



# CHILD CARE LAW CENTER

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## Know the Law About Hiring an Assistant in Your Family Child Care Home in California

To help care for the children in the child care program, family child care providers sometimes need to hire an assistant. Sometimes the assistant might work on a permanent basis; other times the assistant might fill in from time to time, when needed.

In case, hiring someone to help care for the children—and supervising that person—is a big responsibility. If you as a child care provider hire an assistant, in most cases you will be an employer and the person you hire will be your employee. As an employer, you will need to comply with many federal and state laws.

The questions that follow cover many of the most common issues that come up with regard to employment in family child care programs. However, please understand that the answers are not legal advice. If you're unsure about what the law requires in your particular employer-employee relationship with an assistant, be sure to consult an attorney or other professional who knows employment law.

### 1. How Should I Go about Finding an Assistant?

It may help to think of the process as having five steps:

1. Develop and circulate a job description, making sure that you accurately describe the skills that the ideal candidate will

have and the requirements assistants must meet,

2. Review applications or resumes (you can develop your own application form that candidates fill out, or ask for resumes, or do both),
3. Interview candidates, making sure that your questions are legally permissible (see below),
4. Check references
5. Make a job offer

The job description—and the hiring process as a whole—should be fair and uniform. The process should not discriminate against classes of people based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition (including HIV/AIDS), genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation.<sup>1</sup> One way to avoid discriminating against people with disabilities, for example, is to describe the job's essential functions rather than physical abilities an assistant would need.

**Example:** Instead of requiring applicants be able to lift 20 pounds, say that applicants must be able to lift infants and toddlers for diaper changes.

### 2. What Questions Should I Ask on the Job Application or When I Interview Applicants?

Since you will be working closely with an assistant when you interview candidates you

should try to establish a rapport to determine whether you would work well together. Make sure that applicants understand that anyone hired must first pass a criminal background check.

Ask applicants for:

- Their current and previous employment;
- Their current and previous addresses;
- Verification of their educational credentials;
- Personal references (non-relatives who have known the applicant for a substantial period);
- Names and contact information for their former employers and co-workers;
- Names and contact information for parents of children the applicant has cared for.

### 3. What Questions May I *Not* Ask?

Be careful not to ask questions, either on the application or during an interview, that invade the applicant's privacy, such as whether the applicant is married or has children. The California Constitution protects individuals' "inalienable right" to privacy, and questions about family structure can violate this right.<sup>2</sup>

You also may not ask applicants to disclose arrests that did not lead to conviction or convictions that a court has dismissed or ordered sealed.<sup>3</sup> You may, however, ask about convictions that have *not* been dismissed or sealed by a court. This information will come up anyway in the criminal background check that every employee must get before starting work.

### 4. Does an Assistant Have to Pass a Criminal Background Check?

Yes. California licensing law requires everyone working in a family child care home to submit to a criminal background check.<sup>4</sup> You should explain this requirement to all applicants, both in the written job description that you distribute and when you conduct interviews.

Before starting work a prospective assistants must send their fingerprints to the California Department of Justice and the Federal Bureau of Investigation.<sup>5</sup> Anyone you hire as an assistant may not begin work until she receives a criminal record clearance or a criminal record exemption from the state department of social services.

### 5. What Questions May I Ask When I Contact References?

You may want to ask applicants for both *personal* and *employment* references; both can give you valuable information. Personal references are people who have known the applicant for a long time and can tell you about things like the applicant's honesty and character.

Employment references are people who know the applicant in work settings. If the applicant has worked in the child care field, these references can be especially helpful. Ask the reference whether he or she worked directly with the applicant—in what capacity and over what period of time? Ask what the applicant's duties were in her previous position and how she performed those duties.

Before you call either personal or employment references for any applicants, make a list of questions you will ask and use the same list for all applicants' references. That will give you uniform information and allow you to compare applicants based on the same factors. Make a copy of the list of questions to use for each reference and include spaces for name of applicant, name of reference, date, and comments.

### **6. What Is the Minimum Wage that I Must Pay an Assistant?**

You must pay at least the California minimum wage; as of July 1, 2014, that was \$9.00 per hour.<sup>6</sup>

However, some cities or counties have their own, higher minimum wages. If the minimum where you live is higher than \$9.00 you must pay the higher wage. For example, San Francisco has a minimum wage of \$10.74 that took effect on Jan. 1, 2014.<sup>7</sup> As of Oct. 1, 2014, Berkeley will have an hourly minimum wage of \$10.00; the Berkeley minimum wage will increase to \$11 on Oct. 1, 2015 and to \$12.53 on Oct. 1, 2016.

