



Ius Laboris USA Global HR Lawyers

FordHarrison

An Employer's Survival Guide

PREPARED BY

FORD & HARRISON, LLP.
1450 CENTREPARK BLVD., SUITE 325
WEST PALM BEACH, FL 33401
PHONE: 561/345-7500
FACSIMILE: 561/345-7501

May 2016

This Guide is provided for general information purposes only and is not intended as legal advice. If you need guidance with respect to specific circumstances or issues, please seek the advice of counsel.

AN EMPLOYER'S SURVIVAL GUIDE

Consider the following checklist to determine if you are effectively prepared to provide a successful employment life-path for both your employees and your organization.

I. Getting Started

A. Pre-Employment Tasks

1. Does each Job Description:

- | | | | |
|-----|----|----|--|
| Yes | No | a. | specify skills needed to be successful in the job? |
| Yes | No | b. | accurately represent job responsibilities and duties? |
| Yes | No | c. | provide details on supervision and reporting relationships? |
| Yes | No | d. | identify the functions associated with the job? |
| Yes | No | e. | identify the minimum education and experience requirements necessary to perform the job? |

Yes No 2. Is each Job Description gender, ethnic and racially neutral?

Yes No 3. Have we identified common traits and abilities of present and former employees who have performed well and who have failed in order to prepare an accurate job description?

B. Recruitment

Yes No 1. Are the application and interview site accessible?

Yes No 2. Do we list or post open positions and accept applications only for specific open jobs?

Yes No 3. Have we identified common traits and abilities of present and former employees who have performed well and who have failed in order to productively identify and recruit potential employees?

Yes No 4. Do we actively recruit minority candidates for our positions?

Yes No 5. Do we actively recruit from varied sources to ensure a variety of candidates?

C. The Employment Application and Screening

Yes No 1. Is the application site accessible?

- | | | | |
|-----|----|----|--|
| Yes | No | 2. | Do we ensure that all applicants are notified that if they require assistance in completing the application due to a disability, assistance is available? |
| Yes | No | 3. | Have we made certain that the application form has no questions about an individual's obvious or hidden disabilities? |
| Yes | No | 4. | Have we made certain that the application form has no questions about an applicant's marital status, number of children, race, sex, ethnic or religious background, etc.? |
| Yes | No | 5. | Have we made certain that the application form does not inquire as to the applicant's physical or mental disabilities or make other inquiries into medical status or background? |
| Yes | No | 6. | Does the application form require the applicant to specify the job for which he or she is applying? |
| Yes | No | 7. | Have we removed from the application form all unnecessary questions? |
| Yes | No | 8. | Have we included the proper authorization forms in the application packet? |

D. The Interview Process

- | | | | |
|-----|----|----|---|
| Yes | No | 1. | Have we reviewed the application to identify applications who have worked at companies where conditions, wages and benefits are similar to our company? |
| | | 2. | Do we have an application sorting process based upon whether: |
| Yes | No | a. | the applicant filled out the application as instructed. |
| Yes | No | b. | the applicant is available for the dates and times required by the open position. |
| Yes | No | c. | the applicant demonstrates a desirable employment pattern. |
| Yes | No | d. | the applicant explains separations from past employers satisfactorily. |
| Yes | No | e. | the applicant meets our education requirements for the open position. |
| Yes | No | f. | the applicant meets the training/skills requirements for the open position. |
| Yes | No | g. | the applicant meets the experience requirements for the open position. |

