

MINNESOTA FAMILY SUPPORT & RECOVERY COUNCIL
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Avoiding Legal Pitfalls When Hiring and Performance Management

October 2, 2018
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The Basics of Public Sector Hiring

- Position Description
- Advertising
- Employment Application
- Screening
- Interviewing
- Reference Checks
- Documentation

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Position Descriptions

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Position Description

- Defines expectations of the position for the employee and employer
- Provides baseline objective criteria for performance evaluation
- Defines essential functions and minimum qualifications of the position
- Provides basis for determining categories for VPA 100-point competitive scale

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Position Description

- Essential functions
 - The fundamental duties of a position that the individual who holds the position must be able to perform unaided or with reasonable accommodation
- Reasons a function may be considered essential
 - Job exists to perform the function
 - Limited number of employees who can perform the function
 - Function is highly specialized and the person is hired for his or her expertise or ability to perform the function(s)

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Position Description


- Knowledge, skills and abilities
 - Understanding of specific subject areas
 - Competence to perform a learned activity
 - Competence to perform an observable behavior
- Education, experience and credentials
 - Minimum required and preferred



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Position Description


- Other sections
 - Federal Labor Standards Act (FLSA) classification
 - Reporting structure/supervisory responsibility
 - Working conditions
 - Physical demands of the job
 - Travel



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Pitfalls with Position Descriptions

- No current and accurate position description
- Determining essential functions and standards after advertising the position
 - Could infer intentional discrimination
- Best practice: Create (or revise) the position description prior to advertising the position



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Postings, Advertisements and Recruiting Materials

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Pitfall: Relying Solely on Word-of-mouth Recruitment or Referrals



- Could have a disparate impact on a protected class
- Best practice: Advertise or post open positions
 - No legal requirement that the position must be advertised; however, the employer may have a contractual obligation to do so

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Protected Class Categories



• Race	• Disability
• Color	• Public assistance
• Creed	• Age
• Religion	• Sexual orientation
• National origin	• Local human rights commission activity
• Sex	• Pregnancy
• Marital status	• Genetic information
• Familial status	

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Pitfall: References to Protected Class Status in Advertisement



- Could be discriminatory
- Best practice: Advertisement should not include any preference or exclusion based upon protected class status


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Avoid	Reason/Alternative
<ul style="list-style-type: none"> • "Must be U.S. citizen" • "English must be your first language" • "Spanish must be your first language" 	<ul style="list-style-type: none"> • Could be national origin discrimination • "Successful applicant must show proof he or she can legally work in the U.S." • "Ability to effectively communicate in written/spoken [language]"
<ul style="list-style-type: none"> • "Young" or "Youthful" • "Supplement your retirement income" • "Mature adult wanted" 	<ul style="list-style-type: none"> • Could be age discrimination • Focus on desired quality rather than the anticipated age of the applicant



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Avoid	Reason/Alternative
<ul style="list-style-type: none"> • "Great opportunity for stay-at-home mom" 	<ul style="list-style-type: none"> • Could be gender discrimination • Avoid mention of gender • Consider using gender-neutral position titles where possible
<ul style="list-style-type: none"> • "Able-bodied individual ..." • "In good health" 	<ul style="list-style-type: none"> • Could be disability discrimination • Focus on the essential job functions • "Routinely moves equipment weighing up to 50 pounds" • "Requires frequent movement"



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Employment Application

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Pitfall: Failing to Inform Applicant of Legal Rights and Obtain Release




Best Practice: Use a standardized application

- Collects same information pertinent to the position from all applicants
- Platform for informing the applicant of his or her rights under state and federal laws, including the Minnesota Government Data Practices Act and the Veterans Preference Act (VPA)
- Contains authorization for release of information and a waiver of liability against the employer

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Tennessee Notice (MGDPA)



- Must provide whenever asking an individual to provide private data under the MGDPA
- Must include:
 - The purpose and intended use of the data;
 - Whether the individual is legally required to provide the data;
 - Known consequences from either providing or refusing to provide the information; and
 - The identity of other persons and/or entities with statutorily authorized access to the data (Minn. Stat. § 13.04, subd. 2.)

