

Fifteen Things To Do When You Decide to Hire Your First Employee

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Your efforts as a “solopreneur” are paying off and you are looking to hire your first employee to help manage the growth of your business. While not an exhaustive treatise on all conceivable laws and regulations that govern the employment relationship, here are fifteen tips to help you navigate through the hiring process.

1. Set Up A Business Entity

Hopefully you have already created a corporation or limited liability company through which you have been conducting your business. In the event you have been operating as a sole proprietorship to this point, now would be a great time to consider setting up a business entity. As your business grows, so does the importance of risk management and asset protection. Conducting business through a properly formed (and maintained) business entity can provide useful liability protection to a business owner in terms of shielding an owner’s personal assets from debts and liabilities of the business.

2. Obtain a Federal Employer Identification Number (EIN)

Before hiring your first employee, make sure your business entity has obtained an employment identification number (EIN) from the **Internal Revenue Service**. The EIN is often referred to as an Employer Identification Number or taxpayer ID number. The EIN is necessary for reporting taxes and other documents to the IRS. In addition, the EIN is necessary when reporting information about your employees to state agencies. Apply for EIN online at www.irs.gov or over the telephone at 1-800-829-4933. The relevant IRS form is Form SS-4.

NOTE #1: If you obtain an EIN online, the IRS still requires you to fill out, sign, and keep a hard copy of the Form SS-4 with your business records.

NOTE #2: If you obtained an EIN when you first started your business, you do not need to apply for a new one when you hire your first employee.

NOTE #3: For purposes of this article, it is assumed that you have already formed and are conducting business through a separate legal entity such as a corporation or limited liability company.

3. Obtain a State Taxpayer Registration Number

In addition to an EIN, you will also need to obtain a Virginia taxpayer registration number by filing Virginia Form R-1 (this form can also be filed online at www.virginia.tax.gov). This is a combined tax registration form that allows your business to simultaneously apply for multiple state taxes. Form R-1 instructions can be found at www.tax.virginia.gov.

4. Develop a Job Description

A clear and concise job description for the open position will facilitate the recruitment and hiring process. Careful drafting will minimize the risk of inadvertently violating applicable employment laws, such as those prohibiting discrimination in employment. Suggested elements for an effective job application include:

- A list of necessary skills, experience, education, and other qualifications for the position, including any physical requirements associated with the job.
- A clear description of the duties and responsibilities of the position, both essential and nonessential job functions.
- Clarification as to whether the position is exempt or non-exempt (Fair Labor Standards Act status). For a detailed discussion of exempt vs. non-exempt classification, visit www.flssa.com/coverage.html. As a general matter, most workers are classified as either exempt or non-exempt depending on their salary and the type of work they do. The FLSA requires that in addition to paying at least the minimum wage, employers also must pay overtime to employees who work more than forty (40) hours in a given workweek, unless they meet certain exceptions. To complicate matters further, many states have wage and hour laws that may have more requirements than the FLSA. Employers must make sure they abide by both federal and state wage and hours laws to avoid legal trouble. To cite a few examples under Virginia law, (i) the minimum wage is \$7.25/hour, (ii) there is no specific requirement concerning overtime (i.e., the only applicable law to be concerned with regarding overtime is the FLSA), and (iii) employers are not required to provide rest or lunch breaks to employees.

When developing job opening advertisements, keep in mind that federal and state employment laws prohibit discrimination on the basis of age, race, color, religion, sex, or national origin. There is not much definitive guidance on the kind of language that can and cannot be used in job postings and advertisements, but as a general matter, try to avoid using language that suggests a preference based on any of the above-referenced characteristics. For example, avoid using the following types of language in a job posting:

- “Age 20-30”
- “Young”
- “Recent college graduate”
- “Retired persons”
- “Boy” or “Girl”
- “Opportunity for career-minded woman”

5. Prepare a Job Application

The first step is a short, well-written employment application that contains the necessary elements to determine if the person will be a good hire. At a minimum, every application should ask the following:

- Are you legally eligible to work for any company in the United States?

NOTE #4: Do not ask if an individual is a U.S. citizen.

- Have you ever been terminated, or asked to resign, from any previous employer?
- List your addresses for the past seven years.
- What are your minimum salary requirements for this position?
- What position are you applying for?
- For all prior employers, list: specific dates of employment for all prior jobs (start date and end date), your reason for leaving (all current and prior jobs), starting and ending salary at all current and prior jobs, and complete employer information (name and phone number of supervisor, name and address of company, job titles, etc).
- All prior education, including graduation

NOTE #5: Only ask for graduation dates if you plan to conduct a background check to validate relevant dates).

