

BEST PRACTICES TO HIRE AND MANAGE TOWN EMPLOYEES POST ACT 10

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Post Act 10 - What Has Changed?

- “General employees” - Scope of duty to bargain now reduced to “Total Base Wages”
- Employers able to unilaterally set all policies on hiring and firing
- “Just cause” for general employees becoming exception, not rule

Post Act 10 - What Has NOT?

Hiring and Managing Town Employees

- Managing the hiring process - a vital first step.
- Reviewing & revising policies & handbooks.
- Applying policies uniformly and fairly.

Keys to Avoid Lawsuits

- Training and Preparation
- Documentation
- Consistency
- Fairness

Managing The Hiring Process

- Review and update your application
- Conduct lawful, useful interviews

The Application

Examples of Information You Want:

- Work history
- References
- Signed certification that information is true and complete

The Application, cont.

Information You Don't Want:

“Protected Characteristics” Can't Be Any Part of Decision

- Age (applicants over age 40)
- Disability –unlawful to even ask for info under ADA
- Race, Color, National Origin, Ancestry, or Citizenship
- Religion
- Gender or sexual orientation
- Marital or family status
- Service in the military, reserves, or national security
- Genetic characteristics (GINA-federal law);
- Use of lawful products off-duty (tobacco, alcohol, etc.).

The Application, cont.

Criminal Record Information

- Why do you need it?
- When should you get it?
- How should you get it?
- Certification on application
- “Ban the Box” movement

The Application, cont.

Work Authorization Information

Yes or No question only: U.S. citizen
OR currently authorized to work
in US?

- I-9 form NOT needed until after offer and acceptance
- Do not ask for I-9 type information during hiring process

The Interview

Prepare the Written Questions

- Same for all
- Based on job duties
- Review job description and posting, or
- Create list of job duties and responsibilities
- Identify core functions

The Interview, cont.

Train All Interview Team Members

- Interview team members speak for Town
- HOW you ask a question may determine whether it is lawful or not
- ADA example:
 - Are you able and willing to lift up to 50 pounds - lawful
 - Do you have any limitations that prevent you from lifting 50 pounds - UNLAWFUL

The Interview, cont.

- Gender or Family Status Example:
 - This job requires that you occasionally work overtime with little notice. Are you able and willing to work unscheduled overtime? - Lawful and appropriate.
 - Do you have children you are responsible for after school? – Inappropriate and may lead to lawsuit, especially if asked only of women.

The Interview, cont.

Responding to Volunteered Information About Protected Characteristics

- Example: “I’m over 50 now, my children are out of the house and I am not interested in overtime work.”
- Response: “Overtime is required for this job. Also, the Town doesn’t ask for an applicant's age because it’s not relevant to the job qualifications and we don’t consider age in making employment decisions.”

Verification of Information

Complete Your Process Before Job Offer

- Check prior employment
- Check references
- If criminal record info requested, check CCAP or Dept. of Justice
- Falsification of application is lawful basis to reject application or terminate after hire

Managing After Hire

How to Retain Good Employees and Lawfully Terminate Poor Employees

- Adopt clear policies and inform employees: Handbooks
- Apply policies uniformly
- Courts will require Towns to follow their own policies and procedures
- If you are not going to follow a policy, change it

Policies and Handbooks

Review and Revise Handbook and Policies

- Post Act 10 changes
- Changes in state and federal law
- Grievance procedure required by Act 10 (Wis. Stat. § 66.0509(1m))
- No need to have individual contracts
- Consider at-will relationship

Management Best Practices

- Evaluate properly
- Document performance and misconduct in writing
- Follow up on performance improvement expectations
- Follow Town policies and legal requirements for discipline and discharge
- Apply policies and standards fairly

Evaluations

- Set standards and advise employees
- Apply standards equally
- Be honest and direct
- Be specific
- Include appropriate documentation
- Follow up on a timely basis

Personnel Documentation

Why Contemporary Documentation Is Important:

- More credible as accurate statement of facts
- Protects against discrimination and retaliation claims
- Increases likelihood of resignation

Performance Improvement Plans

- Puts employee on written notice of problems
- Sets expectations regarding required improvement
- Sets timeline to improve
- May not be appropriate for “active misconduct” (versus poor performance)

Discipline and Discharge

- Review written standards of conduct
- Consider at-will statement and removal of cause standards that create property rights
- Handbooks: statements of policy, NOT contract
- Consider use of employee receipt form

Discipline and Discharge, cont.

- **Protected characteristics can't form any part of basis for discipline/discharge**
 - “In part” test under Wisconsin Fair Employment Act
- **Some other unlawful bases:**
 - First amendment exercise
 - Statutory rights exercise
 - Concerted activity exercise

FLEXIBLE Progressive Discipline

- Benefit: Employees less likely to challenge discharge
- Caution: Don't use lockstep system:
 - “Generally these are the steps that will be applied.”
 - “The Town reserves the right to deviate from the progressive discipline steps in its sole discretion.”

Last Chance Agreements

- Not a step in a progressive discipline system
- Usually used where employee has benefit of “cause” standard for discharge
- Parties agree that conduct was cause; next occurrence will result in termination
- Employee can only challenge whether the conduct occurred, not whether it is “cause”

Property and Liberty Interests

Employees may not be deprived of property or liberty interests without due process

- Fourteenth Amendment
- Property interest created by cause standard or contract for a specific term. At-will employees have no property interest in job.
- Liberty interest in reputation and good name
- Determining amount of process that is due

Grievance Procedure

- Grievance procedure requirement created by Act 10 Wis. Stat. (§ 66.0509 (1m))
- Recent guidance on issues under the law:
 - “Termination” should be given its ordinary meaning. *Dodge County Professional Employees, et al. v Dodge County*, App No. 2013-AP-535 (Ct. App. 2013).
 - County employee terminated based upon loss of driver’s license required for job was “terminated” and free to file grievance.

Conclusion

Final Thoughts And Questions?

Thanks for attending!

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