### **7. Will My Assistant Be Entitled to Overtime Compensation?**

Yes. If your assistant works overtime you must pay *one and one half times* the regular rate for:

- Any hours *more than 8* that the employee works *in one day*;
- Any hours *more than 40* that the employee works *in one week*; and

- The *first 8 hours* that an employee works on the *seventh day in one week* (regardless of how many hours the employee worked during the previous six days).<sup>8</sup>

So, while the state minimum wage is \$9.00 per hour (and assuming no higher local minimum applies) in any of these circumstances you would have to pay an assistant \$13.50 per hour (1.5 x \$9).

You must pay *twice* the regular rate of pay, or \$18 per hour while the minimum wage is \$9.00, for:

- Any hours *more than 12* that an employee works in one day; and
- Any hours *more than 8* that an employee works on the *seventh day in one week*.<sup>9</sup>

### **10. What Breaks Is an Assistant Entitled to Take?**

If your employee works:

- More than 3 ½ hours in one day you must allow a 10-minute break for every 4 hours of work;<sup>10</sup>
- More than 5 hours in one day you must allow a meal break of at least 30 minutes;<sup>11</sup>

An employee may choose *not* to take a meal break *only* if the employee worked 6 hours or less in one work day *and* the employer agrees that the employee will not take a break. Unless the employee has no duties during a 30-minute break, the break is considered “on duty” time

that is counted as hours worked, paid at the employee's regular rate. "On duty" meal periods are allowed only when the nature of the work prevents an employee from being relieved of all duty and when the employer and employee agree in writing to an on-the-job paid meal period.<sup>12</sup>

*Tip:* Even during employee meal break times you must maintain the required child to staff ratios.

### **11. Is an Assistant Legally Entitled to Paid Sick Time or Vacation?**

Under California law, no. Employers do not have to provide paid sick or vacation days. However, some cities may have their own requirements. For example, employees in San Francisco are entitled to paid sick leave.<sup>13</sup>

Especially in child care settings, paying employees for sick time is a good practice as children cared for by people who are sick will become sick too. A statewide effort is underway in California to convince the state legislature to require employers to offer paid sick time.<sup>14</sup>

### **12. When Is an Assistant Legally Entitled to Unpaid Time Off?**

Under California law you must give an assistant unpaid time off for the following reasons:

- Jury duty;<sup>15</sup>
- Court appearance;<sup>16</sup>

- To get a restraining order if the assistant is a victim of domestic violence;<sup>17</sup>
- To visit the assistant's child's school if the child is suspended;<sup>18</sup>
- To serve as a volunteer firefighter.<sup>19</sup>
- To vote, if the assistant would not have enough time to vote before or after work.<sup>20</sup>

### **13. What Employment Records Do I Have to Keep?**

You must keep, for three years, records about each employee that contain the following information:

- 1) the employee's full name,
- 2) driver's license number if the employee is to transport children,
- 3) date of employment,
- 4) date of birth,
- 5) current home address and phone number,
- 6) documentation of completion of training on preventative health practices,
- 7) past experience, including types of employment and former employers,
- 8) duties of the employee,
- 9) termination date if no longer employed,
- 10) signed and dated copy of the Notice of Employee Rights,
- 11) signed statement regarding the employee's criminal record history, and
- 12) documentation of either a criminal record clearance or a criminal record exemption.<sup>21</sup>

You must also keep a copy of the Employment Eligibility Verification, also known as Form I-9.<sup>22</sup>

### **14. Do I Have to Provide Worker's Compensation Insurance for an Assistant?**

Yes. California law requires all employers maintain worker's compensation insurance for injuries caused by employment during the course of employment.<sup>23</sup>

### 15. What Are My Federal Tax Obligations as an Employer?

If you pay any amount of salary to an employee you must withhold social security and Medicare (FICA) and income taxes from your employee's wages. You also must *pay* federal unemployment taxes (FUTA), and the employer share of FICA taxes.<sup>24</sup>

### 16. What Are My State Tax Obligations as an Employer?

If you pay a permanent assistant more than \$100.00 in any calendar quarter, you must withhold California personal income tax and state disability insurance (SDI) from the assistant's wages. You also must pay unemployment insurance and employment training tax.<sup>25</sup>

