

THE STATE BAR OF TEXAS

HIRING A NON CITIZEN HOUSEHOLD STAFF



A. Introduction

Every day, Texans hire hardworking household employees to help them meet the demands of running a household and raising a family. The services performed by these workers often range anywhere from mowing your grass and sorting through your mail to caring for your children. However, when employees such as these are not U.S. citizens, Texans need to ensure that they take the necessary steps and precautions in order to avoid running afoul of the law.

B. Employee vs. Independent Contractor

As a preliminary matter, it is important to understand and distinguish the difference between a worker who is a household employee and a worker who is an independent contractor. The distinction turns on the level of control that is exerted over the worker. If you control not only what work is performed, but also how the work is performed, then you have a household employee. The distinction is not determined by whether the person works full-time or part-time, or whether the worker is paid on an hourly, daily, or weekly basis, or by the job. It also does not matter if the worker was hired through an agency or service.

On the other hand, if only the worker can control how the work is performed, then worker is considered an independent contractor and not an employee. An independent contractor typically provides his or her own tools and generally offers services to the general public as an independent business. Additionally, a worker who performs child care services at their own home is also generally not an employee. Likewise, if an agency provides the worker and controls what work is done and how it is done, then the worker is not considered an employee.

C. Can Your Employee Legally Work in the United States? Verifying Employment Eligibility

If you hire someone who qualifies as a household employee, then you have a burden to ensure that the

employee is authorized to work in the United States. Individuals who may legally work in the United States are (1) United States citizens, (2) noncitizen nationals of the United States, (3) lawful permanent residents, and (4) aliens who are authorized to work. It is illegal to knowingly hire or continue to employ an alien who cannot legally work in the United States, and a violation could result in both civil and criminal penalties. The law requires that an employer verify the identity and employment authorization documents of an employee and also complete and retain a U.S. Citizenship and Immigration Services (USCIS) Form I-9, Employment Eligibility Verification form. The Form I-9 can be found online at: www.uscis.gov/i-9.

Completing the Form I-9

The process of completing the Form I-9 does not begin until after you have offered an individual a job and he or she has accepted your offer. Section 1 of the form must be completed by the employee, however you as the employer must verify that it has been completed. The deadline for completion of this section must be no later than the first business day of employment for pay. Section 2 of the form must be completed by you as the employer. In order to complete this section, the employee must provide you with certain acceptable documents that establish the employee's identity and employment authorization. A list of the acceptable types of identity and employment eligibility documents can be found on the I-9 form and may include such items as a passport, driver's license, birth certificate, social security card, etc. These must be an original document or a certified copy and must be unexpired. You must accept a document presented by an employee if it reasonably appears to be genuine and it relates to the individual presenting it. If the potential worker cannot produce these documents, it is not legal for you to employ that person. The deadline for completing section 2 is no later than 3 business days after the employee begins work for pay.

What do I do with the Form I-9 once it is filled out?

Once the form is completed, you do not actually file it with any governmental entity. The completed I-9 forms must be securely stored in your own records, and must be kept available for review upon notice by an authorized U.S. Government official within 3 days of an official request for inspection. The I-9 forms must be retained for 3 years after the date you hire an employee or 1 year after the date employment terminates, whichever is later. It is also permissible to scan a completed form to a computer and store it electronically.

Exceptions to I-9 Form Requirement

You are not required to complete a Form I-9 for a person who (1) is employed for casual domestic work in a private home on a sporadic, irregular, or intermittent basis, (2) is an independent contractor, (3) is not physically working on United States soil, or (4) was hired on or before November 6, 1986. The casual domestic work exception typically applies in situations such as an occasional baby sitter.

D. Avoiding Discrimination

The law also prohibits employers from discriminating against individuals on the basis of actual or perceived national origin, citizenship, or immigration status. Although it is perfectly permissible to ask a worker if he or she is eligible to work in the United States, you should refrain from asking more intrusive questions, such as where the prospective employee was born or where his or her parents were born. Asking such questions can open the door for claims of discrimination.

E. Tax Obligations

If you hire a household employee, you may also be required to pay Social Security, Medicare, Unemployment, and federal income taxes on their wages. You should consult with your accountant or a tax profes-

sional to determine what taxes are owed for a household employee. Although this process may seem tedious, you may find that you qualify for one or more tax incentives, such as the federal child and dependent care tax credit. Your household employee may also benefit by receiving future eligibility for Medicare and Social Security benefits.

F. Employment Laws

Once you have hired a household employee, you are required to adhere to all applicable state and federal employment laws. Under the Fair Labor Standards Act (FLSA), you are required to pay your household employee an amount that is not less than minimum wage for each hour worked. If your employee works for more than 40 hours in a one week period, you are typically required to pay overtime, which is calculated at one and one-half times the regular hourly rate of pay.

G. Employment Contract

Another important consideration when hiring a household employee is the drafting of an employment contract. An employment contract allows you to set the parameters of the job, and may likewise include details such as the job duties, the rate of pay, and the expected working hours. You can also set your boundaries in writing for appropriate and inappropriate conduct. With a nannie for instance, you may want to specify how to discipline your children, or identify certain rooms of your house that are off limits. An employment contract may cover other issues as well, such as the termination of employment or agreeing that the employment is “at will,” meaning that either person is free to terminate the employment at any time.

H. Hiring Options

If these protocols seem a bit daunting, you may want to consider using a licensed agency to provide your needed household services. These agencies come with an added cost, however they handle paying all of the required state and federal taxes for the worker and also address the background checks and any necessary immigration paperwork.

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