

Keeping New Hires Legal

by Quenda Behler Story

Your latest efforts to add someone to your crew have failed, and you're still short-handed at a time when the work keeps rolling in. After too many 12-hour days trying to make up the difference, a gentleman with a thick foreign accent approaches you looking for work. You want to hire him on the spot.

But, you have to jump through some bureaucratic hoops before you can complete this new hire. You find yourself between the proverbial rock and a hard place, wanting to get this new person to work as soon as possible, but needing to be mindful of the legal requirements that go with being an employer.

Protecting Us from Ourselves

Congress, in its infinite wisdom, is determined to protect us from illegal immigrants. To that end, they have instituted severe penalties against anyone who "knowingly" hires an illegal alien. This can take the form of hefty financial fines, up to \$20,000 per hire.

But bear in mind that "knowingly" doesn't mean that you actually did know. It means that you should have known, because if you had checked that person's documents, such as a driver's license, birth certificate, or social security card, you would have known.

But it is also illegal for you to discriminate on the basis of ethnic origin, which means you're not allowed to ask job applicants about their accent, or where they're from, or where they were born, or if they have a "green card," or anything else that suggests that you care about their ethnic origin, because those kinds of questions can be evidence of illegal discrimination.

The rock and the hard place. You can't hire an illegal alien, but you can't ask that person if he or she is an illegal alien. Maybe it's time to go back to only working with subcontractors, and let

them worry about whether their new hires are all legal workers.

However, there is a solution that will keep you out of trouble. Make your hiring decision first. Then, after you make that decision and announce it to the prospective hire, you can ask for evidence of legal residency, such as the Immigration and Naturalization Service (INS) document popularly called a green card.

As the employer of a legal immigrant, you're required by law to fill out and keep a form that's available from the INS called the Attestation Form I-9. This form has a list of the types of documents that are acceptable as proof of legal status. This way, you're able to determine if your new hire has all of the required documentation in place.

Reasonable Steps

On this form, you swear that your employee is a legal immigrant and that you believe this to be true because you have confirmed it by checking his or her immigration papers or birth certificate. By signing this form, you're swearing that you have taken reasonable steps to confirm that those papers are authentic.

Reasonable steps would include things like asking your new hire about his or her birth certificate or green card. But exactly who is it okay to ask? Not everyone that looks like a member of a particular ethnic group is foreign born. If there's doubt about whether to ask, tell the person first, before you ask about citizenship or immigration status, that you intend to hire them unless there's a problem. That can go a long way toward heading off a problem.

But the INS still expects you to pass judgment on the authenticity of the documents your new hire produces. Suppose you look at this person's docu-

ments and you don't think they're authentic. They don't appear to be precisely printed, and they're worn at the edges. This can put you into a very difficult position.

If you just flat out refuse to hire that person because of your suspicions and you turn out to be wrong, you may have handed him or her a lawsuit. On the other hand, you could be in real trouble if the INS comes around and discovers that you signed the I-9 Attestation form swearing that your employee was a legal immigrant because, even though this person spoke no English, he carried papers that said he was born in Des Moines, Iowa, and graduated from a Des Moines high school. The truth is that you should have been suspicious.

Seek Help from the INS

If you have reasonable suspicions — and remember that just speaking with an accent even though you graduated from an American school is not in itself suspicious — don't hire the person until you have checked with your local INS office for guidance. And don't sign the attestation form before you contact the INS. First and foremost, you want to put yourself in a position where you can honestly say you did everything you could to verify the new hire's legal status.

Then, you need to keep that I-9 form in the new hire's personnel file for at least three years after hiring her or him, or for one year after the date you no longer employ that person, whichever comes first. And you might also keep a photocopy of the documentation that you were given, as a backup. You can never be too safe in a situation like this. 

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