- | | | | |
|-----|----|-----|---|
| Yes | No | 3. | Do we review the applications for matching the indicated skills, education, and experience with the open position? |
| Yes | No | 4. | Do we interview only the persons who are minimally qualified on paper? |
| Yes | No | 5. | Do we check references for applicants who have been screened that we want to interview? |
| Yes | No | 6. | Do we conduct a patterned form of job interviews? |
| Yes | No | 7. | Do we have a standard form of interview questions that are used in each job interview? |
| Yes | No | 8. | Do we deviate from our standard form of interview questions for any candidate? |
| Yes | No | 9. | Do we have a standard form for all interviews on which responses to the standard questions are recorded for each interview? |
| Yes | No | 10. | Do our standard questions access the accuracy, validity and truth of the information provided on the application form? |
| Yes | No | 11. | Do we have job specific interview questions which relate to the skills, education, and training necessary for each position in our organization and specific questions relating to the open position? |
| Yes | No | 12. | Do our interview questions include standard follow-up questions and responses to applicant answers designed to elicit further information from the applicant? |
| Yes | No | 13. | If possible, do we have the applicant go to the work area and show the applicant the job? |
| Yes | No | 14. | Do we ask the candidate if he/she can perform the job? |
| Yes | No | 15. | Do we make certain that the applicant has a smooth interview process and is interviewed by all necessary personnel in a timely fashion? |
| Yes | No | 16. | Are our interview questions job-related? |
| | | 17. | Do we refrain from asking questions about: |
| Yes | No | a. | the original name of an applicant? |
| Yes | No | b. | pregnancy? |
| Yes | No | c. | a spouse's concerns about travel or hours worked? |

- | | | | |
|-----|----|-----|---|
| Yes | No | d. | whether the applicant plans to start a family? |
| Yes | No | e. | whether the applicant is the primary wage earner? |
| Yes | No | f. | how long the applicant plans to work? |
| Yes | No | g. | the applicant's arrest record? |
| Yes | No | h. | the applicant's birthplace or the birthplace of the applicant's relatives? |
| Yes | No | i. | whether the applicant or the applicant's relatives are citizens? |
| Yes | No | j. | the applicant's national origin? |
| Yes | No | k. | the applicant's age? |
| Yes | No | l. | the applicant's sexual orientation? |
| Yes | No | m. | the applicant's religious denomination or beliefs? |
| Yes | No | n. | the applicant's genetic information? |
| Yes | No | o. | the applicant's previous or present union activities? |
| Yes | No | p. | the applicant's military record? |
| Yes | No | q. | whether the applicant has children? |
| Yes | No | r. | the applicant meets the educational requirements for the position? |
| Yes | No | 18. | Have we checked state and local laws to see if we are prohibited from inquiring about past convictions during the application process? |
| Yes | No | 19. | Do we ask the applicant to explain any convictions indicated on the application (as convictions alone do not make a candidate ineligible)? |
| | | E. | Pre-Employment Testing |
| Yes | No | 1. | Have we reviewed our pre-employment tests to ensure they do not have any impermissible or unlawful inquiries? |
| Yes | No | 2. | Have we determined that all pre-employment testing is job specific? |
| Yes | No | 3. | Have we eliminated all pre-employment medical examinations, requests for medical information and requests for information regarding an applicant's mental or physical disabilities? |

- | | | | |
|-----|----|----|---|
| Yes | No | 4. | Do we conduct a background investigation on the applicant? |
| Yes | No | 5. | Are we following the procedures outlined by The Fair Credit Reporting Act and any applicable state or local laws for background investigations? |
| Yes | No | 6. | Have we checked if state law permits pre-employment drug testing? |
| Yes | No | 7. | Do we have the employee complete a Drug Free Workplace consent form? |
| Yes | No | 8. | Has the candidate been sent for drug testing and did we already receive the test results? |

II. Reporting to Work

A. Extending an Offer of Employment

- | | | | |
|-----|----|----|--|
| Yes | No | 1. | Is our official job offer handled by the personnel officer? By the supervisor? |
| Yes | No | 2. | Is the official job offer extended by phone call? Followed up in writing? |
| Yes | No | 3. | Is our job offer specific and does it include all important information? |
| Yes | No | 4. | Do our job offers include a start date? |
| Yes | No | 5. | Does our offer of employment include information regarding and explaining any introductory period and other employment requirements? |
| Yes | No | 6. | Does our offer of employment include information on post offer medical examinations and drug testing, if applicable? |
| Yes | No | 7. | Are applicants not hired sent a written rejection letter? |

B. Post-Offer

- | | | | |
|-----|----|----|---|
| Yes | No | 1. | Does the employee's new position require any uniform, tools or safety equipment and has it or any necessary information been provided and appropriate training scheduled? |
|-----|----|----|---|

C. The First 90 Days

1. INS Concerns

- | | | | |
|-----|----|----|--|
| Yes | No | a. | Do we have applicants complete the INS Form I-9 within the first three days of employment? |
| Yes | No | b. | Do we complete the INS Form I-9 accurately and completely, noting each document's identity and expiration date, if applicable? |

Yes No c. Do we carefully review all identification papers offered by the new employee?

