SALUS GROUP

What Employers Should Know About Seasonal Employment

Many organizations rely on seasonal workers to supplement their regular workforce during peak times. This often occurs during busy seasons or holidays, as there's an influx of business activity. While similarities exist, there are important differences between seasonal and regular employment. Due to these differences, hiring and reliance on seasonal workers can present significant and unexpected challenges for employers.

Among the issues employers may want to consider when utilizing seasonal workers include:

- Employment verification;
- Worker classification;
- Fair employment laws;
- Wage and hour requirements;
- Child labor laws; and
- Tax considerations.

This HR Compliance Overview provides employers with a broad overview of seasonal employment and compliance strategies for employers.

Legal Considerations for Seasonal Employment

Under most federal laws, there is no specific statutory definition for "seasonal employee"; however, the term generally refers to workers hired for temporary positions during peak periods of business, often related to seasons or specific events, such as summer, holidays or harvest periods. Employers usually hire seasonal workers when they need extra help. This need may be based on industry demands, financial reasons or increased consumer traffic, such as during the holiday season. Seasonal employment is more common in certain industries and businesses, such as delivery services, ski resorts and agriculture.

Hiring around the holiday season is one of the most common times for seasonal employment, as many organizations ramp up production and sales to meet consumers' increased demand during the holidays. Seasonal workers can help fill workforce gaps and perform much-needed tasks and responsibilities without employers having to hire full-time employees who may not be needed once the bustle dies down.

There are other benefits to hiring seasonal employees, including the following:

- **Workforce flexibility**—Hiring seasonal employees gives employers flexibility with their workforce. Employers can decide when to hire workers, how many to hire and how long their employment will last.
- **Cost-effective labor**—It may not be economical to hire full-time employees when employers only need workers for a brief or limited duration. Seasonal employees can help reduce workforce costs since seasonal workers are a cost-effective alternative to hiring full-time employees. For example, seasonal employees typically are paid less, do not work enough hours to qualify for overtime, receive less training and do not receive benefits.
- **Trial employment**—By hiring seasonal workers, employers can determine whether those employees will be a good fit for their organization before deciding to hire them as full-time employees.

Employing seasonal workers to fill workforce gaps can be beneficial and appealing for employers and employees. However, there are many factors employers need to consider before hiring seasonal employees, as these workers can present certain drawbacks. When deciding to hire seasonal employees, employers need to consider the various federal, state and local employment laws and regulations that may apply. Complying with these laws and regulations related to seasonal employees can be difficult and isn't always straightforward. The following are common legal considerations employers may need to examine when relying on seasonal workers.

Employment Verification Requirements

Federal law requires employers to hire only individuals who may legally work in the United States—either U.S. citizens or authorized foreign nationals. To comply with the law, employers must verify the identity and employment authorization of each individual they hire by completing and retaining the Employment Eligibility Verification form (Form I-9). This requirement also applies to temporary and seasonal workers.

Form I-9 has two sections. The first is completed by the employee, and the second is completed by the employer. There are two supplements that are completed only when a preparer or translator assists an employee in completing Section 1 (Supplement A) or when rehire, reverification or name changes apply (Supplement B). The earliest an employer can ask a new hire to complete Section 1 of Form I-9 is after an offer of employment is extended and accepted. Employers cannot use Form I-9 as part of an applicant's screening process or background check. The latest a new hire can complete Section 1 is at the end of the employee's first day of work for pay.

Compared to other onboarding tasks, Form I-9 is unique in that employers must complete this process for every employee in the United States within a very short amount of time and in a specific way, regardless of an employer's size. This task is a heavy burden for employers; complying with all Form I-9 requirements can often be complicated and time-consuming. Form I-9 has multiple sections that both the employer and employee must complete within a limited time frame. Employers must physically examine and verify an employee's identity and employability from a list of approved documents. Employers are also required to maintain and retain all Forms I-9 for a specific time period and reverify an employee's documentation when it expires or if an employee is rehired within three years of when their Form I-9 was initially completed. Employers can find the most current Form I-9 on the U.S. Citizenship and Immigration Service's website. Employers that fail to use the most current form may be subject to penalties under the Immigration Reform and Control Act.

Worker Classification

The influx of temporary and seasonal workers can make it challenging for employers to classify individuals accurately. Due to the temporary nature of their work, employers can mistakenly classify these workers as independent contractors. However, to classify temporary or seasonal workers as independent contractors, those individuals must satisfy the specific requirements of federal and state tests for worker classification. Accordingly, employers should carefully review and apply the necessary legal standards and tests before classifying a temporary or seasonal worker as an independent contractor.

