LOEB & LOEB LLP

Family Office

NEWSLETTER

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Hiring For Your Household Or Family Office: The Basics

Hiring for a household or family office is often fraught with the same employment law considerations that apply to large companies. Some families and family offices mistakenly assume that these laws do not apply to them because they are relatively small and family-governed, that what happens in a private home is outside the purview of the Department of Labor and that employees or applicants for family office or household positions are unlikely to sue.

The reality is very different.

Not only are family office and individual employers covered by many of the same employment laws as big corporations, but they can also be attractive litigation targets because of their wealth and high profiles in their communities.

The first step toward effectively reducing risk is knowing what types of hiring-related rules might apply to you. Here, we offer answers to some of the most frequently asked questions regarding hiring for the family office and the home (which may include not only domestic staff but other personal employees such as chefs, drivers, pilots, bookkeepers and security staff). Many more rules come into play once an employment relationship is formed and when the relationship ends. When in doubt, consult employment counsel or a competent human resources adviser.

1. Should I Hire Employees Through an Entity?

Hiring employees through a limited liability company (LLC) or other entity can provide many benefits for relatively little expense. Because of its ease of formation and maintenance, the LLC is a common form of entity used by household and family office employers. An LLC combines the advantages of the corporate and partnership

forms of doing business — limited liability and pass-through tax treatment. An LLC can exist with only one member and is formed upon the filing of articles of organization with the secretary of state and the payment of modest fees and taxes.

The most important reason many families choose to employ through entities is to protect personal assets against liabilities that may arise in the event of an employment dispute. If properly formed and maintained, an LLC is viewed as a separate legal entity, distinct from its owners. Because only the LLC's assets are subject to debts incurred by or claims against the LLC, the LLC's owners generally stand to lose only the amounts they have invested in the entity. In other words, in most circumstances the LLC's owner is not financially responsible for claims against the entity.

There are critical exceptions to this rule. Many employment-related claims can be brought against entity owners and supervisors in their individual capacities. For example, in California supervisors are personally liable for violations of anti-harassment statutes, and New York and Colorado impose personal liability for both harassment and discrimination. Several states, including New York, New Jersey, Connecticut and Illinois, allow an employee to bring claims against individuals under the theory that they "aided and abetted" discrimination or harassment. Moreover, intentional torts, such as defamation, assault, false imprisonment and intentional infliction of emotional distress, can all give rise to a judgment against the offending individual.

Wage-related claims may also result in personal liability, even where the employment relationship is through an LLC. Both federal law and the laws of some states, including California and Colorado, hold company officers and supervisors personally responsible for failure to pay wages in certain circumstances, including where these individuals have significant ownership interests, exercise day-to-day control of operations, and are involved in the supervision and payment of employees. Under federal law, employees can also sue individuals for violating equal pay rules. Employing through an LLC offers no protection where the law allows claims to be brought against individuals.

Even in the absence of a claim giving rise to personal liability, it is sometimes possible for litigants to "pierce the corporate veil" — in which case limited liability rules are set aside and liability can be imposed on the owners personally. There are no strict guidelines in determining whether an entity will be disregarded for liability purposes, and each situation is decided based upon its own unique facts. Typical cases where owners of a business are held liable for corporate debts involve commingling of funds, inadequate capitalization and failure to follow corporate formalities. It is unclear how a court would approach this issue in a nonbusiness context, particularly where employees are providing personal services for individual family members. At a minimum, separate books and records for the entity should be maintained; the entity should be funded with enough capital to meet payroll, tax, insurance and other employment-related obligations; and funds in entity accounts should not be used for personal expenses.

In summary, while LLCs or other entities are recommended to mitigate personal risk, they are not foolproof. Personal assets may remain at risk depending on the nature of the claims asserted and adherence to corporate formalities, and family members may still be the target of a claim, even with the best planning.

Other practical considerations also generally weigh in favor of employing through an entity. Consolidating personal employees within a single entity (especially where there are many family employees due to multiple generations or other circumstances) helps to streamline payroll, accounting, insurance, benefits and other employment-related processes. A family

office representative can have signature authority for an LLC and ease the associated burden on family members. In addition, a single entity (rather than multiple individual family members) can more efficiently contract with payroll administrators, professional employer organizations and other vendors to conduct pre-hire background checks and provide other human resources services. Although individuals can certainly perform these functions on their own, hiring qualified professionals to do so reduces the risk of error — and liability.

2. What Rules Apply to the Interview Process?

Once you decide who the employer will be, the next question is how to interview applicants without running afoul of employment rules and inadvertently exposing the family or family office to liability. There are many common but easily avoidable pitfalls.

