

STROOCK SPECIAL BULLETIN

Employment Basics for Family Offices in New York

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Operators of family offices or other small businesses may not realize that they are obligated to comply with federal, state and local labor and employment laws. While it is true that several employment laws only apply to large employers (*e.g.*, the federal Family and Medical Leave Act, federal Worker Adjustment and Retraining Notification Act, New York State Worker Adjustment and Retraining Notification Act), many employment laws apply regardless of the number of individuals employed, including, but not limited to, anti-discrimination laws, the New York State Paid Family Leave Law, New York Workers' Compensation Law and the New York City Earned Sick Leave Law.

This bulletin is the first in a series intended to assist family offices navigate the potential pitfalls involved with having employees. Future bulletins will discuss topics such as discrimination and harassment, minimum wage and overtime and the distinction between employees and independent contractors.

Form I-9 and Background Checks

Two of the most common hiring contingencies are the presentation of appropriate employment authorization documentation and successful completion of a background check.

All employers are required to verify an individual's authorization to work in the United States. The Immigration Reform and Control Act of 1986 prohibits employers from knowingly hiring individuals without completing the employment eligibility verification process. Employees are required to complete the United States Citizenship and Immigration Services Form I-9.¹ This includes the employer's attestation that the required documentation has been presented by the employee and reviewed by the employer. Acceptable forms of documentation are divided into three lists. "List A" includes documents that establish both the employee's identity and his or her work authorization (*e.g.*, U.S. passport, permanent resident card, employment authorization document that contains a photograph). If an individual does not produce a document from List A, he or she instead is required to produce one document each from "List B" and "List C." List B includes documents that establish the employee's identity (*e.g.*, driver's license or ID card issued by a state, school ID with photograph, voter registration card) while List C

¹ Copies of the Form I-9 are available in English and Spanish at <https://www.uscis.gov/i-9>. Also available are translator certification forms for those employees who do not speak English or Spanish.

includes documents that establish employment authorization (*e.g.*, an unrestricted social security account card, original or certified copy of birth certificate issued by a state, county, municipal authority or territory of the United States, Native American tribal document).

With regard to background checks, the Fair Credit Reporting Act (“FCRA”) regulates the collection, dissemination and use of consumer information, including consumer credit information. Depending on the depth of the screening, a background check can provide quite a bit of information, including criminal and civil court records, education and employment history, credit history and driving records. As discussed below, however, an employer cannot always take an adverse action based on what is revealed in the background check. Prior to obtaining a consumer report² or an investigative consumer report,³ an employer must provide notice, in writing, that the information may be used with regard to the applicant’s employment.

² A consumer report includes any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character general reputation, personal characteristics, or mode of living which is used or expected to be used or collected, in whole or in part, for the purpose of serving as a factor in establishing the consumer’s eligibility for, among other things, employment.

³ An investigative consumer report is a consumer report, or a portion thereof, in which information on a consumer’s character, general reputation, personal characteristics or mode of living is obtained through personal interviews with neighbors, friends or associates of the consumer who may have knowledge concerning any such items of information. Employers who use investigative consumer reports have additional obligations under the FCRA, including providing written notice to the individual that the employer may request or has requested such a report and providing a statement that the individual has a right to request additional disclosures as well as a summary of the scope and substance of the report.

Before an employer intends to take an adverse job action (*e.g.*, reject the application) based on the information contained in the consumer report and/or the investigative consumer report, the employer *must* give the applicant notice. The notice must contain the name and address of the consumer reporting agency that supplied the background check report, the name and address of the person to whom the information was reported and an explanation of what course of action the applicant can take if he or she believes the background check results are incorrect.⁴ Applicants must also be provided with a Summary of Rights as prepared by the Federal Trade Commission.⁵ After an employer takes an adverse job action, the employer *must* inform the applicant (either in person, in writing or electronically) that he or she was rejected *because of* the information in the report. The employer must, again, provide the name, address and phone number of the company that provided the information as well as a statement that the company providing the information did not make the hiring decisions. Finally, the applicant must be informed that he or she has the right to dispute the accuracy or completeness of the report and to get an additional free report from the reporting company.⁶

In addition to the processes dictated by the FCRA, the New York City Fair Chance Act prohibits employers from making any inquiry or statement about an applicant’s pending arrest or criminal conviction until *after* a conditional offer of employment has been extended. New York City law expressly prohibits the employer from searching publicly available sources to obtain information about an applicant’s criminal history, such as by performing internet searches that would likely return such information. The New York City Commission for Human Rights (“NYCCHR”) (the agency responsible for enforcing

⁴ 15 U.S.C. 1681b.

⁵ Available at http://files.consumerfinance.gov/f/201504_cfpb_summary_your-rights-under-fcra.pdf.

⁶ 15 U.S.C. 1681b.

the NYC Fair Chance Act) also takes the position that requesting an applicant to sign an authorization for a background investigation that includes a criminal record check—even if such a check is not conducted unless and until a conditional offer of employment has been made—is prohibited. Further, in addition to the authorization, employers must provide applicants with a copy of New York Corrections Law Article 23-a, which sets forth the factors an employer must consider when reviewing criminal records.⁷ Employers can only deny employment to an applicant based on a conviction if, after performing the analysis set forth in Article 23-a, the employer finds that (i) there is a direct relationship between the criminal offense and the specific employment sought; or (ii) hiring the person would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Similarly, with limited exceptions, employers in New York City are prohibited from requesting or using an applicant's credit history for the purpose of making any employment decisions.⁸ In addition, the Equal Employment Opportunity Commission and the New York State Division of Human Rights scrutinize the use of credit information in employment decisions due to the potential for such neutral selection criteria to disqualify a disproportionate number of individuals based on race, sex or other protected characteristics. Accordingly, employers should be cautious when requesting such information and consult counsel to help ensure legal compliance.

