

Management Alert



'Tis the Season for . . . Temporary or Seasonal Hires

As the holiday season and Super Bowl XLVIII approach, many New York and New Jersey employers will kick-off temporary or seasonal staffing. What may look like a simple process is potentially littered with legal pitfalls. The danger for many employers lies in assuming that New York and New Jersey mirror each other or the more familiar federal law, when in-fact they are quite different in many respects. Recent examples of the potential consequences stemming from temporary or seasonal hiring include a filed complaint against Major League Baseball seeking unpaid wages and overtime compensation for a proposed class action of potentially 2,000 “volunteers” at Major League Baseball’s July 2013 All-Star FanFest in New York City. Below is a brief overview of notable legal issues to keep in mind when hiring and employing temporary or seasonal employees in New York or New Jersey.

Unpaid Interns and Volunteers

When considering the use of “volunteers” or “unpaid interns,” employers should be aware of the applicable guidelines and standards under both federal, state, and local law. A recent wave of class action litigation concerning unpaid interns has shown former interns seeking to impose liability on their former employers for, among other things, unpaid wages, overtime, liquidated damages, and attorneys’ fees.

Credit Reports and Criminal Background Checks

Both New York and New Jersey allow employers to perform background checks on prospective employees. Both states maintain their own Fair Credit Reporting statutes, which govern the process. Under both generally, before requesting a consumer credit report, a prospective employer must provide written notification and obtain written authorization from an applicant that informs the prospective employee that the report is being used for employment purposes. If an adverse action results from the report, the applicant is entitled to copy of the report as well as the name and address of the reporting agency. New York also limits the amount of information available to a prospective employer on a report where the annual salary of the prospective employee is less than \$25,000.

Generally, employment decisions based upon criminal background checks are also permissible, but highly regulated in both New York and New Jersey. Within New York, an employer must also follow Article 23-A of the New York Corrections Law, which mandates notice and use of eight factors when making employment decisions in light of a prior criminal conviction. The City of Newark, New Jersey also generally restricts the use of criminal background checks until after a conditional offer of employment and for those employees working in “sensitive” positions, and requires consideration of six factors when making employment decisions.

Social Media Passwords

New Jersey prohibits employers from requesting that applicants disclose user names, passwords, or other login information to access their social media accounts like Facebook or Twitter. While New York does not prohibit the practice, there currently is pending legislation.

New Hire Reporting

Under New York and New Jersey law, all employers must report newly hired or rehired employees within 20 days. In New York, an employer does not have to report a returning temporary employee if the break in service has been less than 60 calendar days. Both states also impose quarterly reporting requirements relating to employees and employment taxes.

Wage Payment

Both New York and New Jersey maintain wage protection statutes that mandate varied disclosures to new hires. Within New York, employers must provide to each new hire and to all employees by February 1 of each year a notice of pay rate, including overtime rate if applicable, the pay frequency, the employer's contact information, and allowances taken as part of the minimum wage such as tips, meal, or lodging deductions. Under New Jersey law, employer must only inform new hires of their rate of pay, deductions for each pay period, and the regular payday designated by the employer. In addition, employers must notify employees of any changes in pay rates or paydays prior to such changes.

Minimum wage in New York and New Jersey is \$7.25 per hour until December 31, 2013, which is the same as the federal rate. As of January 1, 2014, New York's minimum wage will increase to \$8.00 per hour and New Jersey's will increase to \$8.25 per hour. Within New York and New Jersey, wage payments must be made on a semimonthly basis, on regular payday designated in advance by the employer. In both states, an employee who reports to work by request or permission of the employer must be paid, even if sent home early, at their regular rate. In New York, that employee must be paid at the minimum wage for at least four hours of work or the regularly scheduled shift, whichever is less. In New Jersey, an employee must be paid for at least one hour of work. In both states, a terminated temporary employee must be paid due wages no later than the regular payday for the pay period in which the termination occurred.

Overtime requirements remain an important concern, especially in temporary hiring situations. Under New York and New Jersey, unless an employee is exempt, an employer must pay overtime compensation at the rate of 1 1/2 times the employee's regular hourly wage rate for each hour worked over 40 hours in a week. Overtime exemptions requirements vary between Federal, New York, New Jersey law, thus individualized assessments are necessary. Additional or different rules may apply depending on occupation or industry, such as in cases of tipped employees, minors, merchants, hotel employees, and food service employees, among others.

Meal and Rest Periods

Employers must carefully monitor meal and rest periods for temporary employees. Generally, New Jersey mirrors the requirements under the federal Fair Labor Standards Act regarding meal and rest breaks for employees outside of the railroad industry. New York, in contrast, provides specific and detailed requirements regarding particular industries and work shifts. For instance, most employers must provide employees who work more than six hours with at least 30 minutes for meal break between 11 a.m. and 2 p.m. Additional requirements apply in certain circumstances.

Paid or Non-Paid Leave

Recently, major municipalities in New York and New Jersey passed laws that require paid or non-paid leave for employees, including temporary hires. Under the Earned Sick Time Act, New York City employers with 20 or more City employees must provide at least one hour of paid sick time for every 30 hours worked by the employee. This requirement applies not only to full and part-time employees, but also to also temporary employees who are employed within New York City for more than 80 hours in a calendar year. Jersey City followed suit and enacted paid sick time ordinance as well, which requires all private sector employers with ten or more employees working in Jersey City to provide city employees at least one hour of paid sick leave for every 30 hours worked, up to five days of sick leave per year. Similarly, this requirement applies to temporary employees. For more information, please see our prior publications [here](#) and [here](#).

Posting Requirements at Temporary Worksites

If you have seasonal and temporary personnel working in a variety of work sites, consider whether posting requirements are being met across all possible New York and New Jersey sites. New York employers should be aware of notice requirements on topics such as employment of persons with criminal conviction records, the provisions of the New York State Human Rights Law, "No Smoking" signage, and notices about the Fair Play Act at construction sites. New York City also requires posted notice of the New York City Earned Sick Time Act. New Jersey employers should also be aware of required notices regarding gender based wage discrimination, and state anti-discrimination statutes, including, but not limited to, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the Conscientious Employee Protection Act, and the New Jersey SAFE Act.

Conclusion

Employers should remain vigilant regarding New York and New Jersey's divergent requirements and the possible pitfalls when hiring temporary or seasonal hires at this time of the year.

By: [Christopher Lowe](#), [Robert T. Szyba](#) and [Ephraim J. Pierre](#)

[Christopher Lowe](#), [Robert T. Szyba](#) and [Ephraim J. Pierre](#) are all located in Seyfarth Shaw's New York office. If you would like further information please contact the Seyfarth attorney with whom you work, Chris Lowe at clowe@seyfarth.com, Rob Szyba at rszyba@seyfarth.com or Ephraim Pierre at epierre@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This One Minute Memo is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | December 12, 2013

©2013 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.