

LEGAL CONSIDERATIONS WHEN HIRING & FIRING LIBRARY EMPLOYEES

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Introduction

During Fiscal Year 2014, Georgia's public libraries spent nearly \$130 million on staffing. Given this large investment of public funds, managers in Georgia's libraries have a duty to make staffing decisions carefully. Furthermore, library administrators have a self-interest to create and promote productive and harmonious workplaces within their library systems.

This work focuses on two critical points within the employer-employee relationship: the very beginning—hiring, and the very end—firing. There are a myriad of legal issues that can arise as an employer adds to or decreases its staff.

The information contained herein is not a substitute for legal advice. When legal counseling is needed, you should contact your attorney. These materials are intended to be educational and serve to alert library administrators and managers to typical problems that may occur in the context of hiring and firing library employees.

Hiring

Job Description

A good hiring decision begins with a well-tailored job description. This written summary is the key to attracting appropriate job candidates. Typically, an effective job description will contain the following components:

1. Summary statement. Include the job title and concisely describe the job duties and identify to whom the employee will report.
2. Functions of the position. This lengthier section details what the job actually entails and should be quite specific. It will describe any supervisory functions in addition to being as detailed as possible describing tasks the employee will face every day. This section will indicate whether the person will deal with customers, the public, or only internal employees.
3. Attributes desired for the position. This section will state what specific equipment or software the employee must be able to use. It should also specify any technical or educational requirements that may be desired as well as any experience prerequisites. This section can be used to provide insight into the type of work environment that exists or is desirable.

4. Reporting. The reporting component of the job description will provide details on the hierarchy of the organization in order to demonstrate how this employee's activities fit into the total enterprise.

5. Evaluation criteria. This section sets out the specific expectations the employer has for the successful job candidate. The drafter of the job description should include evaluation criteria made up of the type of activities that will enhance the success of the organization.

6. Compensation. Including a range instead of a specific figure will give you more flexibility, but often applicants will feel they should be at the top of the range. It is usually better to have a specific dollar amount, especially if you are giving the job description to the employee. If your organization has salary grades, use that.

7. Physical location and surroundings. Describe the environment where the employee will perform the job functions.

In addition to these basic components, there are legal considerations in drafting job descriptions. In the event that an employer's decision-making is challenged by a disgruntled employee or a turned-away job applicant, the best evidence of what the essential functions of a job and the desired attributes of the employee selected for the position is the job description. Specificity is needed to accurately describe the position and the ideal candidate. However, the characteristics sought should relate directly to the job and the skills, education,

training, and experience needed to perform it. The job description should never include protected characteristics such as race, age, sex, national origin, and religion.

Even when the library is not hiring, job descriptions should be routinely reviewed to ensure that each job description reflects what the employee in the position actually does. To the extent that an employee's duties change over time, the job description should be updated accordingly.

Application & Interview Questions

The purpose of the application and interview process is to obtain information from job candidates in order to allow the employer to select the applicant who is the best fit for the organization. However, an employer should not ask questions designed to elicit information that cannot be legally used in hiring decisions. For example, it is illegal to base a hiring choice on a candidate's race. Therefore, there should be no requirement for a candidate to identify his or her race on the application or through questions posed during an interview. There is no prohibition on what a job candidate reveals voluntarily. Thus, an employer should not shy away from questions or discussions that lead to revelations by the candidate related to protected characteristics. What is important is that the employer neither solicits the information nor makes the hiring decision based on the information. Below are examples of questions to avoid and suggestions of neutral questions aimed at obtaining information that is valid for an employer to have and rely upon.

An employer cannot ask for applicant's maiden name or her spouse's maiden name. However, asking whether the candidate has received educational degrees or worked under another name is permissible because the employer has a legitimate interest in confirming a candidate credentials and work history.

Questions about an applicant's marital status or whether he or she has or plans to have children are not allowed. Likewise, questions about a job candidate's child care arrangements are not permissible. After hiring an individual, however,

questions about family members and dependents may be necessary for employer-sponsored insurance enrollment.

