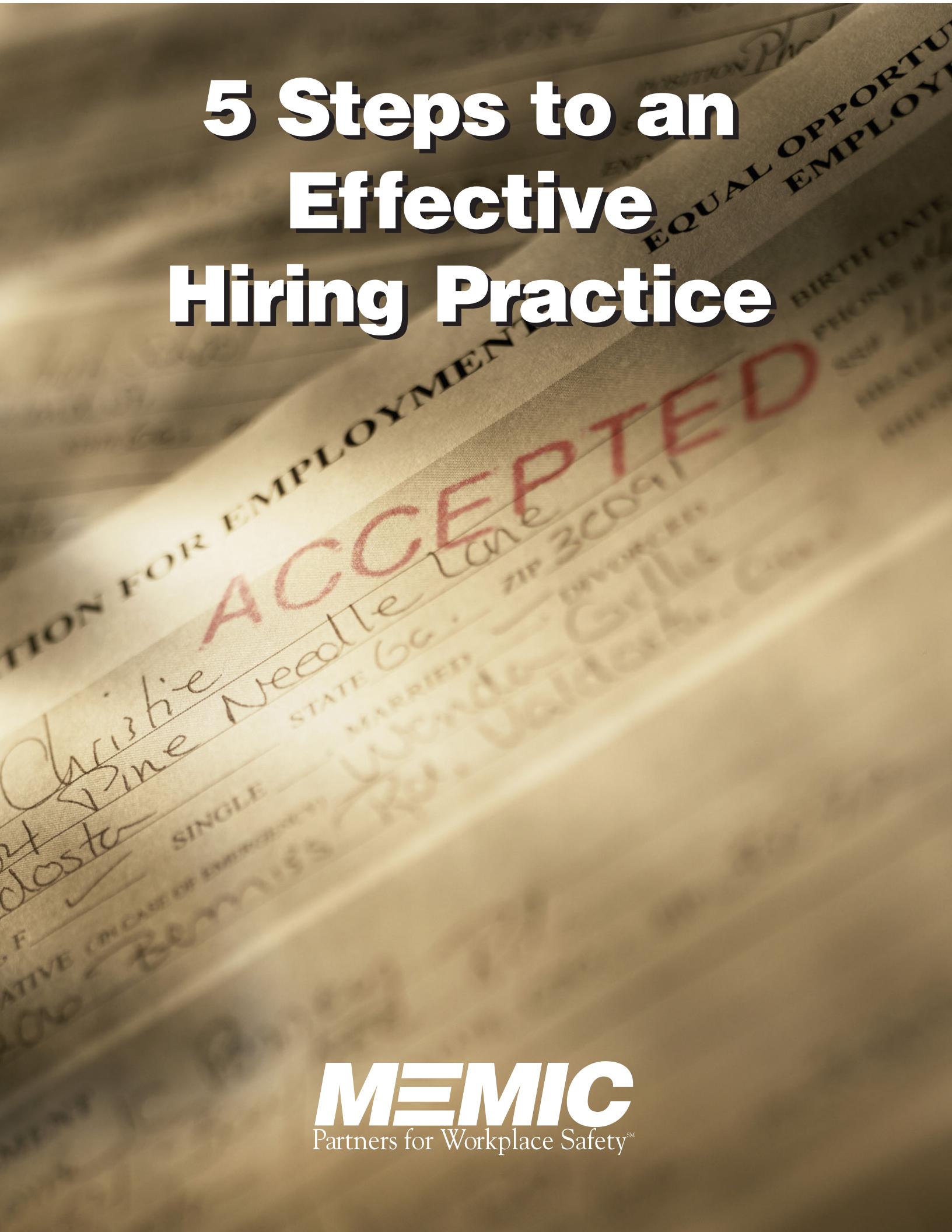


5 Steps to an Effective Hiring Practice



MEMIC
Partners for Workplace SafetySM



Steps to an Effective Hiring Practice

Maine Employers' Mutual is dedicated to providing our policyholders with the best services available and to supporting those services through education and practical guidance.