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Pitfall: Requesting Illegal or Problematic Information



- Best Practice: Do not collect the following
 - Any information related to protected class status
 - Social Security number
 - Maiden name
 - Past workers' compensation claims
 - Litigation or claims against any past or present employers involving a discrimination claim
 - Prior sick leave use
 - Need for reasonable accommodations to perform the job
 - Criminal record or criminal history

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Criminal Record or History (Minn. Stat. § 364.021)



- Prohibits employers from inquiring into or considering the criminal record or history of a job applicant until the applicant is selected for an interview by the employer
 - Except positions for which employers have a statutory duty to consider criminal history or conduct a criminal background check when hiring, such as law enforcement
- May only disqualify applicants from consideration for a position on the basis of a past conviction unless the crime(s) are directly related to the position for which the applicant is applying

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Screening applicants

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Pitfall: Failing to Apply the Veterans Preference Act (VPA)



- Minnesota Statutes, Sections 197.447, 197.455 and 197.46
 - Hiring
 - Discipline/Termination
- Who is a Veteran?: Review the DD214 Form
- Note: Merit System may already apply VPA

Apply VPA When Required




- Applicants must be evaluated on 100-point system
- Eligible veterans get extra points added to "passing score"
 - 10 additional points for veteran
 - 15 additional points for disabled veteran
 - In some circumstances, spouses may be eligible
- Applied to the screening process for interviews, not at the interview
- May hire any person interviewed

Ranking Applicants



- Create eligibility list
- Determine in advance
 - Number of interviewees?
 - Interview at natural break?
- Must notify in writing all individuals claiming preference of reasons for rejection and file with local personnel officer

Pitfall: Screening Process Is Discriminatory



- Best Practice: Establish criteria used for evaluation before applications are reviewed or applicants are tested
 - Criteria should be objective and based upon actual job qualifications and duties
 - Award criteria in a uniform manner

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Interviewing
 Avoid Legal Pitfalls When

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Interviews



- Standard set of questions should be asked of each applicant
 - Drafted prior to the interview
 - Open-ended, job-related and based upon past behavior or experience
- Do not ask about protected class status
- Avoid questions that could infer discriminatory purpose

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Avoid	Reason/Alternative
<ul style="list-style-type: none"> • "How many children do you have?" • "Are you planning on starting a family/having more children?" • "What kind of childcare arrangements do you have?" 	<ul style="list-style-type: none"> • Could be pregnancy, gender, familial status discrimination • Focus on availability to work, if this is the concern behind the question
<ul style="list-style-type: none"> • "Are you married? Single? Widowed? Divorced?" • "Who is your spouse?" • "What is your maiden name?" 	<ul style="list-style-type: none"> • Could be marital status discrimination • It is best to avoid this type of question
<ul style="list-style-type: none"> • "To which clubs or organizations do you belong?" 	<ul style="list-style-type: none"> • Could be discriminatory • "Do you belong to any professional groups that are relevant to this position?"

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Avoid	Reason/Alternative
<ul style="list-style-type: none"> • "Are you currently in debt?" • "Have you ever claimed bankruptcy?" • "Have you ever had your wages garnished?" 	<ul style="list-style-type: none"> • Could be discriminatory • Avoid this type of question in an interview unless the position requires significant financial responsibility
<ul style="list-style-type: none"> • "To which political party do you belong?" • "For whom did you vote in the last election?" 	<ul style="list-style-type: none"> • Could be discrimination based on First Amendment rights • It is best to avoid this type of question
<ul style="list-style-type: none"> • "Do you belong to a labor union?" • "Have you been involved in labor union activities?" 	<ul style="list-style-type: none"> • Could be a violation of labor relations law • It is best to avoid this type of question

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Avoid	Reason/Alternative
<ul style="list-style-type: none"> • "Are you available to work Saturdays?" • "Are you available to work Sundays?" 	<ul style="list-style-type: none"> • Could be religious discrimination • "What days or hours would you be unable or unwilling to work?" • "Will you be able to work the required schedule?"
<ul style="list-style-type: none"> • "What type of military discharge did you receive?" 	<ul style="list-style-type: none"> • Could get protected status information • Avoid questions about <i>type</i> of military discharge unless there is a clear business necessity

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Interviews



- Take comprehensive notes
 - If protected class status is volunteered, do not document it
- Be careful of "casual conversations" that may bring up information related to protected classes
- If possible, do not interview alone

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Reference Checks

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Pitfall: Failing to Do a Reference Check

- Part of due diligence in the hiring process
- May yield additional insight on the top applicants

