


CROWE
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**Tales from a Roadie:
A Review of Best
Practices for Employment
from Advertising all the
Way Through Termination**

Presented by: Madalene A.B. Witterholt

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- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Madalene A.B. Witterholt or another licensed attorney.




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Audience Interaction

Go to www.menti.com and use the code:
6240 4698

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What is Your Favorite Employment Law?

Go to www.menti.com and use the code:
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Onboarding

- **Job searches**
 - Job descriptions – your best friend
 - Questions should have some reasonable relationship to job



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Why Can't You Get Personal?

- Live or on an application
- What will you do with the information?
- How do you prove you ignored it?
- Applicant volunteering information
- Internet address or Facebook questions

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ADA

You may inquire if an Accommodation is needed if there is an obvious disability or need — can inquire about reasonable accommodation when you believe that an applicant will need reasonable accommodation to perform the job functions, based on;

1. obvious disability;
2. voluntarily disclosed hidden disability; or
3. voluntarily disclosed need for accommodation

Job Functions

- Inquiries into ability of applicant to perform any job related functions. Can you perform these functions with or without reasonable accommodation? (Check One).

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Opening Conference



Can ask all applicants to demonstrate how he/she can perform job related functions with or without accommodation. If applicant requires accommodations to enable them to demonstrate, may discuss and provide.

Can ask a particular applicant to describe or demonstrate how s/he would perform the job, if reasonably believe the applicant will not be able to perform the job because of an obvious disability or because applicant voluntarily disclosed a hidden disability. If applicant requires reasonable accommodations to enable them to demonstrate, may discuss and provide.

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Attendance

- Tell them about ability to meet attendance requirements and provide information on regular work hours (e.g., 7:00 - 3:00). May disclose job related leave policies and special attendance needs for the job and ask if applicant can meet these requirements.
- Go farther and you are starting to ask health questions
- How many days absent from work at prior employers because of illness?
- Were you really sick?
 - Do you have some disease that will make our insurance go up?
- Do you smoke?
 - Illegal to discriminate under Oklahoma Law
 - Tell them smoke break policies

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Potential for Disparate Impact.

Education

Only if job related and consistent with business necessity to avoid **disparate impact** claim.

Marital Status

or

your sister really doesn't want to date this guy

Specific inquiries concerning spouse, spouse's employment or salary, children, child care arrangements, or dependents.

After hire may get married/single status for tax and social security purposes and name and ages for benefits purposes.

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What is Something You Want to Ask About but are too Afraid to?

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What's in a Name?

- Don't ask if it's their original name whether it has been changed by court order or marriage.
- Anything that would divulge lineage, ancestry, national origin or descent.
- National Origin
 - Inquiries into an applicant's ability to read, write and speak foreign languages, when such inquiries are based on job requirements
 - No chatting about applicant's lineage, ancestry, national origin, descent, birthplace, or mother tongue. National origin of an applicant's parents or spouse
 - Hence don't ask them what their favorite alien restaurant is



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Who are Your People?

- Relatives
 - Name of applicant's relatives already employed by this company or by any competitor.
 - Names and address of any relative other than those listed as proper in fair pre-employment inquiries.
- Religion or Creed: None.
 - Inquiries concerning applicant's religious denomination, religious affiliations, church, parish, pastor, or religious holidays observed. HAVE I SEEN YOU AT CHURCH?
 - Or Club memberships: LIKE THE KNIGHTS OF COLUMBUS
- Residence
 - Inquiries about address to the extent needed to facilitate contacting the applicant, places and length of current and previous addresses- DON'T A LOT OF ALIENS LIVE IN YOUR NEIGHBORHOOD.
 - Names and relationship of persons with whom you live

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National Origin

- Inquiries into an applicant's ability to read, write and speak foreign languages, when such inquiries are based on job requirements.
- Inquiries into an applicant's lineage, ancestry, national origin, descent, birthplace, or mother tongue. National origin of an applicant's parents or spouse




Citizenship

- Whether applicant is lawfully eligible to work in this country. Whether applicant is a citizen. Better ask everyone including your Mom.
- Requirement before hiring that applicant presents birth certificate, naturalization or baptismal record.
- Any inquiry into citizenship which would tend to divulge applicant's lineage

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Financial



NOPE

- Unless job related and consistent with business necessity.

Ever declared bankruptcy?

- Inquiries about credit history, garnishment-disparate impact

Are you going to steal our money? Or our stuff?

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Type in Your Questions

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Age

- Inquiries and proof if over age 18.
- After hire birth date and proof of age for benefits purposes, etc.
- Any inquiry that implies a preference for persons under 40 years of age or lets someone figure out a person's age example:
 - High school/college graduation date on an application.
 - Hey do you dye your hair?
 - Where were you when Kenndy was assassinated?