The only permissible question of a job applicant related to age is whether a person has attained the minimum age required to perform the job. For instance, in Georgia, there are limitations on the number of hours a minor under the age of 16 is allowed to work. Therefore, an employer seeking a full-time worker may inquire that an applicant is 16 or older in order to ensure that the applicant is of a legal age to do the job. An employer may ask an individual's age after hiring for a legitimate purpose such as enrollment in employer-sponsored health insurance.

An employer may not inquire about an applicant's citizenship beyond whether the individual may legally work in the United States. Importantly, as a governmental entity, a public library has the obligation to verify employment eligibility of all newly hired employees through participation in a federal work authorization program. O.C.G.A. § 13-10-91(a). Questions about an applicant's nationality, ancestry, and native language are impermissible. And, inquiring about the ability to speak a foreign language is permitted only when that ability is a job requirement or a bona fide occupational qualification (BFOQ).

Asking a job candidate about membership in social or political organizations is improper. On the other hand, membership in professional or trade organization directly related to the job is a legitimate inquiry for the employer.

Questions about religious affiliation or what religious holidays a job applicant observes are inappropriate. However, after hiring an individual, inquiring about

his or her availability to work on religious holidays is a legitimate inquiry for scheduling purposes.

There are no questions about a candidate's race that can be asked by the potential employer. Also prohibited are indirect methods to identify an applicant's race such as requiring submission of a photograph with an application or application questions about hair, eye, and skin color.

An employer is prohibited from asking a job candidate about his or her sex or sexual preference.

Asking a job applicant if he or she has a disability is prohibited. However, questions about any need for accommodations are permissible—so long as the need for an accommodation is not the basis for refusing to hire.

The criminal history of a job applicant is increasingly becoming off limits for employers. In Georgia, private employers are not prohibited from inquiring into arrests or convictions. However, in February 2015, Georgia Governor Nathan Deal signed an executive order prohibiting use of criminal history as an automatic disqualification for jobs with governmental entities in Georgia. Additionally, if a public employer does utilize background checks, applicants must be afforded the opportunity to explain or refute the results as well as demonstrate rehabilitation efforts.

An applicant's military service is relevant only if the experience in military service relates to the job, thus an employer's questions should be appropriately limited. Employers may not ask a candidate why he or she was discharged from the

military or to see discharge papers unless there is a BFOQ related to the job (i.e., state job veteran preference or security clearance). A veteran's reason for military discharge is protected by Uniformed Services Employment and Reemployment Rights Act. 38 U.S.C. §§ 4301–4335. However, employers are free to ask the veteran candidate questions about the dates of military service, duties performed, rank during service and at time of discharge, pay during service and at time of discharge, training received, and work experience. The requirements of military reserve duty are not subject to question by a potential employer.

Questions about a job candidate's physical attributes are permissible only to the extent that the physical inquiries relate directly to the ability to perform the job. Also, an employer may require an applicant to take a physical agility test, but only if the test pertains to specific job functions and only if all others in the same job classification are required to take the test. An employer cannot require an applicant to submit to a physical exam.

An employer may require applicants to submit to a test for illegal drugs; however, an alcohol test is considered a medical examination and may not be administered until an offer of employment is made. In the event an employer opts to test for particular substances it must do so on a consistent basis. The tests should be administered to all individuals in the applicant pool as to illegal drugs and to all new hires in the case of alcohol testing.

The Employee Polygraph Protection Act of 1988 prohibits private employers from administering polygraphs to current and prospective employees. But governmental employers such as public libraries are not covered by this law.

Questions about prior job experience are permissible. An employer may ask an applicant to identify former employers and to provide salary information from past jobs. Also, applicants may be asked about reasons for leaving former jobs and to explain gaps in work history.

Inquiring about an applicant's education history is permissible so long as the education is related to the job sought. However, employers should avoid requiring a candidate to provide dates of graduation.

