

Employment Issues for Nonprofit Child-Care Centers

Hiring experienced, qualified, and dedicated employees is the key to operating a safe and successful child-care business. Nonprofit child-care centers must follow specific state laws relating to child-care workers, as well as general state and federal laws when hiring and managing employees and volunteers. This chapter will outline the minimum requirements that a center must meet in addition to summarizing some of the most common employment issues faced by Texas businesses and providing a brief introduction to federal and state laws that govern the employee-employer relationship. For a more detailed explanation of employment issues for nonprofits, see Texas C-BAR's Employment Law manual.

To qualify under the State of Texas licensing requirements, a center must ensure that employees meet the requirements outlined below.

Director: The center director is the key staff person. The director is the adult designated to have the daily, on-site responsibility for the operation of the center, including maintaining compliance with standards and licensing laws. To obtain and maintain licensing, a center must hire a director who meets DFPS requirements. The director must be approved by the DFPS. In addition, under a new law (effective date), failure to maintain a qualified director may subject a center to misdemeanor penalties.

Caregivers and Other Employees: Anyone who works for the center or who is regularly present while children are in care, including employees, independent contractors, or volunteers must meet certain minimum qualifications. The list of qualifications may be found at:

http://www.dfps.state.tx.us/Documents/Child_Care/Child_Care_Standards_and_Regulations/final746.pdf.

Background Checks

Background checks are required to determine whether a person's presence at a child-care operation violates statutory law, administrative rules, or minimum standard rules; or presents a risk to the health and safety of children in care. A center must request background checks for each person 14 years or older, other than clients of the operation, who will regularly or frequently be present at the center while children are in care, including :

- Employees and applicants hired that will provide direct care or have direct access to a child in care;
- Any persons, including volunteers, who are counted in the child/caregiver ratio;
- Any persons, including professionals, under contract with the center who have unsupervised contact with children in care on a regular or frequent basis;
- The directors, owners, operators, or administrators of the operation; and
- Applicants for a child-care administrator's license.

Background checks must be completed 1) at the initial licensing of all intended employees, contractors, and volunteers, 2) at the initial hiring or contracting of additional persons, and 3) every 24 months for persons continuing with the center.

Background checks consist of searches of different databases. There are three types of background checks:

- (1) Criminal history checks conducted by the Department of Public Safety for crimes committed in the state of Texas;
- (2) Criminal history checks conducted by the Federal Bureau of Investigation for crimes committed anywhere in the United States; and
- (3) Central registry checks conducted by DFPS. The Central Registry is a database of people who have been found by Child Protective Services, Adult Protective Services, or Licensing to have abused or neglected a child.

Requesting a Background Check

In order to request a background check, a center must submit the required information online or through a written form (if approved by the Licensing Office). More information is available at http://www.dfps.state.tx.us/Child_Care/About_Child_Care_Licensing/.

Pursuant to Senate Bill 758, passed by the 80th Texas Legislature and effective September 1, 2007, all persons on whom a request for a background check is submitted, must also pass an FBI fingerprint check. See http://www.dfps.state.tx.us/About/News/2007/2007-06-29_fingerprint.asp for more information. The fingerprint check must be initiated within two days of the submission of the background check request. The cost of the fingerprint check is \$48.95 and may be paid by either the person or the center. The fingerprint check will be required on all new employees, volunteers, and contractors, and on all continuing employees at their 24 month background check update.

Background checks must be submitted within two business days after a new person is hired or is present in the center with children. A center may temporarily rely on passage of the name-based portion of the background check if the full results are not returned within two working days, the center faces staff shortages, and the new person is needed to complete child-caregiver ratios.

Results of a Background Check

Title 40 of the Texas Administrative Code lists the following as possibly precluding a person from being present in a child-care center:

- (a) A misdemeanor or felony under Title 5 (Offenses Against the Person), Title 6 (Offenses Against the Family), Chapter 29 (Robbery) of Title 7, Chapter 43 (Public Indecency) or §42.072 (Stalking) of Title 9, §15.031 (Criminal Solicitation of a Minor) of Title 4, §38.17 (Failure to Stop or Report Aggravated Sexual Assault of Child) of Title 8 of the Texas Penal

- Code (TPC), or any like offense under the law of another state or federal law;
- (b) A misdemeanor or felony under the Texas Controlled Substances Act, §46.13 (Making a Firearm Accessible to a Child) or Chapter 49 (Intoxication and Alcoholic Beverage Offenses) of Title 10 of the Texas Penal Code, or any like offense under the law of another state or federal law that the person committed within the past ten years;
 - (c) Any other felony under the Texas Penal Code or any like offense under the law of another state or federal law that the person committed within the past ten years; and
 - (d) Deferred adjudications covering an offense listed in subsections (a)-(c) of this section, if the person has not completed the probation successfully.