2. The Introductory Period

a. Do we use the introductory period to:

Yes No i. provide us with an opportunity to determine if the employment relationship should continue?

Yes No ii. allow training time for the employee to acclimate to the new position?

Yes No iii. provide us with the chance to see the new employee's on-the-job performance to determine if the new employee is in the right position?

Yes No iv. allow us an opportunity to assess the new employee in a limited manner without having to expend an inordinate amount of training or funds?

Yes No b. Do we take prompt action to separate the employee if his or her performance does not measure up to expectations during the stated introductory period?

D. Policies, Procedures and Practices

1. Personnel Manuals and/or Employee Handbooks

Yes No a. Do we give new employees personnel manuals and/or employee handbooks on or about the first day of employment?

Yes No b. Are personnel manuals and/or employee handbooks reviewed and updated on an annual basis to reflect the changes in the organization and in the law?

Yes No c. Are all new policies or procedures immediately distributed when approved to employees?

Yes No d. Do the personnel manuals and/or employee handbooks conform with the necessary information requirements pursuant to Federal and State law?

Yes No e. Have we provided the employee with any separate policies or statements of understanding that are required for his/her new position?

Yes No f. Has the employee read the Handbook and acknowledged his/her understanding by returning the Acknowledgement at the back of the Handbook?

2. Group Benefit Plans

Yes No a. Have we reviewed the enrollment requirements of our group benefits plans to determine if we are enrolling our employees according to the time frames specified in the plan document and applicable law?

Yes No b. Do our group benefit plan enrollment requirements conform with the information published in our personnel manuals and/or employee handbooks?

Yes No c. Are the plan documents readily available for the employee to review?

Yes No d. Have we provided our employees with their first COBRA notice?

III. The Employment Relationship Over Time

A. Personnel Actions

1. Evaluations

Yes No a. Are performance evaluations performed on a regular basis by the employee's supervisor?

Yes No b. Are performance evaluations in writing?

Yes No c. Are performance evaluations based upon measurable job performance criteria?

Yes No d. Are performance evaluations based upon the goals and objectives of the employee and the organization?

Yes No e. Does the performance evaluation conform to the requirements of the job?

Yes No f. Is the performance evaluation meaningful?

2. Transfers

Yes No a. Are transfers considered based upon measurable job performance criteria?

- | | | | |
|---------------|----|----|---|
| Yes | No | b. | Have we examined our process to ensure that employees are not transferred to solve organizational or inter-departmental problems? |
| Yes | No | c. | Have we ensured that transfers are not based on gender, race, disability or ethnicity? |
| Yes | No | d. | Do we have written criteria that explain the procedure for and the availability of transfers to employees? |
| 3. Promotions | | | |
| Yes | No | a. | Are promotions considered based upon measurable job performance criteria? |
| Yes | No | b. | Are promotions based upon merit? or seniority? |
| Yes | No | c. | Do we have written criteria that explain the procedure for and the likelihood of promotions to employees? |
| 4. Training | | | |
| Yes | No | a. | Are training sites accessible to all employees? |
| Yes | No | b. | Are training opportunities available to all similarly situated employees regardless of gender, race, disability or ethnicity? |
| Yes | No | c. | Do we publish training guidelines and information for all employees? |
| Yes | No | d. | Are written sign-in sheets maintained for all training sessions? |
| 5. Counseling | | | |
| Yes | No | a. | Do we counsel employees based upon job performance and behavior? |
| Yes | No | b. | Do we counsel employees based upon a job-related expectation? |
| Yes | No | c. | Do we counsel employees in private? |
| Yes | No | d. | Do we document employee counseling? |
| Yes | No | e. | Is counseling of employees done in close proximity to the time of the incident or problem requiring counseling? |
| Yes | No | f. | Do we ensure that employees know that there is no guarantee that one form of counseling/discipline will occur before another? |

Yes No g. Do we conduct an investigation, where necessary, prior to counseling?

