

## HIRING/FIRING EMPLOYEES: A FEW DOs & DON'Ts

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Exhilarating and heartbreaking moments often mark a relationship's beginning and end. The employer and employee relationship can frequently display such moments too. To help employers navigate the employee relationship in Louisiana, we offer just a few hiring and firing tips.

### 1. COMMON ISSUES WHEN HIRING

Generally, federal and state laws prohibit employment discrimination. These laws prohibit an employer from discriminating against an applicant for employment because of race, color, religion, sex, national origin, religion,<sup>1</sup> age (40 or older),<sup>2</sup> disability,<sup>3</sup> or genetic information;<sup>4</sup> as well as several other protected categories.<sup>5</sup> Further, federal law prohibits employers from denying a reasonable workplace accommodation that might be needed because of religious beliefs or disability.<sup>6</sup> When moving through the hiring process, employers should be mindful of these legal protections.

#### Ask Proper Interview Questions.

The interview process can make it or break it. Improper interview questions can potentially evidence discriminatory animus.<sup>7</sup> Asking the proper interview questions can help employers select the right talent for the job. The key is asking legally permissible questions that provide employers with information about the applicant's ability to do the job with or without a reasonable accommodation. Here is a brief list of generally problematic questions and potential legal alternatives:

IMPROPER QUESTIONS	POTENTIAL LEGAL ALTERNATIVES
How old are you? In what year were you born? In what year did you graduate from college/high school?	Are you over the age of 18?
Do you have any disabilities? Have you had any recent illness or operations? What was the date of your last physical exam?	Are you able to perform the essential functions of this job with or without reasonable accommodations? <sup>8</sup> Are you able to lift a 50-pound weight and carry it 100 yards, as that is part of the job?
Are you married? Are you pregnant? How many children do you have? What are your child care arrangements?	Travel is an important part of the job. Do you have any restrictions on your ability to travel? Do you have responsibilities or commitments that will prevent you from meeting specified work schedules? Do you anticipate any absences from work on a regular basis? If so, please explain the circumstances.
Do you have a car?	Do you have a reliable means of transportation?

## Carefully Consider the Scope of Pre-Employment Investigations.

Numerous employers consider a job applicant's background when making the decision of whether to hire the applicant. Similarly, many employers use social media to help screen job applicants. At least one study suggests that about 40 percent of companies use social media in this manner.<sup>9</sup> A good cultural "fit" was one of the primary reasons cited to screen applicants through social media. Federal and state law does not prohibit an employer from obtaining background information about a job applicant, as long as the employer does not discriminate when it makes the hiring decision.<sup>10</sup>

Still, the federal Equal Employment Opportunity Commission provides guidance indicating that disqualifying job applicants based upon conviction and arrest records may give rise to liability for racial discrimination since minorities tend to have higher arrest rates.<sup>11</sup> In turn, Louisiana recently enacted "ban the box" legislation for the State's politically-appointed unclassified civil service positions.<sup>12</sup> Such legislation precludes the State (as an employer) from asking about a job applicant's criminal history until later on in the hiring process.<sup>13</sup>

In certain situations, Louisiana law requires employers affirmatively determine whether an applicant has any felony convictions.<sup>14</sup> For instance, Louisiana law prohibits public and private school employers from hiring a person, who has been convicted of or has pled *nolo contendere* to a crime listed in Section 15:587.1(C) as a teacher, substitute teacher, bus driver, substitute bus driver, or janitor, or as a temporary, part-time, or permanent school employee of any kind, unless approved in writing by a district judge of the parish and the district attorney or, if employed on an emergency basis, unless approved in writing by the superintendent of the school system.<sup>15</sup>

Of course, employers should obtain the job applicant's written consent before proceeding with any background check.<sup>16</sup> Under Louisiana law, an employer that conducts a background check after obtaining written consent is immune from civil liability for all claims arising out of the disclosure of the background information. An employer should not, however, require that the job applicant pay for the costs of fingerprinting or furnishing any records as a condition of employment.<sup>17</sup>

As to social media investigations, an employer may view, access, or utilize *publicly-available* information on an applicant's social media accounts.<sup>18</sup> Louisiana law prohibits an employer from requesting or requiring a job applicant to disclose a username, password, or other authentication information that allows access to the applicant's personal online social media accounts.<sup>19</sup> As a best practice, an employer should have someone without hiring authority—for example a human resources employee or a third-party—perform the social media investigation so as to avoid potential implicit bias arguments.