In addition, the following may also preclude a person from being present in a child-care center:

- Any sustained finding of child abuse or neglect, including sexual abuse, physical abuse, emotional abuse, physical neglect, neglectful supervision, or medical neglect.
- Any central registry finding of child abuse or neglect (whether sustained or not), where Licensing has determined the presence of the person in a child-care operation poses an immediate threat or danger to the health and safety of children.

Licensing will provide the center with the results of the background check and a determination of whether the person:

- is permanently barred and must not be present at an operation while children are in care;
- is temporarily barred and may not be present at an operation while children are in care pending the outcome of the administrative review and due process hearing; or
- must not be present at a child-care operation while children are in care, unless a risk evaluation is approved.

If the person with the criminal conviction or central registry finding believes the information is incorrect, the center must still take the action called for in the letter. However, the center may also take steps to talk to the licensing staff to verify the results. Complete information regarding background checks including implementing the results of background checks is available at http://www.dfps.state.tx.us/Child_Care/About_Child_Care_Licensing/.

Health Requirements

Exams

Potential caregivers are not required by law to submit to a health exam during the employment process. A center may require potential caregivers to submit to a medical exam, but the exam must be required for all entering employees of the same position. The information must be kept confidential and cannot be used to discriminate against a potential candidate.

Immunization Policy

A center may want to consider requiring care givers to maintain immunizations against the communicable diseases common in children.

Personnel Records

The DFPS requires that child-care centers keep records on each person regularly present at the child-care center (volunteers and employees). These records include documents indicating the start and end dates of employment, documentation of the employee's qualifications, a notarized licensing affidavit for applicants of employment, and a record of the employee's training hours. Records must be kept at the center or in a central administrative location for at least three months after an employee's last day on the job, except the annual training records which must be kept both for the current and previous year. However, due to the recent HIPPA legislation, all health care information including should be kept in a separate file. The center should make sure to limit access to personnel records.

Independent Contractors vs. Employees

An independent contractor is a person who conducts work for the center but is not an employee of the center. DFPS regulations apply to all individuals regularly in contact with the children whether an employee or independent contractor. Other state and federal labor laws apply only to employees. It is important for a center to classify workers correctly.

There is no one test to determine whether a worker is an employee or an independent contractor. Generally an independent contractor controls the details of his/her work, provides the necessary tools, and operates in a business that is distinct from the employer's business.

New businesses often work through independent contractors because doing so minimizes the reporting requirement for the employer. In addition, a center may also find it helpful to classify special area instructors, such as Spanish, computer, or ballet teachers, and other workers such as van drivers and janitors, who work only weekly or bi-weekly, as independent contractors under written contracts. Employers are required to report all wages and pay all taxes properly for their employees. Failure to properly classify a worker may result in severe consequences for the employer including back taxes, interest, penalties, overtime, and compensation for other job benefits. A center director who is unsure whether a worker should be classified as an independent contractor or an employee should seek legal counsel.

Federal and State Nondiscrimination Laws

Texas is an at-will employment state, but many different local, state and federal laws prohibit discrimination in employment based on race, color, religion, gender, national origin, age, and disability, and sexual orientation. Employers can be held liable for discrimination by supervisors, co-employees, agents of the employer, volunteers and, in some circumstances, non-employees such as clients or customers.

ADA Compliance

An individual with a disability under the ADA is a person who has:

- a physical or mental impairment that substantially limits one or more major life activities,
- a record of such an impairment, or
- is perceived as having such an impairment.

Reasonable accommodation means making a change in the work environment or in the way a job is performed in order to enable a qualified person with a disability to enjoy equal employment opportunities. There are basically four kinds of accommodations an employer can provide: changes to a job application process; changes to the work environment, or to the way a job is usually performed; changes to the content of a job, i.e., removing non-essential job functions; and changes that enable an employee with a disability to enjoy equal benefits and privileges of employment (such as access to training).

