EMPLOYMENT LAW FOR THE GENERAL PRACTITIONER & CORPORATE COUNSELOR

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HOW TO HIRE EMPLOYEES WITHOUT GETTING INTO HOT WATER: A GUIDE TO INTERVIEWS, BACKGROUND CHECKS, EMPLOYEE HANDBOOKS AND MORE

I. INTRODUCTION

Human capital is often the greatest (and one of the most expensive) investment companies make in their growth and future. The corporate culture of any organization in turn is defined by its employees. Companies take great pains to seek out not only the candidates with the right skills for the job, but also to identify those who are the right fit for the organization. Unfortunately, given the legal landscape, too much probing for information to identify the right candidate may get the company into hot water if the applicant is not hired.

In addition to the classifications which are well known to be protected – race, gender, age, disability, national origin – statutory protections now exist new classes of individuals, many far from obvious beneficiaries of the legal system. To make matters more difficult for the unseasoned practitioner, the legal prohibitions and requirements are not all located in the most obvious places, such as the New York Labor Law. For example, in New York, convicted felons are protected under a little known provision of the New York Corrections Law. The currently unemployed now enjoy a certain degree of “protected class” status based on recently enacted but not well publicized New York City regulation. Previously common-place inquiries are now off limits. Employers cannot ask about family medical history in a medical exam because it may elicit information about a genetic predisposition. Even having someone fill out a form which asks you to check off “Male/Female” is no longer simple or unambiguous question, as even that may elicit information about gender identity, which now enjoys protected status as well.

The following is intended not as a comprehensive guide to every aspect of the hiring process, but rather as an overview of the relevant statutory framework and a roadmap to some of the most recent and hotbed issues facing employers in New York.

II. THE INTERVIEW PROCESS:

A. What Employers Want to Know

The key to a successful interview process is knowing what skills and experience the ideal candidate would possess. To do this, it is important to have a detailed and objective job description which identifies the essential functions of the job to be filled. The job description will serve two primary goals. First, it allows the employer to determine, based on objective criteria, whether an individual is qualified for a job. This will arm the employer with objective, decision-making criteria in the event a hiring decision is challenged. Second, it gives the employer objective criteria upon which to compare and rank multiple candidates for the same position. Finally, it provides a benchmark for performance and career development once the individual is hired. It is critical that
these job descriptions realistically reflect the actual job functions that the employee is required to be performed, and not merely a recitation of tasks created by a human resource manager removed from the day to day needs at the worksite.

Once the essential functions are identified, the interviewer can then focus on the candidate’s objective education, abilities and experience – and whether they qualify the person to perform the essential job functions. The more objective the inquiry the better. The interviewer should take detailed interview notes to reflect these characteristics, but should refrain from vague and subject comments, such as the individual not being the right fit for the organization. While employers ultimately want someone who will be a fit in its corporate culture, getting the information they think they want crosses into a legal minefield of inappropriate inquiry.

As a general rule, it is important for the interviewer to be trained about what she can and cannot ask. Human resources professionals often are familiar with the parameters of the more tricky do’s and don’ts. But if the direct managers are conducting the interviews, they need to be trained to avoid tripping into turbulent waters. Some key pointers include:

- Ask the same questions to all applicants for the same position. This will avoid any claim of disparate treatment or being singled out because of particular protected category.

- The interviewer should take notes to record key objective criteria distinguishing one candidate from another. Notes should be objective, detailed, factual, and concise.

- Interviewers should avoid the temptation to be colloquial, snide or sarcastic in the interview or their notes – as they all will be discoverable in litigation if a claim were to be filed.

B. What Employers Can Legally Ask

Given the current state of the law, almost every employment candidate will fall within some “protected class.” In New York State, employers need to be mindful of both federal and state statutory schemes in determining what classes are protected and therefore what inquiries are “off limits.” Employers within the boundaries of New York City are further constrained by even more stringent local statutory protections. All employers with four (4) or more employees are covered by one or more of these statutes. The following is a brief overview of the protected categories at each level.