Do not ask any questions on the application that may elicit characteristics like age, race, gender, disability or other protected categories.

In addition, above the signature line, there should be a statement on the application noting that any falsification, misrepresentation or omission will result in termination, regardless of when it is discovered. If you are going to use a third party to conduct a background check, you will need a Fair Credit Reporting Act disclosure form or statement.

6. Conducting the Job Interview

The job interview should follow the same basic guidelines as used in preparing a job description and application. Avoid asking potentially discriminatory questions (e.g., questions likely to elicit information about an applicant's disabilities, ethnic origin, marital status, age, or sexual orientation). From a practical perspective, you should consider devising a systematic interview process to maximize your time and increase your chances of hiring the right person for the job. Follow the process and list of questions in a consistent manner for each interview.

NOTE #6: Ask open-ended questions that force the interviewee to provide narrative responses. Listen for red flags or inconsistent statements. Insist on complete responses to your questions.

Following the interview, be sure to follow up with any references provided by the applicant and consider obtaining third-party background checks, but be careful that your use of background checks in the hiring process does not violate prohibitions against discrimination in Title VII of the Civil Rights Act (e.g., using criminal history information for applicants in different ways for different groups of applicants according to race or national origin).

NOTE #7: If you are especially busy, you can outsource many of these important tasks (e.g., job applicant resume review, interviews, and reference checking).

7. Set Up Records for Withholding Taxes

The IRS requires that employment tax records be retained for at least four years. Keeping good records should also help you prepare financial statements, keep track of deductible expenses, prepare your tax returns, and support items reported on tax returns. Here are three types of withholding taxes you need for your business:

- **Federal Income Tax Withholding.** Every employee must provide an employer with a signed withholding exemption certificate (Form W-4) on or before the date of employment. The employer must then submit Form W-4 to the IRS.
- **Federal Wage and Tax Statement.** Every year, employers must report to the federal government wages paid and taxes withheld for each employee. This report is filed using Form W-2, wage and tax statement. Employers must complete a W-2 form for each employee who they pay a salary, wage or other compensation.

Employers must send Copy A of W-2 forms to the Social Security Administration by the last day of February to report wages and taxes of your employees for the previous calendar year. In addition, employers should send copies of W-2 forms to their employees by Jan. 31 of the year following the reporting period. Visit SSA.gov/employer for more information.

- **State Taxes.** Depending on the state where your employees are located, you may be required to withhold state income taxes. Visit the state and local tax page for more information.

8. Employee Eligibility Verification

Federal law requires employers to verify an employee's eligibility to work in the United States. Within three days of a new hire, employers must complete Form I-9 (employment eligibility verification). Employers are required to examine documents to confirm an employee's citizenship or eligibility to work in the U.S. Employers can only request documentation specified on the I-9 form.

Employers do not need to submit the I-9 form to any government agency, but they are required to keep them on file for three years after the date of hire or one year after the date of the employee's termination, whichever is later.

Employers can use information taken from the Form I-9 to electronically verify the employment eligibility of newly hired employees by registering online with E-Verify.

Visit the U.S. Immigration and Customs Enforcement agency's I-9 website to download the form and find more information.

Employers sponsoring or petitioning a foreign national to work in the United States must verify and send in documents proving his or her eligibility. To avoid civil and criminal penalties and payroll audits, employers must also file an I-140 form (Immigrant Petition for Alien Worker) on his or her behalf with the U.S. Citizenship and Immigration Service (USCIS). An Employment Authorization Document, also known as an I-9 check, must accompany such credentials.

There are additional, specialized classification forms to complete, depending on what type of work the employee will be performing. For more on this process and an employer's obligations, contact the USCIS.

9. Register with the Virginia Employment Commission's New Hire Reporting Program

All employers are required to report newly hired and re-hired employees to a state directory within twenty (20) days of their hire or rehire date. Visit www.va-newhire.com for specific details and instructions on filing the required reports online. The purpose of this program relates to the collection of child support payments and processing of withholding orders relating to child support.

10. Obtain Workers' Compensation Insurance

Virginia law requires every business that regularly employs three or more full-time or part-time employees to carry workers' compensation insurance coverage through a commercial carrier, on a self-insured basis, or through the state Workers' Compensation Insurance program. A business with fewer than three employees may voluntarily cover its employees if it chooses.

