

Chapter 3

Legal Construction of the Employment Environment

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Evolution of the Employment Relationship

- Recruitment of appropriate candidates
- Hiring
- Testing
- Performance appraisals

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Myths about Hiring Your Employee or Getting Your Job

1. The best way to promote workplace unity is to get hiring suggestions only from those who already work there.
2. As long as an advertisement is placed somewhere in the city where hiring is to be done, an employer cannot be accused of selective recruiting.
3. The purpose of the interview is for the employer to find out information about the employee. The employer can hide information about itself.
4. There's nothing wrong with promoting only from within; after all, it raises employee morale and encourages devotion.
5. The only problem with nepotism is that present employees may resent the hired family members and believe he or she got the job because of the familial connection.

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Recruitment

- First step in the evolution of the employment relationship
- Federal statutory regulation of recruitment
 - Title VII of the Civil Rights Act of 1964
 - Vocational Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990
 - Age Discrimination and Employment Act of 1967
 - Immigration Reform and Control Act of 1986
- State employment law regulation
- Common law
 - Fraud
 - Misrepresentation
 - Material facts

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Application of Regulation to Recruitment Practices

- Advertisements
- Word-of-mouth recruiting
- Nepotism
- Promoting from within
- Venue recruiting
- Walk-in applicants
- Neutral solicitation
- Résumé collection concerns

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Preferential Treatment

Preferential treatment

A preference offered to members of a certain class that is not offered to members of other classes.

Affirmative action

Provides for the most equal opportunity possible to members of various groups historically not having been provided equal opportunity, and may include preferential treatment, education programs, referral services, or preemployment preparation or training for certain groups.

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Information Gathering and Selection

- The application process
- The interview
- Background or reference check, negligent hiring
- Reference checks: potential liability for providing references?
- “After-acquired evidence” in defense in wrongful termination suits.
- Uniform guidelines on employee selection procedures
 - Documentation of failure to hire

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Testing in the Employment Environment

- Preemployment testing
 - Tests to find the best individual for a position
 - Tests to ensure that the individual is free from problems that would prevent her or him from performing the position’s functions
- Individual privacy
 - Testing is illegal when the invasion of privacy is “substantially and highly offensive to the reasonable person”

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Myths about Testing in Employment

1. The Constitution will always protect an employee against unreasonable searches.
2. In the private employment sector, employers can pretty much do what they want in terms of testing.
3. Polygraphs are reliable.
4. If you test positive for drug or alcohol on a employment test, you will be terminated.
5. HIV testing is relevant to job performance.

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Legality of Eligibility Testing

- To be legally validated, an employer must show that the eligibility test is:
 - Job-related
 - Consistent with **business necessity**
- Job analysis data
- “Applicants-statistics” approach

Eligibility testing

Tests an employer administers to ensure that the potential employee is capable and qualified to perform the requirements of the position.

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Test Validity

- Criterion-related validation
- Content validation
- Construct validation
- Subgroup norming
- Job-related requirement
- Integrity and personality tests
- Physical ability tests
- Medical tests

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Legality of Ineligibility Testing

- Why test?
 - Reduce workplace injury or to provide a safer working environment
 - Predict employee performance or deter poor performance
 - Reduce the employer's financial responsibility to the worker's compensation system
- Employee claims may be based on:
 - Constitutional or state statute requirements for workplace testing
 - Common-law invasion of privacy
 - Reckless or negligent infliction of emotional distress
 - Defamation
 - Wrongful discharge in violation of public policy

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Polygraphs

- A polygraph measures:
 - Rate and depth of respiration
 - Cardiovascular activity
 - Perspiration
- Accuracy rates range from 90 to 50 percent
- Federal Employee Polygraph Protection Act
- Digital video functional capacity assessment

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Drug and Alcohol Tests

- 70 percent of all illegal drug users are employed
- Drug-Free Workplace Act of 1988
 - Only applies to federal employees
 - Some private sector firms use the Act's guidelines
- Immunoassay test
- Radioimmunoassay of hair

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Reasons for Having a Drug-Free Workplace Policy

1. Complying with legal requirements.
2. Reducing liability risks.
3. Reducing business costs due to accidents, absenteeism, and ill health.
4. Ensuring the integrity of employees.
5. Determining fitness for duty and corroborating evidence of misconduct.
6. Assuring public confidence in the business.
7. Promoting a "drug-free" society.

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Genetic Tests

- No **federal** legislation or regulations restrict the use of genetic testing
- Issues
 - Employers may discriminate based on the potential for a debilitating disease
 - Employees may not want to know results
 - Genetic testing is not perfect
 - Genetic irregularities may be considered protected disabilities under the Americans with Disabilities and Vocational Rehabilitation Act
- At least 26 **states** prohibit or limit genetic testing

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Unique Considerations of HIV/AIDS Testing

- Inappropriate because:
 - For the test to be justified, it must serve a legitimate business purpose
 - The test reports only the subject's status as of several weeks or months in the past
- HIV-positive employees are protected
- Enzyme Linked Immunosorbent Assay test
- Western Blot test
- Testing of health care workers

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Management Considerations: Testing

- A workplace substance abuse program should incorporate:
 - A written abuse policy
 - A supervisory training program
 - An employee education and awareness program
 - Access to an employee assistance program
 - A drug testing program, where appropriate
- Corporate approaches:
 - Mandatory testing
 - "Probable cause" testing
 - Random testing

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Myths About Performance Evaluations

1. An employer can't be liable for giving a negative reference as long as it is based on a poor performance evaluation.
2. To accommodate individual employees' or applicants' needs (such as a disability), the employer must lower its standards or qualifications.
3. If the jobs of minority workers are dependent on their evaluation by other workers, bias cannot be eliminated.
4. As long as the employer believes that the employee understands the requirements or bases for the performance evaluation, the employer is not obligated to do anything further or to allow leeway in compliance.

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Performance Appraisals, Evaluation, and Discipline Schemes

- The purpose of performance appraisals
- The potential for discriminatory effect
- Management by objective
- Checklist system
- Summated scale

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Legal Implications of Performance Appraisal Systems

- Disparate impact
- Disparate treatment
- Defamation
- Negligent performance evaluation

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Discipline

- Elements of a “fair” system:
 - Consistency in application
 - Specific guidelines for attaining the various levels of performance
 - Communicates information to employees
- Documentation
- Progressive discipline

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Summary

- Employers believe that freedom of contract should permit them to hire whom they please.
- An ethic of nondiscrimination must permeate the hiring process.
- The employer should have a clear view of the job to be filled and who is the best person to fill that job.
- After conducting the analysis, the employer should review the written job descriptions.
- Job descriptions should include **all essential** job functions.
- Recruitment procedures should encourage diversity.
- Employers should establish efficient, effective procedures to guarantee that they know **who** they are hiring.

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Summary (continued)

- Employers should review applications to ensure they are only asking for appropriate information.
- Do a thorough background check on each new hire.
- References must be complete and honest to prevent foreseeable harm.
- Testing for eligibility and ineligibility is a necessary component of the selection procedure.
- Designing the appropriate preemployment tests in order to ensure applicants can perform the functions of the job is critical.
- The employer should describe precisely what is required of each position to be evaluated.
- No “unwritten” qualifications should exist.

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Summary (concluded)

- No “unwritten” qualifications should exist.
- Employees should understand each of the standards pursuant to which they will be evaluated.
- The bases for the evaluation should be specific and job- or task-defined, rather than subjective, global measures of job performance.
- The employer should request justifications of ratings wherever possible.
- The employer should establish a formal appeals process.

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