Yes No h. Is there an established final decision maker as to disciplinary action?

B. Policies and Practices

1. Violence in the Workplace

Yes No a. Does the organization have a written policy on weapons in the workplace that is compliant with applicable state law?

Yes No b. Does the organization have proper security policies and procedures in place?

Yes No c. Does the organization have policies covering both client violence as well as co-employee violence?

Yes No d. Does the organization have a written policy advising employees what to do if they feel threatened on the job?

Yes No e. Does the organization have a written policy covering searches of personnel property in the workplace?

Yes No f. Has the organization conformed its policies to the OSHA recommendation?

2. Romance in the Workplace

Yes No a. Does the organization have a written policy on romance in the workplace?

Yes No b. Does the organization have a policy on sexual harassment?

Yes No c. Is the organization's policy on sexual harassment posted?

3. Unlawful Activities

Yes No a. Does the organization have written policies concerning harassment of any employee?

Yes No b. Has the organization posted its policies on unlawful actions by supervisors or co-workers in a conspicuous place in the workplace?

Yes No c. Does the organization have a written policy informing employees how to handle inappropriate behavior by supervisors or fellow employees?

- | | | | |
|-----|----|----|---|
| Yes | No | d. | Does the organization have a written policy that explains what measures will be taken when an employee complains of discrimination? |
| Yes | No | e. | Does the organization respond to complaints of discrimination in accordance with all EEOC guidelines? |
| Yes | No | f. | Do we take prompt and appropriate remedial measures when we determine unlawful behavior has occurred? |
| Yes | No | g. | Is annual harassment training conducted? |
| Yes | No | h. | Do we advise the complaining party of the outcome of our efforts? |
| Yes | No | i. | Does the organization have a written policy concerning the use of drugs and/or alcohol in the workplace? |
| Yes | No | j. | Have we included third parties in our policies prohibiting unlawful actions against employees (<i>i.e.</i> , harassment by third parties)? |
| Yes | No | k. | Does our harassment policy specifically identify who to report alleged harassment and does it include a secondary individual? |
| Yes | No | l. | Are employees instructed about possible searches in the workplace? |
| Yes | No | m. | Do we have an Open Door Policy that advises employees how to file complaints and/or bring ideas to the attention of their supervisors? |
| Yes | No | n. | Are employees informed that they have an obligation to immediately report violations of law and/or policy that they observe? |

4. Other Policies

- | | | | |
|-----|----|----|--|
| Yes | No | a. | Have we included a Social Media Policy in our Handbook? |
| Yes | No | b. | Have we addressed the use of Electronic Devices in our Handbook? |
| Yes | No | c. | Have we ensured that all policies comply with recent NLRB decisional law and that policies do not infringe upon an employee's right to organize or object to terms and conditions of employment? |
| Yes | No | d. | Have we included detailed timekeeping policies that includes instructions directing employees to accurately record all time worked and initial all subsequent changes to time records. |

C. Wages and Compensation

- | | | | |
|-----|----|----|--|
| Yes | No | 1. | Have we developed a compensation scheme that ensures equal pay for men and women, minorities and non-minorities doing the same work? |
| Yes | No | 2. | Have we developed a compensation scheme that conforms to the minimum wage and overtime requirements of the Fair Labor Standards Act? |
| Yes | No | 3. | Have we included a Safe Harbor Policy in our Handbook? |

D. Personnel Files and Record Keeping

- | | | | |
|-----|----|----|--|
| Yes | No | 1. | Have we reviewed our record keeping practices to determine if they conform with Federal and State record keeping requirements? |
| Yes | No | 2. | Have we developed and do we maintain separate medical information files for each employee which are kept confidential and available only to those individuals with a bona fide need to know? |
| Yes | No | 3. | Are employees informed that they must continually update the information in their personnel files? |

IV. Separation from Employment and Beyond

A. The Separation Event

1. Voluntary

- | | | | |
|-----|----|----|---|
| Yes | No | a. | Do we collect all organizational materials, <i>i.e.</i> , employee handbooks and other internal operational documents? |
| Yes | No | b. | Do we advise staff of changes in personnel status? |
| Yes | No | c. | Do we discuss our reference policy with the employee? Do we advise the employee that we verify dates of employment and position held, only? |
| Yes | No | d. | Do we explain continuation of benefits matters to the employee? |
| Yes | No | e. | Do we forward the employee a timely COBRA notice? |

