# **Table of Contents**

# PART I: HIRING by Robert K. Sholl

# CHAPTER 1 DISCRIMINATION IN HIRING

# I. Scope of Chapter [§ 1.1]

# II. Fair Employment Laws [§ 1.2]

- A. Sources of the Law [§ 1.3]
- B. Disparate Treatment, Disparate Impact, and the Use of Artificial Intelligence [§ 1.4]
- C. Direct Inquiries [§ 1.5]
  - 1. In General [§ 1.6]
  - 2. Age [§ 1.7]
  - 3. Arrest or Conviction Record [§ 1.8]
  - 4. Disability [§ 1.9]
  - 5. Marital Status [§ 1.10]
  - 6. Domestic Partnership [§ 1.11]
  - 7. Hair Style [§ 1.12]
  - 8. Military Service [§ 1.13]
  - 9. National Origin or Citizenship [§ 1.14]
  - 10. Race or Color [§ 1.15]
  - 11. Religion [§ 1.16]
  - 12. Sex and Pregnancy [§ 1.17]
  - 13. Sexual Orientation and Gender Identity [§ 1.18]
  - 14. Use or Nonuse of Lawful Products [§ 1.19]
  - 15. Political Affiliations and Beliefs [§ 1.20]
  - 16. Physical Appearance [§ 1.21]
  - 17. Unemployment Status [§ 1.22]
- D. Indirect Inquiries [§ 1.23]
  - 1. In General [§ 1.24]
  - 2. Language Facility [§ 1.25]
  - 3. Memberships [§ 1.26]

- E. Facially Neutral Inquiries: Disparate Impact [§ 1.27]
  - 1. In General [§ 1.28]
  - 2. Education [§ 1.29]
  - 3. Physical Criteria or Ability [§ 1.30]
  - 4. Personal Finances [§ 1.31]
  - 5. Relatives or Close Friends in Workforce [§ 1.32]
  - 6. Compensation History [§ 1.33]
- F. Bona Fide Occupational Qualifications [§ 1.34]
  - 1. In General [§ 1 .35]
  - 2. Age [§ 1.36]
  - 3. Religion [§ 1.37]
  - 4. Sex [§ 1.38]
  - 5. National Origin [§ 1.39]
- G. Affirmative Action Considerations [§ 1.40]

# III. Laws Prohibiting Union-Based Discrimination [§ 1.41]

- A. In General [§ 1.42]
- B. "Yellow Dog" Contracts [§ 1.43]
- C. Wisconsin's "Right to Work" Law [§ 1.44]
- D. Initial Hiring Terms [§ 1.45]
- E. Refusal to Hire [§ 1.46]

# IV. Antiblacklisting Law [§ 1.47]

#### **CHAPTER 2**

#### RECRUITING, APPLICATION FORMS, AND INTERVIEWS

- I. Scope of Chapter [§ 2.1]
- II. Recruiting [§ 2.2]
  - A. In General [§ 2.3]
  - B. Advertising [§ 2.4]
    - 1. In General [§ 2.5]
    - 2. Fraudulent Advertising for Labor [§ 2.6]
    - 3. Advertising When Strike or Lockout Exists [§ 2.7]
    - 4. Notification of Position Openings: Affirmative Action Considerations [§ 2.8]
  - C. Word-of-Mouth Recruiting [§ 2.9]

# III. Employment Application Forms [§ 2.10]

- A. In General [§ 2.11]
  - 1. Introduction [§ 2.12]
  - 2. Scope of Inquiries: Job-Relatedness [§ 2.13]
  - 3. When Otherwise Prohibited Inquiries Are Justified [§ 2.14]
    - a. In General [§ 2.15]
    - b. To Meet Affirmative Action Obligations [§ 2.16]
    - c. To Meet Insurance Requirements [§ 2.17]
- B. Employment Application Statements [§ 2.18]
  - 1. Equal Employment Opportunity [§ 2.19]
  - 2. At-Will Employment Status [§ 2.20]
  - 3. Arbitration Agreement [§ 2.21]
  - 4. Truthfulness of Information Provided [§ 2.22]
  - 5. Consent and Release [§ 2.23]
    - a. Reference Information [§ 2.24]
    - b. Testing [§ 2.25]
- C. Record Retention and Application Consideration Time Frames [§ 2.26]