First, it is important to have a basic understanding of the laws at play. Federal laws prohibit discrimination against job applicants and employees on the basis of race, color, religion, sex (including pregnancy, gender identity and sexual orientation), national origin, age (40 or older), disability or genetic information. Most employers with at least 15 employees are covered by these laws, while the federal law prohibiting age discrimination applies only to employers with 20 or more employees.

Many states and even some cities have enacted their own laws prohibiting discrimination in hiring. Compared with federal laws, these laws tend to be more protective of employees and to apply to more employers. For example, California's Fair Employment and Housing Act covers employers with five or more employees and, in addition to the categories above, prohibits discrimination in hiring on the basis of ancestry, medical condition, marital status, military and veteran status, gender expression and childbirth. California also prohibits harassment on these grounds, and its anti-harassment protections apply to all employers regardless of size. In Illinois, laws prohibiting discrimination on the basis of pregnancy and disability and laws prohibiting sexual harassment apply to all employers regardless of size, but only employers with 15 or more employees are subject to claims based on other protected classes such as race, religion and age. (This is a hotly contested issue in Illinois, where a state bill to reduce the minimum number of employees was vetoed by the then-governor in 2018.) In New York, anti-discrimination laws apply to employers with four or more employees, and laws prohibiting sexual harassment apply to all employers. New York has also enacted laws applicable to all employers that prohibit harassment against domestic employees on the basis of gender, race, religion, sexual orientation, gender identity/expression and national origin. In short, being a small employer may not shield a family or family office from a claim for discriminatory "failure to hire."

In addition to anti-discrimination laws, many states and cities have laws that prohibit certain questions in the recruitment process. For example, in California and New York, it is unlawful to ask a candidate how much he or she earned in a prior job. Illinois is likely to enact a similar prohibition soon. Because of the array of laws that may apply, consulting with employment counsel or a human resources expert is a critical step.

After reviewing the requirements in your jurisdiction, spend some time before interviewing a candidate to sketch out the requirements of the job. What type of physical activity will be involved? Does the candidate need to be fluent in any particular language? What are the anticipated work hours? Having a firm grasp of the requirements for the role will result in a more productive, focused interview — that is, an interview that is less likely to veer into a discussion of inappropriate or irrelevant topics. Taking the time to formulate the right questions to determine whether the candidate has the appropriate qualifications, work ethic and personality for the job may make

you more cognizant of — and help you avoid — the "wrong" questions, which can give rise to a claim for discriminatory failure to hire.

Examples of inquiries that are generally acceptable, and those that should be avoided, include:

- **Identity**. It is fine to ask for the applicant's name and past names to verify past work record. But questions regarding the origins of an individual's name should be avoided, as they may bear upon ancestry or national origin.
- **Citizenship**. It is acceptable to ask whether an applicant has the legal right to work in the United States, but not about birthplace, citizenship or having a driver's license (unless driving is part of the job).
- **Age**. Confirm that applicants are age 18 or older. Other questions about age, or that would reveal age, should be avoided.
- **Disabilities**. Disclose what the job will entail and ask applicants whether they can carry out those functions. If an applicant expresses reservations due to a physical or mental impairment or medical condition, ask whether there are any accommodations that would help. Do not ask about overall health, medical history or disabilities. Likewise, employers cannot require physical exams or tests that are unrelated to job duties.
- **Religion/Family Care/Marital Status**. It is acceptable to ask whether an applicant will be able to work the required schedule, but not the reasons why the applicant might not be able to meet the work schedule. This may reveal information about religion, child care or family needs.
- **Salary History**. As noted above, in California and New York it is illegal to ask for salary history information, and Illinois may soon enact similar legislation. Employers can, however, ask applicants to disclose their desired salary and reveal the compensation being offered for the role. If an applicant voluntarily discloses salary history, you may consider it in making hiring and compensation decisions.
- **Criminal History**. In California and in New York City, an applicant cannot be asked about his or her criminal history until after a conditional job offer is made. Other jurisdictions may have similar rules. Employers should exercise caution in what they ask about criminal history and when they ask it.
- **Prior Workers' Compensation Claims**. In California and many other states, it is illegal to ask about prior workers' compensation claims before extending an offer of employment. While New York and Illinois do not expressly limit questions about prior workers' compensation claims, the Equal Employment Opportunity Commission prohibits these questions prior to making a conditional offer. These questions may also violate local prohibitions against disability discrimination.
- **Unemployment Status**. In New York City, employers may not ask about employment status, as it is a protected category. Federal equal employment opportunity laws also discourage rejecting candidates on the basis of their unemployed status.

3. I Found Someone I Like. Now What?

Once you have identified the right candidate (or have narrowed the field to a select few), it is time to consider (i) background and reference checks, (ii) credit checks, (iii) a review of criminal history and (iv) the preparation of an offer letter and confidentiality agreement.