An employer is free to ask job applicants to provide references.

Background Checks

Georgia law imposes upon employers “a duty to exercise ordinary care not to hire or retain an employee the employer knew or should have known posed a risk of harm to others.” *Drury v. Harris Ventures, Inc.*, 302 Ga. App. 545, 548, 691 S.E.2d 356, 359 (2010). Therefore, hiring libraries must make some level of investigative effort to screen job applicants. Doing so raises a number of legal questions.

While many applicants may not be concerned about background investigations, others are uncomfortable with the idea of an investigator poking around in their personal history. Legally speaking, an employer may investigate a potential employee up to the point that the investigation becomes an invasion of privacy. The Restatement (Second) of Torts provides the following standard definition of intrusion upon seclusion: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”

Additionally, there are federal and state laws that prohibit the use of certain information garnered through a background check. As discussed above, anti-discrimination laws prohibit employers from making hiring decisions based on factors ranging from an applicant's religion to his or her genetic information.

A basic background check that should be conducted for any job candidate is to confirm past work experience. Looking into an applicant’s work history gives

insight into the candidate's job stability and loyalty to an employer as well as the ability to perform in the workplace. The potential employer should obtain consent from the applicant before contacting past employers; refusal to grant consent by the job candidate is a definite red flag.

There are much more in-depth types of background checks a potential employer may consider. As set forth below, there are pros and cons to such investigations.

Criminal Records: Arrest & Conviction

In Georgia, official criminal history information is kept and distributed by the Georgia Crime Information Center (GCIC), a division of the Georgia Bureau of Investigation (GBI). A potential employer may request criminal history records by submitting the fingerprints of the person whose records are requested or a signed consent form with the person's full name, address, Social Security number, and date of birth. In most cases, the GCIC will not release records of arrests or charges that did not result in a conviction, sentences for certain first offender crimes, for crimes where the individual was later exonerated or the charges were discharged without court adjudication of guilt. *See* O.C.G.A. §§ 35-3-34, 35-3-34.1. Note that if an employment decision is made adverse to a person whose record was obtained from the GCIC, the employer is required to inform the applicant of the information obtained from GCIC and the effect the information had on the employment decision. O.C.G.A. § 35-3-34(b).

The United States Equal Employment Opportunity Commission (EEOC) has said that use of criminal history may sometimes violate Title VII of the Civil Rights Act of 1964. This can happen, the EEOC says, when employers treat criminal history differently for different applicants or employees.

In 2012, the EEOC issued extensive guidelines for employers in considering the criminal history of a job applicant or employee. The EEOC cited the most important considerations as: (1) the nature and gravity of the offense, (2) the time that has lapsed since the offense, and (3) the nature of the job. In July 2012, nine state Attorneys General (including Georgia's) sent a letter to the EEOC criticizing the EEOC's application of the disparate impact in the use of criminal screens. In response, the EEOC reiterated its position that if an employer utilizes criminal background checks, there must be some level of individual assessment rather than a blanket screening.

While the EEOC's position on criminal background checks has not been addressed by courts in Georgia, the United States Court of Appeals for the Fourth Circuit recently affirmed a district court in Maryland ruling in favor of an employer who utilized criminal background checks in making hiring decisions. *Equal Employment Opportunity Commission v. Freeman*, No. 13-2365, 2015 U.S. App. LEXIS 2592 (4th Cir. Feb. 20, 2015).

In addition to the EEOC's position discouraging blanket criminal background checks, as a public employer, Georgia public libraries are subject to Governor

Nathan Deal's Executive Order entered in 2015. The executive order requires government entities to implement hiring policies to:

- Prohibit use of a criminal record as automatic disqualification;
- Prevent use of an application form that inappropriately excludes qualified applicants;
- Promote accurate use and interpretation of criminal histories; and
- Provide qualified applicants an opportunity to discuss and refute contents of criminal record or to demonstrate rehabilitation.