# **IV.** Interviews [§ 2.27]

- A. In General [§ 2.28]
- B. Scope of Inquiries: Job-Relatedness [§ 2.29]
- C. Job Descriptions and Ability to Perform Essential Functions [§ 2.30]
- D. Oral Promises [§ 2.31]
- E. Misrepresentations of Fact [§ 2.32]
- F. Social Media Protection Act [§ 2.33]

#### **CHAPTER 3**

#### CREDIT REPORTS AND REFERENCE CHECKS

- I. Scope of Chapter [§ 3.1]
- II. Credit Reports [§ 3.2]
- III. Reference Checking [§ 3.3]
  - A. Defamation Concerns [§ 3.4]
  - B. Scope of Inquiries: Job-Relatedness [§ 3.5]
  - C. Confidentiality [§ 3.6]

#### **CHAPTER 4**

#### **TESTING AND SCREENING**

- I. Scope of Chapter [§ 4.1]
- **II.** In General [§ 4.2]
- III. Medical Examinations [§ 4.3]
  - A. In General [§ 4.4]
  - B. Payment of Costs [§ 4.5]
  - C. Timing: Preemployment or After Job Offer Extended? [§ 4.6]
  - D. HIV Testing [§ 4.7]
  - E. Genetic Testing [§ 4.8]
  - F. COVID-19 Vaccine or Testing Mandates [§ 4.9]
  - G. Disability Discrimination and Tort Claims [§ 4.10]
- IV. Drug and Alcohol Testing [§ 4.11]
  - A. In General [§ 4.12]
  - B. Federal Statutory and Regulatory Provisions [§ 4.13]
    - 1. In General [§ 4.14]
    - 2. Drug-Free Workplace Act [§ 4.15]
    - 3. Department of Transportation Rules [§ 4.16]
    - 4. Department of Defense Rules [§ 4.17]
    - 5. Americans with Disabilities Act and Rehabilitation Act [§ 4.18]
  - C. Considerations for Unionized Employers [§ 4.19]
- V. Honesty Testing [§ 4.20]
  - A. In General [§ 4.21]
  - B. Federal Statute [§ 4.22]
  - C. Wisconsin Statute [§ 4.23]
- VI. Personality, Psychological, Ability, and Other Tests or Selection Procedures [§ 4.24]
  - A. In General [§ 4.25]
  - B. Disparate Impact [§ 4.26]
  - C. Test Validation [§ 4.27]

# CHAPTER 5 THE HIRING DECISION

# I. Scope of Chapter [§ 5.1]

# II. Hiring Particular Categories of Persons [§ 5.2]

- A. Minors [§ 5.3]
  - 1. In General [§ 5.4]
  - 2. Limitations on Type and Place of Work Performed [§ 5.5]
  - 3. Work Permits [§ 5.6]
- B. Strikebreakers [§ 5.7]
- C. Employees' Relatives [§ 5.8]
- D. Unauthorized Aliens [§ 5.9]

# III. Permissible Conditions on Employment [§ 5.10]

- A. "No Moonlighting" Policies [§ 5.11]
- B. Grooming, Dress, and Appearance Requirements [§ 5.12]
- C. Restrictive Covenants and Trade Secret Agreements [§ 5.13]
- D. Arbitration Agreements [§ 5.14]

# IV. Requirements upon Hiring [§ 5.15]

- A. IRCA Verification and Record-Keeping Requirements [§ 5.16]
- B. Confirmation Letters [§ 5.17]
- C. Nondiscriminatory Compensation [§ 5.18]
- D. New Hire Reporting [§ 5.19]

# V. Negligent Hiring [§ 5.20]

- A. In General [§ 5.21]
- B. Distinguished from Respondent Superior [§ 5.22]
- C. Foreseeable Risk of Harm to Third Parties [§ 5.23]
- D. Prohibition Against Arrest or Conviction Record Discrimination [§ 5.24]
- E. Worker's Compensation as Exclusive Remedy in Suit by Coemployee [§ 5.25]