1. Federal law:

   a. Title VII/Civil Rights Act of 1991 (Pub. L. 102-166): Applicable to employers with 15 or more employees, Title VII prohibits discrimination in employment, including hiring, firing, conditions of employment and retaliation, based on an individual’s race, color, religion, sex or national origin. Claims under Title VII must first be brought by filing a charge with the Equal Employment Opportunity Commission (EEOC). If the EEOC opts not to pursue the case, the EEOC
will issue the complaining party a “right to sue” letter, which gives the individual the right to commence an action in federal court. As damages for violations of Title VII, individuals may recover reinstatement, front pay, back pay, future earnings, damages for mental anguish, compensatory damages, punitive damages and attorneys’ fees. However, damages under Title VII are subject to a cap based on the size of the employer as follows: (i) for companies with 15-100 employees, $50,000; (ii) for companies with 101-200 employees, $100,000; (iii) for companies with 201-500 employees, $200,000; and (iv) for companies with more than 500 employees, $300,000. These caps may explain in part why many employees are opting to pursue their discrimination claims under state or local laws, rather than by filing a charge with the Equal Employment Opportunity Commission.

b. **Americans with Disabilities Act (ADA).** Also applicable to employers with 15 or more employees, the ADA prohibits discrimination against “qualified individuals with a disability.” The ADA Amendments Act (ADAAA) of 2009 revised the definition of “disability” to more broadly encompass impairments that substantially limit a major life activity. The amended language also states that mitigating measures, including assistive devices, auxiliary aids, accommodations, medical therapies and supplies (other than eyeglasses and contact lenses) have no bearing in determining whether a disability qualifies under the law. Changes also clarify coverage of impairments that are episodic or in remission that substantially limit a major life activity when active, such as epilepsy or post-traumatic stress disorder. A “qualified individual” is one who can perform the essential functions of a job either with or without a reasonable accommodation. The ever-broadening definition of “disability” under the ADA as well as its state and local equivalents only highlights the importance of a carefully crafted job description identifying the essential functions of each job.

c. **Age Discrimination in Employment Act (ADEA):** For employers with 20 or more employees, ADEA generally offers protection against age discrimination for anyone aged 40 or older. Although originally ADEA capped the protected class at age 70, the limit on that age restriction has since been repealed; however, ADEA does allow the imposition of age limits for certain professions if evidence shows the ability to perform a particular job significantly diminishes with age or imposes a danger to society. This type of limit is termed a bona fide occupational qualification (BFOQ). Courts have interpreted ADEA as allowing the imposition of age limits on professions such as airline pilot and bus driver because research shows the ability to perform these occupations decreases with age.

d. **Genetic Information Nondiscrimination Act of 2008 (GINA):** For employers with 15 or more employees, it is illegal to discriminate against employees or applicants because of genetic information. Covered employers cannot request, require or purchase genetic information, and are strictly limited about their ability to disclose genetic information. Genetic information includes information about an individual’s genetic tests and the genetic tests of an individual’s family members, as well as information about the manifestation of a disease or disorder in an individual’s family members (i.e. family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. Genetic information also includes an individual's request for, or receipt of, genetic services, or the participation in clinical
research that includes genetic services by the individual or a family member of the individual, and the
 genetic information of a fetus carried by an individual or by a pregnant woman who is a family
 member of the individual and the genetic information of any embryo legally held by the individual or
 family member using an assisted reproductive technology. An employer may never use genetic
 information to make an employment decision (including hiring) because genetic information is not
 relevant to an individual’s current ability to work.

(i) **RECENT GINA CASES:** Employers should beware of post-
 job offer medical inquiries, especially if the inquiry seeks family medical history.

(a) In May 2013, the EEOC settled its first genetic bias suit
 against Fabricut. According to the EEOC’s press release
 (http://www.eeoc.gov/eeoc/newsroom/release/5-7-13b.cfm ), the EEOC charged that Tulsa-based
 Fabricut violated GINA when it asked for an applicant’s family medical history in its post-offer
 medical examination and questionnaire. Under GINA, it is illegal to request, require or purchase
 genetic information. In this case, Fabricut’s questionnaire sought information about the applicant’s
 family history of heart disease, hypertension, cancer, tuberculosis, diabetes, arthritis and mental
 illness. The employer ultimately failed to hire the woman as a clerk because she was perceived to
 have had carpal tunnel syndrome, even though her personal physician provided information refuting
 this. confirmed that she did not. The EEOC settled this matter for $50,000. It is not clear from the
 press release whether the $50,000 was all apportioned to settle the GINA claim or whether a portion
 of the settlement was paid to resolve the ADA claim. Either way, the case points out the potential
 minefield in even requiring a simple medical examination as a condition of employment. As a result,
 employers should be cautioned against such practices except in cases where the necessities of the job
 warrant a medical or fitness evaluation to ensure for adequate job safety or to comply with other
 health or regulatory requirements.

