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52nd Heckerling Institute on Estate Planning

EMPLOYMENT AND IMMIGRATION LAW 101

Linda M. Doyle, McDermott Will & Emery, Chicago, IL
Elizabeth Quinn, Maggio+Kattar
Washington DC

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The Hiring Decision

- Treat the hiring of a domestic employee as if you were hiring for a company
 - Resume/application
 - Basic Job Description
 - Interviews
 - Personal references
 - Professional references
 - Background check

The Hiring Decision (cont.)

- Ensure that applications include the question “Are you legally authorized for employment in the U.S.”?
- Do not use the Form I-9 to make hiring decisions
- Be consistent on all of these issues
- Be vigilant
- Follow-up and trust your instincts

Is the Employee or Prospective Employee Authorized to Work?

- Form I-9 required for any employee hired on or after 11/6/86 (i.e., all **W-2 employees**):
 - any full-time employee including housekeepers, maids, nannies, gardeners, kitchen help, groundskeepers
 - those who provide services on a regular but infrequent basis, e.g., once a week
- **Not required** of those who provide services on a sporadic, irregular or intermittent basis
- Form of payment, such as salary vs. cash, is not a determining factor in I-9 completion

Three Key I-9 Issues

- **Employee Information and Attestation:** Employee provides personal information and attests to the status providing their employment eligibility
- **Employer Document Review and Certification:** The employer reviews original documentation which verifies identity & employment eligibility and properly documents and certifies this review.
- **Reverification and Updates:** Timely updates to extensions of work authorization & personal info.

Ensure you are using the **most current Form I-9:**

<https://www.uscis.gov/i-9>

Careful Completion of Form I-9

- Complete within 3 days of the employee's date of hire
- Only the employee can complete Section 1
- The employee must choose which documents to present
- Review original documents in the employee's physical presence
- Consider carefully whether to keep copies of documents

Reverification and Retention

- Need to reverify certain employees (“box 4”)
 - Keep a tickler system to notify employee 90/60/30 days in advance
- Retention
 - Keep I-9s separate from personnel/performance records
 - Former employee forms must be kept for the longer of 3 years from their latest hire date or 1 year from termination
 - ICE’s *Handbook for Employers* - <https://www.uscis.gov/sites/default/files/files/form/m-274.pdf>
- Conduct periodic audits

When the Employee Is Not Legally Authorized to Work

- Employee must be terminated immediately
- Be careful of situations where employee is hired by a third party and provides services to the household
- Confer with immigration counsel

Consequences of Employing an Unauthorized Worker

- Fines for the employer for not properly completing the Form I-9
 - Fines can be a few hundred dollars to a thousand dollars or more depending on the number of errors
- Fines for the employer for employing an undocumented employee – fines are incurred for actual and constructive knowledge
 - Fines can be thousands of dollars depending on the number of employees
 - Criminal penalties can be imposed, though very unlikely in a household situation

Consequences of Employing an Unauthorized Worker (cont.)

- Removal (deportation) or refusal of reentry to the U.S. in the future for the foreign employee
- Disclosure of employer's identity to Customs and Border Protection, and possible increased risk to employer of employer sanctions

Options for Employees who are not Authorized to Work

- Possible family sponsorship
- Possible employer sponsorship: nonimmigrant or immigrant (“green card”)
 - J-1 status for au pairs
 - B-1 visas for domestic employees of U.S. citizens who regularly reside abroad or foreign nationals in the U.S. in temporary visa status
 - H-1B, O-1, TN, E-3, etc.
- Eligibility for special programs – e.g., DACA, TPS

Employee vs. Contractor

- Most domestic workers are employees, not independent contractors
- Contractor: project-based engagement of an individual with special expertise for limited purposes and over whom you exert no control are contractors (*i.e.*, the house painter)
- Employee if:
 - Open ended; indefinite relationship
 - You exert some control over what the person will do and over how he/she does it
 - He/she does not work for other individuals or entities

Employee vs. Contractor (cont.)

