

CHECKLIST | BEST PRACTICES FOR RESCINDING A JOB OFFER

Presented by Tilson HR

The transition from hiring to onboarding an employee is usually 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.

This checklist outlines key steps employers may take when rescinding a job offer. However, it does not consider specific state or local laws. Therefore, this checklist should be used as a guide, and the steps should be modified to meet the unique needs of each organization. Employers are encouraged to work with local counsel to carry out any job rescissions.

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, certain legal risks are 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.

Decide Whether Rescission Is Lawful and Appropriate	Completed
<p>Establish the reason for rescission. As an initial matter, employers should set forth the reason for the rescission. The rationale should be clear, legitimate, and nondiscriminatory. 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:</p> <ul style="list-style-type: none">• Failed drug test;• Failed background or credit check;• Inaccurate resume or application;• Concerns based on candidate behavior, negative reference checks or social media; or• Failure to obtain required credentials. <p>In some cases, an employer may choose to rescind a job offer based on circumstances outside of the candidate’s control. Some common reasons for rescission that are unrelated to a candidate’s actions include:</p> <ul style="list-style-type: none">• Budgetary concerns; or• Business restructuring or change in staffing needs.	<input type="checkbox"/>

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<p>Confirm that the reason for the rescission is lawful. Employers may not rescind a job offer to an employee for any unlawful reason, including:</p> <ul style="list-style-type: none">• Due to a candidate’s protected characteristic, such as those protected under the following laws:<ul style="list-style-type: none">◦ 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).	<input type="checkbox"/>
<p>Confirm that there are no other federal, state or local laws preventing rescission. 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:</p> <ul style="list-style-type: none">• Fair Credit Reporting Act (FCRA) and similar state and local laws—The FCRA may impose obligations on some employers who conduct background checks, including steps the employer must take before taking an adverse action against the candidate, such as providing notice. Some states and municipalities have similar laws;• “Ban-the-Box” or criminal history laws—Many states and municipalities have enacted criminal history laws, sometimes referred to as Ban-the-Box laws, that 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; 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.	<input type="checkbox"/>
<p>Ensure that rescission procedures are applied consistently. 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. For example, prior to implementing a job rescission, employers may consider reviewing past practices to confirm whether they rescinded job offers under similar circumstances.</p>	<input type="checkbox"/>

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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.	<input type="checkbox"/>
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REVIEW RELEVANT DOCUMENTATION

Before implementing a job rescission, employers may consider reviewing relevant documentation to confirm there are no contractual impediments to rescission or, alternatively, whether there are any provisions that support the employer's decision to rescind the job offer. The list below addresses relevant documents that employers may consider reviewing.

Review Relevant Documentation	Completed
Review the terms of the offer letter or employment agreement. As a preliminary step, employers should carefully review the terms of any underlying offer letter or employment agreement. Some of the relevant provisions may include: <ul style="list-style-type: none">• "At-will" provisions, which state that the employee may be terminated at any time for any or no reason without repercussions to the employer;• Provisions that 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); and• Provisions that establish certain conditions a newly hired employee must satisfy prior to commencing employment (e.g., satisfactory completion of a drug test, background check or reference check).	<input type="checkbox"/>
Review the employee handbook and related policies. Employers may also wish to review their existing employee handbook and other policies. Some of the relevant issues to consider include: <ul style="list-style-type: none">• Whether the handbook explicitly states that the policies contained therein apply to applicants as well as employees;• Whether their existing handbook or other policies provide additional support for the employer's decision to rescind an offer of employment (e.g., the candidate failed a drug test and the employer has a drug-free workplace policy); and• Whether the policies do not prohibit the conduct for which the employer is considering rescission or calls for milder discipline (in this case, an employer may choose to reconsider their approach to align with the employee handbook).	<input type="checkbox"/>

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 are addressed in the list below.

Consider an Alternative to Rescission	Completed
<p>Evaluate alternatives to rescission and determine whether the alternative is more appropriate. Depending on the reason for rescission, employers may consider an alternative that is less disruptive to both the employer and the candidate. Potential alternatives that employers may consider include:</p> <ul style="list-style-type: none"> • 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; • 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; and • 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. 	<input type="checkbox"/>

COMMUNICATE THE DECISION TO THE CANDIDATE

Communicating the decision to rescind a job offer is challenging and, if not done properly, can increase the risk of potential litigation or reputational harm to the employer. Employers may consider the following best practices for communicating the decision to the candidate.

Considerations for Communicating the Decision to the Candidate	Completed
<p>Communicate the decision as soon as possible. Candidates who receive job offers may move quickly to prepare for their new position 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</p>	<input type="checkbox"/>

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remain with their current employer rather than face unemployment.	
Convey the decision directly and professionally. 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.	<input type="checkbox"/>
State the valid and lawful reason for the rescission. To avoid potential legal claims, employers should clearly state a legitimate and nondiscriminatory reason for the rescission and identify the specific policy or contractual provision the candidate did not satisfy, where applicable.	<input type="checkbox"/>
Document the conversation with the candidate. The employer may also consider documenting the conversation with the candidate, including the valid and lawful reason for rescission and the candidate's response. Such documentation may help provide support in the event of legal claims.	<input type="checkbox"/>
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: <ul style="list-style-type: none">• The candidate's name;• The position for which they were considered;• A statement that the position was revoked and the reason for the revocation; and• A copy of the underlying agreement or document (such as an offer letter) with the relevant provision(s) highlighted if the candidate failed to satisfy a specific condition of the position (such as a clean drug test or satisfactory reference checks).	<input type="checkbox"/>

DETERMINE NEXT STEPS

After rescinding a job offer, employers should consider the next steps, including whether they must hire an alternate candidate or whether they wish to review and update existing hiring practices.

Evaluate Appropriate Actions Following Rescission	Completed
Select an alternate candidate. In most cases, after rescinding a job offer, the employer will need to select an alternate candidate. In selecting an alternate candidate, employers may either: <ul style="list-style-type: none">• Contact other strong candidates that they interviewed for the position; or• Restart the hiring process if there are no other viable candidates or those candidates are no longer interested.	<input type="checkbox"/>
Review and update offer letter or employment agreement templates. Where an employer issues an offer letter or employment agreement after	<input type="checkbox"/>

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<p>extending an offer of employment, employers may wish to review and update such documents to ensure that future rescissions are as smooth as possible. Some provisions that employers may consider including in an offer letter or employment agreement include:</p> <ul style="list-style-type: none">• A statement that the offer is for at-will employment that may be terminated at any time or for any reason (unless otherwise negotiated for in an employment agreement); and• A statement that clearly indicates the conditions a candidate must satisfy and the ramifications for failure to do so prior to starting employment (e.g., a statement that employment is subject to the satisfactory completion of a drug test, background check or reference check [as applicable] and that failure to complete such checks satisfactorily will result in the potential consequences, up to rescission of the job offer).	
<p>Review and update procedures for communication among 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.</p>	<input type="checkbox"/>

Contact Tilson HR today for more information about rescinding job offers.