Whether a public library utilizes criminal background checks during the hiring process is a policy decision to be made by the library board in conjunction with the system director. Should the library opt to use criminal background checks, the following questions should be resolved prior to beginning the hiring process and use of background checks should be consistent across job categories:

- At what point in the application process will the background check be conducted?
- What form of consent will the library obtain from applicants?
- What job categories will be subject to background checks?
- Will volunteers be subject to background checks?
- How will decision makers discuss results with the applicants?

Credit Check

The Fair Credit Reporting Act (FCRA) requires employers to obtain consent to view a job applicant's credit history. 15 U.S.C. §§ 1681-1681t. Additionally, the

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FCRA requires employers to provide applicants with a copy of their credit information used in the hiring decision, as well as an explanation of the applicant's rights. There is currently a bill in United States Senate to amend the FCRA to prohibit credit checks by employers. Equal Employment for All Act of 2015, S. 1981, 114th Cong. (2015). The bill is currently in committee and can be tracked at <https://www.govtrack.us/congress/bills/114/s1981>.

Bankruptcies are public record. However, employers cannot reject applicants solely because they have filed for bankruptcy. *See* 11 U.S.C. § 525.

Internet Search

The Internet and social media provide rich resources for information that pertains to an individual's suitability for employment—such as his or her dangerous tendencies, but a Google search can also expose an employer to liability. As discussed above, federal law prohibits an employer from refusing to hire an applicant because of his race, color, religion, sex, or national origin. Additional federal statutes prohibit refusal to hire because of age, disability, and military service. Often, information posted by individuals will be sufficient for an employer to discern protected characteristics. For example, a Facebook page could indicate that an individual is affiliated with gay rights groups leading to the conclusion that he is gay, or social media could reflect the efforts of another individual to become pregnant. Also, an employer might decide not to hire a job applicant after seeing that he “likes” a particular religious website. Refusal-to-hire claims are difficult to

prove; however, online searches leave a trail and may be admissible as evidence in civil litigation.

In one major refusal-to-hire case, a leading candidate for a teaching position at the University of Kentucky was not selected after someone at the school performed an Internet search and turned up evidence of his extreme evangelical beliefs. The university informed the applicant of the Internet search and of its concern about his views. The school hired someone else, and the rejected candidate sued. *See Gaskell v. University of Kentucky*, Civil Action No. 09-244 (E.D. Ky. Jul. 10, 2009). The case settled for \$125,000. Refusal-to-hire claims may become more prevalent as more companies decide to screen applicants online.

Medical Records

At the pre-offer stage of the hiring process, disability-related questions and medical examinations are prohibited under the Americans with Disabilities Act (ADA). Furthermore, employers cannot use medical information or the fact that an applicant filed a workers' compensation claim to discriminate against applicants. *See* 42 U.S.C. § 12101. In Georgia, workers' compensation applications and appeals are not public records, therefore, this information will not likely be involved in a background check.

Disposal of Materials Obtained Through Background Checks

When an employer has completed its use of background materials, the best practice is to securely dispose of the report and any information gathered from it. That can include burning, pulverizing, or shredding paper documents and disposing

of electronic information so that it cannot be read or reconstructed. *See Earle, Beverly et. al., The Legality of Pre-Employment Credit Checks: A Proposed Model Statute to Remedy an Inequity, 20 Va. J. Soc. Pol'y & L. 159, 172-73 (2012).*

Diversity Efforts

A primary goal of public librarianship is providing equal access to information for all persons in a library's community. The American Library Association (ALA) suggests that to accomplish this aim, a library's workforce must be reflective of the society it serves. A diverse workforce within the public library fosters an environment that is welcoming to diverse patrons and ensures that diverse perspectives and skills are part of the library's decision-making. ALA offers educational information on developing this type of diversity when hiring library employees. *See*

<http://www.ala.org/advocacy/diversity/workforcedevelopment/recruitmentfordiversity>. This webinar provides advice for working with human resources, including crafting the job description and exploring infrastructure support; working through the recruitment process, including outreach to multicultural groups; and developing institutional and organizational support, such as scholarships, training, and mentoring.