## Avoid Using Unlawful Pre-Employment Tests.

Generally, an employer may require that a job applicant meet job-related standards (e.g. proficiency in typing or ability to perform construction tasks). Employers may use tests or other devices and practices to select employees; however, the tests and devices are governed by federal and state laws prohibiting discrimination in hiring.<sup>20</sup> Yet, the employer must make sure that such testing does not have a disparate impact on a protected class or otherwise discriminate.

Further still, the ADA generally prohibits employers from requiring a job applicant undergo medical examinations and medical inquiries—although limited pre-employment medical examinations are allowed.<sup>21</sup> Employers may require a prospective employee submit to post-offer, pre-employment medical exams, but only if all similarly-situated employees undergo the same examination.<sup>22</sup> Similarly, employers are allowed to perform pre-employment drug tests.<sup>23</sup>

## **2. COMMON ISSUES WHEN FIRING**

The decision to terminate an employee can raise many legal issues. While the default rule in Louisiana is at-will,<sup>24</sup> employees still enjoy numerous protections to any termination or separation. Even though there can never be any guarantees, the following list identifies important factors an employer should consider.

### **Keep a Record of Disciplinary Actions.**

Documentation remains key in defending alleged wrongful terminations, discrimination, or harassment suits. We often hear: “If it’s not in writing—it didn’t happen.” That phrase signals employers should avoid surprises. Employers should keep a record of performance feedback, disciplinary actions, and document things.

### **Don’t Forget Federal or State Laws Protecting Employees.**

Like in the hiring process, federal and state laws prohibit an employer from discriminating against an employee because of race, sex, national origin, religion, age (40 or older), disability, genetic information, as well as, several other protected categories.<sup>25</sup> An employer may not take these characteristics into account when deciding whether to terminate an employee. Importantly, to reduce the chances of a disparate treatment discrimination claim, an employer should make sure the termination decision remains consistent with past behavior and practices.

### **Prepare for the Termination.**

Prior to meeting with the employee a final time, employers should prepare. For instance, employers should review whether or not the employee agreed to any confidentiality or any non-compete obligations.<sup>26</sup> If so, then they can remind the employee about these obligations during that final meeting.

Keep the termination on a need to know basis. Doing so helps maintain a professional workplace, fosters respect for the company, and allows the separated employee to depart with dignity.

If the employee has computer access, an employer should notify the IT department and have access shut down during the termination meeting and remove the terminated employee’s information from the company’s website. Further, an employer may request its IT staff review the terminated employee’s computer and computer use and confirm whether or not any company information may have been improperly handled during the weeks before the separation.

### **Don't Forget to Ask For the Return of Company Property.**

During the final meeting, an employer should ask for the employee to return all company property in the employee's possession, which may include keys, door passes, badges, access cards, laptop computers, smart phones, tools, equipment, and other company-owned materials. If any company-owned items are at the employee's home, make explicit arrangements as to when you expect the items returned and curtail unnecessary delay.

### **Timely Pay the Last Paycheck.**

All outstanding wages, salaries, commissions, bonuses, and vested vacation pay owed to an employee must be paid by the next pay day or within 15 days, whichever is sooner.<sup>27</sup> The payment must be made at the place and in the manner in which it was customarily made during the employment or by mail. Consequently, it is often a good practice to provide the employee his or her final paycheck at the final meeting. This will help limit potential claims for failing to pay final wages.

### **Don't Forget COBRA Rights.**

Under COBRA, covered employers must give terminated employees the opportunity to remain on the employer's health insurance policy for generally up to 18 months after separation.<sup>28</sup> However, the terminated employee is responsible for the payment of the premiums.