- 99.9% of domestic workers are employees
- If you intend a person to be an independent contractor:
 - Meet the test at the outset
 - Have a written agreement
 - Require invoicing and pay by check
 - Require a warranty
 - Check your homeowner's insurance policy for tort coverage and consider an umbrella policy
 - Monitor to ensure you continue to meet the test

If Your Domestic Worker *is* an Employee

- You must comply with tax law and pay:
 - Social security
 - Medicare
 - Federal and state income tax
 - Unemployment insurance

If Your Domestic Worker is an Employee (cont.)

- You should obtain workers' compensation insurance
 - If not, you can be sued in tort and may face other penalties
 - Check your homeowners insurance and consider an umbrella policy
 - Make sure the policy does not exclude employees and/or contractors
- You must comply with all employment laws:
 - FLSA
 - Anti-discrimination laws (ADA, ADEA, Title VII, etc.)
 - State Laws

FLSA

- You must pay minimum wage for all hours (state and federal) and overtime to all non-exempt employees
 - After 40 hours in a work week; or
 - After 8 per day (CA); after 12 per day (CO)
- Most domestic employees are non-exempt and, thus, entitled to 1.5 times the hourly rate for overtime work
- It is critical that you have an accurate record of time worked and that the employees attest to their hours each pay period

FLSA (cont.)

- Challenges with weekly or annual salaries
 - The higher the salary, the higher the hourly rate
 - Agree in the agreement to the hourly rate and overtime rate
- Hours worked
 - “Suffer or permit”
 - Travel time
 - On call time

FLSA (cont.)

- Options for “Live-In” domestics:
 - Primary residence
 - 5 consecutive days or at least 120 hours a week in residence
 - Agree to the amount of free time in advance and state in writing that it is unpaid
 - If so, you may avoid the overtime requirement
 - But still must pay minimum wage for all hours worked
- [Special considerations for B-1 visa domestics](#)

FLSA (cont.)

What does the FLSA not require?

- Paid time off (sick, vacation...)
- Rest or meal periods (CA)
- Premium pay for holidays
- Fringe benefits
- Immediate payment of wages
- Limits on the amount of hours an employee must work (if over 16 years of age)
- Payment of overtime to non-employees (independent contractors)

Employee Handbooks

- Generally, a good idea to:
 - Communicate with employees
 - Introduce new employees to your organization
 - Inform employees of rules, procedures, policies and benefits
 - Help employees understand their role in the organization
 - Provide guidance for supervisors for dealing with day-to-day issues
- Unintended Consequences of Handbooks:
 - Creating expectations that you cannot later change
 - Creating a contract of employment
 - Creating a promise of benefits

Employee Handbooks (cont.)

- How to create a handbook and minimize risk?
 - An “at-will” disclaimer
 - A statement that it does not create contractual rights
 - A statement that benefit plans govern eligibility for benefits, not the summary in the handbook
 - Have employees sign an acknowledgement that they received the handbook and retain that form in their personnel file
 - Add a statement that it cannot be modified except in writing signed by a particular individual

The Employment Agreement

- Have a written agreement that sets expectations:
 - Job duties
 - Hours
 - Compensation/benefits
 - Payroll frequency; tax treatment
- Employment at-will
- For B-1 domestics: contract required; greater of the minimum *or* prevailing wage for 8 hr. day; 2 weeks notice of intent to terminate

The Employment Agreement (cont.)

- Have a strict confidentiality agreement:
 - Cover the entire family (personal, professional and business of the family members)
 - Make it forever
 - Make it prohibit direct or indirect disclosure
 - Add penalties for breach
- House Rules:
 - No guests
 - No smoking
 - No illegal acts on premises
 - Option to test to enforce

Liability For Domestic Employees

- For their Negligence
- Negligent Entrustment / Respondent Superior
 - Driving your car or his/her car for your business
 - **Note:** the car's insurance is primary
 - For driving other people's children
- Criminal law
 - A background check will mitigate this risk significantly

Liability For Domestic Employees

(cont.)

