



Hiring & Firing

Best practices to consider for both situations

by: Robert C. Goldberg, BTA General Counsel

Finding and retaining good employees is a challenge every dealer faces. With the enforcement of non-compete agreements being questioned, employees are testing the marketplace for new positions. Hiring someone who is already trained in industry sales or support allows for an immediate contribution to the organization without the time and expense of bringing an unfamiliar individual on board.

Many dealers with open positions in their dealerships are turning to recruitment firms to help fill the gaps. If a dealer is engaging with a recruitment firm, there are important safeguards to include in the written agreement. The recruiter should assist the dealer in preparing a job description and posting it. He (or she) should also help create interview questions, screen qualified individuals and prepare the employment offer. A background check should be conducted for each potential employee.

If an individual will be responsible for any financial aspects of the business, a credit check should be considered as well. The recruitment firm should also agree that it will not solicit any of a dealership's existing employees.

Perhaps the most important provision in a recruitment agreement is the period for which the firm "guarantees" the employee and will replace him at no additional cost. Often the guarantee period is 60 to 90 days. This amount of time is insufficient to truly determine if an employee fits in and is fully capable of performing the functions in the job description. Look for at least 120 days to secure a replacement if the original employee does not work out.

All employees should be retained "at will." This means a termination can take place by the individual or the company, with or without cause. Sometimes it is found that an employee is "not a good fit" for the company. Such vague terminology may be problematic when the employee claims that his termination was actually because of illegal discrimination or harassment. A U.S. Court of Appeals recently upheld an employer's "not-a-good-fit" determination because the employer was able to provide concrete examples of the employee's poor interactions with others.

In *Lashley v. Spartanburg Methodist College*, a professor sued for discrimination and retaliation under the Americans with Disabilities Act (ADA), among other things, when the school



decided not to renew her contract and then terminated her shortly thereafter. The court found that, with regard to the non-renewal of her contract for being a poor fit, the school offered several reports that the professor was often at the center of conflicts with students and faculty, that there were multiple complaints that she had unprofessional relationships with students, and that there were conflicts with multiple faculty members. There were also emails in which the professor expressed her dissatisfaction with the school — sometimes profanely. As to her termination, that was the result of her making threatening statements to students and colleagues following the non-renewal of her contract.

The lesson here is that "not a good fit" can be a legitimate reason for terminating an employee, but it is important that the employer be able to demonstrate exactly why the employee is a poor fit. And, frankly, it is better to identify the specific grounds — truthfully and accurately — for why the employee is not a good fit when informing him of the reasons for termination. When considering employee actions, BTA members should always consider consulting the BTA Legal Hotline for guidance. ■

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