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EMPLOYMENT AND IMMIGRATION LAW 101

Linda M. Doyle, McDermont 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

• 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
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