

MODERN RESTAURANT MANAGEMENT



Top 10 Employment and Immigration Law Tips for New Restaurant Hires

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5 Min Read

There are a number of factors employers need to consider in the hiring and onboarding process to stay on the right side of the law and protect themselves in the event of an employee complaint or government investigation.

Top Five Employment Law Tips

Determine FLSA exempt status: Employers should carefully consider whether a position is exempt from the overtime and minimum wage requirements of the Fair Labor Standards Act (FLSA) before hiring for the position. Unfortunately, the misconception that paying a salary makes the position exempt from the overtime requirements persists in today's workplaces. It is important for employers to know that in addition to paying a salary, the position must also meet certain duties requirements. Effective December 1, 2016, the new minimum salary that employers must pay exempt employees is \$913 per week, the equivalent of \$47,476 annually for a full-year worker.

Any position that an employer pays less than this amount is non-exempt and must be paid overtime.

Notify employees of wages: In order to avoid future issues of ambiguity regarding the amount of wages owed to any employee, employers should include in their hiring process a written notice to new employees that makes clear whether the employee is exempt or non-exempt, the way in which the employer will pay the employee, g. salary or hourly rate, the amount of the salary or hourly rate, and whether the employee is eligible for tips and the terms of any tip sharing arrangement. In addition to being a best practice, this type of notice to new employees may be required by state or local law as it is in New York and Washington, D.C.

Establish records for time worked and wages paid: Employers should establish a process by which all employees record the hours that they are working. This could be a time clock or a simple written timesheet. This is required under the Fair Labor Standards Act for non-exempt employees, but it is recommended for all employees. If an exempt employee brings a claim for overtime wages for hours worked over 40 claiming that he or she is non-exempt, the employee can simply verbally testify as to the number of hours that they worked. Without timesheets to dispute this testimony, at best the employer is left with the testimony of another employee as to the amount of time the employee worked—essentially resulting in a “he said, she said” situation with no strong evidence or proof. In addition to generating proof of hours worked, employers should ensure they are generating proof of wages paid to employees for each week’s pay. Too frequently, restaurants pay employees with money out of cash registers, or by company or personal check, without recording the payments as wages. Without proof of wage payment, the employer is left open to a wage payment claim, which frequently requires payment of double or triple the amount of back wages plus attorneys’ fees.

Ensure background checks are legally compliant: Employers asking applicants whether they have been convicted of a crime either on the application or during the hiring process, should review applicable state and local laws to ensure compliance with state and local “Ban the Box” laws prohibiting these questions in the initial stages of the hiring process. In addition, when conducting background checks through an outside vendor, employers must ensure the vendor is complying with the federal Fair Credit Reporting Act by giving the required disclosures and pre-adverse action notices, which notify the individual of potential issues in the background report and allow the employee to dispute or provide an explanation prior to the employer making the final hiring decision.

Notify new employees of key policies: Employers who have adopted an employee handbook containing all of their policies should both provide a copy and review the policies with all new hires. Employers without handbooks should provide employees with notice of important policies such as family medical leave (required for employers with 50 or more employees), paid leave (may be

required under state or local law), and the employer's process regarding how to request leave. In addition, employers should review with all new employees their equal employment opportunity, anti-harassment, and grievance reporting policies so that employees understand what harassment is, that the employer does not permit it in its workplace, and what employees should do if they experience discrimination or harassment at work.

Top Five Immigration Law Tips

Ask applicants (only) the “magic immigration questions:”Employers can, and should, ask the following two questions to applicants prior to making an offer: (1) Are you authorized to work in the U.S.? (2) Do you now, or will you in the future, require sponsorship for U.S. employment authorization? These questions enable employers to weed out unauthorized workers and those requiring sponsorship, without engaging in unlawful citizenship/ national origin discrimination.

Complete an I-9 for every employee: Form I-9 must be completed by all U.S. employers for all employees; the employee must complete her section no later than the first day of work, and the employer must review immigration documents and complete the employer section no later than the third day of work. While employers are not expected to be document experts, they must review the documents provided to ensure they appear reasonably genuine. Employers new to I-9s should read the USCIS Handbook for Employers from cover to cover.

Do not discriminate in hiring based on citizenship or national origin: It is unlawful for U.S. employers to discriminate in the hiring process against any applicant based on citizenship or national origin. Employers should not ask questions during the interviewing process designed to elicit someone's citizenship or national origin. When completing form I-9, employers should not ask for specific documents (this can result in a claim of discrimination) and should not over-document (if an employee provides a U.S. passport, green card, or Employment Authorization Document, employers should not also collect a social security card).

Conduct periodic internal audits: At least every five years, it is a best practice to conduct an internal audit of I-9 files to ensure they are in order. DHS currently prioritizes investigations involving national security, public safety, critical infrastructure and key resources – i.e. not the restaurant industry. However, no industry, regardless of size, type or location is exempt from complying with the law or being the subject of an investigation and many restaurant employers, particularly larger ones, have been investigated by DHS in recent years.

Don't forget to reverify: If an employee's documentation of employment authorization has expired, the employer must update Form I-9 to reverify employment authorization. It's important to have a tickler system in place to remind HR when to reverify. Certain employees (U.S. citizens, permanent residents) should not be reverified even if the documents they provided are expired.

While the above list is not exhaustive, these tips should get employers and employees off on the right foot with clear, well-documented communications and a solid basis for compliance with applicable laws and regulations.



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Becki Young

Becki Young is a seasoned business immigration lawyer who has represented more than 100 top U.S. hotel and restaurant properties, facilitating the sponsorship of foreign professionals, trainees, interns and individuals of "extraordinary ability" in finding employment in the hospitality industry in the U.S. She regularly advises hospitality employers in I-9 audit and compliance matters.

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