

HR COMPLIANCE OVERVIEW



Best Practices for Rescinding a Job Offer

In most cases, the transition from hiring to onboarding an employee is straightforward. However, in some instances, employers may find themselves in a position where they must rescind a job offer. This is a difficult situation for both the employer and the newly hired candidate. In particular, rescinding a job offer can expose an employer to legal claims and reputational damage. Therefore, it is important for employers to understand the potential ramifications of rescinding a job offer and the measures they can take to mitigate their risks.

Important considerations for employers when rescinding a job offer include:

- Establishing a valid, lawful reason for rescission;
- Reviewing all relevant documentation, including offer letters and employee policies;
- Considering alternatives to rescission;
- Effectively communicating the decision to the candidate; and
- Determining appropriate next steps, including selecting an alternative candidate and reviewing hiring practices.

Prior to rescinding a job offer, employers should carefully consider their obligations and any potential legal or business risks. This Compliance Overview provides employers with best practices to minimize the risk of litigation or reputational harm to their organization.

Highlights

To minimize legal risk and reputational harm when rescinding a job offer, employers may take certain measures including but not limited to:

- Establishing a valid, lawful reason for rescission;
- Reviewing all relevant documentation;
- Considering alternatives to rescission;
- Effectively communicating the decision to the candidate; and
- Establishing appropriate next steps.



Best Practices for Rescinding a Job Offer

ESTABLISH A VALID, LAWFUL REASON FOR RESCISSION

In general, if an employment relationship is “at will,” an employer may rescind a job offer for any valid, lawful and nondiscriminatory reason. However, there are certain legal risks associated with rescission, so employers should consider all of their options and weigh the potential legal risks before rescinding a job offer. Some potential legal claims include detrimental reliance (i.e., the candidate incurred harm due to their reliance on the job offer, such as leaving their current employer, relocating or turning down other job offers) or discrimination.

Common Reasons for Rescission

In many cases, an employer may need to rescind a job offer based on the candidate’s own conduct. Some common reasons for rescission include:

- **Failed drug test**—Some employers may have a workplace safety policy that requires certain employees to pass a preemployment drug test and may choose to rescind a job offer to candidates who fail such a test. However, as discussed in more detail below, employers may be subject to state or local laws that limit the actions they may take with respect to certain failed drug tests.
- **Failed background or credit check**—Employers may choose to run a background check, which may seek a candidate’s criminal history, or in some cases (such as for financial professionals or other fiduciaries), a credit check on a candidate after extending an offer. Employers may choose to rescind a job offer after a failed background or credit check. However, employers should ensure they follow any applicable laws that restrict the actions they can take regarding such background or credit checks.
- **Inaccurate resume or application**—Employers may discover that a candidate provided false or misleading information on their resume or application. For example, a candidate may exaggerate or lie about prior work experience or education. In some instances, an employer may determine that the degree of the falsehood requires rescission of the job offer.
- **Concerns based on candidate behavior, negative reference checks or social media**—Despite a successful interview process, employers may discover concerns regarding the candidate’s behavior after extending an offer. This may include poor communication with the hiring team or concerning social media behavior. Employers may also uncover negative information about a candidate during a reference check. While employers may generally choose to rescind a job offer in these circumstances, there may be legal protections for certain employee speech and activity, so employers should carefully review relevant laws prior to rescinding the offer.
- **Failure to obtain required credentials**—Some jobs require the candidate to have certain credentials (such as a degree or professional license) to be eligible for the position. In some cases, employers may extend a job offer to a candidate with the understanding that they will obtain such credentials prior to their start date. For example, an employer may hire a college student for a position that requires a college degree to begin after they graduate. If the student fails to successfully complete their degree requirements, they will no longer qualify for the position, and the employer may need to rescind the job offer.

In some cases, an employer may choose to rescind a job offer based on circumstances outside of the candidate’s control. Such rescissions tend to be riskier from a legal perspective. Therefore, employers may wish to consider alternatives to

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rescission where possible. In all cases, an employer should take available steps to avoid potential legal claims or reputational damage. Some common reasons for rescission that are unrelated to a candidate's actions include:

- **Budgetary concerns**—Occasionally, employers will find that their budget no longer allows them to hire the candidate. This can occur for a number of reasons, including a general economic downturn, changes to the organization's budget or loss of revenue.
- **Business restructuring or change in staffing needs**—Sometimes, the organization's needs change during the hiring process, and the position is no longer needed. For example, the business might be restructured, or certain segments of the organization may be subject to downsizing.