(b) On May 16, 2013, just a week after settling its first case
 under GINA, the EEOC filed a press release announcing its first class action under GINA against The
 Founders Pavilion, Inc., a nursing and rehabilitation center in Corning, N.Y. The lawsuit alleges that
 the New York nursing home wrongly requested family medical histories as part of health exams
 before and after workers accept jobs. Like the settled *Fabricut* action, this case also involves alleged

2. **Protections under New York State law:**

   a. **New York State Human Rights Law (NYSHRL).** The NYSHRL
   covers employers with four (4) or more employees, and provides protection for individuals based on
   their age, creed, race, color, sex, sexual orientation, national origin, marital status, disability, military
   status, domestic violence victim status, arrest record, conviction record, and predisposing genetic
   characteristics.

   (i) **Scope.** Note that this statute is broader than Title VII, the
   ADA, ADEA and GINA combined in that: (i) it covers employers with fewer employees; (ii) it
   affords protection based on one’s “creed,” which is broader than the definition of an established
“religion”; (iii) “national origin” is defined to include “ancestry”; and (iv) it includes additional protected categories such as sexual orientation, marital status, military status, domestic violence victim status, arrest record and conviction record.

(ii) **Damages.** Under the NYSHRL, an individual may recover compensatory damages, including back pay, emotional distress and reinstatement. Unlike federal law (Title VII), there is no statutory limit or cap on the amount of compensatory damages an individual may receive. Punitive damages and attorney's fees or costs, however, are not recoverable under the NYSHRL.

b. **New York Corrections Law, Article 23-A, Section 750 et seq.** This law takes many employers by surprise, as it provides protection against discrimination for individuals with a criminal record, including convicted felons. Under the Corrections Law, it is unlawful for an employer to deny an applicant employment based on the applicant’s criminal background, unless:

   (i) There is a direct relationship between the crime and the employment sought; or

   (ii) Employing the person would involve an unreasonable risk to property or to the safety or welfare of any individual or the general public.

It is not sufficient for an employer simply to conclude that any convicted felon poses an unreasonable risk of harm. Instead, the statute requires the employer to make an evaluation based on eight (8) enumerated factors before denying employment based on an applicant’s criminal record. These factors include: the public policy of the state to encourage employment of those previously convicted, the duties and responsibilities related to the position, the bearing of the criminal offense on the individual’s ability to perform his duties and responsibilities, the amount of time which has elapsed since the offense, the age of the person at the time of the offense, the seriousness of the crime, any information or evidence reflecting rehabilitation or good conduct and the legitimate interest in protecting property, safety and welfare of individuals and the general public. Unless required by another statute or regulation, any blanket prohibitions on hiring individuals previously convicted of any crimes violate New York law.

It is critical for employers to train their interviewing personnel about the requirements of this law, and to have policies in place which comply with the rigors of the statute. In any interview which follows or results in the disclosure of a prior criminal conviction, the interviewer should take care to consider each of these factors, and obtain the necessary information from the applicant to do so. The reasons for the denial of employment following a disclosure or discovery of a prior criminal should be documented in detail, illustrating the Company’s consideration of each of the relevant factors. In the event of such a denial of employment, the employer must provide the applicant with a written statement of the reasons for the denial within 30 days of a request by the applicant. Note that an employer still may refuse to hire an individual for making a material misrepresentation on his or her application – such as disclosing a prior criminal conviction – if that conviction is later discovered through conducting a background check.
New York State Labor Law §201-f provides that every employer shall post, in a place accessible to his or her employees, a copy of Correction Law Article 23-A relating to the licensure and employment of persons previously convicted of one or more criminal offenses.