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Why is an Employer Selected for an Investigation?

- Complaints
- The Wage and Hour Division targets low-wage industries
- Regional targeting
- Independent contractors/other hot topics
- Prior bad acts

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Workers' Compensation

Have you ever filed for workers' compensation insurance?

No NO NO !!! No matter what anyone tells you or offers to do for you.

Exception- Have the doctor ask in a post offer pre-employment physical is your chance.



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Guess a number between 1 and 300. Add your initials next to the number

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CONVICTIONS

Inquiries concerning specified convictions which reasonably relate to fitness to perform the particular job(s) being applied for.

Type in Your Questions


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TERM SHEETS

OR

HOW TO NOT TURN YOUR OFFER LETTER INTO A CONTRACT



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Candyland Office
1015 Main St.
Englewood, CO 80110

Dear Mr. Jones

Thank you so much for your application. Good news we picked you!! The job of Client Greeter pays \$100,000 per year. Let us know how you would like this paid. There will be no overtime pay as you will be an exempt employee.

All employees get 4 weeks paid vacation once we are satisfied with your job performance. Also, total health insurance for you and anyone you like. If you get a chance, please look over the attached job description

While you can't quit without 6 weeks' notice, we can fire you at any time for any reason with no notice. Should you quit without the required notice, you will have to give us 1/3 of your wages.

I personally look forward to seeing you soon.

Sincerely,
Dottie Jones
Receptionist



I agree to all this

John Jones

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Candyland Office
1015 Main St.
Englewood, CO 80110

October 31, 2022

Dear Mr. Jones

Thank you so much for your application. We would like to offer you the job of Client Greeter. A copy of the job description is attached hereto. Your pay will be \$100,000/year which is computed to be \$8,400 per month. Generally speaking, you should not work overtime. However, should you work overtime, we will consider your hourly rate to be \$41.66 and your overtime rate to be \$62.49/hour.

You will be an employee at will. This means you can quit your job at any time with or without cause and with or without notice. Likewise, Candyland can terminate your employment at any time with or without cause and with or without notice.

Your start date is November 10, 2022. You will have a 90-day probation period. After that you will qualify for all employee benefits including 4 weeks paid vacation, accrued per pay period at the rate of 10.66 hours per month. We currently pay the employee's portion of the premium. Family coverage will be your responsibility.

Please review the attached job description and confirm that you can perform the essential functions of the job by signing and dating as indicated. Should you need an accommodation, please let us know.

Sincerely,
Dottie Jones
Receptionist and General Counsel

I have had all my questions answered,
I agree to the above terms

Date _____

John Jones

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LAST CHANCE DOCTRINE

BACKGROUND CHECKS

POST OFFER PRE-
EMPLOYMENT PHYSICAL

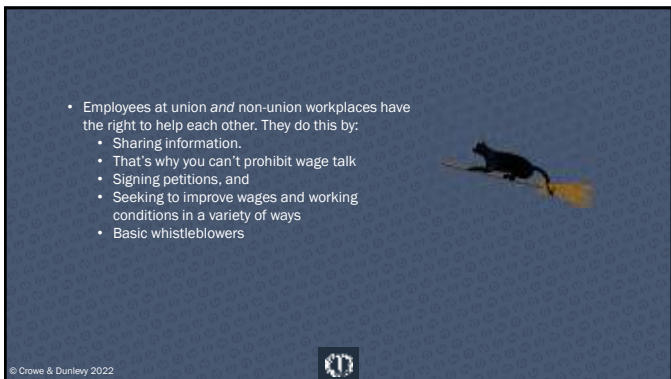


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EFFECTIVE EVALUATION AND DOCUMENTATION OF EMPLOYEE PROBLEMS

Performance Appraisals

Its Useful if its honest. It can help with

- informing the employee about his/her performance,
- deciding pay raises and
- helping to determine promotions.

Different types of appraisal forms.

- They include a ranking that is either numerical or categorical,
- an essay form and/or
- a forced distribution ranking.

Many problem areas exist with performance appraisals. These include use of subjective evaluations and use of non specific criteria. Subjective evaluations are suspect in discrimination cases brought under Title VII, ADEA and state statutes.

General appraisal forms that grade on items which are not specifically related to the job are suspect. Evaluations often suffer from "grade inflation." That disparate impact business again.

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Develop a Legally Defensible Evaluation System

- Develop rating forms which are job specific. Use job analysis to develop the rating criteria. Use the job description to help develop evaluation criteria.
- Front line supervisors and personnel should develop the criteria for evaluation. Measure observable performances rather than character traits. Weigh the factors.
- Give specific written instructions and training to supervisors concerning the evaluation criteria.
- Have a two tiered evaluation system.
- Faux Due Process Allow for employee review, comment and appeal.
- Require a forced ranking system within the department from the supervisor

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Documentation of Disciplinary and Performance Issues

Why It Should Be In Writing
From a business standpoint, the purpose of disciplinary action is to correct problems in order to make better employees and thus a better business. Putting disciplinary actions in writing to the employee helps the employee to understand the importance of the problem and will help minimize the chance that the employee does not understand what is expected.