⁷ Available at <https://www.labor.ny.gov/formsdocs/wp/correction-law-article-23a.pdf>.

⁸ N.Y.C. Admin. Code §§ 8-102(29), 8-107(24). Exceptions include “if the employer is (i) required by state or federal law or regulation or by a self-regulatory organization; (ii) law enforcement; (iii) positions subject to a Department of Investigation background investigation; (iv) positions requiring security clearance under federal or state law; (v) positions involving responsibility for funds or assets worth \$10,000 or more; or (vi) positions involving digital security systems.

Offer Letters

You have reviewed applications, interviewed prospective candidates and decided who you would like to hire. It may seem like the simple solution is to call and offer the job, but this could be a mistake. In order to provide maximum protection, family office employers should provide offer letters to prospective employees that includes all of the relevant terms of employment. An offer letter should include the position being offered, a brief description of the job duties, to whom and where the individual will report for work, the rate of pay and what benefits, if any, the employee is eligible to receive. The offer letters should also indicate whether the employee is exempt or non-exempt—that is, eligible for overtime—and the overtime rate, if applicable. Typically, employees are hired on an “at-will” basis (*i.e.*, the employer or the employee can terminate the employment relationship at any time for any non-discriminatory reason or no reason at all) and the offer letter should confirm such at-will status. Finally, the offer letter should include any contingencies to commencing employment (*e.g.*, subject to successful completion of a background check, as discussed above).

Wage Notices

In 2011, the New York Wage Theft Prevention Act (“Wage Theft Act”) became law. The Wage Theft Act amended the notice of wage requirements for all New York State employers, including family offices. Employers are now required to provide, at the time of hire,⁹ both in English and in the employee’s primary language (provided that the New York State Department of Labor has made it available in that language),¹⁰ a written notice containing the following information:

⁹ In addition to providing notice at the time of hire, employers are required to provide new notice at least seven days in advance of a change in any time one of the enumerated items. N.Y. Labor Law, §195(2).

¹⁰ The employer should receive a signed acknowledgement from the employee indicating

- The employee's rate or rates (including, if applicable, the employee's overtime rate) of pay and whether it is paid by the hour, shift, day, week, salary, piece, commission, or on some other basis;
- Allowances, if any, claimed as part of the minimum wage (e.g., tip, meal, lodging);
- The regular pay day designated by the employer;
- The name of the employer, including any "doing business as" names used by the employer;
- The physical address of the employer's principal place of business (and a mailing address if different); and
- The telephone number of the employer.¹¹

In addition to providing wage notice at the time of hire, employers are also required to provide employees with a statement *every* pay period that includes (i) the dates of work covered by the payment; (ii) the employee's name; (iii) the rate(s) of pay and the basis thereof (e.g., hourly, shift, day, week, salary); (iv) gross wages; (v) deductions; (vi) allowances, if any, claimed as part of the minimum wage; and (vii) net wages.¹² Further, unless the employee is exempt from overtime compensation, the statement must also include the employee's regular rate *and* overtime rate as well as the number of hours worked at each rate.¹³

Additional Notices and Postings

In addition to the wage notice and the background check notices discussed above, upon hire employees in New York City must also receive the New York City Pregnancy and Employment Rights

Notice¹⁴ as well as the New York City Earned Sick Time Act Notice of Employee Rights¹⁵ (both of which must be provided in the employee's native language, provided NYCCHR has made it available in that language).

Federal, state and city laws also mandate that employers inform their employees of their rights through the posting of employment posters. Federal law requires employers to post the following:

- OSHA Job Safety and Health: It's the Law
- EEO is the Law
- Fair Labor Standards Act Minimum Wage Poster
- Your Rights Under the Uniformed Services Employment and Reemployment Rights Act
- Employee Rights: Employee Polygraph Protection Act

New York State requires:

- Attention Employees: Minimum Wage Information
- Deductions from Wages
- Unemployment Insurance
- Workers' Compensation Notice of Compliance Law
- Disability Benefits Notice of Compliance
- Time Off To Vote
- No Smoking (in addition, no smoking signs must be posted in every place where the act prohibits or restricts smoking)
- Blood Donation Leave
- Criminal Conviction Records

not only the employee's receipt of the notice but also a statement that the notice was provided in the employee's primary language. N.Y. Labor Law, §195(1)(a).

¹¹ N.Y. Labor Law, §195(1).

¹² N.Y. Labor Law, §195(3).

¹³ N.Y. Labor Law, §195(3).

¹⁴ Available at https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_Card2015.pdf.

¹⁵ Available at <http://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-MandatoryNotice-English.pdf>.

- Rights of Nursing Mothers to Express Breast Milk (alternatively, this can be provided individually to each employee)
- New York State Election Law

New York City requires:

- New York City Pregnancy and Employment Rights

Many of these posters are available through various services that compile all of the required notices onto one poster. Some of the notices (e.g., workers' compensation, disability rights) are available through the employer's insurance carrier.

Handbooks/Confidentiality Agreements

Given the ever-increasing scope of laws and regulations that are applicable to family offices and other small employers, it is important to provide employees with a handbook detailing various policies and procedures. At a minimum, a handbook should include policies regarding equal opportunity, reasonable accommodations, unlawful discrimination and harassment, working hours (including policies regarding lunch and breaks), payment of wages and overtime and time off (e.g., vacation, sick leave, holidays, jury duty, uniformed services leave, voting leave, paid family leave). Employers should work with counsel to determine the content of the various policies.

Finally, given the nature of family offices, employers should require employees to sign a relatively simple confidentiality agreement to protect private family information as well as proprietary business information. Counsel can advise as to the necessary components of such an agreement.

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