For failure to comply with this little-known legislation, an employer may be liable for back pay, front pay, emotional distress damages, civil fines, penalties and attorneys’ fees.

NOTE: Following an investigation by the Attorney General’s Office, and based on a complaint that its hiring practices did not comply with the Corrections Law, Quest Diagnostics entered into a settlement including the payment of $70,000 in fines and an agreement to modify their policies, conduct training and comply with the law in the future in his hiring practices.

NOTE: Under no circumstances is it proper to consider an applicant’s arrest record, where the arrest did not result in a conviction.

3. **Protections under New York City law**

   a. **New York City Human Rights Law (NYCHRL).** This law applies to employers with four (4) or more employees, and prohibits discrimination in employment based on an individual’s actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status.

      (i) **Scope.** In addition to the characteristics protected under state and federal law, the NYCHRL adds protections for partnership status and citizenship status (subject of course to an individual’s legal right to work in this country). In addition, the NYCHRL expressly provides protection not only for “actual” characteristics, but for “perceived” characteristics. Moreover, the definition of disability under the NYCHRL law is even broader than under the ADA Amendments Act.

      (ii) **Damages.** Under the New York City Human Rights Law (NYCHRL), there is no statutory limit on the compensatory damages that an individual may receive. Punitive damages and reasonable attorney's fees and costs to the prevailing party are available under the NYCHRL, as are reinstatement, back pay and front pay.


      (i) On March 13, 2013, the New York City Council overrode the Mayor’s prior veto and passed legislation which prohibits employers with 4 or more employees from refusing to consider or hire an employee because the applicant is currently unemployed. The legislation also prohibits any employer, regardless of size, from posting job advertisements which require job applicants to be currently employed, or indicate that they will only consider applicants who are currently employed.
However, the new law does carve out some protections for employers, and does not prohibit employers from:

- Consideration of job status if there are “substantially job related reasons doing so” (presumably referring a skill which could go stale after a dormant period, but otherwise not explained);
- Inquiring into the reasons regarding the separation from prior employment;
- Requiring or advertising for an applicant to hold current licenses or possess similar job qualifications;
- Giving priority to existing employees of the company for open positions; or
- Setting compensation based on an applicant’s actual experience.

It is uncertain whether this law will spur a new swath of litigation over hiring practices or how stringently the courts will view the “permitted” employer activities. “Unemployed” applicants still need to show not only that they did not have a job, but were available for work and actively seeking employment in order to be protected by the statute. The unemployed then needs to prove that the fact of his or her unemployment – as opposed to a host of other criteria such as experience, training or education – were the motivating factor in the company’s decision. This only highlights the importance of careful documentation of the interview and decision-making process at the time it is in progress, as well as training of those conducting the interviews to be aware of the new law.

4. Some Sticky Interview Issues and Questions: The following are some examples of the right way and wrong way to broach some sticky interview issues.

a. Religion -- To an applicant wearing a yarmulke:

(i) **OK:** “Saturdays are our busiest days in the store, and we require all employees to work at least two Saturdays per month. Can you do that?”

(ii) **NOT OK:** “Do you go to synagogue on Saturdays?”

b. Disabilities – To an applicant using a cane:

(i) **OK:** “This job frequently requires lifting materials of up to 50 lbs. Is there anything that would prevent you from doing that?”

(ii) **NOT OK:** “What’s wrong with your leg? Will your injury get in the way of doing your job?”
c. Gender/Pregnancy – To the apparently pregnant candidate:

(i) **OK**: This job requires frequent travel, often on short notice. Will you be able to do that?

(ii) **NOT OK**: “So when are you due? Who will watch the baby if you have to go out of town?”

d. Age:

(i) **OK**: For a bartending job, “are you over the age of 21?”

(ii) **NOT OK**: “What year did you graduate from college?”

e. Genetic Information:

(i) **OK**: It’s not. There’s nothing you can ask which solicits any genetic information because there is no relevant information to be gleaned.

(ii) **NOT OK** (even if well-intentioned): “I’m sorry to hear you’ve had to take care of your mother during her illness. What did she have?” Unwittingly, you may be eliciting information about a genetically transmitted disease.