Securing a safe working environment for your employees involves many elements. Establishing effective hiring practices will take you one step closer to your goal.

The following guide should be used for reference for fair and legal hiring practices. Questions left unanswered by this guide should be answered by an attorney familiar with employment law.



Steps to an Effective Hiring Practice

Table of Contents

1. Publicize the Opening	3-4
2. Use a Lawful Employment Application Form	5-8
3. Systematize Hiring Process	9-13
• Job Opening Record	
• Job Advertisement/Recruitment Record	
• Screen/Interview Qualified Applicants	
• Check References/Background Checks	
• Make Contingent Offers of Employment	
• Conduct Preplacement Medical Exams	
4. Conducting the Employment Interview	15
5. Termination	17-21

Step 1

Publicize the Opening

The prospect of hiring a replacement for a departing employee or the creation of a new job need not be a difficult task if you view this as an opportunity to create work for another person and possibly bring new ideas to your business. You should take advantage of the several different ways you can start the process of searching for the right individual.

There are at least six (6) options to help you spread the word that you have an employment opportunity available. The following points illustrate the advantages and disadvantages of each option.

A. IN-HOUSE POSTING

Advantages

1. Provides opportunities for career growth for existing employees.
2. Job search can begin quickly.
3. No advertising costs.
4. Often effective because current employees know the job and know of qualified prospects.

Disadvantages

1. Reaches limited number of prospects
2. Tends not to aid in diversifying the workforce.
3. Does not allow for opportunity to bring in new skills from outside the company.

B. PRIVATE EMPLOYMENT AGENCY

Advantages

1. Can reach target applicants from wide geographical area.
2. Can locate difficult-to-find skills.
3. Can increase diversity in applicant pool.
4. Does not require staff to screen inquiries.

Disadvantages

1. Entails costs of commission.
2. May involve time delay.

C. JOB SERVICE (unemployment office)

Advantages

1. Reaches large numbers of potential candidates.
2. Inexpensive—no advertising costs and no need to screen applicants.
3. Can increase diversity in applicant pool.

Disadvantages

1. Targets only unemployed—not those seeking a job change.

D. COLLEGE/UNIVERSITY/TRADE SCHOOL/HIGH SCHOOL

Advantages	Disadvantages
<ul style="list-style-type: none"> 1. Can attract recent graduates with state-of-the-art skills. 2. Inexpensive. 3. Helps foster good community relationships if area students are recruited. 	<ul style="list-style-type: none"> 1. Students may lack practical work experience. 2. May involve time delay. 3. Exclusive use of this source not recommended because it may exclude consideration of older candidates.

E. NEWSPAPER/TRADE PUBLICATION ADVERTISEMENTS

Advantages	Disadvantages
<ul style="list-style-type: none"> 1. Reaches large number of potential candidates. 2. Provides means of reaching minority candidates. 	<ul style="list-style-type: none"> 1. Requires staff to screen responses. 2. Entails advertising costs. 3. May result in time delay. 4. May receive large number of unqualified applicants.

F. NONTRADITIONAL RECRUITMENT EFFORTS (minority-affiliated organizations)

Advantages	Disadvantages
<ul style="list-style-type: none"> 1. Targets qualified minority candidates. 2. Inexpensive. 	<ul style="list-style-type: none"> 1. May involve time delay. 2. May not reach large number of potential candidates.

Step 2

Use a Lawful Employment Application Form

WHY USE AN APPLICATION FORM?

An application form ensures that the employer gets all relevant information from each applicant in a readily accessible format.

An application form is an effective way of documenting who applied for each opening.

Legal Note: State and Federal equal employment opportunity regulations require that employers keep application forms and/or resumes for at least one year.

An application form can put applicant on notice of certain terms and conditions of employment.

TIPS ON USING APPLICATION FORMS

Do not hand out application forms or accept applications when there are no job openings.
Avoid unlawful pre-employment inquiries; have application form reviewed by legal counsel for use in each state in which employees are hired.

See Step Four, "Conducting the Employment Interview: What an Employer Can and Cannot Ask Employment Applicants."