2. Involuntary

- | | | | |
|-----|-----|----|--|
| Yes | No | a. | Do we collect all organizational materials, <i>i.e.</i> , employee handbooks and other internal operational documents? |
| Yes | No. | b. | Do we advise staff of changes in personnel status? |

- | | | | |
|-----|----|----|---|
| Yes | No | c. | Do we discuss our reference policy with the employee? Do we advise the employee that we verify dates of employment and position held, only? |
| Yes | No | d. | If the separation is for misconduct connected with work, have we prepared all necessary documentation to support the reason for separation? |
| Yes | No | e. | If the separation is for performance reasons, have we prepared all necessary documentation to support the reason for separation? |
| Yes | No | f. | Do we explain continuation of benefits matters to the employee? |

B. Employer Actions at Separation

1. The Exit Interview

- | | | | |
|-----|----|----|---|
| Yes | No | a. | Do we schedule all employees separating voluntarily or involuntarily for an exit interview? |
| Yes | No | b. | Is the exit interview in private with a supervisory level staff member present? |
| Yes | No | c. | Do we have a form for recording the results of the exit interview? |
| Yes | No | d. | Do we act on the outcomes of the exit interview? |

2. The COBRA Notice

- | | | | |
|-----|----|----|--|
| Yes | No | a. | Do we provide timely notice of continuation of benefits opportunities to separating employees <u>or</u> other employees who become eligible due to a reduction in hours, etc.? |
| Yes | No | b. | Do we monitor the term of each electing individuals COBRA status? |
| Yes | No | 3. | Do we timely pay all wages due at separation in keeping with applicable law? |

V. Special Considerations of the Larger Employer

- | | | | |
|-----|----|----|--|
| Yes | No | 1. | Is the employer covered by The Family Medical Leave Act (FMLA)? |
| Yes | No | a. | Is it engaged in commerce? |
| Yes | No | b. | Does it have 50 employees who are employed for 20 or more workweeks in the current or proceeding year? |
| Yes | No | 2. | If the employer is covered, which employees are eligible for FMLA leave? |

- | | | | |
|-----|----|----|--|
| Yes | No | a. | Will the employee have been employed for at least 12 months when the leave begins? |
| Yes | No | b. | Has the employee worked at least 1,250 hours in the 12 months prior to the leave commencement date? |
| Yes | No | c. | Is the employee at a worksite with 50 or more employees in a 75 mile radius? |
| Yes | No | 3. | Has the employee satisfied the notice and/or policy requirements of the Act? |
| | | 4. | What is the purpose of the Leave? |
| Yes | No | a. | Have we identified the reason for leave and it is a qualifying reason to grant FML? |
| Yes | No | b. | Does the condition also qualify as a disability under the ADA? |
| Yes | No | 5. | Certification |
| Yes | No | a. | Have we confirmed that all the time constraints under the FMLA met? |
| Yes | No | b. | Are all forms properly and fully completed? |
| Yes | No | c. | Is a second opinion required? |
| Yes | No | d. | Is a third opinion necessary? If so, have we resolved how to select the third health care provider? |
| Yes | No | 6. | Is the employee requesting intermittent or reduced schedule leave? |
| Yes | No | a. | Have we confirmed such leave is medically necessary? |
| Yes | No | b. | If so, will the employer transfer the employee to an alternative position to accommodate such leave? |
| Yes | No | c. | Have we identified all impacts of such a move on the employee's benefits? |
| Yes | No | 7. | May/Must the employee substitute paid leave? |
| Yes | No | a. | If so, what are the requirements of the paid leave policy or program? |
| Yes | No | b. | What are the impacts on employee benefits? |
| Yes | No | 8. | Have we identified the employee as a key employee? |

- Yes No 9. Is the employee required to provide fitness for duty certification?
- Yes No a. Is the requirement to provide such certification uniformly applied to all employees?
- Yes No b. Is the certification timely provided?
- Yes No 10. Is the employee advised of how and when to properly advise the organization of his/her ability to return to work?