III. DOCUMENTS AND INFORMATION GATHERED DURING THE HIRING AND INTERVIEW PROCESS:

During the interview and application process, the employer has an opportunity to collect some optional documentation and information, and a mandatory obligation to collect others. While not exhaustive, the following provides a brief outline of some of the documents and information most likely to be encountered in the hiring process.

A. **Form I-9**: All employers must complete for all employees a Form I-9, which provides proof of eligibility to work legally in the United States. As of May 7, 2013, all employers must use the *new form* issued by the government (dated 3/2013). Old versions will not be accepted after that date. It is recommended that any offer letters explicitly state that the offer of employment is subject to presentation of documents sufficient to satisfy the I-9 requirements. As a practical matter, it is helpful to inform the new employee (in the offer letter) of the information required, and request that they bring it with them on their first day. The employer cannot ask for more or different documents if the employee provides documents which satisfy the requirements from the government –provided lists. The penalties for failure to comply with I-9 range from $110-1100 per I-9 mistake or omission, to $375 - $11,000 for knowingly hiring or continuing to employ an undocumented worker.

B. **Credit and Background Checks** – Many employers routinely conduct credit and background checks. The question for employers is how they are permitted to gather this information, and to what degree they are able to use this information in the hiring decision.
a. **Fingerprinting Law.** Fingerprinting is commonly used in certain governmental, educational or financial employers as a base line for conducting a background check. But in New York, private employers must avoid this. *New York Labor Law* § 201-a prohibits an employer from requiring fingerprinting of employees, except as otherwise provided by law. The law does not apply to state or municipal employees, and provides a further exception for employees of legally incorporated hospitals, supported in whole or in part by public funds or private endowment, employees of medical colleges affiliated with such hospitals or employees of private proprietary hospitals. Note that in a recent opinion letter, the Department of Labor relied on this provision to find that the required use of a biometric time-clock – which interpreted biometric information from a fingerprint but did not store fingerprint images – violated this provision. NYS DOL Opinion Letter, RO-10-0024 (April 22, 2010).

b. **Credit Reporting Requirements.** Background checks must comply with both federal law (the Fair Credit Reporting Act, or FCRA), as well as *New York General Business Law* § 380 (known as the New York Fair Credit Reporting Act). FCRA is now under the rulemaking and enforcement authority of the Consumer Financial Protection Bureau (CFPB), a newly created agency under the Dodd-Frank Act of 2010. The CFPB has imposed the use of new Summary of Consumer Rights form used by employers, as well as two forms used by Consumer Reporting Agencies (CRA). The new forms take effect January 1, 2013.

(i) In order to comply with federal law, an employer seeking a consumer background check must provide a disclosure that they are seeking the information, and obtain written permission from the applicant to obtain the background report. Before rejecting an applicant based on information in a credit report, an employer needs to notify the applicant in writing and provide a copy of the consumer report relied on, together with a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act” (typically obtained from the credit reporting agency). This prevents denying any applicant based on the case of mistaken identity, as one of the most common problems is that the credit reports provide faulty information, sometimes correctly reporting conduct about someone named “John Smith,” but not the same John Smith applying for the position.

(ii) New York requires the compliance with the federal laws. In addition, under New York State Consolidated Laws Article 25, Section 380-j consumer reporting agencies are generally prohibited from providing or maintaining information about: (a) an arrest or a criminal charge unless there has been a criminal conviction for such offense, or unless such charges are still pending; and (b) records of conviction of crime which, from date of disposition, release, or parole, predate the report by more than seven years.

(iii) Although credit checks are commonly used in the hiring process, especially in the wake of the recession the reliance on a “bad credit” report to deny employment has been criticized by many as discriminatory against those from a lower socio-economic background, and as potentially having an adverse impact against minority applicants. There is currently sponsored federal legislation that would restrict the use of credit checks in the hiring process. Both the New York State Legislature and the New York City Council are considering strict new laws that would greatly limit an employer’s ability to do credit screening. As of the time this paper was submitted, none of those bills has become law.
C. Medical Exams and Drug Testing.

1. **Pre-Offer Inquiries.** The rule is simple. An employer may not ask a job applicant to answer medical questions or take a medical exam before making a job offer.