Consider including language in your application form in compliance with the Fair Credit Reporting Act obtaining the applicant's or employee's consent to perform background checks and other investigations, see Step 2, Paragraph 4 titled "Authorization for Background Check or Investigation."

ELEMENTS OF AN EFFECTIVE EMPLOYMENT APPLICATION FORM

1. ADA/State Human Rights Act Accommodation Statement:

Front cover or top of application form should state the following: "Consistent with the provisions of the Americans with Disability Act (ADA) and the Maine Human Rights Act, applicants may request accommodations needed to participate in the application process."

Legal Note: Pursuant to the ADA and State Human Rights Acts or Fair Employment Practices Acts, job information, including application forms, should be available in a location that is accessible to people with mobility impairments. Similarly, applicants with visual or dexterity impairments may need assistance in completing application forms.

2. Equal Opportunity Employer Statement:

Front cover or top of application form should affirmatively state that employer complies with antidiscrimination laws. Some examples:

“The XYZ Company is an equal opportunity employer dedicated to a policy of compliance with all federal, state and local laws regarding nondiscrimination in employment. No question on this application is intended to secure information to be used for unlawful purposes.”

“Applicants are considered for all positions without regard to race color, religion, sex, sexual orientation, ancestry or national origin, age, or veteran status. In addition, this Company does not discriminate on the basis of physical or mental disability where the essential functions of the job, as reasonably accommodated, do not require such distinction. No question on this application is intended to secure information to be used for unlawful purposes.”

Legal Note: Massachusetts, New Hampshire, and Vermont have adopted state laws banning discrimination based on sexual orientation. Maine has not adopted a state law, but employers doing business in local communities that have adopted ordinances banning discrimination based on sexual orientation should include sexual orientation in this list. As of October 1, 2001, those communities in Maine include: Bangor, Bar Harbor, Castine, Falmouth, Long Island, Orono, Portland, and South Portland. New Hampshire state law also prohibits discrimination by an employer based on marital status.

3. Employment History:

Preface request for employment history with direction that applicants should list each of last (at least four) employers, listing last position first. Applicants should also be directed to explain any periods of unemployment.

Request names of prior supervisors for reference checking.

Inquire directly whether applicant has ever been terminated or asked to resign from a previous position.

Legal Note: Applicants in Massachusetts must state that an applicant may list work performed on a volunteer basis as well as on a paid basis.

4. Authorization for Background Check or Investigation:

The Federal Trade Commission has interpreted the Fair Credit Reporting Act (FCRA) to require notice to and consent of an applicant or employee to conduct certain background checks or to use any outside agency to conduct certain checks or investigation. To ensure compliance with FCRA when doing background checks or investigations, include the following language, possibly on a separate form from the employment application:

“I understand that in evaluating my application for employment and to evaluate my continued suitability for employment [Employer] may from time to time procure or have prepared an [employment, education, criminal history, motor vehicle, military and/or investigative report, or a report about my background, character, general reputation, mode of living, and/or employment

Use a Lawful Employment Application Form

Step 2

performance] about me. I consent to and authorize [Employer] to obtain these reports, and by copy of this authorization, I have been notified that: 1. the reports may be requested; 2. that upon request, I will be informed whether such a report has been requested; and 3. that upon request, I will be informed of the name and address of any agency that furnished any report.

"I understand that upon written request and within five days after receipt of my request, I am entitled to complete disclosure about the nature and scope of this investigation. I authorize all persons, schools, employers, companies, corporations, law enforcement agencies and other government agencies to release information to [Employer] and to any company hired by them. The authorization includes matters of opinion relating to character, ability, reputation and past performance."

FCRA also requires that an employer give notice to an applicant or employee that a report is being obtained and a summary of rights under FCRA. For copies of these notices or for more information about FCRA, see www.ftc.gov.

5. Certification of Truthfulness of Application Form:

Require applicants to read and sign a statement that the statements contained in the application are truthful. Suggested language:

"I certify that all of the statements contained in this application or accompanying forms are true and complete. I understand that any false statements, omissions, or misrepresentations will constitute sufficient cause and reason for either refusal to hire or termination from employment."

