

## **TAKE THIS JOB AND LOVE IT!**

*Reluctant advice on the hiring and retention of effective public sector employees*

By Eric L. Harrison, Esq. and Richard S. Pevner, Esq., RPLU.

The phone was ringing as I cruised into my office at 7:30 on Monday morning, fortified by a weekend of golf and reflection on last week's courtroom battles. Some of those battles were won; some were lost. All were funded by weary and often stubborn clients.

The caller ID alerted with the familiar private number of a beleaguered director of personnel. Ah, the promise of a fresh crisis to begin the week! Nothing like a client in need to justify Friday night's dinner tab or the BMW lease.

I booted up the hard drive and routed my way to a blank "NEW CLAIM" report. Eager to greet an old friend bearing new business, I entered his client ID number even before I picked up the phone.

"So who's suing now, you poor guy?" I answered with a tone of sympathy so forced it would make a politician blush. The school board had a well-known history of contentiousness with its employees.

"No one. I'm just calling to thank you," responded a voice distressingly free of distress. "That employment practices seminar you conducted for the Board last month really opened our eyes to some hard truths about today's public sector workers."

"Well, you're certainly welcome," I replied with growing agitation over the unfamiliar calm in my most litigious client's voice. "So which of those hard truths will take us to arbitration this month?"

"None, I'm happy to say. Not only have we nipped in the bud some potentially costly disputes, but we've also revamped our hiring system to weed out poor candidates. We'll also be improving communication with the union and implementing safeguards to promote consistency in policy enforcement. It looks like we'll be spending a little more on preventive maintenance to avoid spending a lot more in legal fees!"

My heart sank as I came to realize the greatest fear of every trial attorney who ventures into the world of consulting: the client might listen!

From a risk management perspective, even winning every battle can sometimes mean losing the war.

\* \* \* \* \*

Now more than ever, prudent employers are seeking legal counsel on workplace issues previously confined to the boardroom or the offices of upper or middle management. The urgency with which management pursues the appropriate balance between flexibility and consistency has never been greater – not only because of the national rise in costly litigation, but also because of independent budgetary constraints in both the public and private sectors.

While the authors are an employment defense attorney and an employment claims management professional, we are not so short-sighted as to suggest that effective risk management alone will magically lead to the hiring and retention of quality employees. The majority of your least productive employees will never file for arbitration or sue. Nevertheless, our exposure to EPLI (Employment Practices Liability Insurance) claims has demonstrated common patterns of managerial conduct that often culminate not only in otherwise avoidable litigation, but also a consequential decline in morale and productivity. A drop in morale and productivity will ultimately compromise the performance of current employees and discourage quality candidates from applying for new positions.

We have seen this happen time and time again: a disgruntled employee files suit, requiring supervisors and coworkers to answer voluminous written interrogatories and attend lengthy depositions. The litigation casts a net that ensnares coworkers and causes them to resent both the plaintiff and management for involving them. Perhaps accused of contributing to a hostile workplace, those employees themselves will come to view the workplace as hostile. Their performance and attitude will suffer. If they share certain characteristics with the plaintiff -- such as age, race or gender -- perhaps they too will become plaintiffs by filing lawsuits of their own. The litigation-related responsibilities of management will soon encroach on daily administrative functions, fostering a sense of neglect and disillusionment throughout the workforce

We are increasingly called upon to accommodate a shift in the workforce whereby families are often supported by either two working parents or by a single working parent. As our employees' responsibilities increase so to are the potential and actual demands of the Employer. This is magnified by the challenges of complex and fluid employment laws and regulations.

Employees affect productivity, morale, liability, growth, public perception, good will, trust and the strength of every entity. The amount of time, analysis, effort and strategic planning expended relative to assembling and retaining good employees is often inadequate. An employee earning a \$50,000.00 base salary with fringe benefits, requires well over a \$1 million dollar total commitment over the course of a 20 year career. Additionally, consider the organizational and productivity ramifications. Is your organization dedicating an appropriate amount of time, energy, and resources in hiring and retaining employees?