What is the advantage of carrying workers' compensation insurance if not legally required to do so? The primary advantages are two-fold. For the injured employee, worker's compensation insurance can offer the following benefits for work-related injuries:

- replacement income when employees are off work;
- payments for medical expenses; and
- vocational rehabilitation benefits (e.g., on-the-job training, education, or job placement assistance (depending on the state where the employee is injured)).

An injured employee who is temporarily unable to work will typically receive temporary disability payments of two-thirds of the employee's average wage, up to a fixed amount. An employee who becomes permanently unable to do the work he or she was doing prior to the injury, or unable to work at all, may be eligible for long-term or lump-sum benefits for permanent disability. Workers' compensation insurance also pays death benefits to surviving dependents of workers who are fatally injured in a work-related incident.

For the employer of an injured employee, workers' compensation insurance reduces, and in certain cases eliminates, the risk of an employer being legally liable for damages to the employee and his or her survivors.

For more details, visit the Virginia Workers' Compensation Commission web site at www.vwc.state.va.us.

11. Post Required Notices

Employers are required to display certain posters in the workplace that inform employees of their rights and employer responsibilities under both federal and state labor and employment laws (e.g., Fair Labor Standards Act, Employee Polygraph Protection Act, Service Contract Act, Public Contractors Act, Davis-Beacon Construction Contracts Act, Family Medical Leave Act of 1993, Migrant and Seasonal Agricultural Worker Protection Act, Equal Employment Opportunity, Uniformed Services Employment and Reemployment Rights Act, Virginia

Unemployment Compensation Act, Virginia Occupational and Safety and Health Act, Virginia Department of Social Services Earned Income Tax Credit Notice, and Virginia Workers' Compensation Notice). You can order posters online for a minimal cost (generally under \$50) that will satisfy these disclosure requirements.

12. File Your Taxes

Generally, employers who pay wages subject to income tax withholding, Social Security and Medicare taxes must file IRS Form 941 (Employer's Quarterly Federal Tax Return). For more details, visit www.irs.gov. First-time employers should consult (i) the IRS Employer's Tax Guide online at <http://www.irs.gov/pub/irs-pdf/p15.pdf> to understand all their federal tax filing requirements, and (ii) the Virginia Withholding Tax Guide available online at <http://www.tax.virginia.gov/taxforms/Business/Withholding%20Tax/Employer%20Withholding%20Instructions.pdf>.

13. Recordkeeping

Before your new hire debuts, there are a variety of records you are required to complete and maintain. According to the U.S. Department of Labor, there are no less than twelve (12) different records an employer must maintain concerning each employee for the length of their employment:

1. Employee's full name and social security number
2. Mailing address
3. Birth date (if employee is younger than 19)
4. Sex and occupation
5. Time of day and day of the week when employee's workweek begins, hours worked each day, and total hours worked each work week
6. Basis on which employee's wages are paid (e.g., weekly, bi-monthly)
7. Regular hourly pay rate
8. Total daily or weekly "straight time" earnings for each workweek
9. Total overtime earnings for each workweek
10. All additions to or deductions taken from employee's wages
11. Total wages paid each pay period
12. Date of payment and the pay period covered by the each payment

As noted above, outsourcing your payroll compliance will often be a cost-effective way of fulfilling these recordkeeping and related compliance requirements.

14. Consider a Confidentiality and Noncompete Agreement for Key Employees.

Confidentiality and Noncompete Agreements are becoming increasingly common tools utilized by business owners to protect their business interests. While similar statutory and common law protections exist, these contracts—if carefully drafted—offer both legal and practical protections to employers. While such agreements are not necessary or appropriate for each and every employee you might have, when hiring a new employee it is often beneficial to consider the extent which a particular person could damage your business after his or her departure by sharing your business secrets, transitioning your customers, or encouraging your employees to leave.

15. Develop Written Employee Handbook or Basic Set of Employment Policies

Personnel policies are important both as risk management and compliance tools as well as informational resources to employees. If not carefully drafted and consistently followed, neither goal will be achieved.

While small companies with only a handful of employees may not require as sophisticated an employee handbook as Fortune 500 employers, certain employment practices and policies should be memorialized in writing and communicated to employees.

Effective personnel policies should be practical, clear, and consistently applied. Nondiscrimination, anti-harassment, workplace safety, use of company email and computers, and social media policies are a few important policies that even the smallest employer should adopt.