- Solutions:
 - Check the driving record
 - Confirm that your auto insurance covers the driver
 - Buy an umbrella policy
 - Do a criminal background check

Options Beyond Direct Employment

- Via an agency
- Via a Family Office
- Set up an LLC
 - Shields your personal assets
 - Provides structure for employment relationships
 - Easier to offer insurance
 - Offers scalability

Critical Components

- It must be a separate legal entity
- It must be funded – capitalized to meet its obligations
- It must operate for its purpose and not mix its business with other professional or personal business
- It should be insured

Nonimmigrant or Temporary Visas

- B-1s: for certain household workers
 - Employee must have “home ties”
 - Must apply for an employment authorization document (EAD, or work permit)
- D crewman visa: does *not* allow for work in US
- H-2B workers: for full-time temporary, intermittent, or seasonal employees

Nonimmigrant or Temporary Visas (cont.)

- H-1B: professional positions (jobs requiring a degree)
 - Annual numerical limit (“cap”)
- J exchange visitors
 - au pairs, interns, trainees
- O extraordinary ability in arts, business, athletics
- P-1 internationally recognized athletes

Immigrant Visas or Permanent Resident (“Green Card”) Status

- PERM labor certification: proving a shortage of qualified/willing US workers for the job
 - Lengthy process
 - Requires a “recruitment effort” (advertising the job)
 - Does *not* afford work authorization during process
- Extraordinary ability individuals: for the very highly qualified

Special Considerations with Foreign National Employees

- Allowing sufficient time to secure work visa
- The need to renew visas at a US consulate
 - Possible need for employee to establish strong home country ties
 - Security check delays
- Admissibility issues:
 - Prior immigration violations
 - Criminal issues such as past arrests or convictions

Other Employment Laws

ADA

- General requirements
 - Provide reasonable accommodation to qualified individuals (applicants and employees) with disabilities
- Threshold questions to be resolved
 - Is the individual truly disabled?
 - If so, what is a “reasonable” accommodation?

ADA (cont.)

- Definitions

- Disability: physical or mental impairment that significantly limits one's ability to engage in a major life activity; a record of such an impairment; or being regarded as having such an impairment
- Major Life Activity: walking, talking, sitting, standing, hearing, seeing, working, performing manual tasks...
 - **Note:** excluded are: transitory conditions (flu), current drug use even if as a result of addiction, conditions that pose a direct threat to safety
- Working: in a broad range or category of jobs, not just the job at issue

ADA (cont.)

- What is a reasonable accommodation?

- Individual analysis
- Employer is required to engage in an “interactive” process
- Must accommodate the ability to perform the essential functions of the job
- Must remove or reassign marginal functions
- Must accommodate unless doing so poses an undue hardship

ADA (cont.)

- Areas of Liability
 - Failure to engage in the interactive process
 - Failure to accommodate
 - Perceiving someone as disabled when they are not
 - Over-accommodating and, thus, setting a precedent
- Common Mistakes
 - Not being consistent
 - Assuming disability means you cannot address performance

Other Anti-Discrimination Laws

- ADEA
 - Protects employees over 40 on the basis of age
 - From discrimination in terms and conditions of employment
- Title VII
 - Protects all employees
 - From discrimination in terms and conditions of employment
 - Prohibits retaliating against a person who complained about discrimination
 - Based on race, religion, national origin, ethnicity, and gender
- Equal Pay Act
 - Protects female employees who are not given equal pay for equal work
- Many of these laws are supplemented by state and local laws that offer concurrent and, in some cases, additional protections

State Laws

- Leave
 - Sick leave
 - Family/pregnancy
 - Voting
- Wage Payment and Collection
 - Timing
 - Lawful deductions
 - Vacation pay at termination

State Laws (cont.)

- Background Checks
 - Timing
 - Salary information