Often there is an immediate sense of anxiety when, without warning an employee states something like: "the past five great years have been great thanks for everything, but.....

I'm taking another job in 10 business days and will be using my vacation time for the next two weeks". A natural reaction, beyond reaching for the closest bottle of alcohol and perhaps trying your first cigarette, is to immediately place a classified advertisement. Whenever feasible resist the temptation for a quick fix, and take time to thoroughly evaluate and assess both your personnel needs as well as any pool of potential candidates.

Identifying personnel needs requires a comprehensive understanding of workflow and productivity. The critical task of staffing should include management's detailed assessment of both the candidate and the employment position. The subject of hiring is usually predicated upon the loss of an employee, increased responsibilities, or an existing staff's inability to meet goals or objectives. Before adding (or subtracting) any employee, managers must ensure that productivity level of each employee is acceptable.

After thoroughly evaluating staffing needs, and determining that it is necessary to hire someone, attention must be turned toward identifying the ideal skills which a candidate should possess. Incorporating feedback from current and previous employees based upon past experience can provide significant assistance. The analysis of employees must also account for teamwork- people possessing different types of personalities often complement each other more effectively than those containing identical characteristics and traits.

### **Hiring Tips**

So – how to sidestep legal landmines while building and retaining an effective workforce? Begin with a well-tuned process for screening prospective employees.

- *Define the job requirements and test appropriately for them.*

Prepare a written, detailed job description. Consult with immediate supervisors to define and refine the description if necessary. We have seen countless business managers and personnel directors surprised to learn that a mid-level supervisor effectively altered the job description with no notice to upper management or the surprised new hire. Once you have arrived at an accurate job description you should consider supplementing a conventional job interview with appropriate testing.

**Prior to administering any test you should consult with a labor attorney to ensure compliance with the EEOC's Uniform Guidelines on Employee Selection Procedures. Alternatively, contact the U.S. Department of Labor for "Compliance Assistance," which may be accessed through its website at [www.dol.gov](http://www.dol.gov).**

If **physical strength** or coordination is essential to the job then do not shy away from a field test. Keep in mind the requirement of the Americans With Disabilities Act that reasonable accommodations be given to a candidate with a disability. The law defines a "reasonable accommodation" as one which allows performance of all essential job

functions without posing an undue hardship on the employer. The bottom line? Define the essential requirements of the job in advance – ideally with a written job description – and do not hire a candidate who cannot perform all of them, either with or without a reasonable accommodation.

If **mental agility or intelligence** is necessary to the job you may administer an appropriate test, carefully tailored to the job requirements. Such tests are available from a host of test vendors, either prefabricated or made to order. Before administering such a test, however, ensure through a detailed job analysis that the job truly requires a certain minimum level of cognitive performance.

**Integrity** is almost always essential to the job. Remember, a public sector employee works for the taxpayers. While physiologically-based exams such as polygraphs are prohibited in most states, you should not hesitate to administer a written integrity test. Such tests are available from a variety of national vendors.

**Personality Profile Testing** has enjoyed increased popularity in recent years. Certain jobs often call for certain personality types. For example, a gregarious person may perform poorly in a solitary, late-night position. A timid person may fare poorly in a position requiring a great deal of interaction with others.

Again, we must reiterate the importance of ensuring compliance with Title VII and the EEOC guidelines. Many test vendors already will have consulted with the EEOC or the Department of Labor to ensure compliance with the nebulous federal standards. As an added prophylactic measure, we encourage you to have your attorney review the proposed tests and communicate not only with the test vendor, but also with the EEOC or DOL to assess their propriety.

- *Check references – thoroughly.*

Try to speak with more than one former supervisor. Do not confine your survey to upper-level personnel managers; speak with supervisors who worked directly with the applicant. Inquire into the circumstances of her departure from the prior position – was it a simple reduction in force as she indicated? Or was the parting of ways in part the product of a personality clash? Would this applicant’s work style and personality gel with those of her immediate supervisor? Take note of a so-called “neutral” reference, simply confirming the dates of her former employment. Such references are typically a component of grievance or litigation settlements.