Ensure the Reason Is Valid and Lawful

In all cases, employers may **not** rescind a job offer for any unlawful reason, including the following:

- Due to a candidate's protected characteristic, such as those protected under the following laws:
 - Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, sex (including pregnancy and related medical conditions), national origin and religion;
 - The Americans with Disabilities Act prohibits discrimination on the basis of an employee's disability;
 - The Age Discrimination in Employment Act prohibits discrimination on the basis of age (40 or older);
 - The Genetic Information Nondiscrimination Act prohibits discrimination on the basis of genetic information; and
 - The Uniformed Services Employment and Reemployment Rights prohibits discrimination on the basis of past, current or prospective military service;
- Because a candidate seeks or obtains a disability, pregnancy or religious accommodation; or
- Because the candidate supports or is affiliated with a union or engaged in protected concerted activity under the National Labor Relations Act (for example, an employee discussed union organizing, wages, or other employment terms and conditions).

Consider Other Federal, State and Local Laws

Employers should also review relevant laws in the state and municipality in which the job offer is being rescinded to ensure there are no additional legal barriers to rescission. Some potential legal restrictions include but are not limited to:

- **Fair Credit Reporting Act (FCRA) and similar state and local laws**—Employers conducting background checks, including for criminal or credit history, may use a third-party service provider, known as a consumer reporting agency (CRA). Employers who use CRAs for conducting background checks must comply with the FCRA. The FCRA imposes certain obligations on employers who conduct background checks, including steps that the employer must take before taking an adverse employment action against the candidate, such as providing notice. Some states and municipalities have similar laws. Employers should carefully review their obligations under any applicable law and ensure compliance;
- **"Ban-the-Box" or criminal history laws**—Many states and municipalities have enacted criminal history laws, sometimes referred to as Ban-the-Box laws. These laws vary but, in general, may restrict employers from inquiring about an applicant's criminal background at various stages of the hiring process. Other laws limit how employers may use information obtained. For example, some laws prohibit employers from making employment decisions based on a candidate's arrest record, and other laws may require employers to take certain steps before taking adverse action on the basis of an individual's conviction record. Therefore, prior to conducting

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background checks or taking any adverse action (such as rescinding a job offer), employers should confirm that they are following all of their obligations under applicable law; and

- **Legal off-duty conduct laws**—Some states and municipalities have enacted laws that prohibit employers from discriminating against individuals based on their lawful off-duty conduct. Such conduct may include the use of legalized marijuana or political speech, among other actions.

Be Consistent

Regardless of the reason for rescission, employers should ensure they apply the same standards to all individuals in determining whether to rescind a job offer. Failure to do so could have a disparate impact on employees of different demographic groups and could put the employer at a greater risk of legal action. For example, if an employer more frequently rescinds job offers to candidates of one sex than to candidates of the opposite sex for the same reason, the employer could be subject to claims of discrimination. Therefore, it is imperative that employers establish consistent standards and enforce them fairly with respect to all candidates.

Document the Reason for Rescission

To help protect against future claims of discrimination, it is important for employers to document the lawful, nondiscriminatory reason for the job rescission. Specifically, in the event that a candidate later claims that the job offer was rescinded for an unlawful reason, proper and timely documentation can provide a defense for the employer.

REVIEW RELEVANT DOCUMENTATION

Review the Terms of the Offer Letter or Employment Agreement

Employers should carefully review the terms of any underlying offer letter or employment agreement. Ideally, the offer letter will set forth clear conditions a candidate must satisfy prior to starting employment and state that their employment is at will (i.e., the employee may be terminated at any time for any or no reason without repercussions to the employer). However, in some cases, the offer letter or employment agreement may indicate guaranteed employment for a certain period of time or offer severance benefits in the case of employment termination. In those cases, employers should carefully review the terms of the document to determine whether rescission would trigger any employer obligations.

Review the Employee Handbook and Related Policies

Employers may also wish to review their existing employee handbook and other policies. In some cases, employee handbooks explicitly state that the policies contained therein apply to applicants as well as employees. However, in any case, employers may be able to refer to their existing handbook and other policies to determine whether they provide additional support for the employer's decision to rescind an offer of employment. Alternatively, where a handbook does not prohibit the conduct for which the employer is considering rescinding a candidate's job offer or calls for milder discipline, an employer may choose to reconsider their approach to align with their employee handbook.