2. **Post-Offer Inquiries.** An employer can condition an offer of employment on the successful completion of a medical exam or answering certain medical questions with several caveats. First, this condition is acceptable only if all new employees in the same job or job classifications have to take the same exam and answer the same questions. Second, the inquiry cannot run afoul of GINA, and therefore should not require or seek to elicit any genetic information, whether directly or indirectly, therefore precluding questions about family medical history. Third, great care needs to be taken in the event that an employee is denied employment to ensure that the reasons for the decision are well-documented and not based on any genetic information or actual or perceived disability. The focus needs to be on the individual’s abilities to perform the essential functions of the job. Note that any medical information obtained during the application process must be stored in separately locked files, not as an integral part of the individual’s personnel file.

3. **Drug Testing.** An employer is free to conduct pre-employment drug testing, and it is common practice among major corporations to do so. Courts have consistently upheld the legality of requiring a pre-employment drug test as a condition of employment; however, it is advisable to obtain an applicant’s consent to the testing and to make it clear in writing that successful results from the drug testing are a condition to commencing employment. Note that although the Americans with Disabilities Act (ADA) and similar state laws provide protection for people who are in rehabilitation for a drug addiction (as a “disability”), the ADA does not protect current users of illegal drugs, and therefore does not affect pre-employment drug testing. Even smaller employers find a benefit to screening out habitual drug users, who tend to have more performance, punctuality and medical issues than other individuals.

D. Social Media.

1. **Best Practices.** Given the burgeoning use of social media as a means of communication, especially among the younger generation entering the workforce for the first time, it is not surprising that employers have sought to use these powerful social media tools to obtain more of the kind of information they “really” want to know about an applicant (i.e. Do they exercise good judgment? Will they behave in a manner consistent with the corporate culture? Do they use illegal drugs? Will they embarrass the company?). It is not uncommon, nor is it illegal, for an employer to “Google” an applicant and research their public “online” profile. But doing so poses the risk of finding out more than an employer wants to know, or can legally ask in an interview or job application. For example, an employer may learn that an individual is suffering from cancer based on a blog, or is fund-raising for a disease which is hereditary in her family. Similarly, an employer may learn of an applicant’s religious or political affiliation, marital status or sexual orientation based on information posted on the Internet – information about which the employer would not be entitled to inquire, but which it now possesses. From the employer’s standpoint in most circumstances, despite the temptation to know as much as possible about an applicant, ignorance is bliss.
2. **Legislation.** Facebook posts have become the modern-day equivalent of passing notes across the classroom, or sharing secrets in late night phone calls between friends. In other words, although they are “public” in the sense that they are available (though perhaps only to certain other users) on the Internet, they are still intended as “personal” communications. More often than not, an applicant’s Facebook postings and activities revealed by them are no more relevant to the employment context than asking an applicant what she did last Saturday night, how much she had to drink, who she danced with, or what time she got home. Slowly recognizing this, some states have passed legislation prohibiting employers from requiring job applicants to provide access to their Facebook accounts or login information as a condition to employment. These states include California, Michigan, Illinois, Maryland and Delaware, and it is anticipated that more will follow. On the other hand, the New Jersey Legislature was overwhelmingly in favor of a measure that would have barred employers from obtaining social media IDs and other social media related information from employees and applicants, but Governor Christie vetoed the bill. At present, there is no federal or New York state law governing this issue, but stay tuned for new developments.

IV. **EMPLOYEE HANDBOOKS AND POLICIES**

A. **General Guidance.** Employee handbooks and formalized policies can be useful tools for managing the workforce. However, if the handbooks do not accurately reflect an employer’s actual business practices, or are inconsistently applied to all employees, formalized policies clearly can do more harm than good. On the other hand, employee handbooks – whether distributed in hard copy or electronic format – can serve as useful a tool for distributing information and/or policies which certain employers are required to make available to their employees, such as information about employees’ rights under the Family and Medical Leave Act or Anti-Harassment policies.