Increasing diversity among library workers begins with the job description. Care should be taken that the description is not so restrictive that it limits potential applicants. The description must include the essential and necessary skills and qualifications for the job; but also, it must be free of any unnecessary qualifications that might prohibit the widest possible pool of applicants. This is true even if qualifications are added for the purpose of encouraging diversity. For example, adding a language requirement to a job description is valid only when the job calls

for it. Including a language requirement for the sole purpose of encouraging applicants from particular branches of the community could open the employer up to claims of reverse discrimination.

Legitimate efforts to generate a diverse applicant pool include stating that the organization serves a diverse or underrepresented community and that it is seeking individuals who have experience successfully managing diverse teams or serving diverse populations.

Another avenue to achieve diversity in the library's workforce is by educating those tasked with recruitment and selection. Members of hiring committees may benefit from understanding the goals of a more diverse workforce and the opportunities for more diversity within the organization. Discussing the library's goals and consideration for under-represented groups and the implications of affirmative action and equal employment opportunity with members of the committee is valuable.

Next, consider the application process; it should not be a barrier to employment. Making the application process accessible can be as simple as providing contact information for individuals with disabilities who may desire accommodations in the application process.

Also, where jobs are posted affects the diversity of the applicant pool. Using the widest means of communicating job opportunities will increase diversity among those applying.

An additional method of fostering diversity in the library workplace is to be equally responsive to all applicants who seek information about the position. While only one applicant will ultimately be selected for a vacant position, creating a courteous and respectful experience for all those who demonstrate an interest in working with the library will encourage wider participation regarding future job opportunities.

In sum, creating diversity within the library workforce stems from encouraging the widest range of applicants within the profession and the community. Generally, it is not a good idea to add prerequisites to the job description for the mere purpose of promoting diversity. Job requirements must be legitimate, i.e., they must be necessary to perform the job. Otherwise, an employer could be subject to claims of reverse discrimination.

Probationary Period

As a general matter, Georgia is an at-will employment state, which means that absent an employment contract, an employee can be terminated at any time without reason or for any reason so long as it is not an illegal reason such as discrimination. Despite the pro-employer environment, it has become common practice for employers to start new employees in a probationary period. However, probationary hiring can be confusing for employers and employees alike. The use of probationary hiring began in the context of collective bargaining agreements; the practice allowed employers to carve out a short, introductory period that would not be governed by the same termination requirements as the regular employment period under the agreement. Generally, that meant that during the probationary period, a union employee could be let go without concern for just cause or other rules governing termination. In terms of an at-will employment relationship, though, probationary hiring makes little sense because any employee can be terminated at any time in his or her employment with or without cause; setting aside a special introductory period does not change that.

Arguably, using a probationary period erodes an employer's at-will rights because it implies some increased level of job security after the period ends. Therefore, in order to maintain at-will employment relationships employers should evaluate whether there is a real benefit to using a probationary period.

There is no problem with an employer creating a preliminary period during which new hires are not eligible for benefits or to take vacation. What the employer

should seek to avoid is the implication that after a certain time period, an employee becomes “permanent.”

Employers who have utilized probationary periods in the past have not automatically created contracts with employees who were probationary hires. Rather, courts look to the totality of the circumstances including what information is conveyed to the employee via an employee handbook and what employees have been told about their employment status.

While it is unlikely that an organization will terminate an employee without cause, having the right to do so is valuable. Likewise, the right to fire an employee without explanation and justification benefits the employer. Giving up these rights through use of a probationary hiring system simply weakens the position of the employer with no real benefit in exchange.