Legal Note: Massachusetts law requires that employment applications contain the following language:

"It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability."

6. At-Will Employment Acknowledgment (Non-union positions only):

For non-union positions, include statement of acknowledgment of at-will status of employment. Suggested language:

"I understand, acknowledge and agree that unless otherwise expressly agreed to in writing signed by a duly authorized official of the Company, if employed by the Company, my employment will be at will and without fixed term, and that either of us may terminate the employment at any time with or without prior notice and with or without cause. I also understand that this at-will employment relationship may not be changed, altered or amended, except by the express written consent of the President of the Company."

7. Preplacement Physical Examination Authorization:

If preplacement physical examinations are required, a consent to the same should be placed in the application form for the applicant to sign. Suggested language:

“If extended an offer of employment, I consent to undergo a preplacement physical examination by a health professional selected by the Company. I understand that any offer of employment is conditioned upon the results of this post-offer examination.”

Legal Note: The ADA and State Human Rights Act place limitations on preplacement physical examinations.

- These examinations cannot occur unless the applicant is first given an offer of employment (conditioned upon successfully passing the physical).
- The employer cannot selectively require applicants to undergo preplacement physicals, e.g., require only those over a certain age or those with obvious disabilities to be examined. The employer must either require all entering employees to undergo the examination or select certain positions for which all entering employees will be required to undergo examinations.

8. Drug Testing Authorization:

If a drug-screening test is required (and is lawfully authorized under state and federal law; see below), consent to the same should be included in the form. Suggested language:

“If extended an offer of employment, I consent to undergo a substance abuse test in accordance with Company policy. A copy of the Company’s substance abuse policy shall be provided to all applicants prior to administering the test.”

Legal Note: Maine law prohibits substance abuse testing (other than by breathalyzers) except pursuant to a written policy approved by the Maine Department of Labor. Vermont law also prohibits substance abuse testing except pursuant to a written policy. Federal law requires some employers , e.g. employers subject to D.O.T. regulations, to administer drug-use screens to applicants and employees.

Step 3

Systematize Hiring Process

A well-organized recruitment and hiring process will assist in the efficiency of the process. Moreover, such an organized process is essential to an effective defense of an employment discrimination charge alleging unlawful hiring practices.

HOW SHOULD THE PROCESS BE ORGANIZED?

Maintain file or notebook to document critical information regarding advertising and recruitment efforts for each opening along with information regarding the application, interview and selection process.

These recruitment and selection records should be kept at least one year after position is filled.

Contents of Recruitment/Selection File

- 1. Job Opening Record:** Chronological listing of all job openings, showing when opened, when filled, and name of successful candidate.

Sample Job Opening Record

Position	Date Open	Date Filled	Name of Hire
laborer	06/02/02	06/15/02	Pat Jones
clerk-office	07/15/02	08/02/02	Chris Chen
sales-inside	09/30/02	09/30/02	P. J. Morris

- 2. Advertisement/Recruitment Record:** Keep record of all efforts to advertise or recruit for each opening. Keep dated copies of all advertisements and copies of letters sent to agencies, schools, organizations, etc.

Sample Job Advertisement/
Recruitment Record

Position	Date Open	Advertising/Recruitment (copies attachd.)
laborer	06/02/02	In-House Posting 06/02/02 Portland Press Herald 6/09- 6/12 Call to Job Service 6/09/02
clerk-office	07/15/02	In-House Posting 7/15/02 Portland Press Herald 7/22/02 Bath-Brunswick Times 7/22/02 Call to Job Service 7/22/02

3. **Applicant Flow Log:** Keep copies in file (or notebook) of application forms received, and annotate as to disposition; e.g., “no suitable opening”, “not qualified for open position,” “more qualified applicant selected.” Do not allow managers to place stray marks on the returned application forms.

Keep in file (or notebook) with application forms any accompanying resumes, letters of reference, and related correspondence.