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Pitfall: Reference Check Is Discriminatory or Incomplete



- Ask the same questions to all references
- Draft questions prior to contacting references
- Questions should be job related and consistent with business necessity
- Questions should solicit critical but legal information
- Do not ask about protected class status

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Other Background Check Pitfalls



- Unlawful use of criminal background information
- Using social media and the Internet for background checks
- Improper credit history check or pre-employment physical or mental examinations

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Documentation

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Pitfall: Failing to Make or Retain Documentation of Hiring Process



- Documentation is crucial in defending against a hiring-related lawsuit
- Best practices
 - Make record of the hiring process
 - Maintain records on applicants for at least 18 months
 - For the individual hired, maintain his or her application materials indefinitely

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Performance Management

Making the Most of your Human Resources

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Agenda



- Discussing Personnel Issues
- Performance Evaluation
- Dealing With Unsatisfactory Performance
- Veteran's Preference Act - Discharge
- Police Officers Discipline Procedures Act
- Performance Problems Involving Drugs, Alcohol or Mental Illness

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Discussing Personnel Issues



- Care must be taken not to share private personnel data with anyone not authorized to receive the data
- When seeking input from professional peers, discuss issues in general terms only
- Omitting the employee's name may not be enough if the other information provided can be used to identify the employee

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Performance Management Starts with Hiring



- Position description
- Screening applications
- Interviews
- References

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Position Description



- Defines expectations of the position for the employee and employer
- Provides baseline objective criteria for performance evaluation
- Defines essential functions of the position
- Defines minimum qualifications for a position
- Provides basis for determining categories for Veterans Preference 100-point competitive scale

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Interviews

- When done by a quorum of the board, OML applies
- Standard set of questions should be asked of each applicant
- Questions and notes regarding answers should be maintained for at least 18 months

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Interviews

- Make sure questions do not run afoul of anti-discrimination laws
- Avoid questions that could infer discriminatory purpose
- Be careful of "casual conversations" that may bring up information related to protected classes

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Protected Class Categories

- Race
- Color
- Creed
- Religion
- National origin
- Sex
- Marital status
- Familial status
- Disability
- Public assistance
- Age
- Sexual orientation
- Local human rights commission activity
- Pregnancy
- Genetic information


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Reference Checks

- Part of due diligence in the hiring process
- May yield additional insight on the top applicants
- Be careful of using the Internet or social media to “check out” or evaluate an applicant for employment
- Comply with legal requirements relative to background checks, etc.

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Performance Evaluation
 Performance Management

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Performance Management

- Ongoing process
- Designed to improve the efficiency and effectiveness of the organization
 - Employees significantly affect the organization
- Requires work
 - Planning
 - Managing
 - Evaluating
- Document, document, document!

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Plan

- Performance management starts with the position description
- Should already be established per the hiring process

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Manage

- The process of working toward the performance expectations established in the planning phase and listed in the position description
- Observing
 - Direct: first-hand knowledge
 - Indirect: learning by reviewing work
- Coaching
 - Provide immediate positive reinforcement
 - Handle problems, deficiencies, trouble spots as they occur

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Manage

- Knowledge and skills to monitor
 - Conceptual: ability to see the "big picture," set priorities
 - Perceptual: understanding mission, goals, structure
 - Interpersonal: ability to work with people
 - Technical: ability to use tools and concepts
 - Personal: ability to take action or responsibility

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Performance Evaluation Benefits

- Opens lines of communication regarding performance and expectations
- Provides employee feedback
- Increases morale
- Assists in managing talent

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Performance Evaluation Benefits (Continued)

- Assists in career development
- Identifies areas of needed training and improvement
- Provides documentation for making fair, objective, legal personnel decisions


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Provides Opportunity for Dialogue

- Employees can:
 - Analyze their performance and look for ways to improve
 - Develop their communication skills
 - Find role models
- Employers can:
 - Help employees identify strengths and areas of improvement
 - Provide resources, suggestions, opportunities

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Completing the Evaluation



- Do not allow personal biases to affect your judgment; be objective
 - Focus on concrete examples
- Do not use almost meaningless rating scales
- Do not rely on memory
 - Track both positive and negative examples

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Completing the Evaluation



- Avoid common rating errors
 - Recency effect
 - Horns effect
 - "Big surprise"
- Do not avoid tough issues