Firing

At-Will Employment Doctrine and Public Employees

As set forth above, Georgia is an at-will employment state, which means that absent an employment contract, an employee can be terminated at any time without reason or for any reason so long as it is not an illegal reason such as discrimination. With regard to employers who are governmental entities like public libraries, employees arguably have a legally recognized “liberty interest” in their jobs.

The United States Supreme Court has held that where a public employee’s name, reputation, honor, or integrity are impugned because of an action by the public employer, or where government action, such as a failure to reemploy the individual, imposes a stigma that limits the person’s future employment opportunities, the employee is entitled to notice and a “name-clearing” hearing. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). Notably, courts recognizing a public employee’s liberty interest have not prohibited the public employer from terminating its employee. Rather, these courts have held that a public employee who establishes that the employment decision harmed his reputation and prevented him from obtaining new employment is entitled to no more than an opportunity to prove that the reputation-harming allegations are meritless.

While most employment cases that include the due process claim involve educators, public libraries are governmental entities in the same way public schools

are. Therefore, a public library that terminates an employee could face this due process argument.

Illegal Reasons for Termination

The concept of “at-will” employment means that an employer does not have to prove it had good cause for taking an adverse employment action; it must prove only that its reasons were not illegal ones. The “illegal reasons” have been established by the federal government beginning in the 1960s, Federal anti-discrimination laws protect employees from adverse employment actions based on factors not directly related to the quality of an individual's work.

Title VII of the Civil Rights Act of 1965 42 U.S.C. § 2000e et seq.

- Prohibits discrimination on the basis of race, color, religion, national origin, or sex.
- Requires that employers reasonably accommodate applicants’ and employees’ sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer’s business.
- Amended to add the Pregnancy Discrimination Act, which prohibits discrimination against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. 42 U.S.C. § 2000e (k)..

The Age Discrimination in Employment Act of 1967

- Protects people who are 40 or older from discrimination because of age. 42 U.S.C. § 6102.

The Americans with Disabilities Act of 1990

- Prohibits discrimination against a qualified person with a disability in the private sector and in state and local governments. 42 U.S.C. § 12101 et seq. Under this law, a “person with a disability” means someone with: (1) Long term physical or

mental impairment that substantially limits a major life activity; (2) History of disability (i.e., suffered from cancer in the past); or (3) Regarded as having a disability (i.e., person who has a limp may not have a disability, but may appear so). A “qualified” worker is someone who has the skills, training, license, experience, etc. to do the job with or without a reasonable accommodation. A “reasonable accommodation” is assistance or changes to the job or workplace; examples are a lowered desktop, an accessible restroom, voice recognition software, intermittent leave.

The Genetic Information Nondiscrimination Act of 2008

-Prohibits discrimination against employees or applicants because of genetic information. 42 U.S.C. § 2000ff1. 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 any disease, disorder, or condition of an individual's family members (i.e., an individual's family medical history).

Retaliation Components

It is illegal to fire an employee because he or she exercises rights under the law. For example, an employee who has complained pursuant to one of the anti-discrimination statutes, who has taken leave under the Family Medical Leave Act (FMLA), or has spoken out about a matter of public concern cannot be fired because of these protected actions. A complaint about discrimination or harassment is protected activity whether it is directly to the employer or to a government agency.

Terminating an employee who has exercised his or her rights under the law

amounts to retaliation, which is an actionable claim that the discharged employee could bring against the employer.

Employees who participate in an investigation of any of these problems are also protected -- for example, an employer is prohibited from punishing an employee for giving a statement to a government agency that is looking into a discrimination claim. Even if the original complaint of discrimination or harassment turns out to be unfounded, an employee who can prove that something negative happened because of the complaint can still win a retaliation claim.

Because of the risk of retaliation claims, terminating an employee who has exercised rights under the law should be undertaken with extreme caution. In fact, seeking advice of counsel before making a decision to discharge any employee involved with a complaint of discrimination or harassment or an employee who has recently taken FMLA leave is advisable.

