



20 Essential Employment Law Questions to Consider Before Opening a Business

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The Hiring Process

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Is Employment in Virginia Still Considered “At Will”?

- Yes, the employment at-will presumption is alive and well in Virginia.
- Employment at will is a contractual concept:

Sources of Legal Obligation		
Contractual	Statutory	Common Law

What Employment Discrimination Laws Apply to Your Company?

No. of Employees	Statute
Any	Virginians with Disabilities Act, Va. Code § 51.5-40, <i>et seq.</i>
5+	Virginia Human Rights Act, Va. Code Ann. § 2.2-3900, <i>et seq.</i>
15+	Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, <i>et seq.</i> ; Americans with Disabilities Act, 42 U.S.C. § 12101, <i>et seq.</i>
20+	Age Discrimination in Employment Act, 29 U.S.C. § 621, <i>et seq.</i>

What Can You Ask During the Hiring Process?



Don't ask about:

- Age or date of birth.
- Marital status.
- Gender.
- Parenthood.
- Citizenship.
- Religion.
- Economic status; prior bankruptcy.
- Prior arrests.
- Physical or mental limitations.
- Workers' compensation history.
- Treatment for drug addiction or alcoholism.
- Genetic testing.
- Crime victims.

Can You Require an Applicant to Provide Salary History Information?

- In Virginia, the answer is yes.
- Numerous states and local jurisdictions have recently enacted laws that prohibit asking the salary question.
- If you have applicants from a jurisdiction outside of Virginia, check local laws.



What about Arrest or Conviction Records?

- Virginia private-sector employers may ask applicants to disclose criminal conviction information except arrests, juvenile record information, charges for possession of marijuana.
- Criminal background information in Virginia is maintained by the State Police Central Criminal Records Exchange.
- EEOC – employers may face liability for using criminal records under Title VII if it disproportionately affects a protected group.



Where Should You Report New Hires?

- All new employees should fill out a W-4 and VA-4.
- Within 20 days of hire, Virginia requires employers to report the following at <https://va-newhire.com>:
 - Employer's FEIN, name, and address;
 - Employee's name, address, SSN; and
 - Employee's start date.



Do You Need to Confirm Your Employees' Eligibility to Work?

- Immigration & Reform Control Act of 1986 (IRCA)
- Employers must complete the Form I-9 within 3 business days of the employee's first day of employment.
- Employers can't specify which documents employees present.



How Should You Categorize Your Workers?

- Persons working for remuneration are **presumed to be employees**, not independent contractors.
- Businesses are prohibited from requiring or even requesting a worker to enter into an agreement or sign any document that results in misclassification.
- Stiff penalties including debarment from public contracts, \$1,000 penalty per worker for the first offense, \$2,500 for the second offense, and \$5,000 for the third offense.
- Individual damages per worker, including wages, salary, and employment benefits (such as insurance) that should have been provided, other lost compensation, attorneys' fees and costs.

What Is an Independent Contractor?

- Has an independently established trade or business and performs work for other entities;
- Charges fees for services;
- Uses its own tools for the job;
- Is engaged only for a specific term to perform an identified service or task that is different from the products and services the company provides;
- Retains control over the manner and means of work;
- Retains economic independence; and
- Sets own hours.
- No one factor is determinative.
- The IRS has a separate 20-factor test.

Should You Provide New Hires With an Offer Letter?

- Yes – memorialize the employment relationship with a simple letter.
- Include:
 - Start date & hours of work;
 - Title & reporting relationship;
 - Rate, manner, & frequency of pay;
 - Eligibility for benefits;
 - Conditions of employment; &
 - Employment at-will language.





Rules That Govern the Workplace

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Do You Need a Handbook?

- Employment actions often arise where an employee feels he or she has been treated unfairly compared to others.
- A handbook can help minimize the risks of an action where you:
 - Make your expectations well known (and in writing);
 - Let employees know promptly and clearly when they aren't meeting your expectations;
 - Treat similar employees consistently, and similar problems consistently; and
 - Provide a mechanism for employees to report concerns.
- Certain laws require policies to be included in a handbook.

Are Employees Entitled to a Copy of Their Personnel Files?

- Yes. Employees and former employees are entitled to receive a copy of “all records or papers retained by the employer in any format, reflecting (i) the employee's dates of employment with the employer; (ii) the employee's wages or salary during the employment; (iii) the employee's job description and job title during the employment; and (iv) any injuries sustained by the employee during the course of the employment with the employer.” Va. Code 8.01-413.1
- Such records must provided within 30 days.



Do You Need Workers' Compensation Insurance?



- Yes. Businesses with 2 or more employees are required to have WC insurance.
- More information is available here:
www.vwc.state.va.us.

What Kind of Postings Do You Need to Put Up in Your Office?

- Many statutes require employers to post notices of employees' rights.
- Virginia DOLI has compiled a list of posters:

<http://www.vec.virginia.gov/employers/Required-Posters-for-Virginia-Employers>

Are You Required to Provide Paid Vacation?

- Paid vacation is not required under Virginia law, but you'll likely want to make some type of paid vacation leave available.
- Create a written policy that describes the leave, how it can be used, and whether it is paid out at termination.
- Certain laws require employers to provide paid or unpaid leave, such as to serve on a jury or as witness, for military obligations, for pregnancy/childbirth, for medical reasons, etc.



Compensating Your Employees

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What Wage and Hour Requirements Apply?

- Under the Fair Labor Standards Act and the Virginia Overtime Wage Act, unless an exemption applies, employers must: (1) pay all employees at least minimum wage; and (2) pay employees overtime for all hours over 40 worked in a workweek.
- The primary exemptions under the FLSA and VOWA include: (1) executive; (2) administrative; (3) professional; (v) certain computer professionals; and (4) outside sales.
- If an exemption applies, the employee must be paid on a salary basis of not less than \$684/week.
- For non-exempt employees, the minimum wage in Virginia is currently \$9.50 per hour.



Are You Required to Have a Set Wage Schedule or Provide Employees with a Paystub?

- Under Virginia law, employers must establish regular paydays, which generally must be at least every two weeks or twice per month.
- Wage statements must be provided to employees each pay period in writing via paystub or online accounting.
- Wage statements must list the following: (1) the name and address of the employer; (2) the number of hours worked by the employee during the pay period; (3) the rate of pay; (4) the gross wages earned by the employee during the pay period; and (5) the amount and purpose of any deductions.



May a Virginia Employer Withhold Funds from Employee Paychecks?

- Generally, NO.
- The Virginia Wage Payment Statute provides:
 - An employee must be paid his final wages after termination;
 - An offset against wages may not be made without voluntary written and signed authorization by the employee;
 - An employee's wages cannot be subject to forfeiture; and
 - Deductions should not reduce the employee's pay below minimum wage.



QUESTIONS?

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