Disclosure

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Strategic Planning

- The importance of state laws and an employment lawyer in your state!
- Your mission and vision.
- Your business plan!
Practice Entry Choices

- Purchase of practice, cold start or co-ownership?
- Determining initial staff pay and benefits.
- Congratulations, you are now an employer!
Entity Choice

- Sole proprietorship.
- Limited liability company.
- C-corporation.
- S-corporation.
- Partnerships.
- Tax considerations — not many.
- Non-tax considerations — limited liability.
Purchase a Practice

- If purchasing a practice, worker classification for the retiring orthodontist.
- Hiring the seller's employees.
- The seller's spouse/your spouse in the practice.
- When do you interview the existing staff?
- Hiring family members of the seller.
- The seller's employee census, including compensation, retirement plan contributions, health insurance and other benefits.
- Existing 401(k) account balances from the prior employer/seller.
THE HIRING PROCESS
Prior to advertising or recruiting for a position, develop a comprehensive job description which outlines the essential functions of the job. This sets forth standards which will enable you to make hiring decisions, complete performance appraisals and make disciplinary decisions including termination of employment.
Include essential functions of the position set forth in a job description and necessary qualifications. The advertisement should state that your practice is an equal opportunity employer. Avoid language promising advancement, pay increases or long-term employment and adhere to hiring requirements.
Soliciting Applicants

- Before advertising or otherwise soliciting applicants for the practice, formulate a detailed description of the job position, including all essential duties and skills that will be expected of the employee.

- Ensure that the summary of traits and skills advertised for the position does not include legally-impermissible criteria such as nationality, race, age, religion, disability, gender, or ethnic or national origin.

- Avoid requests for photographs (which may disclose sex, race, and other characteristics) and for submissions which could disclose the presence of a disability — such as the request for an applicant to submit a statement in her or his own handwriting.

- Limit the solicitation to job-related criteria and advertise as an equal opportunity employer.

- A job description/design will enable you to better evaluate the skills and attributes of applicants and to better explain to the new employee what you expect of such employee.
Job Applications

Failure to hire an applicant can give rise to a discrimination claim that is difficult to refute if the job application and/or interview included inquiries into matters unrelated to the job requirements or unlawfully requested information about the applicant's race, religion, national origin, etc. Written job applications can be structured to provide a substantial amount of useful information, such as education, prior work experience, and personal references, but an employer must take care to avoid questions which reveal (or tend to reveal) age, religion, sex, race, national origin, disability, veteran, or other protected status.
Applicant Interviews

- Review the completed application and/or resume to assess what additional information is needed prior to the interview.
- Let the applicant answer the questions; don't interrupt.
- Check-off questions as they are asked.
- Do not make notes on the application or resume.
- Evaluate applicants as soon as possible after the interview.
- Avoid questions that are not job-related or are discriminatory.
Some Inquiries To Avoid In Interviews

- Marital status, number of children and childcare arrangements.
  - Acceptable to ask what hours an applicant can or cannot work.

- Where the applicant or his/her parents were born or whether the applicant is a U.S. citizen.
  - Acceptable to inquire if the applicant is eligible to work in the U.S.

- How much work have you missed due to illness in the last year?

- What is the applicant's native language?
  - Acceptable to ask what languages the applicant speaks or writes fluently if they are job related.

- Questions about church or religious affiliations.

- Questions about an individual's age, including date of graduation.
Some Examples of Acceptable Inquiries Are:

- Prior employment and reasons for leaving the employer.
- Education, training and experience.
- Past work experience.
- Inquiries into the applicant's ability to meet the practice work hours and schedule.
Objectively Assess Reasons For Not Hiring Someone

Statements such as, "You are overqualified for this position" may be interpreted to be age-related or to disguise another impermissible motive. If someone is "overqualified" then he or she meets the basic requirements of the job position.
Some Acceptable Reasons Not To Hire An Applicant

- Applicant rejected job offer.
- Applicant lacks specific necessary qualifications to perform essential job functions for the available position.
- Applicant was not the best qualified candidate.
- Applicant refused to take, or failed, a drug screen which the employer requires of all applicants.
- Applicant's falsification of application or resume.
- Applicant failed to report to work.
- Applicant failed to appear for follow-up interview.
- Employment interview disclosed that applicant has no real interest in the available position.
Job Application Releases

- Consider inclusion of a release on the job application. The release obtains the applicant's permission to contact former employers, educational institutions and references.

- Include a statement that all information provided by the applicant is true and that no promises of employment have been made.

- Falsification of a job application or resume is grounds not to hire an applicant or to discharge an employee if the falsification is discovered after hiring.

- Release language should be in conspicuous print just above the applicant's signature.

- Include an acknowledgement that any employment is terminable at will.
Committing The Applicant To A Release Serves Several Purposes

- It refutes any allegation by the applicant later that she or he was guaranteed employment or specific terms and conditions of employment.