Whistleblowing

State and federal laws protect whistleblowers from retaliation by their employers. A whistleblower is an employee who complains of or reports misconduct within the employer organization. And the employee does not have to be correct to be protected; as long as the employee has a reasonable belief that wrongdoing has taken place, the employee is considered a whistleblower, even if that belief turns out to be mistaken.

Georgia has a statute protecting whistleblowers who are public employees.

O.C.G.A. § 45-1-4(d)(2). Under the statute, a public employer cannot fire a public

employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency or for refusing to participate in any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation. A disclosure is not protected, however, if it was made with knowledge that it was false or with reckless disregard for its truth or falsity. Moreover, the protections of the statute do not apply to policies or practices which implement or to actions by public employers against public employees who violate privilege or confidentiality obligations recognized by constitutional, statutory, or common law.

Termination Interview

The face-to-face discussion during which an employee is told he or she is being terminated is not comfortable for any participant. The following tips may make the process more manageable and help protect the employer from legal claims later on.

DO

- Terminate in the first ten minutes of the conversation. Avoid a long build-up to soften the blow because this will often only confuse and cloud the message.
- Focus your discussion on performance related issues.
- Be clear and answer questions. Make sure the employee understands that he or she is being terminated. Once you have explained the situation, let the employee ask questions.
- Let the employee respond. Acknowledge any valid points and tell the employee that you appreciate the input and candidness.
- Ask the employee if he or she understands the reasons for the termination.
- Specify clearly why the employee is being terminated and the effective date and time of the termination.
- Inform the employee of any rights or entitlements that he or she may have coming.
- Ensure the return of any property that belongs to the employer.
- Cover all areas of security, including computer passwords, access to company property or data, and physical security of the job site and other employees.

- Arrange for the employee to remove personal effects in private.
- End on a positive note. Thank the employee for all contributions and wish the employee well in the future. When the meeting is over, stand up and shake hands.
- Document the termination conference.

DO NOT

- Do not give employees false hope and say you'll help them find a job.
- Do not say, "I'm sure you're not going to have any trouble."
- Do not pass the buck and say this firing was not your idea.
- Do not give platitudes and say, "You'll feel better when you sleep on it."
- Do not say, "I feel really bad about this." Saying these things only makes the situation worse.
- Do not get defensive.
- Do not interrupt, contradict, or try to defend yourself or the organization.

Arguing will only create resentment and frustration on the part of the employee.

- Do not assess blame or make apologies. There is no reason to blame the employee or the organization for the termination. Just explain that the organization's needs do not match the employee's particular skills.
- Do not apologize; you can express regret that the employment relationship did not work out, but do not apologize.
- Do not debate or argue with the employee.
- Do not make value judgments or attempt to analyze the reasons for dismissal.

Cite the reasons briefly and factually.

- Do not take responsibility for the failure. You may want to simply express regret that the opportunity did not work out.
- Do not use words like "incompetent" or "dishonest." Focus on performance.
- Do not offer advice.
- Do not discuss the termination with anyone other than the employee and those directly involved.

Obtaining a Release

When terminating an employee, the employer is free to seek a release of liability by entering into a severance agreement with the discharged employee. In this type of an employee agrees to take something of value to which he is not otherwise entitled — additional compensation, benefits, or other “in kind” consideration — in exchange for agreeing not to sue the employer.

Even in an at-will employment state and having been subject to a completely legal termination, an unhappy employee may sue the employer. If that happens, an organization that is completely in the right will end up spending money to defend the meritless claim. A severance agreement that includes a full release of claims is a method by which an employer can pay out an agreed-upon sum in exchange for fully and finally concluding its relationship with the employee.

Whether a severance agreement is a beneficial step for an employer depends on a variety of factors. First, the following risk questions should be considered:

- Is the employee in a protected category under a discrimination law?
- Is it likely that the employee will be replaced by someone not in the same protected category?
- Has the employee recently engaged in protected activity such as taking leave under the FMLA, filing a workers’ compensation claim, or blowing the whistle on the employer?
- Are there any indicia of an employment contract?

