

Employee Checklist

I often get inquiries about how to hire a first employee. While each employer will approach the process a bit differently, there are some essential steps to take and important things to consider. This checklist will highlight the many issues an employer must contend with, but it is not intended to provide a comprehensive list of everything an employer must take into account. Instead, it should be a starting point for further inquiry. I will break it down into a couple of phases.

Recruiting

- Advertisements for employees must remain neutral so as to not discriminate against a protected class. Advertisements must also not result in a disproportionately small number of applicants from any protected class. However, it is appropriate to include certain requirements, such as a degree, if the position requires such educational background. Carefully consider whether other positional requirements are necessary and how to communicate the requirements in a manner that is not discriminatory.
- Consider employment agencies. As a first-time employer, an employment agency can be a valuable resource in sourcing candidates. Employment agencies often have vast networks of ready-to-work candidates, many of whom have undergone background checks and skill assessments.
- Maintain records of content used for recruiting. While complaints of discrimination in the recruiting process are difficult to prove, they do appear now and again and employers who maintain meticulous records of the recruiting process will be best positioned to defend against any such allegations.
- Evaluate candidates to determine if the candidate is in any way restricted by an agreement with another employer. Covenants not to compete are generally unlawful in California, but nondisclosure agreements and other restrictions on trade secrets may limit the utility of what otherwise would be an ideal candidate.
- Like advertisements, candidate applications are also subject to a variety of restrictions. Applications must not be discriminatory, in either intent or effect. While not applicable to all employers, an application cannot include any question seeking to obtain information on a candidate's conviction history. Questions about salary history are also unlawful. The Department of Fair Employment and Housing publishes Employment Inquiry guidelines that are very useful for both the application and interviewing process, but a word of caution, they are not comprehensive.
- Be careful how deep you dig into a candidate's history or electronic presence. For example, it is unlawful to use information found on the registered sex offender website in making an adverse employment decision.

Interviewing

- Like with application questions, there are a number of topics that must be avoided during the interview process. These are questions that provide insight into or inquires about some aspect

of the candidate that may be related to a protected class. For example, questions regarding race or gender identity.

- Consistency is key. While interviews will often reveal topics the employer investigates further during the interview, employers should have a framework from which all interviews begin. Ideally, questions will be related to the open position and designed to determine if the candidate possesses the necessary skillset for the position. To ensure that the most qualified person is selected for the position, and to reduce the chance of a claim of bias, I recommend a scoring matrix that allows the employer to rate the candidate across a variety of areas.
- If trade secrets or confidential information are going to be disclosed during the interview process, consider having the candidate sign a confidentiality agreement.
- Documenting the interview process and the basis for any hiring decision is an important step in ensuring the process is conducted fairly and subsequent challenges to the hiring process can be adequately defended.
- Once a candidate for the position has been identified, employers should prepare an offer letter to the candidate. The offer letter should provide information on the role the employee will fulfill as well as basic compensation information. If there are any pre-employment qualifications that must be satisfied, the offer letter should indicate such qualifications. If candidate consent is required for any pre-employment qualification, for example drug testing, the offer letter should include such authorization forms. Most importantly, the offer letter should include an employment at-will provision.

Onboarding

- Satisfy requirements of Labor Code section 2810.5. The Department of Industrial Relations maintains a form that, once completed, satisfies the requirements of Labor Code section 2810.5.
- Evaluate human resource management systems. Comprehensive management systems can assist with payroll, benefit administration, performance reviews, and time and attendance.
- Employers must ensure that candidates are authorized to work in the United States. This process begins with completion of the I-9. Employers may also want to consider employment authorization through the e-verify system maintained by the Federal government. California limits the circumstances under which e-verify can be used, so unless you are required by law to use e-verify, I would avoid e-verification.
- New employees must complete IRS Form W-4 and state withholding forms.
- Consider if an employment contract is necessary. This will be determined by several factors. Since one purpose of an employment contract is to create predictability in the employment relationship, particularly with respect to termination, employers who wish to retain flexibility and the at-will provisions under state law should avoid entering into such agreements.
- Have employee sign as a condition of employment any necessary documentation to protect trade secrets and confidential information.

- Post and/or provide to new employees all required notices under state and federal law. These include information on workers' compensation, sexual harassment, domestic violence leave, California paid family leave, and COBRA. There are many vendors who can provide posters to satisfy all state and federal posting requirements.
- Report the hire to the California Employment Development Department within 20 days of the employee's start date.
- Arbitration agreements can be a powerful tool for employers to control the method by which employee disputes are resolved. If the employer desires an arbitration agreement with the employee, it is best obtained at the time employment is offered.
- Discuss with a trusted tax professional your federal and state withholding obligations. Companies that specialize in payroll management can also assist in helping you meet these requirements.

Hiring your first employee can be intimidating. Three guiding principles will make the experience less painful. First, the entire process should be equitable, and merit based without influence by any personal bias. Second, consistently document the basis for any decisions made, whether favorable or unfavorable, and retain such documentation in an organized and easily accessible manner. Lastly, while you mustn't be legally trained, employers are obliged to maintain a working knowledge of the laws applicable to human capital management and to adhere to such laws. And while this checklist is geared to an employer's first hire, it also serves as a reminder to all employers, large and small.