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Employee Development Plan



- Appropriate for all employees
- Address employee's strengths and weaknesses
- Establish employee's performance factors and goals for the next evaluation cycle

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Performance Goals



- Specific: not general
- Measurable: quantifiable
- Attainable: achievable in the context of present realities
- Realistic: capable given existing resources
- Timely: date by which the goal must be accomplished

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Conducting the Evaluation



- Establish meeting location, date and time well in advance of the meeting
- Prepare the employee for the meeting
 - Consider a self-evaluation
 - Consider providing a copy of your evaluation prior to the meeting
- Prepare yourself for the meeting

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Conducting the Evaluation




- Avoid phrases such as:
 - You're wrong
 - What was your problem
 - You did a really great job, but...
 - Negates compliment
 - I understand
 - Following an excuse for poor performance

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Conducting the Evaluation


- Review the job description with the incumbent
 - Identify the most important job functions
- Discuss performance standards
- Discuss performance goals



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Conducting the Performance Evaluation


- Listen to what the employee has to say
- Focus on the employee and keep your mind open
- Try not to interrupt
- Utilize nonverbal and verbal signals to show you are listening



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Performance Evaluations

- Should be written
- Signed by the employee
- Placed in the employee's personnel file



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Warning Signs of Systemic Performance Evaluation Issues

- Surprise ratings during review
- Inconsistent application of rating system
- Ratings don't reflect actual employee performance
- Productivity/Morale decreases during evaluation time

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DEALING WITH UNSATISFACTORY PERFORMANCE

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Options/Strategies

- Informal Coaching
- Formal Coaching
- Performance Evaluations
- Performance Improvement Plan (PIP)
- Directives
- Discharge

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Performance Improvement Plan



- Can be initiated at any time
- Should be:
 - Written
 - Signed by the employee
 - Placed in the employee's personnel file

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Performance Improvement Plan



- Performance evaluation notations have been unsuccessful
- Problem is of a nature that it cannot be addressed properly in a performance evaluation
- Problem is serious and needs immediate attention

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Elements of a Performance Improvement Plan



- Identify the specific problem(s), including examples
- Explain why the employee's conduct/ performance is not acceptable
- Identify the specific areas to be improved
- Establish expectations for improvement including timeframe and date to revisit the issue

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Elements of a Performance Improvement Plan



- Include directives that are clear and concise
- State the consequences for failing to improve performance
- Provide the employee an opportunity to present ideas for coaching or training
- Offer and identify assistance/resources for employee to improve performance

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Elements of a Performance Improvement Plan



- State that you will assume the employee understands the PIP unless he or she seeks clarification
- Warn the employee, failure to follow through on PIP may be subject to discipline, up to and including discharge

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Directives



- Directives to employee seek to change a certain behavior
 - You will arrive to work at X
 - You will follow directions given by your supervisor
 - You will not swear at work
- Typically address concrete concerns:
- Failure to abide by directives leads to discipline

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Notification

- Meet with the employee to discuss the PIP/Directives
- Have the employee sign the Notice
- Send a follow-up memo to the employee memorializing any verbal clarifications
- Place all documents in the employee's personnel file

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Note of Caution

- Do not issue letters or evaluations praising the employee for an improvement in performance immediately following a disciplinary incident or poor evaluation until a reasonable amount of time has passed

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Note of Caution


- Referring the employee to an employee assistance program (EAP) should only be done as an option and should not be made mandatory
- Never suggest to the employee that he or she may have a physical, mental or emotional problem that is affecting his or her work

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Discipline

- Consider any terms or conditions outlined in the organization's personnel policy or collective bargaining agreements
- Be wary of inconsistent application of rules


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Last Chance Agreement

- Often times agreement between employer and employee (often involving union) that says if employee violates agreement will be terminated


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Note of Caution

- Contract language or policies that mandate progressive discipline can adversely affect the employer's disciplinary plan
- Preserve the option to discharge an employee or skip steps for egregious conduct even when it is the first violation

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Note of Caution

- Do not agree to remove the discipline from the file after a specific period
- If removed, the employer will have to start over to develop the record and will have lost the ability to argue there is a continued pattern of misconduct or poor performance by the employee

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Areas of Increased Risk

- Discipline/Termination immediately after
 - Protected leave
 - Disclosure of a disability
 - Election/Protected first amendment conduct
 - Whistleblower Conduct
 - Worker's Comp report of injury
- Discipline/Termination may be warranted, but the file should warrant a legal review

