

ARE YOU READY TO HIRE YOUR FIRST EMPLOYEES?

Nonprofit organizations often operate with an all-volunteer workforce during the start-up phase. As programming expands and funding becomes more stable, a nonprofit may be ready to hire its first employees. This alert highlights some of the fundamental legal obligations of nonprofits hiring employees to work in New York City.

1. ARE YOU ACTUALLY READY TO HIRE?

- Managing a workforce in the nonprofit sector with limited resources can be challenging. Every organization needs a strong team in order to thrive.
- **Before you begin to hire, ask yourself these questions:**
 - *Do you have enough money to pay employee(s) salaries for an extended period of time?*
 - *What's the right mix of full-time, part-time and temporary positions to be sustainable, and how does that align with volunteers?*
 - *What salaries, benefits, potential raises, and bonuses are appropriate?*
 - *Do you have sufficient time and expertise to recruit and screen applicants?*

2. WHAT YOU'LL NEED TO CONSIDER BEFORE YOU HIRE:

Set Employee Compensation

- Nonprofit organizations must pay at least minimum wage for all employees, as well as overtime to any employee who works more than 40 hours in any workweek, unless the employee is legally exempt from overtime.¹
- Compensation for senior employees must be “reasonable.” Excessive compensation may result in the loss of federal tax-exempt status. It may be helpful to learn the “going rate” for hiring new staff by checking with

¹ Information about minimum wage and overtime rates can be found here http://lawyersalliance.org/pdfs/news_legal/Pay_Attention_to_Pay_Practices_Legal_Alert_updated_Sept_2017_FIN_AL.pdf and here <https://www.labor.ny.gov/workerprotection/laborstandards/workprot/minwage.shtm>

state associations or purchasing this information from [GuideStar](#). Smaller organizations should check the executive compensation information found online in the IRS-990's filed by comparable organizations in the same geographic area.

- The IRS will examine whether compensation is reasonable by considering factors such as:
 - Actual job description
 - Required level of education or experience
 - Compensation averages in the area
 - Number of hours worked
 - The overall budget of the organization

Determine Proper Paid Worker Classification

- New organizations may be tempted to cut costs by classifying some or all of their paid workers as independent contractors rather than employees. Unless the individual truly is an independent contractor, this misclassification puts your organization at tremendous risk for penalties for noncompliance with several employment laws, particularly the statutory insurances described below. Your organization would also be liable for failing to withhold payroll tax.

The key to classifying a worker as an employee or an independent contractor is delineating the individual's relationship with the organization. Does the organization have the ability direct and control the worker? Quite simply, the more the organization controls the individual, the more likely the worker will be classified as an employee. In addition, the Department of Labor will also look at whether the individual is actually in business for him/herself, and not someone who may happen to have one or more part-time jobs.

Obtain Statutory Insurances

- [Workers' Compensation](#): The Workers' Compensation Law requires that employers obtain and continuously keep in effect workers' compensation coverage for all their employees. *Note that, while there is some confusing language in the statute that appears to exempt nonprofits, most nonprofits are in fact required to obtain workers compensation insurance even if they have only one part-time employee.* Organizations may meet this requirement by: (i) purchasing and maintaining a workers' compensation insurance policy; (ii) obtaining self-insurance for workers' compensation; or (iii) being exempt. Most employers will purchase the policy.

- Where can you obtain Workers' Compensation Insurance? You can: (i) purchase it from a private insurance carrier authorized by the New York State Insurance Department, (ii) purchase it from the State Insurance Fund by calling 1-888-875-5790 or (iii) set aside reserves for self-insurance in a formal, regulated process (more information at 518-402-0247).
- Section 51 of the Workers' Compensation Law requires that employers post a Form Notice of Compliance (most employers obtain this form from their workers' compensation insurance carrier).
- **Disability Insurance:** New York is one of the few states that mandate employers to provide disability benefits to employees who are unable to work due to illness or because they have sustained off-the-job injuries. Coverage for disability benefits can be obtained through a disability benefits insurance carrier who is authorized by the New York State Workers' Compensation Board to write such policies. Another option is for large employers to become authorized by the New York State Workers' Compensation Board to self-insure.
- **Unemployment Insurance:** New York State requires that nonprofit employers register for unemployment insurance. The organization must register by filing a NYS-100N form with the New York State Department of Labor. After registering, the organization will receive an eight-digit employer registration number. Nonprofit employers are liable: (i) on the first day of the calendar quarter they pay remuneration of \$1,000 or more; or (ii) as of the first day of the calendar year they employ four or more workers on at least one day in each of 20 different weeks during that year or the prior calendar year. If you are liable for Unemployment Insurance, you must electronically submit a Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return (Form NYS-45).

