

CONSULTANTS CORNER

Withdrawing a Job Offer: Proceed at Your Own Risk

BY TIM TWIGG AND REBECCA CRANE



After several months of recruiting, you've finally found an applicant you like. You offer him the job, he accepts, gives notice at his current place of employment and is scheduled to start work in a few weeks. "Perfect," you think.

As part of your final process before the new person starts, you decide to conduct a background check, and the results that come back are not good. As a result, you withdraw the job offer.

Problem is, this person cannot keep his current job having given notice of resignation and now being unemployed. Angry at what happened, he threatens to sue you or turn you into the labor board for unfair labor practices.

Your response: "First, I'm not guilty because I never technically hired the person and second, I'm an 'at-will' employer, therefore nothing will come of this."

Is that true?

Although withdrawing a job offer is not necessarily illegal, the action does have some inherent risks, which should be taken into consideration by any doctor who may want to exercise the right to hire, fire, and/or withdraw job offers "at-will."

Regardless of what leads an employer to withdraw a job offer, the individual subject to that action can make a legal argument based on fraud, breach of contract, promissory estoppel, and/or discrimination.

Claims of Fraud

An individual who relies on misinformation provided by an employer during the recruiting process can file claims of fraud, fraudulent misrepresentation, or negligent misrepresentation.

This happens most often when the dentist, or the person doing the hiring, embellishes or conceals facts in order to snag the candidate for hire. You can certainly be enthusiastic and positive during the recruiting process regarding the business when trying to convince a candidate to work for you. It is best, however, to answer questions as truthfully and accurately as possible in order to avoid problems in the future.

In order to make this argument, an individual would have to demonstrate the practice made a false representation, knew it was false, and intended for the applicant to rely on that false information as part of the decision-making process for accepting a position with the practice. If the individual is later subject to adverse actions because of this, then she/he could have a very strong case for a fraud claim.

Breach of Contract

Contracts can be created by an employer through both verbal and written communication. Based on the language used, the employee, or job candidate, may believe a contract has been created and his/her "at-will" status has been altered.

During the hiring process, this most often occurs with verbal or written job offers. Examples are offers that include statements such as, "We look forward to having you on board and enjoying a long employment relationship," or "Employment with us will continue until we have just cause to terminate the relationship." These statements can be construed as creating a contract, which can supersede "at-will" prerogatives.

Consequently, it is very important that employers carefully craft their verbal and/or written job offer language in order to avoid inadvertently creating contracts.

Promissory Estoppel

Promises made, promises broken; that is what promissory estoppel is all about.

It happens like this: the employer makes a promise of employment with the expectation the employee will take measures to begin employment at a certain date; the employee gives up something of value or suffers economic loss based on the offer; then the employer rescinds the job offer.

Whether or not an employer will prevail in these types of claims is most significantly determined by how substantially the employee is hurt by the action taken by the employer. Merely quitting a job may not be enough, but often accepting employment elsewhere entails much more than that. Examples include changes in child care or school, purchasing transportation,

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a move to be near or closer to the office, purchasing new clothes, even selling a home, relocating to another state, and purchasing a new home. Now the bar can be sufficiently high enough for the employer to find him/herself in trouble when an offer is withdrawn.

Discrimination

A claim of discrimination can occur if the person originally slated for hire is in a protected class and, after having the job offer rescinded, discovers the employer hired someone else who is outside the protected class. The legitimacy of the reason for the job offer withdrawal will greatly influence the validity of a discrimination claim.

The employer would have to demonstrate the decision to rescind the offer was based on legitimate and non-discriminatory reasons such as newly acquired knowledge indicating the candidate isn't suited for the job. Ultimately, it is the employer's responsibility to justify the actions as legal.

Preventing liability

In an ideal world, the employer will have completed all phases of the recruiting process before making an offer of employment. The recruiting phases are different at each practice, but most often include applicant screening, interviewing, reference checking, background checking, personality assessments, drug testing and, when appropriate, a skills assessment.

Legally, there are only two parts of the recruiting process that must be done post-job offer, if applicable. One is a medical exam. The other is workers' compensation claim inquiries during a background check in those few states that allow it.

Aside from these two, there is no reason why an employer cannot complete a thorough screening of the candidate prior to hiring. This will help prevent learning information after the job offer that causes the employer to change his/her mind about employment.

When making job offers either verbally or in writing, consider the following guidelines to protect your practice:

- Include "at-will" language and disclaimers that the offer is not to be construed as a contract or a guarantee of employment.
- State the offer is "contingent on" or "conditional upon" successfully passing other steps in the process, such as a medical exam. Fully outline conditions so there are no surprises.
- If you do include start date or salary information, preface this information by stating "tentative." Avoid giving the impression the offer is an absolute done deal.

Contact our office for a sample copy of our Offer of Employment Letter (form #107) or our Conditional Offer of Employment Letter (form #107A).



Last resort - withdrawing an offer

If an employer is faced with having to withdraw a job offer, timing and technique will go a long way in preventing legal action.

Notify the applicant immediately once the decision has been made. The further along in the process, the more likely the applicant has made changes in his/her life that will result in anger and resentment when the offer is taken away.

When informing the applicant of the withdrawal, be open and honest. Sugarcoating or lying can compound the issue if later challenged in the courts.

The employer may also want to contemplate reimbursing the applicant for any costs incurred as a result of the job offer and subsequent withdrawal. If the case against the employer is fairly strong, including an amount for wage reimbursement in addition to expense reimbursement may certainly be a lower cost alternative to court proceedings. An attorney can assist an employer in making this determination and drawing up a settlement agreement.

Conclusion

Saying "no" after saying "yes" to an applicant carries potential problems for employers. It is best to not offer employment until the employer has fully researched the applicant's background and character to the best of his/her ability and knows the applicant is qualified. Withdrawing job offers should be done as an absolute last resort and handled with great care. The employer's reputation can be at stake, not to mention an individual's livelihood, neither of which should be taken lightly.



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