Paying Employees

Texas law has several specific mandates governing when and how employees must be paid. Employers can be sanctioned with both criminal and civil penalties for violating the payday laws. As a result, employers need to be extremely careful in this area of the law.

Laws regarding the payment of employees include:

- Time for Payment of Employees: how often to pay exempt and non-exempt employees, when paychecks must be ready, and notices that must be posted.
- Delivery of Payment to Employees: where and to whom to deliver payment to employees.
- Last Paycheck: how and when to pay employees who are fired or who resign.
- Employment Taxes: A nonprofit employer is responsible for federal income tax, social security, and Medicare taxes which must be deducted from employee wages and sent to the IRS. Nonprofit directors are jointly and severally liable for a failure to pay such taxes..
- Unemployment Compensation: Employees who are terminated from nonprofits with more than four employees may be eligible for unemployment compensation. Employees who leave their jobs due to disaster or domestic violence may also be eligible for compensation.

- **Deductions:** Deductions are allowed in only very limited circumstances and employers must be careful to get proper authorization from the employee in writing before making an employee-authorized payroll deduction. Unauthorized deductions cause many problems for employers. Legal deductions include the following: a court order, such as court-ordered child support payments; IRS withholding; and authorization in writing by the employee, and then only for a lawful purpose such as deductions for charities or medical expenses. Deductions for health insurance for dependants of employees subject to court order under Family Code § 154.186 are mandatory.

The 40-Hour Work Week

The Fair Labor Standards Act (FLSA) is the federal law that governs wages and hours. It requires employers, including non-profit organizations, to pay employees a minimum wage and overtime pay for all hours worked in excess of 40 hours in a workweek, unless the employee is an exempt employee. The workweek is defined as seven consecutive 24-hour periods starting on any day and hour designated by the employer. Center administrators should note that employees who work a 7:30 a.m. to 6:00 p.m. shift five times a week will work more than 40 hours per week.

Once the workweek is established, it may not be changed to avoid complying with federal wage and hour laws. Hours worked includes all time spent in physical or mental exertion for the benefit of the employer and also all on-duty time required or controlled by the employer, even if no work is required. Employers are generally required to pay non-exempt employees one and a half times their hourly pay for their overtime hours.

Exempt employees need not be paid overtime for hours worked over 40. To be considered an “exempt employee”, an employee must meet both a “duties test” and a “salary (or fee) basis test.” To satisfy the duties test, the employee’s duties must fall into one of the following categories: executive; administrator; professional; or outside sales employee. Simply paying an employee a salary and assigning an employee an exempt-sounding job title does not make them exempt. The determination of whether an employee is exempt or nonexempt is complex and fact specific. A center should consult an attorney for assistance in making the determination.

Penalties for Violations of the Fair Labor Standards Act

The Department of Labor enforces the FLSA and may recover back wages for employees who have been underpaid in violation of the law. Violations may result in civil or criminal action.

Best Practices Tips

Have an accurate and detailed job description to determine whether an employee is exempt from overtime pay. Have clear policies and procedures for deductions from the pay of exempt employees.

Suggested Handbook Provisions

Have an accurate and detailed job description to determine whether an employee is exempt from overtime pay. Have clear policies and procedures for deductions from pay of exempt employees. Establish clear standards for hiring and termination employees. Implement an employee handbook with the following provisions:

- Employment Terminable At-Will;
- Statement of Right to Revise Policy;
- Equal Opportunity Statements and Prohibition Against Discrimination;
- Payroll Practices/Policies;
- Full Time and Part Time Work;
- Leaves of Absence;
- Workplace Safety Policies;
- Obligation to Report Child Abuse;
- Policy Prohibiting Sexual Harassment and Harassment Based on Race, Color, Religion, or National Origin;
- Disciplinary Policies; and
- Acknowledgment of Receipt of Handbook and Obligation to Read and Adhere to Policies.

For more information, see Texas C-BAR's *Employment Law Issues: A Guide for Nonprofit in Texas*, available at http://www.texasbar.org/legal_library/pubs/employment_law.php.