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Discharge
Performance Management

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Discharge


- Investigate and document the actions that necessitate the discharge



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Areas of Risk-Investigation


- "Neutral" investigator
- Tennesen Notice/Garrity Warning
- Offering "confidentiality"
- Who may have access



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Discharge

- Provide the employee with due process
 - Notice of expectations and work rules
 - Notice of performance deficiencies
 - Notice of charges for egregious conduct justifying termination
- Conduct a Loudermill Hearing



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Loudermill Hearing



- Prior to being discharged, a public employee has the right to an informal pre-termination meeting to respond to the allegations against him or her
- The hearing is generally informal

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Loudermill Hearing



- Some employees may have recourse to have the employer's decision to terminate reconsidered, which may include arbitration proceedings pursuant to a CBA or a hearing required by a personnel policy

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Name Clearing Hearing



- Typically arises when employee says information released by government entity in support of termination raises a "liberty interest"
- Example: X said Y to the public, which has tarnished my reputation
- Employee demands name clearing hearing in front of governing board

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Veteran's Preference Act

Discharge

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Veterans' Rights

- Right to notice and a hearing prior to removal from a position or employment
- Can only be removed for incompetence or misconduct
- **Recent statutory change now allows for a probationary period for veterans under certain conditions


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What Is a Removal?

- Discharge, demotion or "resign or be terminated"
- Disciplinary suspension will constitute a removal, if:
 - Conditions imposed for return to work make it unlikely that the veteran will be able to return
 - Is in conjunction with a proposal for termination

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Notice of Charges



- Employer has an obligation to provide notice of charges
 - Includes statutory grounds and factual basis for removal
 - Informs veteran that he or she has 30 days to request a hearing and of other hearing rights
- If no hearing request, veteran waives right to a hearing and all other remedies for reinstatement

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Compensation



- During this 30-day period, the public employer is obligated to compensate the veteran
- If the veteran requests a hearing, compensation continues until the arbitrator* panel makes its decision

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Importance of Notice



- If employer fails to give notice of rights, the 30-day period is indefinitely extended
- A veteran successfully asserting a right to a hearing could be entitled to back pay from the date of discharge, even if removal is upheld

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Best Practice



- Include a veterans preference notice with all discharge, layoff or demotion notices, regardless of whether you think that the person is a veteran

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Right to a Hearing



- The hearing is held before a neutral decisionmaker
- Public employer has the burden at the hearing to show that it acted reasonably and that there is just cause for the discharge or demotion
- Veterans covered by a CBA must choose between grievance procedure or Vets Pref hearing

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Nondisciplinary Layoff or Demotion



- Not considered removal when done by seniority and current position abolished
- Veteran can challenge if he or she believes the action is being used to avoid VPA rights
- Notice of right to challenge should be given in the layoff notice

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Peace Officer Discipline Procedures Act (Minn. Stat. 626.89)

Termination

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Peace Officer Discipline Procedures Act (PODPA)



- Establishes regulations when investigating allegations against a licensed peace officer and a formal statement is required of that officer.

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PODPA



- Notice of formal statement must include:
 - Interview location
 - Written complaint signed by complainant
 - Witness list, upon request
 - Copies of witness statement or investigation report, upon request
 - Length of session
 - Electronic recording
 - Notice of use of admissions

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PODPA

- Requires CLEOs to have written procedures re: investigating complaints of misconduct
 - May result in disciplinary action
 - Investigation process
 - Imposition of sanctions
 - Appeal process
 - Notification of complainant
 - Effective date

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PERFORMANCE PROBLEMS INVOLVING DRUGS, ALCOHOL OR MENTAL HEALTH ISSUES
 Performance Management


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Handling Performance Problems

- Document the performance issues, not the disability
- Never assume to know what is affecting the employee's job performance
- Treat the employee like any other employee whose work fails to comply with the job description or to meet expectations
- Bring performance issues to the attention of the employee

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Handling Performance Problems



- Provide the employee the opportunity to correct his or her performance
- Never suggest to the employee that he or she may have a physical, mental or emotional problem that is affecting his or her work

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Conclusion



- Attempt to correct and improve employee performance deficiencies
- Be prepared to deal with employee misconduct or performance that does not improve

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Conclusion



- Have an effective performance management system
- Consult with legal counsel or labor/employment specialists

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Questions?

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