

# Introduction to Employment Issues the Solo or Small-Firm Practitioner May Face

By Maralee Sanders

You've graduated law school. You've passed the bar exam. Maybe you clerked or spent time in a firm before deciding to hang your own shingle. No matter how you got here, here you are: running your own business. You may be a great attorney, adept at litigating complex criminal matters or advising your elderly clients about Medicaid planning, but being an employer comes with its own considerations and pitfalls that aren't always readily apparent.

By carefully planning and ensuring you are in compliance from the beginning, you can avoid common employment mistakes and provide yourself the protections you need to keep your business running smoothly for years to come. Here are some things to consider:

## HIRING HELP

### Interviewing Issues

You've decided that you need to hire someone to help around the office. You've carefully compiled a list of skills that your ideal candidate will have to get the job done and placed an ad online. You've got interested candidates sending their resumes.

Before you begin requesting applications or interviewing, it's important to remember what you cannot do. You should be aware that New Jersey law prohibits employers from asking a candidate about any of the New Jersey Law Against Discrimination's (LAD)<sup>1</sup> protected characteristics<sup>2</sup> or about the candidate's social media profiles or usage.<sup>3</sup> Further, an employer is also not allowed to make any decisions about employment based on whether a candidate smokes or uses tobacco products<sup>4</sup> or whether they are unemployed.<sup>5</sup> You should also be aware that New Jersey law prohibits employers from asking about a candidate's criminal history during the initial application and interview phase.<sup>6</sup> And beginning on Jan. 1, an employer may not screen an applicant based on their salary history or use that information in

determining what compensation they may want to offer an employee.

### Making the Offer

Once you've found the right candidate, next you need to provide them with an offer letter specifying the terms of the position. A well-drafted offer letter should include the following; the position title; workplace location; rate of pay; the expected work schedule; and an expected start date. If you are offering employee benefits, it can be helpful to provide that information in an offer letter as well.

You should always include a caveat that employment is at-will and that the offer letter does not constitute a contract for employment for any length of time. Another issue for consideration is whether to request that the employee sign a confidentiality agreement, protecting your confidential business and client information. If you go this route, you should mention it in the offer letter as a condition of employment. While currently, other restrictive covenants for non-lawyers, such as non-compete or non-solicitation provisions, are allowed under New Jersey law, public policy is turning against these types of restrictions and they have been the subject of proposed legislation in previous legislative sessions.<sup>7</sup>

### A Taxing Concern

It can be tempting for a small employer to consider a new hire either as an independent contractor in order to avoid payroll taxes and insurance requirements or to classify an employee as exempt to avoid paying overtime. However, it is critical that the employee is properly classified. An employer faces significant penalties should the New Jersey Department of Labor conduct a wage and hour audit and find a problem. And know that such an audit can prompt additional investigations by the Division of Taxation and Unemployment Compensa-

tion. Recently, the Murphy administration has formed a task force to crack down on worker misclassification and the New Jersey legislature has considered legislation related to the classification of independent contractors in New Jersey.<sup>8</sup>

## GETTING TO WORK

Once your employee has started work, you should provide them with any policies and procedures that the office has in place. Employees should complete the federal I-9 form no later than their first day of employment and provide documentation in support of the I-9 no later than the third day of employment. It is important to remember that an employer must review the original documentation and maintain a copy. These records should be kept separately from standard personnel records. All employers should consider adopting a document retention policy for such records.

### Employee Notifications

New Jersey law requires that employers display certain workplace posters, as well as provide certain notices at the beginning of employment. Each employee should receive the Notice of Employer Obligation to Maintain and Report Records and the Notice of Employee Rights under the New Jersey Paid Sick Leave Law. Employers with over 50 employees are also required to annually distribute the New Jersey Gender Equity Notice and retain a signed copy for each employee. Employers with more than 10 employees should annually provide the Conscientious Employee Protection Act (CEPA) notice, though no signature is required for this notice. These documents can be downloaded from the New Jersey Department of Labor website.<sup>9</sup>

### Employee Handbook

While you may only have an employee or two early on, it can be helpful to provide employees with a handbook explaining the workplace policies and any expectations related to their work. Some policies, such as an anti-harassment and anti-retaliation policy, can be used in defense of a workplace harassment claim. Others, such as an electronic communications and social media policy, can be useful in outlining your expectations and can clarify their expectations of privacy while using employer resources. A confidentiality policy should explicitly communicate privacy expectations related

to confidential information in the workplace. If you do provide employees with a handbook, best practices include providing a disclaimer indicating that the handbook does not alter the at-will nature of the employment relationship. An employer should also require an employee acknowledgement form, indicating that the employee has received and reviewed the handbook.

### Vacation and Sick Leave

While New Jersey law does not require an employer to provide vacation time, all employers in New Jersey must allow employees to earn paid sick leave at a rate of one hour for every 30 hours worked. A combined paid time-off policy is sufficient if the employee is allowed to earn paid leave at a rate equal or greater than that required by the Earned Sick Leave Law.<sup>10</sup>

### Performance Reviews

Hopefully, you and your employee will have a long and mutually fulfilling employment relationship, but there may come a time that you need to provide some constructive feedback about their job performance or discipline them related to a violation of a policy. Many employees appreciate receiving periodic feedback about their work, even if their employer is happy with their performance. These conversations can be daunting to an employer, but with the right preparation and mindset, both parties can use it as a growth opportunity.

There is no hard-and-fast rule about how to conduct a performance review, but the process should be fair and consistently applied to all employees. You should have clearly communicated standards for employee performance, which can form the basis of a performance evaluation. You should provide employees with feedback about those standards and whether they are meeting them and identify areas for improvement. If an employee is not on track and may be subject to corrective action, a performance review is an ideal place to document those issues, identify opportunities for improvement, and inform the employee of the potential for additional corrective action. To avoid any potential issues, an employer should always focus on the work, rather than on the individual, and how the employee's conduct is impacting the work. During this process, you can offer the employee the opportunity to provide additional information or a response to your feedback.

## All Good Things Must Come to An End

When the employment relationship ends, whether through resignation or termination, you must provide the employee with the Instructions for Claiming Unemployment Benefits form with the employer information already completed.<sup>11</sup> An employer must pay all wages due to an employee through the date of separation, no later than the next regular payroll date following the separation.<sup>12</sup> You should clearly communicate to the departing employee your expectations regarding ongoing confidentiality.

By planning carefully and dedicating the time to organize yourself from the beginning, you can avoid costly employment mistakes and focus on what you do best: practicing law. ■

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## Endnotes

1. N.J.S.A. § 10:5-1 et seq.
2. Protected characteristics currently include: race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression, disability, nationality, pregnancy or breastfeeding, sex, or service in the Armed Forces. N.J. Stat. § 10:5-12(c). A hiring employer may also not discriminate on the basis of an applicant's genetic information, atypical hereditary cellular or blood trait, or refusal to submit to a genetic test or make available the results of a genetic test. N.J. Stat. § 10:5-12(a).
3. N.J.S.A. 34:6B-5 et seq.
4. N.J.S.A. 34:6B-1
5. N.J.A.C. 12:67
6. N.J.S.A. 34:6B-11 et seq.
7. Most recently, S2872 and A1769 in the 2018/2019 legislative session
8. S4204
9. <https://www.nj.gov/labor/lwdhome/content/employerpacketforms.html>
10. N.J.S.A. 34:11D-1 et seq.
11. N.J.A.C. 12:17-3.1
12. N.J.S.A. 34:11-4.3