Sample Applicant Flow Log

Position: Laborer
Date Open: 06/02/02
Date Filled: 06/15/02

Names	App. Rec'd	App. Screen	Interview	Disposition
J. Weeks	06/04/02	reject		rejection, letter sent 6/6
M. LeBlanc	06/04/02	reject		rejection, letter sent 6/7
C. Marsh	06/05/02	OK	06/10/02	rejection, letter sent 6/14
P. Jones	06/05/02	OK	06/10/02	contingent offer 6/14, hired 6/15
G. Kim	06/06/02	OK	06/10/02	rejection, letter sent 6/14

4. **Screen/Interview Qualified Applicants:** Screen application forms to eliminate unqualified candidates; document rejections in applicant log. Interview qualified applicants. Initial interviews may be conducted over the telephone.

Ensure that managers are adequately trained to conduct effective and lawful interviews. See Step Four: “What an Employer Can and Cannot Ask an Applicant.”

Ensure that interviews are conducted in physically accessible sites for applicants with mobility impairments and that reasonable accommodations are made when interviewing individuals with hearing impairments or other impairments affecting communication skills.

5. **Check References/Background Checks:** Call personal references listed by applicant on application form. Ascertain relationship to applicant and amount of time reference has known applicant. Ask reference about reliability, trustworthiness, work ethic and character of applicant. Document response.

Call former employers. Many employers will not give references, except to confirm dates of employment. This information may, however, be very valuable. Document response.

Call former supervisors, if possible. These individuals may be more forthcoming with information regarding past job performance. Caution: do not inquire into unlawful areas, e.g., history of workers' compensation injuries, prior employment discrimination charges. Document response.

Systematize Hiring Process

Step 3

If state law permits, obtain criminal and driving records (if position requires driving).

MAINE

To obtain criminal record in Maine write to:

State Bureau of Identification
Maine State Police
36 Hospital Street
Augusta, ME 04330

To request a person's criminal record, call the State Bureau of Identification for the appropriate form. The "purpose of the request" is INQUIRY. You must have a date of birth. You must include a check and self-addressed, stamped envelope. The telephone number for the State Bureau of Identification is 207-624-7009. This office will not provide information on individuals over the phone.

To get a Maine driving record, write to:

Secretary of State
Bureau of Motor Vehicles
State House Station 29
Augusta, ME 04333
<http://www.state.me.us/sos/bmv/licenses.drrecord.html>

Please note that driving record information cannot be obtained over the telephone. However, if you should have questions, the telephone number of the Bureau of Motor Vehicles, Driver Record Section, is 207-624-9000, ext. 52116

MASSACHUSETTS

Access to criminal records in Massachusetts is limited by CORI (Massachusetts Criminal Offender Record Information). To obtain information, contact:

The Massachusetts Criminal History Systems Board
200 Arlington Street, Suite 2200
Chelsea, MA 02150
Phone: 617-660-4600 • TTY: 617-660-4606 • Fax: 617-660-4613
http://www.state.ma.us/chsb/CORI_app.html

For information about obtaining a driving record in Massachusetts contact:

Registry of Motor Vehicles
Driver Control Unit
P.O. Box 199150
Boston, MA 02119-9150
Phone: 617-351-9213
<http://www.state.ma.us/rmv/suspend/index.htm#record>

NEW HAMPSHIRE

To obtain information in New Hampshire:

To obtain a criminal record in New Hampshire, contact the following department to receive the appropriate form:

New Hampshire Department of Safety
Division of State Police
Central Repository for Criminal Records
10 Hazen Drive
Concord NH 03305
Phone: 603-271-2538
<http://www.state.nh.us/nhsp/cr.html#criminal>

Note: The form authorizing the employer to obtain the record must be notarized.