### **Consider Whether or Not to Contest Claims for Unemployment Benefits.**

A terminated employee may apply for unemployment benefits under the Louisiana Employment Security Law.<sup>29</sup> An employee may be disqualified from unemployment benefits because of (i) misconduct connected with employment, (ii) not being available for or actively looking for work, (iii) making a false statement to obtain or increase benefits, or (iv) discharge for use of illegal drugs.<sup>30</sup> To avoid any unjustified benefit claims, an employer should file within 72 hours of the termination a separation notice alleging disqualification.<sup>31</sup>

## **3. CLOSING THOUGHTS**

Several factors impact whether or not employers select and keep the *right* employees. Keeping these tips in mind and knowing their legal obligations may help employers build more successful employee relationships and reduce costly litigation.

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- <sup>1</sup> Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e, *et seq.* along with Louisiana’s Intentional Discrimination in Employment law, LA. REV. STAT. § 23:332.
- <sup>2</sup> Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, *et seq.* along with Louisiana’s Age Discrimination law, LA. REV. STAT. § 23:312.
- <sup>3</sup> Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et seq.* along with Louisiana’s Disability Discrimination law, LA. REV. STAT. § 23:323.
- <sup>4</sup> Genetic Information Nondiscrimination Act of 2008 (“GINA”), 42 U.S.C. 2000ff-1, *et seq.*, and Louisiana’s Genetic Information and Privacy law, LA. REV. STAT. §§ 23:368-369.
- <sup>5</sup> For example, sickle cell traits (LA. REV. STAT. §§ 23:352, 354), smoking (LA. REV. STAT. § 23:966), and political affiliations (LA. REV. STAT. § 23:961) are protected characteristics under Louisiana law.
- <sup>6</sup> *See* 42 U. S. C. § 2000e(j) (requiring that employers make reasonable accommodations for employee’s religious practices); *see also Trans World Airlines Inc. v. Hardison*, 432 U.S. 63 (1977) (explaining that Title VII amendment made it an unlawful employment practice for an employer not to make reasonable accommodations—short of an undue hardship—for the religious practices of employees and job applicants); 42 U.S.C. § 12112(b)(5)(A), (requiring employers to make reasonable accommodations of an employee’s known physical or mental limitations).
- <sup>7</sup> *See e.g.* 29 C.F.R. § 1604.7 (detailing that under Title VII “[a]ny pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification”); *see also* 29 C.F.R. § 1605.3 (addressing religious discrimination in employee selection process); 29 C.F.R. § 1606.6 (addressing national origin discrimination in employee selection process); 42 U.S.C. § 12112(d) (providing that employers may not ask questions that are likely to reveal the existence of a disability before making a job offer); 29 C.F.R. § 1625.5 (noting that “[a] request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act.”).
- <sup>8</sup> The interviewer should have already described the position’s essential job functions.
- <sup>9</sup> *Number of Employers Passing on Applicants Due to Social Media Posts Continues to Rise, According to New CareerBuilder Survey*, available at <https://cb.com/1mtEMbk> (Last viewed on April 27, 2017).
- <sup>10</sup> *Background Checks—What Employers Need to Know*, available at [https://www.eeoc.gov/eeoc/publications/background\\_checks\\_employers.cfm](https://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm) (Last viewed on April 27, 2017) (explaining that “. . . asking only people of a certain race about their financial histories or criminal records is evidence of discrimination.”).
- <sup>11</sup> *EEOC Policy Guidance on the Consideration of Arrest Records*, available at [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) (Last viewed on April 27, 2017).
- <sup>12</sup> 2016 LA. ACTS 398, codified as LA. REV. STAT. § 42:1701.
- <sup>13</sup> The law, however, does not affect pre-hire screening procedures for job applicants seeking a law enforcement or corrections position.
- <sup>14</sup> *See e.g.* LA. REV. STAT. § 40:1203.2 (requiring mandatory criminal history check for ambulance personnel); LA. REV. STAT. § 22:1554 (prohibiting an insurance producer from employing any employee who is convicted of a felony involving moral turpitude, public corruption, dishonesty, or breach of trust without obtaining a waiver from the Louisiana Department of Insurance).
- <sup>15</sup> LA. REV. STAT. § 17:15.
- <sup>16</sup> LA. REV. STAT. § 23:291(D).
- <sup>17</sup> LA. REV. STAT. § 23:897.
- <sup>18</sup> LA. REV. STAT. § 51:1953(F).