B. **Common Handbook Policies.** The following are some of the most commonly found policies in employee handbooks.

1. **At-Will Employment.** Under New York law, an employment relationship which is not for a specified period of time is deemed to be “at will” unless the parties have agreed otherwise. *Smalley v. The Dreyfus Corp.*, 10 N.Y.3d 55, 58, 853 N.Y.S.2d 270, 272 (2008). This means that either the employer or the employee can terminate the employment relationship, with or without cause, and with or without notice or cause. In challenging employment terminations, employees may argue that the employer made some express or implied promise that they would not be terminated except for “cause,” or that they were promised to be employed for a specific period of time. In other cases, employees have argued that some policy of the employer – such as a progressive discipline policy – created an exception to the “at will” relationship and constituted an implied agreement not to terminate the employees except in accordance with that policy.

To best protect employers from spurious claims of wrongful termination, all employee handbooks should state unequivocally that the employer is an “at will employer” and that all employment relationships are “at will,” explaining that they can be terminated with or without notice, with or without cause, by either the employer or the employee at any time. The handbook should contain an explicit statement that this policy cannot be varied except by a writing signed by the CEO, or some other designated senior officer of the company, and contain an acknowledgement form to be signed...
by the employee. Strong language reflecting a clear and unambiguous at-will policy is the best defense to any claim for breach of an implied contract not to be terminated except for cause. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 237 (1983) (where an employee manual contains an explicit disclaimer of any contractual relationship, the disclaimer preserves the employer’s right to maintain an at-will employment relationship and defeats any claim for wrongful termination).

2. **Progressive Discipline Policies.** These policies often create more problems for the employer than they solve, and are generally not recommended. The two biggest problems are: (a) arguments by employees that the policy creates an implied right not to be terminated except for cause (see above); and (b) these policies are not consistently administered. The first problem admittedly can be minimized by a carefully drafted policy (articulating that nothing in the progressive discipline policy alters the at will nature of the employment relationship), combined with a strong “at will” statement. However, the second problem arises because discipline is often doled out on a case-by-case basis. The nature and extent of the discipline – irrespective of any written policy – varies from manager to manager, employee to employee, office to office. Properly trained managers generally will progressively discipline employees with warnings and document counseling about performance issues – but if they fail to do this, the existence of a progressive discipline policy only strengthens the employee’s claim in the case of a poorly documented termination.

3. **Holiday, Vacation and Sick Leave Policies.** Under New York law, employers are not required to offer employees any paid holidays or vacation time. Absent a policy of the employer, time away from the office is simply considered “time not worked.” In the event an employer wishes to offer a time-off policy, Section 195.5 of the Labor Law requires the employer to “notify [its] employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours.” In the absence of a written policy, an oral policy or past practice may be enforced, provided the employee can establish evidence of the policy. Moreover, violators of § 195.5 are subject to civil penalty.

Once it is determined to have a vacation policy, employers in New York have broad discretion to dictate the terms of that policy, provided that it is clear, in writing, and communicated to the employees. Vacation policies could impose the restrictions on the use of vacation time (i.e. require approval in advance by manager), provide that vacation cannot be taken before it is accrued, or prohibit vacation from being carried over into the following year. It is recommended that all vacation policies indicate that annual leave accrues on a “pro rata” basis, so that employees cannot claim entitlement to their full annual allotment of vacation as of January 1 each year.

Nonetheless, the most common practice is to provide that employees will receive pay for accrued unused vacation together with all earned salary at the time of termination of employment.

**NOTE re Paid Sick Leave:** On May 8, 2013, the NYC Council passed a bill which would require all employers with more than 20 employees to provide at least five (5) paid sick days for all full-time and part-time employees who have worked for them for more than four (4) months. The bill would become effective April 1, 2014; and as of April 2015, the bill would apply to all employers with more than 15 employees. It also requires unpaid sick leave for all employees as of April 2014. The bill is
expected to be vetoed by Mayor Bloomberg; however, the bill passed with a sufficient margin within the City Council to override the veto. All employers should stay tuned for the final version of this law and ensure that they revise their sick leave policies and procedures accordingly.

