The Ins and Outs of Hiring and Performance Management

MASWCD GOVERNANCE 101
Sept. 17, 2015
The information contained in this document is intended for general information purposes only and does not constitute legal or coverage advice on any specific matter.
Performance Management

STARTS WITH HIRING
Hiring

• Job description
• Advertising
• Application
• Interview
• References
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
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)
Position Description

• Knowledge, skills and abilities
  – Specific tasks
  – Understanding of specific subject areas

• Minimum training and experience
  – More general
  – Easier to identify
Advertising

• No legal requirement that the position must be advertised
• Because of veterans preference and anti-discrimination laws, posting may be advisable
Application

• Tennessen Notice
  – Must provide whenever asking an individual to provide private data under the MDGPA
  – 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.)
Example Tennessen Notice

DATA PRIVACY NOTICE

The information requested in this application process is intended to be used by [ENTITY NAME] in determining suitability for employment for the position, which you are currently seeking or may seek in the future. If hired, the information may later be used for consideration for other positions, verification of employment history or disciplinary action in the event that the information provided is not truthful. You are not legally required to provide any of the information requested in this form or as part of the application process at this time. However, failure to provide complete, accurate information may result in [ENTITY NAME] being unable or unwilling to offer employment to you. With respect to any special accommodations necessary for completing your application or the interview process, [ENTITY NAME] may be unable to provide the necessary accommodations if you do not provide this information. The information you provide in this application process that is classified as private data under the Minnesota Government Data Practices Act (MGDPA) will not be released outside [ENTITY NAME] without your consent except as necessary for tax purposes or as otherwise required by state or federal law. Information which is classified as public data will be released pursuant to the terms of the MGDPA.
Criminal Background

Minnesota Statutes, Section 364.021

- Prohibits public 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
- Excepts 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
Example Criminal Background Language

CRIMINAL BACKGROUND INFORMATION

[ENTITY NAME] will request information regarding criminal history in the event that you become a finalist for the position for which you are applying. For certain positions, criminal background information will be requested during the application stage. Further, [ENTITY NAME] may conduct a criminal background check on individuals upon making a contingent job offer. If the job description or other application materials states that a criminal check will be conducted, no offer of employment shall become final until receipt of the results of the criminal background check from the BCA or other source, the content of which is acceptable to [ENTITY NAME] and formal approval by the appointing authority.
Veterans Preference

- Minnesota Statutes, Sections 197.447, 197.455 and 197.46
- Veteran: Review the DD214 Form
- Hiring
- Discipline/Termination
Veterans Preference: Screening

• 100-point system: education, experience
  – 10 points: veteran
  – 15 points: disabled veteran
  – For those achieving a “passing score”

• Applied to screening process for interviews

• DO NOT GIVE POINTS AT INTERVIEW

• May hire any person interviewed
Example

- County X is hiring an administrative assistant
- Criteria
  - 20 points for education
  - 30 points for computer skills
  - 50 points for experience
- Minimum passing score: 50 points
## Applications Reviewed

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Initial Score</th>
<th>Vets Preference</th>
<th>Final Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fred</td>
<td>80</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wilma (V)</td>
<td>70</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Barney (V)</td>
<td>50</td>
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<tr>
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<td></td>
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<tr>
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<tr>
<td>Jane</td>
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<td></td>
</tr>
<tr>
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<tr>
<td>Elroy</td>
<td>35</td>
<td></td>
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Preference Points Assigned

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## Final Scores Calculated

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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
• Be careful of “casual conversations” that may bring up information related to protected classes
Interview

• Make sure questions do not run afoul of anti-discrimination laws
• Can not ask questions soliciting information about protected classes
Protected Class Categories

- Race
- Color
- Creed
- Religion
- National origin
- Sex
- Marital status
- Disability
- Public assistance
- Age
- Sexual orientation
- Local human rights commission activity
- Pregnancy
- Genetic information
- Familial status
<table>
<thead>
<tr>
<th>Avoid</th>
<th>Reason/Alternative</th>
</tr>
</thead>
<tbody>
<tr>
<td>• “How many children do you have?”</td>
<td>• Could be pregnancy, gender, familial status discrimination</td>
</tr>
<tr>
<td>• “Are you planning on starting a family/having more children?”</td>
<td>• Focus on availability to work, if this is the concern behind the question</td>
</tr>
<tr>
<td>• “What kind of childcare arrangements do you have?”</td>
<td></td>
</tr>
<tr>
<td>• “Are you married? Single? Widowed? Divorced?”</td>
<td>• Could be marital status discrimination</td>
</tr>
<tr>
<td>• “Who is your spouse?”</td>
<td>• It is best to avoid this type of question</td>
</tr>
<tr>
<td>• “What is your maiden name?”</td>
<td></td>
</tr>
<tr>
<td>• “To which political party do you belong?”</td>
<td>• Could be discrimination based on First Amendment rights</td>
</tr>
<tr>
<td>• “For whom did you vote in the last election?”</td>
<td>• It is best to avoid this type of question</td>
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</table>
Reference Checks