When determining whether a worker is an employee or an independent contractor, it's vital to know the business relationship that exists between the organization and the individual performing the services. Whether an individual is an independent contractor or an employee depends on the facts of the specific situation and different legal standards are used to assess this classification. Broadly speaking, an independent contractor is a self-employed individual or entity contracted to provide services for or perform work for another entity as a nonemployee. As a result, an independent contractor is self-employed and subject to self-employment tax. Typically, an individual is an independent contractor if the employer has the right to control or direct the results of the work and not what will be done or how it will be done. On the other hand, an individual is typically an employee if they perform services for an organization that controls how the work must be done and how it should be completed.

There is no standard test to determine an independent contractor relationship. Employers may have to apply various tests to determine whether issues of employment benefits, workers' compensation, unemployment compensation, wage and hour laws, taxes and protections under federal employment laws, like Title VII of the Civil Rights Act and the Americans with Disabilities Act, affect their workforces. In addition, various federal government agencies and some states and localities have their own tests to determine independent contractor status.

The IRS, the U.S. Department of Labor (DOL) and various state agencies monitor compliance with employee and independent contractor classification by applying various criteria. Employers that misclassify employees may be liable for expensive fines and litigation if a worker should have been classified as an employee and did not receive a benefit or protection they were entitled to by law.

Fair Employment Laws

Under federal law, many employers are prohibited from discriminating against individuals based on certain protected traits. An employer's size—meaning the number of employees—is a key factor in determining which federal laws the employer must comply with. For example, employers with 15 or more employees may not discriminate against individuals based on race, color, religion, national origin, sex, disability or genetic information. Employers with at least 20 employees are also prohibited from discriminating based on age against individuals who are age 40 or older. In addition, all employers are subject to equal pay requirements. It's vital for employers to be aware of the size-based federal laws that may apply to their organizations to ensure they're complying with all applicable laws and regulations. This is especially important for employers who have fluctuating workforce numbers or are considering hiring additional employees during busy seasons or holidays.

Employers hiring seasonal workers must navigate these employment laws to ensure compliance and foster a fair workplace. Federal antidiscrimination laws protect all employees, including seasonal workers, from discriminatory practices. Employers must ensure that hiring, promotions and work conditions are free from bias based on race, color, religion, sex, national origin, age, disability and other protected characteristics. This means that hiring practices should be fair and equitable, and any policies regarding pay, promotions or termination should not disproportionately affect seasonal workers based on these protected categories. The U.S. Equal Employment Opportunity Commission has the authority and jurisdiction to enforce various federal discrimination laws. Its authority extends to a wide range of employers and employees, including seasonal and temporary workers.

Additionally, employers should be mindful of the potential for harassment in the workplace, as seasonal employees may be more vulnerable due to their temporary status. Implementing robust training programs and clear reporting procedures can help create a safe and respectful environment. Regularly reviewing policies and practices not only aids in compliance but also demonstrates a commitment to fostering inclusivity and protecting the rights of all workers. By proactively addressing these legal requirements, employers can minimize risks and contribute to a more positive and equitable work environment for seasonal employees.

In addition to federal fair employment laws, most states have passed their own laws prohibiting employers from engaging in discriminatory employment practices. In general, these laws provide protection for temporary and seasonal employees that is similar, though not identical, to the protection provided under federal fair employment laws. For example, many state laws protect a wider range of individuals, apply to small employers that are not subject to the federal provisions and provide different exemptions from their discrimination prohibitions. Employers should become familiar with how both federal and state laws apply to their employment practices.

Wage and Hour Laws

Employers may rely on seasonal, temporary or part-time employees to accommodate during peak periods of business. The Fair Labor Standards Act (FLSA) does not define full- or part-time employment. Consequently, whether a worker is a full- or part-time employee does not change the application of the FLSA. Instead, the FLSA requires employers to pay nonexempt employees for all hours they are "suffered or permitted to work" and overtime pay at a rate of 1.5 times their regular rate of pay for every hour worked over 40 during a workweek.

The FLSA provides specific exemptions from these requirements for employees employed by certain establishments and in certain occupations. For example, the employees are exempt from the FLSA's minimum wage and overtime provisions if they are employed by an establishment which is an amusement or recreational establishment if either of the following conditions are met:

- The establishment does not operate for more than seven months in any calendar year; or
- The establishment's average receipts for any six months during the preceding calendar year were not more than 33.3% of its average receipts for the other six months.

Examples of amusement or recreational establishments include beaches, golf courses, swimming pools, boardwalks, stadiums, summer camps, ice skating rinks and zoos.

