

# 7 Tips for Hiring and Firing Employees While Minimizing Legal Liabilities

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# 7 Tips For Hiring And Firing Employees While Minimizing Legal Liabilities

*Written by Allison Goico 4-6-18*

Hiring an employee is exciting — it's an opportunity for both employer and prospective employee to develop a mutually beneficial and profitable relationship. However, when done incorrectly, hiring can create liability.

To avoid turning a potentially promising encounter into a problematic one, VARs and MSPs need to adhere to a few best practices.

1. **Ask the right questions.** Candidates should be asked similar questions geared toward determining if they can perform the job. Asking different candidates different types of questions, especially if not directly tied to the job, can create claims certain employees were treated less favorably because of their membership in a protected class. VARs and MSPs are specifically prohibited from asking questions about an employee's health or potential disabilities until after a conditional offer of employment is made.
2. **Make sure application materials are legally compliant.** In recent years information that used to be requested as a matter of course has become prohibited. For example, many cities and states have "banned the box," meaning VARs and MSPs can no longer ask potential employees about criminal convictions on job applications. Now states are starting to prohibit inquiries about an applicant's current compensation, and litigation due to noncompliant

background check forms is on the rise. Applications and other pre-hire materials should be reviewed annually to make sure they are in the best shape they can be.

## **How To Avoid Legal Liability In The Event Of A Termination**

Potential liability does not end after an employee is successfully hired. In fact, liability is much more common after the employment relationship has begun, and ending those relationships is always difficult. Employment terminations are often emotionally charged for the employer as well as the employee, which can lead to a hasty termination and confusion or anger on the part of the employee. While an employer may not be able to guarantee a former employee will not bring a legal action against it, there are best practices an employer can follow to minimize the likelihood of an employee prevailing in such an action, or even from bringing one in the first place.

1. **Follow your policies.** The number one thing VARs and MSPs can do to reduce their legal exposure is to have disciplinary policies in place and to consistently follow them. Most private sector employees are at-will employees, meaning they can be terminated at any time and for any lawful reason. However, even though an employee is at-will, an employer creates legal exposure when one at-will employee is treated differently than another employee in a similar situation. Dissimilar treatment of similar employees invites discrimination claims on the part of employees that are costly to defend.
2. **Document, document, document.** It doesn't matter how well an employer handles an employee's termination if there is no record of it. If an employee's performance warrants counseling, the reason



for the deficiency and how the employer addressed it should be documented in writing, including oral counseling. All disciplines should be presented to the employee for signature or notation that the employee received the discipline, but refused to sign it. Where there are witnesses to an employee's misconduct, those witnesses should be asked to give signed written statements as soon as possible. These statements will serve both to refresh memories, as many lawsuits don't surface for years after the event, as well as to aid the employer in the event a witness' employment is subsequently terminated.

3. **Train your supervisors.** Many lawsuits arise not because a company doesn't have a policy in place, but because its supervisors are not trained in those policies frequently enough. As supervisors are the ones who work with employees on a daily basis, they are the mostly likely to become emotionally wrapped up in the situation; therefore it is important they are aware of human resources policies and the importance of following them. If the employer has a human resources department, supervisors should know who they can contact to help them deal with their subordinates.
4. **Be realistic in employee performance reviews.** Employees are most likely to become disgruntled when their termination comes as a surprise to them. Too often VARs and MSPs tolerate mediocre employee performance, and then when they begin to crack down with performance improvement plans, discipline, or termination, the employee feels he or she is being "picked on" since he or she has been performing that way for months or years without incident. It's natural to want to avoid confrontation which is why inflated

performance reviews are so common, but they can wind up making the situation worse in the long run.

5. **Handle the termination professionally.** VARs and MSPs need to handle the termination meeting as appropriate for their operations, but there are some basics that can help the process go as smoothly as possible. In addition to the employee's supervisor, another employee (a member of the human resources department is preferred) should participate in the termination meeting as a witness. The meeting should be as private and brief as possible. The supervisor should be compassionate, but should be concise and honest about the reason for the termination.

Employees should be provided with details about next steps, including issues such as the handling of their final paycheck, outstanding vacation, and continuing health insurance. Where an employee's past behavior has led to safety concerns, an employer may want to arrange for security to be available during the meeting and to escort the employee to collect belongings and leave the premises.

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