



TIPS TO HIRING AND MANAGING EMPLOYEES

The Small Business Majority, Start Small Thing Big, and Donahue Fitzgerald put on a webinar series called Life Pro Tip for Small Business. In this series, Bianca Blomquist of The Small Business Majority discussed CalSavers while Yen Chau of Donahue Fitzgerald discussed tips to hiring the right candidate. Here are some takeaways from Yen Chau's portion of the webinar.

1. Classifying Workers (Independent Contractor v. Employee)

Before looking for the right candidate, it's important to first ask, "Is the worker an independent contractor or an employee?" Due to the California Supreme Court's ruling in *Dynamex Operations West, Inc. v. Superior Court*, (2018) 4 Cal.5th 903, it's become much more difficult to classify an employee as an independent contractor. In order to classify a worker as an independent contractor, all 3 prongs of the "ABC" Test must be fulfilled.

- "A" - Autonomy - this test requires that the worker has control over their work. For example, the worker creates his/her own schedule and gives the hiring entity the end result that was contracted for.
- "B" - Business - this is the most difficult test to satisfy as the Supreme Court stated that if a worker provides a service that is core to the hiring entity's business then the worker is considered an employee and not an independent contractor.

- "C" - Customarily Engaged - this test requires that the worker is customarily engaged in an independently established trade, occupation, or business.

2. Job Description

It's recommended to write a job description to attract and hire the right candidate, but also to comply with California laws. In addition to including knowledge, skills, and abilities in the job description, it's also crucial to identify the essential and marginal functions of the job to comply with the Americans with Disabilities Act (ADA). When it comes to including education, experiences, and licenses, do not overstate the minimal requirements as making the standard too high may lead to excluding certain classes of people, violating the equal employment opportunity commission. The goal of the job description is to provide realistic expectations of the job functions.

3. Job Application Form

It's easy to opt-in for an already made form online, but because California is particular with its job application form, it's recommended not to grab forms off the internet. For example, in California, employers are prohibited from asking salary history and criminal history. In addition, employers cannot ask for the following unless it is for a legitimate business reason:

- Driver's license number
- Social security number
- Birthdate
- Sex/gender identity
- Marital status
- Number of dependents
- Place of birth

The key to the job application form is making sure that unrelated business/job task questions are not asked.

4. Pre-Screening Phone Call and the Interview

The pre-screening phone call is a way to gauge how interested the candidate is in the job and to see the candidate’s responsiveness. After the pre-screening phone call, an interview may be set via text or email to also assess the candidate’s written skills. Before the interview, it’s recommended to review the job description to see if the resume reflects the job qualifications. During the interview, it’s prohibited by California law to ask about criminal history, prior workers compensation injuries, disabilities or need for accommodation, and salary or benefits history. If the candidate discloses any of the above-mentioned topics, employers cannot consider such factors in the hiring process.

5. Criminal/ Credit Check (background check)

Background checks can only be conducted after a conditional offer of employment has been made. Also, employers can neither consider non-felony marijuana convictions that are older than 2 years nor consider juvenile records.

6. Record Keeping

Its best practices to create a checklist of documents such as job description, employee handbook, and acknowledgment, W4 Form, background check, etc. and the date provided/completed along with the date returned for each document. The types of records to keep in the personnel file and outside personnel file are also important to distinguish. See the table below for examples:

In Personnel File	Outside Personnel File
Emergency contacts	Payroll records
Wages/ position	Time records
Performance reviews	Disability/ health information
Signed employment documents such as handbook acknowledgement, NDAs	Workers compensation
	Harassment investigations

These files should be kept as long as the employee is employed with the employer until the employee is terminated and up to 6 years thereafter as 6 years is the IRS’ recommendation for company record retention. For further questions regarding hiring and managing employees please contact any member of our Employment Practice Group.

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