CONSIDER ALTERNATIVES TO RESCISSION

Rescinding a job offer is complicated and can expose employers to legal risks and reputational harm. Therefore, before moving forward with a job rescission, employers may consider alternatives to job rescission depending on the underlying reason. Potential alternatives may include:

- **Delayed start date**—If the rescission is based on business restructuring, or if any budgetary issues are expected to be temporary, the employer may offer a delayed start date;

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- **Alternate position**—If the position no longer exists due to business restructuring or any other reason, employers may consider the candidate for an alternate position at the company for which the candidate may be qualified;
- **Additional references**—In some cases, an employer may consider rescinding a job offer after a negative reference check. Reference checks may not always be reliable; therefore, where possible, the employer may seek an additional reference to determine whether the initial negative reference is reliable; or
- **Clarification from the candidate**—Employers may decide to rescind an offer based on a discrepancy in the candidate’s resume, a failed background check or a belief that the information the candidate provided was untruthful. Rather than rescind the job offer immediately, employers may consider reaching out to the candidate to seek clarification on such discrepancy or apparent falsehood, as it may have a reasonable explanation or be the result of an honest mistake.

COMMUNICATE THE DECISION TO THE CANDIDATE

Advise the Candidate as Soon as Possible

Candidates who receive job offers may move quickly to prepare for their new position, including by notifying their current employer of their resignation or taking other steps to prepare, such as relocating. Therefore, it is typically in the employer’s best interest to notify the candidate as soon as possible of the job rescission to mitigate the potential damage and increase the chances that the employee may remain with their current employer rather than face unemployment.

Convey the Decision Professionally

Informing a candidate that their job offer has been rescinded can be difficult for both the candidate and the employer. Employers should consider advising the candidate of their decision either over the phone or in person. In conveying the decision, the employer should remain professional and, particularly where the rescission is not caused by the candidate, empathetic. The employer should clearly state the valid and lawful reason for the rescission and document the conversation with the candidate.

Follow Up With Written Correspondence

To avoid confusion, employers may consider following up on their discussion with the candidate by writing to the candidate to reiterate the job rescission. Some items that may be included in the written communication include the candidate’s name, the position for which they were considered, a statement that the position was revoked and the reason for the revocation. Where the candidate failed to satisfy a specific condition of the position (such as a clean drug test or satisfactory reference checks), the employer may include a copy of the underlying agreement or document (such as an offer letter) and highlight the specific condition that was not met.

DETERMINE NEXT STEPS

Select an Alternate Candidate

In most cases, after rescinding a job offer, the employer will need to select an alternate candidate. Employers may reach out to other strong candidates that they interviewed for the position. Alternatively, if there are no other viable candidates or those candidates are no longer interested, the employer may need to restart the hiring process.

Review and Update Hiring Practices

Ideally, rescinding a job offer will be rare for an employer. However, following a rescission, employers may wish to review and update their existing hiring practices to either prevent future job rescissions or mitigate any potential risks where rescission is unavoidable. Some of the key considerations are outlined below.

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Offer Letter or Employment Agreement Templates

In most cases, an employer will issue an offer letter after extending an offer of employment to a candidate. Less commonly, employers may choose to formalize the employment relationship through a written employment agreement. Employment agreements often, but do not always, provide greater protections for employees in case of employment termination.

In each case, employers should clearly indicate the conditions a candidate must satisfy and the ramifications for failure to do so prior to starting employment. For example, an employer may note that the individual's employment is subject to the satisfactory completion of a drug test, background check or reference check (as applicable) and that failure to satisfactorily complete such checks will result in a rescission of the job offer. Unless otherwise negotiated for in an employment agreement, employers should clearly state the offer is for at-will employment, meaning the employer may terminate the individual's employment at any time, for any or no reason.

By affirming that employment is at-will and the conditions must be met in order to begin employment, the employer puts the candidate on notice that the offer may be rescinded for failure to satisfy those conditions. Doing so provides greater support to the employer in the event the candidate attempts to bring a legal claim.

Ensure Adequate Communication with All Stakeholders

Where the employer needs to rescind an offer due to budgetary constraints or other organizational issues, the employer may wish to review existing procedures to ensure that all relevant stakeholders are in communication during the hiring process. For example, when members of the company's management team foresee an upcoming financial strain, the employer should ensure they have an appropriate and efficient way to communicate with hiring managers and other HR personnel to pause hiring. Employers may also advise hiring managers to confirm the company can still afford and still needs the services of the candidate before extending an offer, especially as the hiring process can be lengthy and company finances and workforce needs change over time.

Employer Takeaways

Rescinding a job offer can be fraught and requires employers to contend with various legal requirements and business considerations. To reduce the risk of litigation and reputational harm, employers should ensure that they have clear policies and procedures and are aware of their legal obligations. Employers may also wish to take proactive measures, such as drafting effective offer letters and ensuring proper communication within the organization, to mitigate risk.