under RCW 49.46 ;

## **Exercise of a Legal Right or Privilege** (cont.)

- Filing a family-leave claim under RCW 49.78;
- Exercising rights under the Washington Family Care Act under RCW 49.12.287;
- Engaging in collective bargaining activities

## Making the Decision



- Are all facts recorded?
- Are all documents assembled?
- Is the employee aware of the problem?
- In appropriate cases, have progressive disciplinary steps been taken and documented?

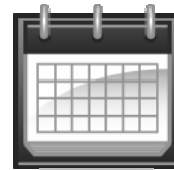
## Making the Decision



- Has the employee had an opportunity to tell his or her side of the story?
- Have you considered past similar situations to be certain your actions are consistent?
- Have you complied with all internal review procedures or other practices called for by the organization's policies?

## Special Considerations for Layoffs (WARN )

- WARN applies to employers who employ 100 or more full-time employees in aggregate, or who employ 100 employees who, combined, work 4,000 hour per week
- WARN requires employers to provide 60 days' advance notice to affected employees before certain events.



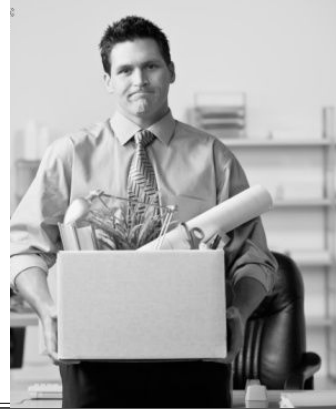
## Special Considerations for Layoffs (WARN ) (cont.)

- Plant Closing – permanent or temporary shutdown affecting 50 or more employees in 30-day period (can be extended to 90 days)
- Mass Layoff – employment loss at a single site affecting 500 employees or 50 or more employees constituting 1/3 of the workforce at that site



## "Employment Loss"

- Layoff exceeding 6 months; or
- 50 percent reduction in hours during each month in a 6-month period



31

Perkins  
Coie

## Don't Count:

- Employees discharged for cause
- Employees who voluntarily quit
- Employees who retire
- Certain part-time employees
- Employees offered transfer to location within a reasonable commuting distance



32

Perkins  
Coie



## Some Exceptions to Advance Notice:

- Unforeseen business loss
- Layoffs and closing caused by completion of a project
- Economically unstable company seeking capital investors



33

Perkins  
Coie

## Some Exceptions to Advance Notice: (cont.)

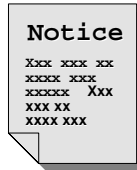
- Bona fide strike or lockout
- Consolidation or relocation
- Natural disaster
- Employer may still need to provide notice as soon as layoff or closing becomes reasonably foreseeable



34

Perkins  
Coie

## The Notice



- Notice must be provided to affected employees, as well as state and local agencies
- Notice must be tailored, including timeline for layoff
- Compliance enforced through private suits:
  - Up to 60 days of pay and benefits
  - Civil penalties up to \$500 per day for 60 days for not sending notice to affected state and local governments

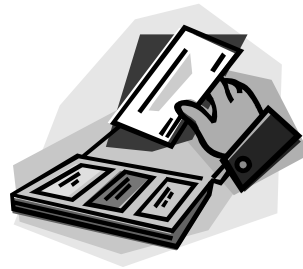
## Termination Logistics

- Communications with employee
- Security Issues
- Communications with Coworkers
- Separation agreements
- Final paycheck



## Deductions from Final Paycheck

- 3 categories of deductions from final paycheck
  - Deductions without employee's agreement
  - Deductions with employee's agreement
  - Deductions permissible if wages do not fall below minimum wage



## Deductions Allowed With or Without Employee's Agreement

- Deductions required by state or federal law
- Deductions for nonoccupational medical, surgical, or hospital care or service
- Deductions to satisfy a court order, judgment, wage attachment or the like

## Deductions Allowed With Employee's Agreement

- Pension, medical, dental or other benefit plan contributions
- Payment to a creditor (including the employer) or a third party, so long as the payment is for the benefit of the employee (such as repaying a loan)

## Deductions Allowed If Wages Do Not Fall Below Minimum Wage

- Acceptance of a bad check or credit card in violation of procedures previously made known to the employee
- Cash shortage **if** the employee had sole access to the cash and participated in the cash accounting at the beginning and end of the shift
- Cash shortage, failure of customer to pay, or breakage or loss of equipment **if** it was caused by “a dishonest or willful act” of the employee
- Employee theft **if** it can be shown that the employee intended to deprive **and** the employer filed a police report.

## Unemployment Compensation Process

- Presumption of eligibility
- Unemployment compensation provides benefits to any person unemployed through no fault of his or her own.
- Poor job performance is not “fault.”

## Disqualification for Misconduct

- The burden is on the employer to prove:
  - The employer has established a rule or policy that is reasonable under the circumstances of the work;
  - The employee’s conduct is connected with the work; and
  - The employee’s conduct violates the rule.

## Off-Duty Misconduct

- Employer must also prove:
  - The conduct has some nexus to the employee's work;
  - The conduct results in some harm to the employer's interest; and
  - The employee acted with the intent or knowledge that the employer's interest would suffer

## Don't Forget the Personnel File!

- Under Washington Law employee retains "rebuttal rights" for two years
- Keep the employee's file for at least 3 years, if not longer



# QUESTIONS

