

## Rescinding a Job Offer Can Be Done Carefully

Most employers find that from time to time they are faced with the need to withdraw a job offer that has been made to and accepted by a candidate. Rescinding a job offer can be an uncomfortable experience for all involved and can expose the employer to significant legal risk. Therefore, it is wise to take steps to reduce the likelihood of having to do so and to do it right when rescinding an offer is absolutely necessary.

One of the most common reasons for having to withdraw a job offer—and one of the most avoidable—is the discovery of additional information that changes your assessment of the candidate's suitability for the position. This can occur when the results of a reference or credit check is unacceptable or when a candidate refuses consent to a drug test or sign a noncompete agreement, for example. By stating on your employment application and in your offer letter that the job offer is contingent on the successful completion of these tests and inquiries, you put the candidate on notice that the offer will be withdrawn if the results are unacceptable.

Another common reason for withdrawing an offer is a change in business plans that results in the decision not to fill the position. This may be the result of a financial downturn, lower demand for the company's goods and services, or a change in upper management, for example. The company should be able to justify the withdrawal of the offer on the basis of a change in business conditions.

While it is generally legal to withdraw job offers, it is important to pay close attention to the specific reason for the withdrawal and how the process is carried out. A candidate whose job offer has been rescinded may sue the employer on a number of legal theories. The most common are:

1. **Promissory estoppel.** The candidate made important changes in his life in reliance on the offer extended by the employer. He may have quit another job, relocated, or taken other steps to transition to the new job. When the job offer is rescinded the candidate is left in a worse position that he was before he received the job offer because he has no job, home, etc. He may sue the employer to recover his damages incurred in reliance on the rescinded offer.
2. **Fraud.** The candidate must show the company knowingly made a false representation and intended for the candidate to rely on the misrepresentation. The candidate may sue to recoup damages incurred by relying on the misrepresentation. For example, an employee submits his letter of resignation to take another job, but his current employer makes a counteroffer that includes a promotion and large raise. After the employee turns down the job offer in reliance on the current employer's counteroffer, the current employer refuses to implement the promised raise and promotion.
3. **Breach of contract.** The candidate construes the job offer to be an employment contract. Withdrawal of the offer constitutes breach of the contract.
4. **Discrimination.** The candidate perceives the job offer was withdrawn for a discriminatory reason under state or federal fair employment laws.

Consider these suggestions if you find it necessary to withdraw a job offer to a candidate:

- Inform applicants that a job offer may be withdrawn if certain contingencies are not met. Spell out those contingencies in your employment application and offer letter. Making the contingencies clear makes it less awkward to withdraw the offer and provides a defense to the employer in the event the candidate sues over the withdrawal of the offer.
- Do not allow a candidate to begin work (thereby becoming an employee) before completing the activities that have been designated as contingencies. It is much less risky to withdraw an offer of employment when adverse information (i.e. a positive drug test or bad reference) is received than it is to terminate an employee.
- Check your offer letter to make sure it states that employment is at will.
- Ensure you are "in the loop" with company communication so that you are aware when business conditions may warrant changes in hiring plans.

- Act quickly to notify the candidate when you become aware that an offer must be withdrawn so that his losses are minimized. Rescind the offer in a straightforward manner, providing the legitimate reasons for the withdrawal.

Here is some sample verbiage to assist you:

On [Date] you received a job offer for employment with [XYZ Company] as a [Position Title]. As stated in your offer letter, your employment was contingent upon successfully passing a reference check. During our hiring process, we were unable to substantiate information you had provided regarding your previous employment. This letter, therefore, serves as formal written notification that your contingent offer of employment with [XYZ Company] has been withdrawn.

On rare occasions most employers need to withdraw a job offer. Doing so promptly and compassionately will help to reduce your risk of liability.