**NOTE re Use It or Lose It Policies:** As a general rule, an employer is required to pay accrued vacation to an employee upon separation from employment if its policy or contract requires it, or if its established policy or contract is silent on the matter. *NY Labor Law, § 198-c; NY Dept. of Labor FAQs.* However, in New York, “an employee’s entitlement to receive payment for accrued, unused paid time off upon termination of employment is governed by the terms of the employer’s publicized policy.” *Kolesnikow v. Hudson Valley Hosp. Ctr.,* 622 F. Supp. 2d 98, 120 (S.D.N.Y. 2009). Therefore, an employer is free to put in place a “use it or lose it” vacation policy provided it gives the employees advance notice of the policy. *See Glenville Gage Co. v. Industrial Board of Appeals of NY,* 52 N.Y.2d 777 (1980). Such a policy could condition the right to payment of vacation pay upon termination of employment upon an employee’s compliance with a requested notice period (i.e. they will receive pay for accrued vacation if they provide 2 weeks’ notice of termination). A more common variant would provide, for example, that any vacation not taken by the end of the holiday year will be forfeited, and will not carry over into the following year. Note that such “use it or lose it” policies are not valid in all states (such as California, which bans them), and therefore should not be applied outside New York without consulting with local legal authority.

4. **Anti-Harassment/EEO Policies.** An employer’s best defense to a complaint of discrimination or harassment is to demonstrate that upon receiving knowledge of the complaint, it conducted a timely investigated and took prompt remedial action if warranted by the investigation. Absent knowledge (or imputed knowledge) of any conduct, an employer is not likely to be found liable for harassment.

Under certain circumstances, the existence of a robust policy may prevent claims of hostile work environment from even getting out of the starting box. Known as the *Faragher/Ellerth* defense, an employer may defend a hostile work environment claim with evidence that:

a. there was no tangible adverse employment action was taken against the plaintiff (for example, discharge, demotion or undesirable reassignment);

b. the employer exercised reasonable care to prevent and promptly correct the harassing behavior (by employee training, imposition of a policy or both); and

c. The plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm (for example, by not taking advantage of reporting procedures outlined in an anti-harassment policy).

**NOTE,** however, that the *Faragher/Ellerth* defense applies to federal law and many state laws, but has been rejected by New York City as inapplicable to claims of sexual harassment under the NYC Human Rights Law. *See Zakrzewska v. The New Sch.,* 598 F. Supp. 2d 426 (S.D.N.Y. 2009) (rejecting *Faragher-Ellerth* for purposes of sexual harassment claims under the New York City Human Rights Law).
5. **Internet and Email Use and Monitoring Policies.** Given the prevalence of electronic transmissions, email and Internet usage in employees’ personal and professional lives, implementing a robust Internet usage and email policy is more critical than ever. These policies can serve several key purposes:

- Provide reasonable limits on personal Internet and email communications during working hours, and provide an avenue for a “performance” termination if violated.

- Limit (or eliminate) the employee’s reasonable expectation of privacy in any email or other electronic transmissions over the company’s server.

- Allow the company to conduct reasonable investigations, including email searches, in the event of a complaint of harassment or potential violation of a restrictive covenant without risking any claim for breach of privacy.

Any such policies should clearly provide that the company “owns” all the computer equipment and any emails or other electronic transmissions utilizing the company property. The policy should also expressly inform the employees that the company has the right to monitor the email transmissions and Internet usage of its employees at any time in its discretion.

C. **Workplace Posters.** Most employers have some obligation to post notices about laws applicable to them. Depending on the number of employees, an employer may have different posting requirements. Federal and state (local jurisdiction) posters are available for purchase on numerous websites. Some are sold with services which provide updates in the event of any changes to applicable law.

V. **CONCLUSION**

Given the plethora of protected categories and often obscure regulations – many of which are unknown to the typical business executive making hiring decisions – a decision *not* to hire an individual can get an employer into as much hot water as a decision to fire an individual who never should have been hired in the first place. Determining who is the right candidate for the job and who will be the best fit with the organization requires employers to walk a tightrope between what they think they want to know and what they can legally find out. This is especially tricky given that new laws are being passed and new protections for employees are being passed all the time. New York – especially New York City – is becoming almost as employee-friendly as California. Amidst this quagmire of rules and regulations, an employer’s best defense is the use of highly trained personnel to conduct interviews, evaluate and document the information obtained from or about the candidate and guide the ultimate selection process. Carefully crafted employment policies and well-articulated job descriptions are an integral part of this process. And of course, when in doubt, it is always best to consult with experienced employment counsel, especially in those sticky situations.
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