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

• Using the Internet or social media to “check out” or evaluate an applicant for employment
• Consider whether the benefits outweigh the risks
Potential Risks and Concerns: References

• Accuracy and Context of Information:
  – May be difficult to find the correct individual
  – Not all information on the Internet is complete or reliable
  – Not all applicants may have an Internet presence
  – Savvy applicants have cleaned up their Internet identities
Potential Risks and Concerns

• Discrimination/Retaliation
  – Rejected applicants could raise claims asserting discrimination on the basis of protected class status or retaliation for exercising First Amendment rights.

• Background Checks
  – Requirements related to background checks may also apply to social media/Internet searches
Potential Risks and Concerns

• Circumventing privacy controls or accessing private social media sites without authorization or exceeding authorization could raise federal or state law claims
Performance Management

PERFORMANCE EVALUATION
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!
Plan

• Performance management starts with the position description
• Should already be established per the hiring process
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
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
Performance Evaluation Benefits

- Opens lines of communication regarding performance and expectations
- Provides employee feedback
- Increases morale
- Assists in managing talent
Performance Evaluation Benefits (Continued)

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

• Avoid common rating errors
  – Recency effect
  – Horns effect
  – “Big surprise”

• Do not avoid tough issues
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
Performance vs. Development Goals

• Performance Goals: The “what” you are working to accomplish. They are tied to departmental and/or organizational strategic priorities.

• Development Goals: Focus on areas you want to develop to grow in your job or advance in your career
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
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
Conducting the Evaluation

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

• Written
• Signed by the employee
• Placed in the employee’s personnel file
Warning Signs of Systemic Performance Evaluation Issues

• Surprise ratings during review
• Inconsistent application of rating system
• Ratings do not reflect actual employee performance
• Productivity/morale decreases during evaluation time
Performance Management

DEALING WITH UNSATISFACTORY PERFORMANCE
Notice of Deficiency and a 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
Notice of Deficiency/Performance Improvement Plan

• Identifies the specific problem(s), including examples
• Explains reasons the employee’s conduct/performance is not acceptable
• Identifies the specific areas to be improved
• Establishes expectations for improvement, including timeframe and date to revisit the issue
Notice of Deficiency/Performance Improvement Plan

- Includes directives that are clear and concise
- States the consequences for failing to follow the directives of the notice
- Provides the employee an opportunity to present ideas for coaching or training
- Offers and identifies assistance/resources for employee to improve performance
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
Notice of Deficiency/Performance Improvement Plan

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

- Follow through is critical
  - Observe/monitor
  - Failure to enforce may create difficulty if discipline or termination is needed

- Meet with the employee to discuss the Notice/PIP or discipline
Directives

• State in the written document that you will assume the employee understands the directives unless he or she seeks clarification
• Warn the employee he or she will be subject to discipline, up to and including discharge, if the directives are not followed
• Have the employee sign the Notice
Directives

• Send a follow-up memo to the employee memorializing any verbal clarifications
• Place all documents in the employee’s personnel file
• Continue to monitor and evaluate the employee
• Take additional action if improvement does not occur
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
• Documenting that the problem has been corrected may result in having to start from scratch with a new Notice of Deficiency
Discipline

Consider any terms or conditions outlined in the organization’s personnel policy or collective bargaining agreements
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
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
Discharge

• Investigate and document the actions that necessitate the 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
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

• 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
Discharge of a Veteran

• Discharging a veteran involves different considerations and a different proceeding than nonveteran cases
• Include a veterans preference notice with all discharge, layoff or demotion notices, regardless of whether you think the person is a veteran
Performance Management

SUBSTANCE ABUSE OR MENTAL HEALTH ISSUES
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
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
Performance Management

BOTTOM LINE
Conclusion

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

• Have an effective performance management system
• Consult with legal counsel or labor/employment specialists
Ask Questions and Share Experiences

DISCUSSION