# VI. Withdrawing an Offer of At-Will Employment [§ 5.26]

#### VII. No-Rehire Policies [§ 5.27]

#### **PART II: TERMINATION**

#### by Bradden C. Backer, Shannon A. Allen, and John C. Gardner

# CHAPTER 6

#### **TYPES OF TERMINATION**

- I. Scope of Chapter [§ 6.1]
- II. Voluntary Termination or Quit [§ 6.2]
- III. Involuntary Termination or Discharge [§ 6.3]
- IV. Constructive Discharge [§ 6.4]
- V. Terminations During Leave [§ 6.5]
  - A. In General [§ 6.6]
  - B. Layoffs [§ 6.7]
  - C. Strikes or Lockouts [§ 6.8]
  - D. Medical and Related Leaves of Absence [§ 6.9]
  - E. Personal Leaves of Absence [§ 6.10]
  - F. Miscellaneous Leaves Guaranteed by Statute [§ 6.11]

#### CHAPTER 7

#### LIMITATIONS ON AN EMPLOYER'S RIGHT TO TERMINATE

- I. Scope of Chapter [§ 7.1]
- II. Complications Arising in the Reduction-in-Force Context [§ 7.2]
- III. Contracts [§ 7.3]
  - A. In General [§ 7.4]
  - B. Collective Bargaining Agreements [§ 7.5]
  - C. Individual Written Employment Contracts [§ 7.6]
  - D. Oral Agreements [§ 7.7]
  - E. Application of the Promissory Estoppel Doctrine [§ 7.8]
  - F. Written Personnel Policies and Handbooks [§ 7.9]

# **IV.** Statutes [§ 7.10]

- A. Fair-Employment Laws [§ 7.11]
- B. Whistleblower and Antiretaliation Laws [§ 7.12]
  - 1. In General [§ 7.13]
  - 2. Wisconsin Laws [§ 7.14]
  - 3. Federal Laws [§ 7.15]
- C. Other Laws Protecting Conduct or Status [§ 7.16]
  - 1. In General [§ 7.17]
  - 2. Wisconsin Laws [§ 7.18]
  - 3. Federal Laws [§ 7.19]
- D. Veterans' Reemployment Laws [§ 7.20]
- E. Plant-Closing Laws [§ 7.21]

# V. Public Policy [§ 7.22]

#### **CHAPTER 8**

# THE TERMINATION DECISION

# I. Scope of Chapter [§ 8.1]

# II. Pretermination Considerations [§ 8.2]

- A. In General [§ 8.3]
- B. Review of Relevant Records, Practices, and Issues [§ 8.4]
- C. Consistency of Decision-Making [§ 8.5]
- D. Fairness and Due Process Considerations [§ 8.6]
- E. Property and Information Concerns [§ 8.7]

### III. Communicating the Decision [§ 8.8]

- A. In General [§ 8.9]
- B. Meeting with Employee [§ 8.10]
- C. Characterization of Termination [§ 8.11]
- D. Implementation of Decision [§ 8.12]

# CHAPTER 9

#### **TERMINATION PAYMENTS**

- I. Scope of Chapter [§ 9.1]
- II. Required Payments and Benefits After Separation of Employment [§ 9.2]
  - A. Wage Payments and Deductions from Wages [§ 9.3]
  - B. Insurance Continuation and Conversion Rights [§ 9.4]
- III. Discretionary Payments [§ 9.5]
  - A. Gratuitous Payments [§ 9.6]
  - B. Payments Made Under Separation and Release Agreements [§ 9.7]
    - 1. In General [§ 9.8]
    - 2. Release of Federal Age-Discrimination Claims [§ 9.9]

#### CHAPTER 10

#### **LEGAL ISSUES IN PROVIDING REFERENCES**

- I. Scope of Chapter [§ 10.1]
- II. Liability for Termination Decision [§ 10.2]
- III. Defamation [§ 10.3]
- IV. Privacy [§ 10.4]
- V. Negligent Referral or Duty to Warn [§ 10.5]
- VI. Retaliation [§ 10.6]

#### **APPENDICES**

- A Fair Hiring & Avoiding Discriminatory Interview Questions (DWD)
- B Model Employee Verification, Authorization, and Release Statement

- Summary of Rights Under the Fair Credit Reporting Act (12 C.F.R. app. K pt. 1022) Employment Termination Checklist  $\mathbf{C}$
- D

Index