- *Eschew pure nepotism but encourage referrals from current employees.*

Few things are worse for morale than the impression that a less-qualified new employee obtained his job as a political favor from a well-connected friend or relative. On the other hand, few things are better for morale than the hiring of a deserving candidate referred by a current employee.

Sociological workplace studies have shown that new hires referred by current employees are more motivated, more productive and less likely to leave. The referring employees are more likely to improve productivity. Their loyalty will increase as they begin to “take ownership” of the team-building process. Consider the implementation of an employee referral program incorporating incentives for the referring employees.

### **Special Considerations for Public Entity Employers**

Public sector employers face a host of challenges rarely encountered by private employers. With the exception of contractors -- whose retention is frequently limited or restricted by contract -- at-will full-time employees are more scarce than ever in American towns and cities. The past few decades have seen freedom of contract give way to stringent state regulation and complex collective bargaining agreements negotiated by powerful unions. An employee on the “tenure track” who performs poorly during a probationary period will sometimes be difficult to remove in the absence of the most egregious misconduct. Contractually-appointed arbitrators will often impose concepts of progressive discipline to grant in effect what many of us on the management side have come to view as “de facto tenure.”

In the public employment world, involuntary retention of ineffective employees poses an even greater challenge than the need to retain good employees. The best way to avoid the widespread institutional burden of ineffective tenured employees, of course, is to avoid hiring them in the first place. Be wary of applicants with checkered employment histories and personality profiles suggesting feelings of entitlement. State and national courts have defined tenured public employment as a property right, the removal of which triggers constitutional protections. Look for employees more likely to view it as a privilege.

### **Tips for Attracting and Retaining Good Employees**

**Flexibility.** A heavy-handed approach to minor issues will alienate and demoralize your employees. Pick your battles. For example, if you can accommodate an employee’s personal problem with a schedule adjustment that will not jeopardize the employee’s essential job functions then by all means do so.

**Consistency.** Respond to employee concerns and requests as consistently as possible. Some employees are more vocal than others. Restrain your frustration when answering their concerns, lest your response be compared to your responses to other employees in the context of an adversarial proceeding down the road. If it is your practice to respond in writing to written communications from employees then be certain to adhere to this practice with respect to all employees – even the somewhat “over-communicative” ones.

**Employee Dialogue.** When a problem presents itself you should communicate openly with the employee involved. Ask what he would do if he were in your position. If you decide to do otherwise, explain your reasoning.

**Union Involvement.** In the public sector most employees belong to a union which not only negotiates the general terms of their employment via a collective bargaining agreement, but also provides representation in response to individual requests and grievances. While union participation in talks between management and an employee will sometimes introduce additional friction, it will also open a dialogue and encourage negotiation in the early stages of a potential conflict.

This is important for several reasons. First, resolution of a problem through union-facilitated negotiation will foster a sense of fair play and respect. Many employees are too intimidated to negotiate directly with management. Their direct dealings with administration will typically degenerate into hostility or frustration. The involvement of a union representative well-versed in the terms of the collective bargaining agreement and the avenues available for appealing a management decision will maximize the likelihood of a mutually agreeable resolution. An employee is more likely to accept the opinion of a knowledgeable union representative that management cannot or need not accede to the employee's demands. Alternatively, the employee and management are more likely to find middle ground with the help of a representative sensitive not only to the needs of the employee, but also to the budgetary constraints and need for consistency which must inform every managerial decision.

Secondly, union involvement promises to provide a valuable buffer against any subsequent accusations of inconsistency or unfairness. An employee claiming that the administration acted in an arbitrary or discriminatory manner will have a more difficult time proving her case when the administration can demonstrate that her cause was advocated by a union representative with intimate knowledge of her substantive and procedural rights under the collective bargaining agreement.

### **How would you handle this situation?**

Suppose a special education teacher desires a later starting time to meet family obligations. The teacher is a single father whom must prepare and transport three young children to different schools. He expresses a willingness to work later or take on additional responsibilities upon his delayed arrival. Central administration has given similar accommodations to several other teachers in his building including a gym teacher and a mainstream social studies teacher.