Background and Reference Checks. Background and reference checks are extensively regulated by state and federal laws requiring the written consent of applicants and written notices summarizing their rights. If you decline to proceed with an applicant based upon the outcome of a check, the applicant is entitled to written notice, a copy of the background

report and, in some instances, an opportunity to submit corrective information. Using a reputable vendor is preferable to undertaking your own background checks. Typically, vendors will furnish the detailed consent forms and other notices that are required by law. Vendors are also familiar with laws limiting the types of information that can be disclosed and considered in connection with a preemployment background screening.

Credit Checks. Credit checks are also closely regulated. In California, an employer can obtain credit checks only for specific types of employees, including managerial employees; employees who will have regular access to bank or credit card information, Social Security numbers and dates of birth; employees who will be named signatories on bank or credit card accounts of the employer, or authorized to transfer money or enter into financial transactions on the employer's behalf; employees who will have access to confidential or proprietary information; and employees who will have regular access during the workday to the employer's cash totaling at least $10,000. Household bookkeepers and many family office employees will fall into one or more of these categories. In Illinois, applicants are protected by the Employee Credit Privacy Act, which prohibits employers with one or more employees from refusing to hire an applicant based on credit history. Check with a qualified human resources agent or employment counsel before obtaining a credit check on an applicant or making a decision based on the outcome of a credit check.

Criminal History. In the past, criminal history was routinely included in any preemployment background screening. Now many jurisdictions, including California and New York City, require the employer to make a conditional offer of employment before obtaining a criminal background report. Employers in these jurisdictions must refrain from asking about criminal history — as part of either the written application or the interview — and defer those inquiries until after a conditional offer has been communicated. Because criminal background reports must be limited in time and scope, using a vendor is preferable. In California, a candidate who is ultimately denied employment due to criminal history is entitled to written notice of that determination and the chance to offer a mitigating explanation. In New York, private employers are prohibited from inquiring about any arrest or criminal accusation unless specifically required or permitted by statute. In Illinois, employers may not inquire about an applicant's criminal background until the applicant has been selected for an interview, and the employer may not consider the criminal background until a conditional offer has been made. As in states with protections for criminal background histories, employers in Illinois should not have criminal history inquiries on job applications.

The Offer Letter and Confidentiality Agreement. Offers to hire candidates should be made in writing. Again, sometimes an offer is required to be made before you can take certain actions with respect to a candidate, such as checking criminal history. In other instances, the employer may want to deliver the offer letter faster than the vendor is able to produce a background check. In any situation where your due diligence is not yet complete, a written offer should include words to this effect: *"This offer of employment is conditional pending satisfactory completion of background, reference and credit checks."* Including this type of caveat will help if you later decide to rescind the offer based on the outcome of these checks.

Offer letters typically also identify the role, the anticipated start date, the rate of pay and any benefits for which the candidate will be eligible. These letters should include a statement reflecting that by countersigning the letter and accepting the offer, the candidate agrees to be bound by all the employer's personnel policies. Unless the employer intends to guarantee employment for a fixed duration, an offer letter should include a statement that any employment

will be on an “at will” basis and that at-will status can be changed only in a writing signed by both the employer and the employee. Many employers also choose to include arbitration clauses in their offer letters, which require both parties to submit disputes to private, binding arbitration rather than file them in court. Employers who use written applications may also include such provisions in the written application form.

Lastly, consider having each employee sign a confidentiality agreement. Household and family office employees may have access to sensitive personal information, such as information regarding health, finances, travel plans, opinions and so on. Certain employees may also have access to proprietary information belonging to family businesses or other businesses. A confidentiality agreement is a strong deterrent against public disclosure of private information. Be aware, however, that confidentiality and nondisparagement provisions are often subject to special rules that vary by state. For that reason, it is important to obtain a valid form from a human resources professional, professional employer organization or counsel who is knowledgeable about the laws of your particular state.

4. Post-Hire Considerations

After the candidate accepts the offer and starts employment, make sure that all mandatory forms, such as immigration and tax forms, are filled out and stored. Many states also have specific requirements with respect to policies that must be posted or distributed to employees at the start of employment. Again, it is prudent to consult with employment counsel, a professional employer organization or other human resources professional regarding these requirements.

In a future issue of the Family Office newsletter, we will address how to navigate the employment relationship and how best to manage an employee’s termination.

Recent Events

Northern Trust and Loeb & Loeb co-hosted a participatory roundtable discussion in Chicago on March 13, 2019, for executives of single-family offices. The topics included family mission statements, education of younger generations, communication and reporting, family governance, and succession planning. The featured speakers were Tom Dykstra, chief operating officer of Jupiter Management LLC; Claudia Sangster, Northern Trust’s director of family education and governance; and partner Ross Emmerman, co-leader of Loeb’s Family Office practice.