- The applicant expressly authorizes release of information by prior employers, schools, and references, which refutes a later claim of invasion of the applicant's privacy rights or other claim related to these inquiries. Because of fear of being sued for defamation, prior employers are reluctant to discuss a former employee's qualifications (especially negative traits), absent a release from the employee. (Even with the release some employers stick to a policy of silence, other than to confirm dates of employment).

- The certification of truth and completeness provides a specific reason not to hire - or to later fire - an applicant who lied on the application.
References

- Ask only job related questions.
- Do not ask anything that you could not permissibly ask the applicant.
- Probe neutral or ambiguous responses.
Reference Check Limitations

- Consumer Reports.
- Federal Fair Credit Reporting Act.
- State Mini-FCRAs.

**Steps:**

- Disclosure
- Consent
- Certification to reporting agency
- Provide information to applicant prior to adverse employment action based upon the report
- Provide notification of information to applicant
Be careful! Make informed decision on use of internet searches for applicants to minimize use of impermissible information and verify before basing any decision on it.
Arrest Records and Convictions

- The information cannot be used in a discriminatory manner.
- Employer may make employment decisions based upon convictions that are job related.
APPLICANT SKILL TESTS
At will employment reference.

Avoid specific term of employment.

Reference employee manual.
TERMINATION OF EMPLOYMENT AFTER THE DISCIPLINARY PROCESS
Employers prefer to preserve an at will employment relationship with their employees. This means that either the employer or the employee can terminate the relationship at any time, without notice or cause. This principle derives from the notion that the private business owner(s) should be free to determine the best way to run his or her business. In general, if the employment relationship is for an indefinite term without an employment contract of a specific duration, the relationship is presumed to be at will in most states.
However, the employment at will doctrine is subject to a growing list of limitations. Employers may inadvertently abandon employment at will without intending to do so, as by making promises to employees, inappropriately drafting contracts, policies or manuals, and inadequately documenting general business practice. If employment is not deemed at will, then the employer is limited to termination of employment only for just cause.
Promissory Estoppel

Either at the time of hiring or during the course of an otherwise at will employment relationship, an employer may make a statement which the employee interprets to be a promise upon which the employee foreseeably relies to his or her detriment, thereby limiting the employer's ability to terminate the relationship to only for just cause.
Unlawful Practices

The employment at will doctrine will not be an effective defense to a claim of discharge for an unlawful reason. Under federal and state discrimination laws, it is unlawful for an employer to discharge a person on the basis of race, national origin, religion, gender, age, disability, veteran status, military status, or any other group or status protected by law. Laws also prohibit discharge of employees who are "whistleblowers" (reporters of unlawful employer conduct) or who have asserted legal rights in the course of their employment. For example, it is unlawful to terminate an employee because he or she has reported a perceived violation of OSHA's bloodborne pathogens regulations, has filed a worker's compensation claim, has filed a discrimination claim, or has filed a claimed wage and hour violation with the Department of Labor.
In most cases, employers, at least from their own perspective, have "cause" for discharge related to performance problems or misconduct of the employee. The question is one of "just" cause. Examples of just cause basis for discharge are: absenteeism, theft, antisocial behavior with co-workers or patients, insubordination, on-the-job drug or alcohol use, and violation of safety and other work rules. Documentation of these events is imperative.
Making the Decision to Terminate

- Employers tend to wait too long.

- If the employer terminates, there is a risk of legal action, if the employer does not, there's other risks, e.g., morale with or loss of other employees or a precedent for the same or similar behavior by another employee.
Considerations

- Comply with the employee handbook and policies.
- Be consistent with past practice in employee treatment for similar behavior.
- Consider all alternatives to termination.
The Termination Process

- **Preparation:**
  - Rehearse delivery of termination message.
  - Schedule shortly in advance and minimize contact with other employees. End of the day is good.
  - Determine what will be communicated to other employees.
The Termination Meeting

Termination meeting:

- Be decisive, honest and brief — roughly 10 minutes.
- If appropriate, thank the employee for the employee's service with your practice.
- Do not give any indication that the decision is not final.
- Allow the employee to ask questions or respond and do not argue.
In most instances, termination of an employee will be in a face-to-face conversation in which the employee is told that his or her employment has been terminated and the reasons. It is good practice to conduct such an interview with a witness from management (not a co-worker of the employee), so that it is clear later, if necessary, as to what was said during the interview. In an orthodontic practice, this would typically be the practice owner(s) and the practice administrator or office manager. A written summary of the interview should be placed in the employee's personnel file.
Ending the Working Relationship

Concluding:

- Obtain practice property, e.g., keys.
- If possible, provide the employee with a final paycheck, including any accrued vacation pay.
- Discuss state health insurance continuation and the retirement plan account balance, if applicable.
Maintain a Policy Regarding References of Former Employees

- Exit interviews may be acceptable for an employee who resigns or relocates; otherwise they are not useful.

- Determine very carefully whether the practice will contest a claim for unemployment compensation — sometimes an unemployment check is what is standing between the terminated employee and a possible lawsuit.
Summary and Thoughts