If the answer to any of these questions is “yes”, the risk of a lawsuit should be weighed against the expense of a severance package.

Next, the level of fault on the part of the employee and how well-positioned the employer is to prove fault should to be taken into account. For example, it is less beneficial to the employer to offer a severance package when the employer can readily prove that the discharge occurred because the employee was caught stealing, engaged in insubordination or workplace violence, or committed some form of harassment. This is so because an employer poised to defend a wrongful termination claim with such evidence will likely achieve a dismissal of the claim very early in the litigation.

Also, employers should assess the danger of establishing a precedent of offering severance packages. If it becomes known that employees who engage in egregious behavior are essentially “paid off” on their way out the door, overall workplace conduct and morale are likely to be affected. Indeed, an employer can even appear to be complicit in the employee’s bad behavior in such situations.

Remember that employers cannot force a discharged employee to sign a severance agreement. The employer may merely make the offer. And, offering a severance agreement does not come without risk. It is possible that an employee who had never thought about suing may see the list of claims in the release and begin wonder if any apply to him. The employee may interpret the employer’s efforts as a signal that he does, in fact, have a valid claim.

Finally, in order for a severance agreement to be enforceable, the discharged employee must be given a reasonable amount of time to consider it. For example, to obtain an enforceable release of age discrimination claims, federal law requires the employer allow the employee up to 45 days to consider the agreement. 29 U.S.C. § 626(f)(1)(A).

Ultimately, whether an organization offers a discharged employee a severance agreement is judgment call that should be made on a case-by-case basis. Weighing the risks and benefits of severance agreements outlined above is the appropriate starting point for any employer concerned about claims that may be raised by disgruntled former employees.

Post-termination References

Terminated employees may use their former library supervisors as references in seeking other employment. Library administrators need to plan in advance how to handle such requests. Obviously, an employee who was terminated would not ordinarily be the recipient of a glowing recommendation. However, library managers should be cautious in providing detailed information about the employee to another potential employer. It may be wise to limit the disclosure to: the dates of employment, description of the duties performed, and salary information. Furthermore, it is advisable to verify that the former employee is aware of and does not object to the former employer responding to the reference request before giving out any information.

Unemployment Insurance

The Georgia General Assembly has declared that it is the public policy of this state that “economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. . . . [Therefore] the general welfare of the citizens of this state require the enactment of this measure under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.” O.C.G.A. § 34-8-2. As an employer, a public library is required by law to make contributions to the fund, which are held in trust by the Commissioner of Labor. Monies from the fund are used to pay unemployment benefits to eligible employees.

The reason for an employee’s termination factors into whether the employee will be eligible to receive unemployment benefits. If an employee is discharged due to failure to obey orders, rules or instructions, or failure to perform duties, the employee will be disqualified from drawing unemployment. O.C.G.A. § 34-8-194(2)(A). Note, however, that the burden of proof is on the employer to establish some fault on the part of the employee. Also, if the employee is terminated for intentional misconduct while on the job that results in physical assault or property damage in the amount of \$2,000 or more, he or she will not be eligible for unemployment benefits. O.C.G.A. § 34-8-192(2)(A)(ii)(I). And finally, an employee fired for intentional misconduct that results in theft of property valued at more

than \$100 is not eligible for unemployment payments. O.C.G.A. § 34-8-192(2A)(ii)(II).

When a former employee files a claim for unemployment benefits, the former employer is sent a notice of claim and has the opportunity to attend a predetermination interview or submit written information. It is beneficial for the employer to provide the claim examiner any written documentation supporting the termination such warnings, reprimands, performance evaluations, and attendance records,

For additional information, employers can visit the Georgia Department of Labor's website at www.dol.state.ga.us. An Employer's Handbook pertaining to unemployment insurance is available for download at <https://dol.georgia.gov/documents/employer-handbook>.