First, is the request reasonable? Certainly one cannot help but sympathize with the teacher's family responsibilities. But the administration is not in the business of tailoring jobs to individual needs; it is in the business of educating its students. The pivotal question should always be whether the accommodation requested would inhibit the performance of an essential job function.

While the superintendent would like to be flexible, she believes in good faith that the needs of the special education population militate against a flexible starting time. Federal law imposes a host of administrative duties on special education teachers, such as the creation and implementation of Individualized Education Plans (IEPs). Additionally,

state law requires that the teacher take part in periodic meetings with respect to all of his students. These meetings are generally conducted twice a week during first period. In sum, central administration believes that the teacher should be in school at the starting bell so as to guarantee timely performance of his unique obligations as a teacher of the handicapped.

Too many of our clients would simply turn down the teacher's request, citing the relevant portion of the collective bargaining agreement which sets starting times. From a purely legal standpoint, of course, such a response would be adequate. But it would also be short-sighted and likely to impact negatively upon staff and students alike, as the teacher's dissatisfaction could affect both his classroom performance and his interaction with immediate supervisors and coworkers.

A prudent administrator would schedule a mutually convenient meeting to discuss the teacher's request. The administration should invite him, in writing, to bring a union representative. Upon the teacher's arrival, the superintendent should express sympathy for the teacher's situation and acknowledge that similar accommodations (flexible starting times) have been made for other teachers in the building. However, this teacher's unique position as a special education carries additional responsibilities which seem to counsel against the relaxation of his mandatory starting time.

Ask the teacher directly: "In view of your first period IEP and periodic meeting responsibilities, and in view of the District's responsibility to comply with state and federal regulations, how would you handle this request if you were in my position?" Advise that you are not inclined to grant the request but that you are open to suggestions. The ball is now squarely in the court of the employee and his representative.

Perhaps the union representative will present a counter-proposal involving one flex day per week, to be taken only when no early morning meetings are scheduled. Assessing the feasibility of such an accommodation might require consultation with the school or district special education supervisor. Don't be afraid to adjourn the meeting before making a final decision. Whatever you do, demonstrate to the teacher that you value his service to the students and that you take his request seriously.

If you ultimately decide that there exists no acceptable middle ground then put your decision in writing with a concise statement of reasons. Encourage the teacher in closing to contact you, on his own or through his union, if he wishes to discuss the matter further.

At the very least, your documentation of the decision following union participation will demonstrate notice and an opportunity to be heard, two essential elements of due process that permeate state and federal law. Involving the union representative connotes respect for both the teacher and his union. Additionally, if the teacher wishes to file a grievance the union representative is directly involved and presumably available to discuss his options. The teacher will not be heard to complain two years later that he had no idea what to do next, since the participation of the union official will demonstrate very real access to any available procedural means of challenging the decision.

## **Conclusion**

The hiring and retention of effective employees requires a sympathetic mix of common sense and fairness, tempered by recognition of the budgetary, political and legal realities that shape the modern workplace. Public entity employers face special challenges that demand special care in the awarding of “tenure track” positions and the negotiation of individual employee concerns. We should closely examine the commitment and resources dedicated to the employee hiring process. Experience has demonstrated that while you cannot please everyone all the time, you will maximize your ability to find and retain effective employees by treating your current employees with respect and sensitivity.

*ERIC HARRISON is counsel at Methfessel & Werbel, P.C. in Edison, New Jersey. A graduate of Princeton University and Georgetown University Law Center, Mr. Harrison represents private and public sector employers in a variety of state and federal settings. He specializes in the defense of employment discrimination, professional liability, products liability and directors and officers errors and omissions litigation.*

*RICHARD PEVNER is an Assistant Claims Manager for Summit Risk Services Inc. A graduate of Temple University and the Temple University School of Law, Mr. Pevner is a former Assistant City Solicitor for the City of Philadelphia, and is a Registered Professional Liability Underwriter. Summit Risk Services Inc., is a Third Party Claims Administrator specializing in Public Entity, Employment Practice, Professional Liability, and General Liability Claims Management.*