To obtain a driving record in New Hampshire, the applicant must complete and have notarized, a form DSMV505. For more information contact:

New Hampshire Department of Safety
Division of Motor Vehicles
10 Hazen Drive
Concord, NH 03305
Phone: 603-271-2322
<http://www.state.nh.us/dmv/privacy.html>

VERMONT

For information regarding obtaining a driving record in Vermont, contact the VCIC:

Vermont Criminal Information Center
Department of Public Safety
103 South Main Street
Waterbury, VT 05671-2101
Phone: 802-244-8727, ext. 5237
<http://www.dps.stat.vt.us/cjs/vcic.htm>

For information regarding driving records in Vermont, contact:

Vermont Agency of Transportation
Department of Motor Vehicles
120 State Street
Montpelier, Vermont 05603
<http://www.dmv.state.vt.us.dmvhp.htm>

Legal Note: In order to request certain records on applicants or employees, you must first have obtained their consent and notified them of their rights under the Fair Credit Reporting Act (FCRA), if applicable. See discussion under Step 2, Paragraph 4 on page 6.

- 6. Make Contingent Offers of Employment:** Make offer of employment, contingent upon successful completion of preplacement physical examination or substance abuse testing if required.

Document offer in writing, noting any contingencies. Specify starting pay and start date, if known. Do not represent that employment is for any specified duration or terminable for cause.

- 7. Conduct Preplacement Medical Exams:** Because state and federal disability laws prohibit pre-employment inquiries into physical or mental disabilities, a preplacement medical examination may be the only way to determine whether a person can perform certain jobs effectively and safely. A well-managed preplacement physical examination program can help reduce the number or severity of work-related injuries by eliminating individuals who do not have the physical ability to perform the job safely.

The ADA/State Human Rights Acts require that medical examinations be conducted as a separate, second step of the selection process, after a contingent offer of employment has been extended. The employer cannot select out for preplacement physicals only those with known disabilities or those whom the employer believes may have a disability. The employer must either require preplacement physical examinations of all entering employees or of all entering employees in certain designated jobs.

Setting up your preplacement physical examination program:

- a. Select a qualified medical provider who is familiar with the workplace and the essential functions of the jobs involved. If possible, have the medical examiner tour the facility and observe the job functions.
- b. Give the provider current job descriptions that identify the physical job requirements.
- c. Inform the medical provider that any recommended actions or conclusions related to hiring or placement of an individual should focus on only two concerns:
 - 1.) Whether this person currently is able to perform this specific job, with or without an accommodation.
 - 2.) Whether this person can perform this job without posing a “direct threat” to the health or safety of the person or others.

Keep all information obtained from post-offer medical examinations and inquiries on separate forms, and maintain them in separate files (not in personnel files). These files must be treated as confidential, which means kept in a locked file accessible only by a designated person or persons. Other supervisors or managers should not have access to these files except: a) they may be informed about necessary restrictions on the work duties of an employee and necessary accommodations and, b) first aid and safety personnel may be informed, when appropriate and necessary for first aid and emergency situations.

Step 4

Conducting the Employment Interview

WHAT AN EMPLOYER CAN AND CANNOT ASK AN APPLICANT

The process of selecting your new employee hinges on his or her potential to perform the essential function of the job and your opinion of this ability.

The interview is extremely important in helping you to evaluate the applicants. The following questions will help you ask the “right” questions.

CAN ASK	CANNOT ASK
<ol style="list-style-type: none">1. What relevant educational experience do you have?2. Tell me about your work experience, beginning with your last job and working backwards.3. Have you ever been terminated or been asked to resign from a prior position? If so, why?4. What special skills do you possess?5. Have you ever been convicted of a crime? <i>Note: Massachusetts limits such inquiries; review with legal counsel.</i>6. Our regular workday is 8:00 a.m. to 5:00 p.m. five days per week, with overtime when required. Are you willing and able to meet these attendance requirements?7. This job requires lifting of boxes weighing up to 50 pounds. Are you able to perform this function? If not, is there an accommodation that can enable you to do so?8. How much time did you miss from your last job?9. Do you use illegal drugs?10. This is a nonsmoking workplace. Are you willing to comply with that policy?	<ol style="list-style-type: none">1. Have you ever filed a workers' compensation claim or been injured on the job?2. Do you have any health problems or disabilities?3. Are you planning to have children in the future?4. Are you pregnant?5. How old are you?6. What is your religious preference?7. What are your height and weight measurements? (unless job related)8. When did you graduate from high school?9. Do you have any military service training obligations?10. What is your ethnic background?11. Were you born in the United States of America?12. Have you ever had any emotional or mental problems?13. Are you an alcoholic?14. Do you smoke cigarettes?