3. **HIRING PROCESS:**

6 Things NOT to Ask on Written/Online Applications or During Interviews:

- *Do not include any disability-related or medical questions.* Employers should not ask questions related to whether an employee is disabled or has a medical condition because this could violate the state and city disability laws. It is lawful to ask whether an applicant can perform the essential functions of the position, with or without accommodation.
- *Don't forget a non-discrimination statement.* It is wise to include a statement that the organization, per the NYS Human Rights Law, does not discriminate on the basis of age, creed, race, color, sex, sexual orientation, gender identity, national origin, marital status, disability, military status,

domestic violence victim status, criminal or arrest record, or predisposing genetic characteristics.

- *Do not ask for high school graduation dates.* Asking applicants for high school graduation dates may be evidence of age discrimination.
- *Do not ask about arrests at all; you may ask about convictions only after a conditional offer of employment has been made.*² Several municipalities across New York State, including the three largest cities in the state: New York City, Buffalo, and Rochester, have enacted “Ban the Box” legislation which prohibits employers from asking about applicants’ criminal histories until after a conditional offer of employment has been made. Exceptions to this law are extremely limited. With very rare exceptions, an applicant cannot be denied employment *because of* a criminal conviction history unless a full analysis of the situation has been made.
- *Do not ask about marital or familial status.* Asking questions about an applicant’s marital status, the number of kids he or she has, the ages of his or her children or dependents or provisions for childcare could be construed as discrimination on the basis of sex. It is lawful to ask whether an applicant can be available to work overtime, if in fact the job requires overtime work.
- *Do not ask about salary history.* In New York City, beginning on October 31, 2017, employers cannot ask applicants about their salary history.³

Offer Letters

- Once an applicant has accepted an offer of employment, best practice is to send a letter confirming agreed upon title, start date, compensation, and information about benefits. If the offer is conditioned on a background check, references, and/or drug testing, the letter must say so. Unless the employment is for a set period of time, the letter should also state that the employment is “at will,” meaning that either party may end the employment relationship at any time, with or without notice, and with or without cause.

² More information is available here http://lawyersalliance.org/pdfs/news_legal/Legal_Alert_NYC_Fair_Chance_Act_Oct_2015_FINAL_10-23-15_v4.pdf and here <http://www1.nyc.gov/site/cchr/media/fair-chance-employers.page>.

³ More information is available here http://lawyersalliance.org/pdfs/news_legal/Salary_History_Legal_Alert_Aug_2017_FINAL.pdf and here <http://www1.nyc.gov/site/cchr/media/salary-history-employers.page>.

4. AFTER HIRING:

- Employers in New York State are legally required to notify new hires about their pay rate, including the overtime rate, payday and other pay practices in writing, signed by the employee. Employers may use the New York State Department of Labor's [form](#), or their own document as long as it contains the same information. The information may also be contained in the offer letter, as long as the new hire also signs it.
- [I-9 Form \(Employment Eligibility Verification\)](#): The employer and employee must complete an I-9 Form no later than three days after the employee's first day of work. The I-9 is used for verifying the identity and employment authorization of individuals hired for employment in the United States. All new hires, regardless of whether they are citizens or noncitizens, must complete the form. The form must be retained in a secure place for the earlier of (i) three years or (ii) one year after the employment ends.

This alert is meant to provide general information only, not legal advice. Please contact Judith Moldover at Lawyers Alliance for New York at (212) 219-1800 ext. 250 or visit our website at www.lawyersalliance.org for further information.

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