And of course, litigation.

IS THIS A JOKE?

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Performance Plan



- Tell the employee what is wrong
- Tell the employee how to get it right.
- Tell the employee how long the employee has to get it right.
- Tell the employee what will happen if the employee does not get it right.
- Make sure the employee can write comments on document. (The Due Process Concept)
- Let them have a copy



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Tips on Effective Documentation

- Just The Facts, Not Your Feelings And Opinions.
- Sign, Date The Document
- No Legal Conclusions.
- Create the documentation promptly while recollections of the events is clear. Please throw away drafts. Or send to your lawyer.
- Due Process

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THE WINDOW OF EMPLOYMENT OPPORTUNITY IS NOW OPEN!!!

Prohibit on the spot discharges or Send them home with pay pending investigation.

AVOID THE Adverse Employment Action.
THE WHAT?

- Call your lawyer. Legal advice should help you make termination decisions that are not only good for your company but are defensible at trial.
- RACE, CREED, SEX, AGE, DISABILITY, NATIONAL ORIGIN, LGBTQ, WORK COMP

HR IS THE KEEPER OF THE CORPORATE MEMORY

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THE TERMINATION MEETING

ALL YOU NEED IS ONE SENTENCE.
THIS IS AN ARGUMENT YOU WILL NEVER WIN.

- What do you say why you are terminating them

Nebulous v. The Truth
THE LAW OF THE LOSS OF CONFIDENCE

- Some people think you should give the employee the true reason for the discharge.
- Witness
- Due Process, again. Give the employee the opportunity to tell their side of the story. Short and simple.
- And no, their lawyer can't join you. However, they can have a witness present.

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RELEASE OF CLAIMS OR MONEY TALKS

- Consideration must be something the employee is not otherwise entitled too.
- Not all terminations justify a release of claims, but it may be useful when you have some concerns that litigation may ensue.
- The release must be properly drafted. Legal counsel should be consulted.
- Something of sufficient value must be given the employee in exchange for the release. Releases which are not properly drafted and handled will not be enforceable against the Employee.

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Payment of Wages To Terminated Employees Best Practices

1. Don't have to pay them on the spot but
\$=Happiness
Oklahoma only requires pay by next regularly scheduled payday. Be prepared to explain to the employee that he/she will be paid and when to expect the payment.
2. Vacation pay if such has been earned and is due to the employee at the time of termination, in accordance with the employer's policies.
3. Severance pay, if such is provided for by either the company's policies, or by past practice or contract.

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BENEFIT INFORMATION

- Insurance under COBRA (at the employee's expense), unless the employee was terminated for gross misconduct.
- Sixty days advance notice if termination resulted from plant closings or mass layoffs under the WARN Act. Employees falling under this Act are entitled to fully pay and benefits during these sixty days.
- Any other benefits as required by contract, policies, or collective bargaining agreements.

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Guess a number between 1 and 300. Add your initials
next to the number

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What should the termination letter say?

NOTHING

There is no requirement under Oklahoma law to give an employee a written explanation of why they were terminated.



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Reference Checks and Other Third Party Inquiries

NAME, RANK AND SERIAL NUMBER
Dates of employment.
Position held.

IF YOU FEEL LIKE IT

What if I Get A Request For Salary Info?

OF COURSE NOT

ELIGIBLE FOR REHIRE?

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THANKS FOR STAYING TO THE END!!!!



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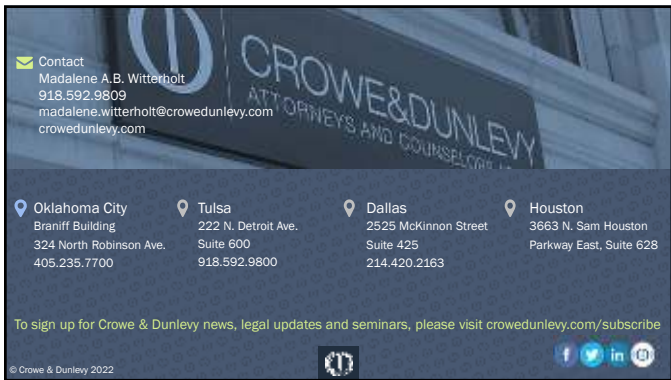
COME VISIT
OUR NEW
OFFICES

AT THE GUTHRIE GREEN
IN THE HEART
of
THE NEW DOWNTOWN TULSA
IN THE SHADOW OF DRILLER STADIUM
222 NORTH DENVER



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