
Human Resources Management and the Hiring Process Basics

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Disclaimer: The following is intended for educational purposes only and is not legal advice.

Whether hiring a full-time farm manager or seasonal farm hands, the hiring process should be taken seriously. Employers should take the time to comply with labor laws throughout the process of advertising, hiring and employing workers.

Employment Relationships

Maryland is an “at-will” employment state, meaning that in the absence of an express contract, agreement, or policy, an employee may be hired or fired, with or without cause, and without any previous notice, for any non-retaliatory and non-discriminatory reason. However, an employer can either orally or in a written document negate the “at-will” employment presumption by agreeing to only terminate employees for cause, only in accordance with established policies, or by specifying a guaranteed duration of employment. In some cases, however, employment contracts are legally required. For example, the Migrant and Seasonal Agricultural Workers Protection Act (MSPA) requires farmers to use employment contracts with specific provisions when hiring migrant and seasonal employees, and employment contracts are also necessary when hiring H-2A Visa workers.

Types of Employees

When an employment relationship is established, the employer will have various legal responsibilities, depending on the type of employee (discussed later in *Agricultural Labor Laws*). Types of employees include migrant workers, seasonal workers, H-2A visa workers, interns, apprentices, and office workers. Family members are often recruited to help on the farm as well. Immediate family members are not considered employees under the Fair Labor Standards Act (FLSA) or the various Maryland labor laws and are not entitled to minimum wage or overtime.

Employee versus Independent Contractors

Understanding the difference between an employee and an independent contractor is important for an employer. Employers have significantly fewer obligations when engaging independent contractors. An independent contractor has been judicially defined as “one who contracts to perform a certain work for another according to his own means and methods, free from control of his employer in all details connected with the performance of the work except as to its product or result.”

Failing to properly classify a worker as an independent can have steep financial consequences. Even if there is a signed agreement declaring that a worker is an independent contractor, that is not enough by itself to prove that an employer-employee relationship did not exist. Instead,

the predominant consideration is the level of behavioral and financial control the employer maintains over the worker.

Interns and Apprentices

Interns and apprentices are a popular hiring option for reducing the farm workload while also helping the next generation gain practical farming knowledge and experience. Internships and apprenticeships are not interchangeable terms. Separate guidelines provided by the U.S. Department of Labor (DOL) must be used to determine a worker's legal status as either an intern or an apprentice.

Internships provide work experience that corresponds to the intern's academic program and accommodates the intern's academic commitments. Internships are usually short term and the intern receives academic credit in place of monetary compensation. Under the FLSA, interns are not considered "employees" and can therefore be compensated at less than minimum wage. Intern classification is determined by DOL's "primary beneficiary test," using seven factors weighed all together to examine the "economic reality" of the employment relations.

Apprenticeships combine paid on-the-job training with classroom instruction to prepare workers for highly-skilled careers. Apprentices learn from an experienced mentor for typically one to three years and may receive increases in pay as their skills and knowledge increase. Although under the FLSA apprentices are considered employees, an apprentice may be paid less than minimum wage. Maryland Department of Labor, Licensing and Regulation (DLLR) also oversees work-study apprenticeship programs in Maryland.

Volunteers

Volunteers are not paid for work but nonetheless willingly provide their time and effort. Employers using volunteers for their farm operations must remember that individuals cannot waive their right to a minimum wage, and employees may not serve as unpaid or underpaid volunteers in for-profit private sector businesses. A farmer may allow the collection of leftover crops, known as gleaning, with volunteers for a non-profit organization coming onto the farm to glean. Farmers will generally not be liable for injuries to gleaning volunteers of other organizations as long as they provide a warning of known dangerous conditions on the farm.

Job Descriptions

Accurate job descriptions help the farmer attract qualified candidates and help applicants obtain a realistic preview of the job. Job postings should include the job title, a brief narrative summary of duties and responsibilities, hours, wage, and benefits, and required qualifications. If the position requires the ability to do specific tasks, like heavy lifting, operating heavy machinery, or following written instructions, the job advertisement should clearly state those types of essential job functions. Under the Americans with Disabilities Act (ADA), employers are required to make reasonable accommodations to qualified employees with disabilities, unless doing so would pose an undue hardship to the employer. Including a list of the essential job functions is important; doing so will allow a farmer to terminate a worker for not

being able to fulfill known job requirements. Farmers who anticipate hiring migrant or seasonal workers should keep records of written job descriptions, including “the crops and kinds of activities on which the worker may be employed,” for reporting purposes.

Screening and Interviewing Applicants

Once applications are submitted and it is time to screen and interview applicants, employers must keep the job qualifications clearly in mind when coming up with interview questions to figure out who is capable of performing the work. Both state and federal laws prohibit employment discrimination based on personal attributes that have no bearing on the ability to perform the work, i.e. race, religion, national origin, ancestry, mental or physical disability, marital status, age over 40, medical conditions, sex, gender identity, or sexual orientation. Employers must craft interview questions with care to avoid inadvertently asking questions that will expose details on personal attributes like marital status, health, etc. Establishing a neutral and relevant skills test to every applicant is one way to avoid complaints of unfair treatment.

Employment Eligibility Verification and Form I-9

Employers are required to verify an employee’s identity and eligibility to work in the United States, which is completed by having the employee complete a Form I-9, Employment Eligibility Verification (I-9). Ensuring each new employee fills out an I-9 is the employer’s defense against a potential claim of knowingly employing an unauthorized worker. According to the U.S. Citizens and Immigration Services (USCIS) Employer Handbook (M-274), all employers must complete and have an I-9 on file for each person currently on their payroll. Employers are required to physically examine identifying documents within 3 days of hiring an employee; the Employer Handbook provides guidance on which documents are acceptable. Further, employers must retain I-9s for all terminated employees for three years past the hire date, or the date of termination plus one year. Employers should keep careful records in case of a USCIS audit.

Payroll and Recordkeeping

Federal and state laws regulate how and how often wages should be paid, require record-keeping obligations for employers, and require the employer to withhold taxes from employee earnings. Employers are required to pay employees no less often than every two weeks, or semi-monthly. Employers must provide a paystub to each employee on each payday, regardless of the basis of pay. Paystubs must include: hourly rate, or piece rate and the number of units earned, for each activity; correct number of hours worked; total earnings for the pay period; amount and purpose of any deductions, such as for taxes, rent or meals; net pay; employer’s name, address, and identification number, and; worker’s name, address, and social security number. Payroll records must be kept for at least three years. Records used for computing wages, such as time sheets or field tally totals, must be kept for at least two years. Farmers who hire migrant, seasonal, or H-2A workers will have additional record keeping obligations.

Termination

Various labor laws place restrictions on employee termination, including anti-retaliation provisions prohibiting employers from firing employees in retaliation for engaging in protected activities, like filing a workman’s compensation claims, filing a lawsuit for injuries sustained on the job, becoming a “whistle-blower,” missing work for jury duty, helping form a union, or refusing to do hazardous work. Employers should be careful and document reasons for employee termination to protect against wrongful termination charges. Upon termination, employers must timely provide all earned income and accrued leave to the terminated employee, or potentially be subject to punitive damages up to three times the amount withheld.

Conclusion

Each step of the way, employers must remember to satisfy various recordkeeping obligations. Consulting an attorney and tax professional is the best way to make sure records are kept in compliance with all federal and state laws in case the farm ever faces an audit. The hiring process can be long and costly, and managing employee performance is an ongoing process. However, the time and effort required to find and retain the best employees is an investment in the productivity of the farm.

