



CONSTANGY
BROOKS, SMITH &
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Recruitment & Retention of Public Sector Employees

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A wider lens on workplace law

Job Environment

- The Great Resignation
 - ~47 million people quit in 2022
 - 80% report regretting the decision
 - 70% reported trying to get their jobs back
- Higher unemployment rate for professional and business services workers, and a lower rate in manufacturing.
- "It's a buyer's market for brain and a seller's market for brawn," said Aaron Terrazas, chief economist at the jobs and workplace search site Glassdoor.





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Recruitment/Hiring

A wider lens on workplace law

Importance of Good Hiring Practices

- Time and expense
- Unqualified employees
- Civil liability
- Harassment and discrimination claims
- Theft or property damage
- Diminished morale
- Employee retention

The best and only opportunity to preview an applicant



Legal Risks Associated with Improper Hiring Practices

- “Disparate impact” discrimination suits, based on selection rates for who gets interviewed and who gets hired
- “Disparate treatment” discrimination suits, when an unsuccessful applicant asserts greater qualifications than the one hired
- Negligent hiring claims
- Negligent or fraudulent misrepresentation claims
- Veteran’s Preference violations
- Civil Rights violations (i.e., drug testing)
- Fair Credit Reporting Act concerns



Preparing Position Descriptions

- Create or update the job description for the open position
- Include:
 - All essential functions
 - Physical and mental requirements
 - Environmental conditions
 - Minimum education, skills, experience, certifications, or licenses required (and future requirements)
 - Secondary or marginal functions
 - Statement that the description is not exhaustive and that other duties and functions may be assigned, and that the employer has the right to add/remove them at any time



Job Vacancy Advertisements

- Ensure consistency with the job description
- List the essential functions and the required skills, experience, and competencies
- Accurately describe the position, including the duties expected of the position
- List the minimum qualifications
- State that employer is an EOE and a drug-free workplace
- Include Veteran's Preference language



Uniformity in the Process

- Same standards for considering applicants
- Consistency in response to misrepresentations on application

Key: Will the process be perceived as fair?

- Also required to have a written veteran's recruitment plan



Pre-screening

- Screen initial applicants based on skills, experience, and competencies reflected on applications/resumes
- Do not review applicant's social media
- Identify who is claiming Veteran's Preference



Veteran's Preference – Legislative Intent

It is the intent of the Legislature to provide **preference and priority** in the hiring practices of this state as set forth in this chapter.

All written **job announcements** and audio and video advertisements used by employing agencies of the state and its political subdivisions must include a notice stating that certain service members and veterans, and the spouses and family members of the service members and veterans, receive preference and priority in employment by the state **AND** are encouraged to apply for the positions being filled.



Who is a veteran?

- A person who served in the active military, naval or air service AND
- Was discharged or released under honorable conditions OR later received an upgraded discharge under honorable conditions.



Who qualifies for Veteran's Preference?

(a) Those **disabled veterans**:

1. Who have served on active duty in any branch of the United States Armed Forces, have received an honorable discharge, and have established the present existence of a service-connected disability that is compensable under public laws administered by the United States Department of Veterans Affairs; or

2. Who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the United States Department of Veterans Affairs and the United States Department of Defense;

(b) The **spouse of a person** who has a total disability, permanent in nature, resulting from a service-connected disability and who, because of this disability, cannot qualify for employment, and the spouse of a person missing in action, captured in line of duty by a hostile force, or forcibly detained or interned in line of duty by a foreign government or power.

(c) A **wartime veteran** as defined in s. 1.01(14), who has served at least 1 day during a wartime period. Active duty for training may not be allowed for eligibility under this paragraph.

(d) The **unmarried widow or widower of a veteran** who died of a service-connected disability;



Who qualifies for Veteran's Preference? (Continued)

(e) The **mother, father, legal guardian, or unremarried widow or widower** of a member of the United States Armed Forces who died in the line of duty under combat-related conditions, as verified by the United States Department of Defense.

(f) A **veteran** as defined in s. 1.01(14). Active duty for training may not be allowed for eligibility under this paragraph.

(g) A **current member of any reserve component** of the United States Armed Forces or the Florida National Guard.



Why does this matter?

- Complaint can be filed with Department of Veterans' Affairs
- Can be required to place preference eligible applicant who is not selected in position he/she applied for

E.g., *City of Apopka* – firefighter applicant was interviewed and participated in screening test, but a less qualified non-veteran applicant was offered the position based on “community ties.” City admitted to having little knowledge of Veterans' Preference requirements. City was ordered to offer position to complainant and pay back wages.