How to Properly Terminate an Employee (Non-union)

REDUCING THE LEGAL RISK

Circumstances will occur when it will become necessary for the employer to terminate the employment relationship for reasons other than work shortages. The following basic rules are intended as a guide to assist with what can appear to be a difficult task.

- Rule One:** Institute a progressive disciplinary process and follow it.
- Rule Two:** Document performance problems and discussions with employees about performance problems.
- Rule Three:** Never terminate out of anger—use suspension while you investigate or cool off.
- Rule Four:** Ensure objectivity by requiring termination decisions be approved by at least one person in addition to the supervisor.
- Rule Five:** Use caution when employee might be in a protected category: Don't base decision on factors such as age, sex, race, color, religion, national origin, ancestry, disability, veteran status, workers' compensation history, union activity, whistle-blowing activity, or sexual preference.
- Rule Six:** Do not discuss reasons for termination with anyone besides decision-makers.
- Rule Seven:** Choose a private spot, preferably at the end of the day, to deliver the news.
- Rule Eight:** Before the termination meeting, have a plan as to what severance benefits, if any, will be provided. Be prepared to discuss what kind of reference you are willing to provide.
- Rule Nine:** Keep the meeting simple. To the extent you discuss reasons, be honest; don't sugarcoat them.
- Rule Ten:** Be fair.

Rule One: Institute a progressive disciplinary process and follow it.

A progressive disciplinary process means a system whereby an employee is expressly warned about performance or conduct problems and given an opportunity to correct them. Most progressive disciplinary programs consist of three steps: an oral warning, a written warning, and a final written warning or suspension. If, despite these levels of warnings, the employee's performance does not improve satisfactorily, then the employment relationship is terminated.

The law does not require an employer to institute a progressive disciplinary process. In general,^{*} under Maine, Massachusetts, New Hampshire, and Vermont law, unless there is a contractual agreement to the contrary, an employment relationship is considered to be at-will. This means that the employer can terminate the employee with or without notice and with or without cause, as long as the reason is not an unlawful one.^{**} A progressive disciplinary system, however, can help reduce legal exposure to unlawful termination lawsuits by letting the employee know up front what performance expectations he or she must meet to retain employment and also by creating documentation of the legitimate, job-related problems that led to the decision.

If the progressive disciplinary process is put in writing, then the policy should reserve to management the right to deviate from the policy when it deems appropriate. Inevitably, there will be situations where, due to the seriousness of the performance problems, the attitude of the employee, or other business needs, management will want to compress or skip steps in the process. An explicit reservation of the right to deviate from the normal process will defeat arguments that the employer was contractually bound to follow all of the steps.

Rule Two: Document performance problems and discussions with employees about performance problems.

Good documentation of counseling or disciplinary sessions with employees can strengthen a defense to a wrongful discharge complaint. Documentation that is shared with the employee can also serve to reinforce the session for the employee and can help to avoid any misunderstandings about the message given during the meeting. When employees are given written warnings or performance reviews, they should be asked to sign them. A written signature will eliminate any argument later that they were not apprised of performance deficiencies.

* Massachusetts, New Hampshire, and Vermont have recognized some exceptions to the at-will doctrine such as discharge in violation of public policy and breach of implied covenant of good faith.

** Some examples of unlawful reasons for an employment termination include: termination based on the employee's sex, age, race, color, disability, religion, pregnancy, union status, veteran status, or workers' compensation history.

Rule Three: Never terminate out of anger—use suspension while you investigate or cool off.

People often say things they regret when they are angry. Furthermore, they may be quick to jump to unwarranted conclusions without all of the facts. If a serious situation arises suddenly and it is desirable to have the employee off the premises, then put the employee on a suspension pending investigation. After all involved have had a chance to cool down, investigate the facts, document the evidence, and reassess. If a termination is deemed appropriate, then deliver the message under calm, controlled circumstances.