Additionally, employers are not required to provide rest breaks or meal periods to their employees under the FLSA. However, many employers choose to provide breaks and meal periods to their employees. Under the FLSA, if an employer provides short rest periods (usually 20 minutes or less), they must be counted as hours worked and paid. Unauthorized extensions of authorized work breaks do not need to be counted as compensable time when the employer has communicated to employees that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Meal periods (typically 30 minutes or more) generally are not compensated as work time under the FLSA, but only if employees are completely relieved from their work responsibilities for the purpose of eating a meal. Employees are not relieved of their responsibilities if they are required to perform any duties —whether active or inactive—while eating. Employers should note that different requirements may exist under state or local laws.

Nearly all FLSA-covered employees, including part-time employees, have the right to take needed time and access an appropriate space to express breast milk for a nursing child for up to one year after the child's birth. However, employers with fewer than 50 employees are not subject to this break time and space requirement if it would impose an undue hardship.

States and localities can set higher minimum wages, and localities can set stricter overtime requirements or protections. If a state or local jurisdiction sets a higher standard than the federal standard, employers must comply with the highest applicable wage and overtime laws. Many states also have workplace protections for breastfeeding employees, which may be greater than those provided by the FLSA, that employers are required to follow.

Child Labor Laws

Many employers rely on youth workers when filling seasonal positions. The FLSA establishes standards for employing individuals younger than 18 years old. Covered employers must comply with certain restrictions, including the minimum employment age, permissible work activities and limitations on work hours. Youth workers who are 14 and 15 years old are limited in the kinds of jobs they can perform in nonagricultural work and what hours they may work. Minors who are 16 and 17 years old can be employed for unlimited hours in any occupation other than those declared hazardous by the U.S. secretary of labor. Minors who are 18 years old and older can be employed for unlimited hours in any occupation.

The FLSA also sets the minimum wage for employment and subminimum wage standards for certain employees who are younger than 20 years of age, full-time students, student learners, apprentices and workers with disabilities. The FLSA authorizes employers to pay the youth minimum wage of not less than $4.25 per hour for employees under 20 years of age during their first 90 consecutive calendar days of employment. However, employers may not take any action to displace employees in order to hire workers at the youth minimum wage. The FLSA also allows employers to pay subminimum wages to workers under certain circumstances. For example, full-time students in retail or service establishments may be paid below the minimum wage.

Employers that violate the law's child labor provisions may be subject to civil monetary penalties, injunctions and criminal action in federal court, including fines and imprisonment. In addition to the FLSA, states can implement their own laws governing the employment of minors. When both federal and state regulations apply to youth workers, the law with stricter standards must be followed.

Paid Time Off

There are no federal mandates requiring employers to offer paid time off to their workers, including seasonal employees. However, many states and localities may impose paid leave requirements, which employers must comply with to avoid legal repercussions. For example, some states have enacted laws that require employers to provide a certain amount of paid sick leave, which could extend to seasonal workers. In such cases, employers must ensure that their policies are inclusive of all employees, regardless of their employment status, and that they adhere to the minimum accrual rates established by law. Employers should also be aware of any local ordinances that may have additional requirements, as these can vary significantly even within the same state.

Tax Considerations

The IRS defines seasonal workers as employees performing labor or services on a seasonal basis, meaning six months or less. Seasonal employees are subject to the same tax withholding rules that apply to other employees. This means seasonal employees must complete a Form W-4 when starting a new job. Additionally, an employer's tax withholding responsibilities are the same for seasonal employees as they are for regular employees. As a result, an employer must withhold the same taxes from a seasonal employee as it would a regular employee within their organization. Employers must also include seasonal employees along with regular employees on their Form 941 when reporting payroll taxes.

Health Care Benefits

While most employers do not offer health care benefits to seasonal employees, employers should be aware of the Affordable Care Act's (ACA) employer mandate to provide benefits to their workforce under certain circumstances. Each year, employers must determine, based on their current number of employees, whether they are considered an ALE for the next year under the ACA. The ACA requires ALEs to offer affordable, minimum-value health coverage to their full-time employees or pay a penalty. This employer mandate is also known as the "employer shared responsibility" or "pay-or-play" rules. Seasonal workers are considered by the IRS when determining whether organizations are ALEs under the ACA. However, employers can easily overlook including seasonal workers when determining whether they qualify as ALEs, which can result in costly penalties.