Exempt from Veteran's Preference

- Positions that are exempt from the state Career Service System under s. 110.205(2);
- Positions in political subdivisions which are filled by officers elected by popular vote or persons appointed to fill vacancies in such offices;
- Members of boards and commissions;
- Persons employed on a temporary basis without benefits; and
- Positions that require that the employee be a member of The Florida Bar.



Veteran's Preference in Hiring

- Required language in written announcements and audio and video advertisements of employment opportunities subject to preference that preference in appointment will be given to preference-eligible applicants
- Employer must inform preference-eligible applicants at the time of application of the right to an investigation by the Department of Veterans' Affairs if a non-preference eligible applicant is appointed to a position, the time limits for requesting such investigation, and the address to which the request for an investigation should be sent
- Application forms must ask whether the applicant is claiming Veterans' Preference and shall state that required documentation must accompany the application or be submitted prior the application date and time
- The employer has an affirmative duty to notify an applicant if a timely submitted Veterans' Preference claim is found to be missing information. The employer must advise the applicant and provide a reasonable amount of time for the applicant to cure the deficiency.



Veteran's Preference in Appointment – Numerical Based Selection Process

- If examination is used, then you must ADD points (20, 15, or 10), depending on their status *if* they obtained a qualifying score
- Two ways to augment scores:
 - (1) applicant must pass the first test in order to proceed to the next test – augment at each step/test; or,
 - (2) applicant takes a series of tests and all of the scores are added up to reach a single cumulative score. If applicant scores a passing score, the final test score is augmented.



Veteran's Preference in Appointment – Non-numerical Selection

- Disabled veterans receive first preference in appointment, employment, and retention
- Second preference to other veterans
- Must possess the minimum qualifications necessary to discharge the duties of the position involved
- Preference-eligible applicants must be given special consideration and priority at each step of the selection process



Veteran's Preference in Appointment – Non-numerical Selection (Cont'd)

- Preference-eligible applicants who meet the minimum qualifications shall be considered for selection and shall **be granted an interview in all cases**
- At each stage of the process, if a preference-eligible meets minimum qualifications, he or she will advance to the next step in the selection process
- If, at any step, a determination is made that the preference-eligible applicant is not qualified to advance to a subsequent step in the process, there must be a review process



Documentation of Selection Process

- Maintain records that document the manner of selection and the propriety of the selection process and decision
- If a preference-eligible applicant is not selected, the employer shall notify the applicant **within 14 business days** of the hiring decision, which timeclock starts to run when the employer secures a commitment from the selected applicant for a date certain to start work.



Conditional Offer:

- Criminal, credit, and/or DMV checks
- Fingerprinting
- Contact references and prior employers; remember the FCRA!
- Pre-Employment Drug Testing
- § 768.096, Florida Statutes (presumption)



Negligent Hiring Presumption

- Section 768.096, Fla. Stat.
 - Obtain criminal background check from the FDLE;
 - Make a reasonable effort to contact references;
 - Require an employment application that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for intentional tort, including the nature of the intentional tort and the disposition of the action;
 - Driver's license check, if relevant to the position sought; or
 - Interview the applicant.



Fair Credit Reporting Act

- Applies when a third-party background check company is used
 - Criminal background, credit check, references
 - Investigative consumer report
 - Authorization and Disclosure
 - Employment application
 - Stand-alone authorization
- Pre-adverse action notice
- Post adverse action notice



Pre-Employment Drug Testing

- Pre-employment and random testing should be limited to safety-sensitive positions or those for whom there is a “special need” to test (also referred to as “mandatory-testing positions” and “special-risk positions”).
- 4th Amendment Violation to test without reasonable suspicion
- “Safety-sensitive position” means any position, including a supervisory or management position, in which a drug impairment would constitute an immediate and direct threat to public health or safety.



Drug Testing (Con't)

- "Safety-sensitive position" means, with respect to a public employer, a position in which a drug impairment constitutes an immediate and direct threat to public health or safety, such as a position that
 - requires the employee to carry a firearm, perform life-threatening procedures, work with heavy or dangerous machinery
 - work with confidential information or documents pertaining to criminal investigations, or
 - work with controlled substances;
 - a position subject to s. 110.1127; or
 - a position in which a momentary lapse in attention could result in injury or death to another person. (440.102(o) F.S.)



Drug Testing (Con't)

- S. 110.1127 – Positions requiring security background checks, including fingerprinting, as a condition of employment;
- All positions in programs providing care to children, the developmentally disabled, or vulnerable adults for 15 hours or more per week;
- All positions of the central abuse hotline.



Arrests and Criminal Conduct

First Question – Are they accused, or have they been convicted?

Second Question – What are the underlying facts?

EEOC's Position on *Arrests*

- Possible Disparate Treatment/Disparate Impact Claims
- Individualized assessment (offense, job, business necessity)
- Consistent application of policies
- What are the underlying facts?