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- <sup>19</sup> LA. REV. STAT. § 51:1953(A).
- <sup>20</sup> *See e.g.* 42 U.S.C. § 2000e-2(h) (Title VII); 29 C.F.R. § 1607.1B (Title VII); 29 C.F.R. § 1625.7 (ADEA); and 42 U.S.C. § 12112(b)(3),(6)-(7) (ADA).
- <sup>21</sup> 42 U.S.C. § 12112(d).
- <sup>22</sup> 29 C.F.R. § 1630.14(b).
- <sup>23</sup> *See* 42 U.S.C. § 12210(b)(3) (drug testing allowed under the ADA); *see also* LA. REV. STAT. § 49:1001, *et seq.* (drug testing must be performed by laboratories certified by the Louisiana Substance Abuse and Mental Health Services Administration).
- <sup>24</sup> LA. CIV. CODE art. 2747.
- <sup>25</sup> *See supra* notes 1-5. Additional categories of protected classes may also exist. For example, Louisiana law prohibits discrimination against employees based upon pregnancy, childbirth, and related medical conditions. LA. REV. STAT. §§ 23:341-342. Likewise, Louisiana law also protects “whistleblower” employee who advises his or her employer about possible unlawful conduct, discloses or threatens to disclose such conduct, provides testimony in an investigation, or refuses to participate in an employment act that is against the law. *See generally* LA. REV. STAT. §§ 23:967, 30:2027, and 42:1169.
- <sup>26</sup> Non-compete agreements are generally disfavored by Louisiana law and prohibited unless they meet several requirements present in LA. REV. STAT. § 23:921(C). Non-compete agreements will only be enforced if they last no more than 2 years and are geographically limited to specified parishes or municipalities in which the employer carries on a like business. *Id.*
- <sup>27</sup> LA. REV. STAT. § 23:631, *et seq.*
- <sup>28</sup> *See* 29 U.S.C. § 1161, *et seq.* A covered employer has 20 or more employees.
- <sup>29</sup> LA. REV. STAT. § 23:1471, *et seq.*
- <sup>30</sup> *See* LA. REV. STAT. § 23:1601. Additional bases exist under LA. REV. STAT. §§ 23:1600-1602.
- <sup>31</sup> *See* LA ADMIN. CODE tit. 40:IV § 323.

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**DORIS BOBADILLA** practices throughout Louisiana, Mississippi, Texas, and Florida, representing clients in the areas of employment law, insurance coverage, subrogation and general liability. She holds an extensive background in civil and workers' compensation litigation, having represented clients before state, federal, and administrative courts. In recognition of Doris' career and community achievements, the New Orleans CityBusiness Board selected Doris as a "Leader in Law." The New Orleans Chapter of the Federal Bar Association also honored Doris with the Camille Gravel Public Service Award. She is a recipient of the Executive Women International, New Orleans Chapter's Representative of the Year Award. Doris is also the first Hispanic female on record to practice in the state of Mississippi.

Doris' trial experience began as an Assistant District Attorney, Orleans Parish, State of Louisiana, where she handled jury and judge trials. She has also handled civil trials throughout local and district courts in Louisiana and Mississippi and has tried claims before the Mississippi Workers' Compensation Commission. She now maintains a regional practice and serves as the Managing Director of the firm's Gulfport, Mississippi office.

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John holds an extensive background in civil, workers' compensation, and bankruptcy litigation, having represented clients before state, federal, and administrative courts. He has also litigated matters and appeared in courts on behalf of his clients throughout Louisiana, including—for example—Orleans Parish, Jefferson Parish, St. Tammany Parish, the United States Districts Court and Bankruptcy Courts for the Eastern, Middle, and Western Districts of Louisiana.

John's practice has concentrated on Labor and Employment law, including litigation under workers' compensation, Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and Family Medical Leave Act (FMLA). He has represented clients during labor audits and investigations by regulatory agencies such as the Department of Labor and the Equal Employment Opportunity Commission, the Louisiana Human Rights Commission, and the Louisiana Department of Insurance. John also counsels employers on avoiding employment litigation by the use of smart internal practices and policies, including the use of social media, employee handbooks, and thorough record-keeping. Beyond his labor and employment work, John possesses wide-ranging experience in subrogation recovery, insurance coverage, admiralty, bankruptcy, and general defense litigation.