To qualify as an ALE, an employer must employ, on average, at least 50 full-time employees, including full-time equivalent employees (FTEs), on business days during the preceding calendar year. All employers that employ at least 50 full-time employees, including FTEs, are subject to the ACA's employer shared responsibility rules. A full-time employee is an individual who works, on average, 30 or more hours of service each week. For this purpose, 130 hours in a calendar month is treated as the monthly equivalent of 30 hours of service per week. Hours worked by employees with fewer than 30 hours per week must be counted—and then divided by 120 per month—to determine the number of FTEs. The number of FTEs is then added to the actual full-time employee count.

When determining if an employer is an ALE, it must measure its workforce by counting all its employees. However, there is an exception for seasonal workers. Under the exception, an employer will not qualify as an ALE if both of the following apply:

- The employer's workforce exceeds 50 full-time (and FTE) employees for 120 days or fewer during a calendar year; and
- The employees in excess of 50 who were employed during that time were seasonal workers.

An employer may apply either a period of four calendar months or 120 days (whether or not consecutive) to determine if it qualifies for the seasonal worker exception. For this purpose, a "seasonal worker" means a worker who performs labor or services on a seasonal basis, including (but not limited to):

- Workers covered by 29 CFR 500.20(s)(1) ("Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year."); and
- Retail workers employed exclusively during holiday seasons.

Employers may apply a reasonable, good-faith interpretation of the term "seasonal worker" and a reasonable, good-faith interpretation of 29 CFR 500.20(s)(1) (including as applied by analogy to workers and employment positions not otherwise covered under 29 CFR 500.20(s)(1)).

Temporary Work Visas

Employers often rely on foreign workers as part of their seasonal workforce. Generally, these workers hold either a J-1 foreign student visa or an H-2B visa. The U.S. Department of State offers the J-1 Summer Work Travel program for students with at least a semester of post-secondary academic study at an institution outside of the United States. These students travel to the United States to teach, study, conduct research, demonstrate special skills or receive training in an approved program. The H-2B nonimmigrant program permits organizations to temporarily hire nonimmigrants for nonagricultural work in the United States regardless of their student status. Employers must file an Application for Temporary Employment Certification with the DOL and be granted registration before they begin recruiting these workers. After hiring workers, employers must comply with the program's also need to comply with the program's requirements, such as paying the higher of the prevailing wage for the occupation in the area of intended employment or the federal minimum wage.

Best Practices for Employing Seasonal Employees

While best practices will vary for each organization, taking the following actions can help employers establish effective strategies to address common operational and compliance challenges when utilizing a seasonal workforce:

Establish Workplace Policies

Hiring seasonal employees requires well-defined processes and policies to ensure legal compliance. Establishing strong workplace policies can help organizations identify potential issues before they become problems and stay compliant in a cost-effective manner. Failing to implement such policies can often be the first in a series of missteps that lead to costly investigations and penalties. However, by implementing and enforcing legally compliant workplace policies, employers can promote a strong culture of compliance within their organizations, which can help reduce potential violations.

Train Managers and Employees

Many legal or regulatory violations related to seasonal workers are preventable. Organizational compliance cannot be achieved unless managers and employees are aware of applicable laws and regulations and follow them. Regular training can aid employers in developing policies and procedures to stay compliant, establishing a culture of compliance and educating employees on their responsibilities. Effective training often provides employees with real-life examples of how compliance applies to their workplace roles. Employers can train managers and employees to recognize applicable laws, regulations and requirements; identify compliance concerns and issues; and report compliance issues properly. Ensuring that employees are properly trained can drastically improve an organization's compliance efforts.

Create a Uniform Onboarding Process for Seasonal Employees

Establishing a standardized onboarding process is crucial for employers hiring seasonal workers, as it provides a structured and efficient way to integrate these workers into an organization's workforce. A uniform onboarding process helps employers maintain legal compliance with their seasonal workforce by ensuring standardized training, completing all required employment documents and forms in a timely and accurate manner, and improving communication.

Perform Regular Audits

Regular and comprehensive audits reviewing seasonal employment practices can help employers identify and remedy potential violations. These audits can review organization policies and practices to ensure they follow federal, state and local regulations. If internal audits reveal potential issues, employers can take prompt action to remedy these issues before they turn into costly violations.

Employer Takeaways

Although most seasonal employment is temporary, these workers can be valuable assets to employers, especially when responding to surges in business activity or attempting to reduce payroll costs. It's in an organization's best interest to ensure that hiring seasonal workers is done competently and efficiently. Through proper planning, establishing best practices and understanding the potential risks of hiring seasonal workers, employers can set their organizations up for long-term success with their seasonal workforce.

LINKS AND RESOURCES

- DOL's website on seasonal employment
- IRS' website on applicable large employers (ALEs)
- DOL's Fact Sheet on employers participating in the H-2B Program

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