Rule Four: Ensure objectivity by requiring termination decisions be approved by at least one person in addition to the supervisor.

Having a termination decision reviewed by at least one other person can inject increased objectivity into the process. This review will force the supervisor to articulate the reasons for the proposed termination and will ensure that all of the progressive disciplinary steps were followed. This built-in check may also avoid biased decision making.

Rule Five: Use caution when employee might be in a protected category: Don't base decision on factors such as age, sex, race, color, religion, national origin, ancestry, disability, veteran status, workers' compensation history, union activity, whistle-blowing activity, or sexual preference.

State and federal equal employment opportunity laws prohibit discrimination in employment based upon a person's age, sex, race, color, religion, national origin, ancestry, disability or veteran status. Other state and federal laws make it illegal to base an employment decision on a person's veteran status, history of work-related injuries or claims, union activity, or whistle-blowing (i.e., reporting to upper management or public authorities what the employee believes in good faith to be an illegal practice or condition). In Massachusetts, New Hampshire, and Vermont and in some local Maine communities, it is unlawful to base an employment decision upon an individual's sexual preference.

While the fact that an employee might belong to a protected category does not mean the employer cannot fire him or her for incompetence or other legitimate reasons, it will be more important in these situations that the employer give the employee an opportunity to correct perceived deficiencies and that the steps leading to the discharge be well documented. Review any questionable cases with legal counsel before acting.

Rule Six: **Do not discuss reasons for termination with anyone besides decision-makers.**

Publicizing the reasons an employee was discharged can lead to defamation claims. This is true even if the reasons are told only to other management employees. Only those individuals with a legitimate reason to know the circumstances surrounding the termination should be informed.

For the same reasons, prospective employers should not be told the reasons for a termination. The safest practice when giving employment references is to verify only dates of employment and positions held.

Rule Seven: Choose a private spot, preferably at the end of the day, to deliver the news.

Firing an employee is never easy, but there are ways of handling the situation that can help reduce the emotional trauma to the employee and minimize the chances of a legal contest. Give the discharged employee a graceful exit. It is usually better to terminate the employee at the end of the day or the shift, so that the employee can clean out his/her desk or locker and leave the premises without being observed. Never deliver the termination message over a meal; the employee will feel trapped and the humiliation will be intensified.

Rule Eight: Before the termination meeting, have a plan as to what you are going to say to the employee.

Know what you want to say before the meeting. An outline will help you keep on track during this stressful confrontation. Include on the outline any kind of severance benefits that the company is prepared to offer.

Keep in mind that the law generally requires that any employee be paid any unpaid wages, including accrued vacation pay, by the next regular payroll period. In Massachusetts, employees who are discharged by an employer must be paid all wages due on the day of discharge. In New Hampshire and Vermont, employees who are discharged by an employer must be paid in full within 72 hours.

Generally, except in the case of a loan agreement signed by the employee, an employer cannot make deductions from this check, even in the case of suspected theft or employee-caused loss or damages. Also, certain employers with group health care plans are required to offer continuation of medical coverage to terminated employees. Find out in advance whether this type of coverage is available to the employee.

Rule Nine: Keep the meeting simple. To the extent you discuss reasons for the termination, be honest; don't sugarcoat them.

It usually does not help the situation to dwell on the reasons for the termination. It is very important, however, that if the reasons are discussed, the manager is forthright. Oftentimes, managers will attempt to spare an employee's feelings by calling a termination a "layoff" or by giving other, nonpersonal or non-judgmental reasons for the decision. This approach can backfire, however, if there is a later legal challenge to the action because the employer's actual, legitimate reasons for the decision will have been contradicted by its own statements.

Do express genuine empathy or concern for the employee. Whatever you do, do not lose your temper.

Rule Ten: Be fair.

Juries tend to decide employment cases based upon their own notions of fundamental fairness. Were the employer's actions fair to the employee? Keeping fairness considerations in mind can go a long way toward minimizing legal risk.

Additional copies may be obtained from
Maine Employers' Mutual Insurance Company (MEMIC).
Please call 1-800-660-1306, ext. 577

