

HIRING SEASONAL EMPLOYEES? HERE'S NINE LAND MINES TO AVOID

Publication
Jul 1, 2016

For many employers, the arrival of summer signals a time for hiring seasonal staff. But hiring seasonal staff presents some substantial legal traps for the unwary. Therefore, employers should assess their seasonal hiring procedures to ensure compliance with various state and federal laws. Here are some best practices that employers should follow when hiring seasonal staff.

1. Verify That Seasonal Employees Are Legally Authorized to Work in the United States.

Employers must treat seasonal staff in the same way they treat regular employees by verifying that they are legally eligible to work in the United States. Employers should complete the Employment Eligibility Verification form (I-9 form) even for seasonal employees. Employers should also request original documents, not photocopies (with the exception birth certificates), just as they would from regular employees.

2. Make Clear to Seasonal Employees That Their Work Status is For a Limited Duration and At-Will.

Although seasonal employees are generally aware that they have been hired for a limited time, employers should specify the limited duration of employment at the onset and in writing. Further, employers should require seasonal employees to acknowledge, in writing, that they understand they are being hired for a limited duration; that they are "at-will" employees; and that their employment may be terminated with or without cause at any time (even prior to the end of the summer season).

3. Be Aware of Restrictions Related to Employment of Minors.

Under federal and state law, different rules apply to the employment of minors. For example, minor employees are restricted from working in certain hazardous occupations and are restricted in the hours they can work. In Pennsylvania, the Child

Labor Act prohibits minors from working more than a certain number or hours or in certain establishments and occupations, and also requires employment certificates. For individuals who are under 16 years of age, a written statement by the minor's parent or legal guardian acknowledging an understanding of the duties and hours of employment and granting permission to work is required. Employers should be sure to review applicable laws for compliance when employing minors for seasonal employment.

4. Take Care When Classifying a Seasonal Worker as an "Independent Contractor." Businesses sometimes misclassify seasonal workers as "independent contractors," which may lead to liability in some circumstances. Employers should be sure to avoid designating a seasonal worker as an independent contractor without first determining that the circumstances of the seasonal employment legally justify such a classification.

5. Determine Whether the Employer is Required to Pay Overtime.

Both federal and state laws exempt certain individuals and businesses from overtime requirements. Under Pennsylvania law, for example, the following types of employees are generally exempt from overtime pay: employees of seasonal amusement parks, organized camps, and religious or nonprofit educational conference centers; seasonal employees under age 18; students under age 24 working with either handicapped or exceptional children for nonprofit or welfare agencies or with campers under age 18 for nonprofit day or resident camps operating less than 3 months a year; and certain students employed by nonprofit educational institutions where they are also enrolled. If employers employ seasonal staff who are not exempt from overtime pay, be mindful that the federal Fair Labor Standards Act and related state laws require employers to pay these non-exempt employees one-and-a-half their regular rate of pay for hours worked in excess of forty in a workweek. Recently, a lawsuit was brought by the Department of Labor on behalf of seasonal employees against a Philadelphia-based farm labor contractor for wage violations of the Fair Labor Standards Act, among others. Employers should review their seasonal workflow and the context of their seasonal employees' work statuses to determine whether seasonal employees must be paid overtime, or whether the employees are exempt.

6. Evaluate Whether Hiring Seasonal Employees Trigger Other Legal Obligations.

Most federal and state employment laws apply to only businesses that employ a certain number of employees. For example, those businesses employing at least 50 employees during each of 20 or more calendar workweeks in the current or preceding calendar year must comply with the state Family and Medical Leave Law. Small businesses which may not be covered by certain employment laws should pay attention to whether hiring seasonal employees will increase their total number of employees and therefore trigger additional legal obligations.

7. Avoid Litigation Landmines.

Federal, state, and local laws prohibiting employment discrimination, harassment, and retaliation apply with equal force to seasonal staff. Employers should take the same care in preventing and addressing allegations of discrimination, harassment, and retaliation against seasonal employees as they do for regular employees. Recently, several seasonal employees at a local government agency brought an age discrimination claim when they were passed over for a promotion after applying for a full-time position. Employers should educate seasonal employees regarding company anti-discrimination and harassment policies and ensure that each employee acknowledges—preferably in writing—that they have read and understand these policies. It is also important that employers train supervisors and managers to respond to any complaints of discrimination or harassment alleged by seasonal employees in the same manner that they would for regular employees.

8. Review Benefits Policies.

Employers should review their benefits policies to determine if seasonal staff is included. Failure to provide required benefits can lead to expensive consequences.

9. Keep Confidential Information Secret and Shielded From Seasonal Employees.

The protection of confidential information should not be overlooked when hiring seasonal employees. If the seasonal employee will have access to confidential or proprietary information, an employer may want to consider entering into a non-disclosure/confidentiality agreement.

10. Take Care When Hiring “Unpaid Interns.”

Under the federal Fair Labor Standards Act, there are only narrow circumstances where a business can hire an “unpaid intern” or “volunteer.” While the test for whether an individual is appropriately classified as an unpaid intern is complicated, in general the intern must work primarily for his or her own educational benefit, and not perform routine solely or substantially for the benefit of the business. If the intern or volunteer performs routine work of the business and the business is dependent on that work, the worker is probably an employee and must be paid minimum wage and overtime. Employers should be sure to seek guidance when retaining summer interns or volunteers.

Seasonal staff provide a great benefit to employers by allowing employers to effectively accommodate variations in their workflow needs. To maximize this benefit and avoid some of the legal risks associated with hiring seasonal staff, employers should follow the best practices outlined above and also ensure that they are complying with all relevant employment laws. Employers who are unsure of their legal obligations with respect to seasonal and/or other employees should consult an attorney experienced in the practice of labor and employment.

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