Balancing Act – Potential claims under Title VII vs. Negligent Hiring/Retention Claims under State Law

- Job related and consistent with business necessity



EEOC's Position

EEOC's Position on *Convictions*

- Conviction will usually serve as sufficient evidence of criminal conduct. Provided that
 - 1) it is job related and
 - 2) consistent with business necessity.
- Fact Inquiry – how long ago, what was the conviction for, etc.
- Consistency



Marijuana Use

- Varies state by state (even recreational use)
- ADA and medical marijuana
- Currently, in Florida, use of medical marijuana is not protected activity
- Remote employees or employees who have traveled to a legal state?



Personnel Policies

- References – refer to designated individual; no references authorized by non-designated individuals
- Drug testing policy – possible workers' compensation premium discount
- Rehire eligibility – length of time before rehire will be considered?; disqualifying reasons for rehire consideration
- Nepotism; conflicts of interest
- Consensual relationships



Contractual concerns

- Beware of promises made during the hiring process
- Such promises or guarantees can lead to legal claims, such as –
 - Breach of contract
 - Promissory Estoppel
 - Remember at-will nature of employment – no set duration of employment
 - Be aware of promises made that could lead to a claim of detrimental reliance
 - If you don't know the answer, wait to answer.
 - Consult counsel before withdrawing an employment offer



The Hiring Decision

- Notice to selected candidate
 - Be careful with offer letter wording
- Notice to candidates who were not selected
 - Remember veteran's preference requirements
- Availability of recruitment documents





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Retention

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- In general, what an employee does on his/her own time and outside the workplace is the employee's business
 - Employment is at-will (unless Contract or CBA)

BUT . . .

- There are exceptions to this principle which arise when off-duty conduct has a connection to the employee's position and/or the employer's operations
- And when there are legal protections put in place



Legitimate Employer Concerns

The employee's involvement in certain types of off-duty conduct can raise employment concerns and may constitute legitimate grounds for discipline or termination

Examples:

- Protecting employer's reputation
- Disruption in the workplace
- Impact on the employer's operation/mission
- Liability risk exposure



Assessing the Conduct . . .

Is there a real/material connection between the conduct and the workplace?

- Nature of employee's duties
- Employer's expectations for employee's conduct
- Nature and seriousness of employee's conduct
- Impact of employee's conduct on employer's operation/mission and reputation
- Impact on fellow employees



When Can You Discipline for Otherwise Lawful Activity?

Generally, when the conduct

- 1) reflects poorly on the employer,
- 2) detrimental to the employer's reputation,
- 3) is disruptive,
- 4) Negatively impacts the operation or mission of the employer
OR
- 5) exposes the employer to liability.

But remember – **Constitutional Implications**



Drug Testing

BEFORE YOU DISCIPLINE OR DISCHARGE OVER A DRUG TEST, REMEMBER:

- No “suspicionless” testing unless it’s a safety-sensitive or “special need” position
- This is true for post-accident testing, too
- Reasonable suspicion testing needs to be conducted close in time to the circumstances giving rise to the reasonable suspicion



Public Expression

Apply a balancing test to weigh the employer's interest in providing efficient public service against the employee's interest in making the speech/expression

Questions:

1. Is their speech or expression a matter of public concern or a private issue?
2. Is there a real/material connection between the conduct and the workplace?
3. Is the speech a substantial reason for the discipline or discharge?
3. Would the same decision have been made in the absence of protected conduct?



Purely Personal Communication

- A nurse of a public hospital is pulled over and issued a speeding ticket. She tells the officer she “hopes to never have him as a patient.” The hospital fires her. **Does she have a First Amendment claim?**
 - No. The speech reflects a purely personal dispute, not a matter of public concern.
 - *Leverington v. City of Colorado Springs*



Speech is of Public Importance

- Director of Solid Waste Dept. appeared at board meeting. During public comment period, he criticized the decision to increase the solid waste disposal fee and to privatize waste collection. He stated, in part, that the decisions would harm the community and senior citizens. He also called the commissioner a “liar” and a “big liar.” He was terminated. **Was his speech protected by the First Amendment?**
 - Yes. The “main thrust” of his speech was of public importance.
 - *Brown v. Greene County Com’n.*



Social Media

- An Assistant Finance Director at a local county government was terminated for his Facebook posting about a new state attorney's decision to not seek the death penalty. He posted that she "should be tarred and feathered if not hung from a tree" and that "she should get the death penalty." **Was his speech protected by the First Amendment?**
 - No, his speech clearly interfered with the operation of the office and damaged the credibility of the department.
 - Although the posts were on a matter of public concern, the employer's interest in carrying out its functions outweighed the employee's interest in the speech.



QUESTIONS