### 17. What Are My Legal Obligations When I Fire or Lay Off an Assistant or the Assistant Quits?

If you fire or lay off an assistant you must give the assistant her final paycheck on her last day of employment.<sup>26</sup>

If the assistant quits, you must give her the final paycheck within 72 hours of when you receive notice. If the employee gives you at least 72 hours' notice, you must deliver the paycheck at the time of quitting. If the assistant asks you to mail the last paycheck, you must mail it within 72 hours.<sup>27</sup>

If you offer paid vacation time and the employee has accrued vacation time that she has not used at the end of their employment, you must pay out the vacation time in the final paycheck.<sup>28</sup>

**This publication is intended to provide general information about the topic covered. It is made available with the understanding that the Child Care Law Center is not engaged in rendering legal or other professional advice. We believe it is current as of June 2014 but the law changes often. If you need legal advice, you should seek help from a competent attorney.**

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### Endnotes

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<sup>1</sup>Laws that prohibit employment discrimination apply only to employers with a minimum number of employees. *See* California Fair Employment and Housing Act, California Government Code §§12926(d), 12940(a) (five or more employees); Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e(b) *et seq.* (15 or more employees); Age Discrimination in Employment Act, 29 U.S.C. §§623, 630(b) *et seq.* (20 or more employees); Americans with Disabilities Act, 42 U.S.C. §§12101, 12111(5) *et seq.* (15 or more employees). As a family child care provider you are not likely to have even five employees. *However*, you still should be careful not to discriminate against employees or job applicants; discriminating is never a good practice.

<sup>2</sup> [Cal. Const. Art. 1.](#)

<sup>3</sup> [Cal. Labor Code § 432.7.](#)

<sup>4</sup> [Cal. Health & Safety Code §§ 1596.871\(a\)\(1\), \(b\)\(1\)](#); Cal. Code Regs. tit. 22 §102370(d).

<sup>5</sup> Cal. Code Regs. tit. 22 §102370(c)(2).

<sup>6</sup> Cal. Code Regs. tit. 8 § 11050; [Industrial Welfare Commission Order No. 5-2001, Regulations Wages, Hours, and Working Conditions in the Public](#)

[Housekeeping Industry 4 \(2014\); State of California, Department of Industrial Relations, Minimum Wage \(2014\).](#)

<sup>7</sup> [City and County of San Francisco, Labor Standards Enforcement, Minimum Wage Ordinance.](#)

<sup>8</sup> [Cal. Labor Code §510\(a\); Industrial Welfare Commission Order No. 5-2001, 3\(A\)\(1\)\(a\).](#)

<sup>9</sup> [Cal. Labor Code §510\(a\); Industrial Welfare Commission Order No. 5-2001, 3\(A\)\(1\)\(b\); Cal. Code Regs. tit. 8 § 11050\(3\).](#)

<sup>10</sup> [Cal. Code Regs tit. 8 §11050\(12\); Industrial Welfare Commission Order No. 5-2001, 12 \(A\).](#)

<sup>11</sup> [Cal. Code Regs tit. 8§11050\(11\); Industrial Welfare Commission Order No. 5-2001, 11 \(A\).](#)

<sup>12</sup> [Cal. Code Regs tit. 8 §11050\(11\); Industrial Welfare Commission Order No. 5-2001, 11\(C\)](#)

<sup>13</sup> [San Francisco Administrative Code Chapter 12W.](#)

<sup>14</sup> For more information about the bill and the reasons paid sick time is important, see [Next Generation, The Top 5 Reasons to Pass Earned Sick Leave Legislation in California.](#)

<sup>15</sup> [Cal. Labor Code § 230\(a\).](#)

<sup>16</sup> [Cal. Labor Code § 230\(b\).](#)

<sup>17</sup> [Cal. Labor Code § 230\(c\).](#)

<sup>18</sup> [Cal. Labor Code § 230.7 \(a\).](#)

<sup>19</sup> [Cal. Labor Code § 230.3.](#)

<sup>20</sup> [Cal. Elec. Code § 14000 \(a\).](#)

<sup>21</sup> [Cal. Code Regs. tit. 22 §102416.1\(a\)\(1-12\).](#)

<sup>22</sup> [Form I-9](#) is required by the United States Department of Homeland Security.

<sup>23</sup> [Cal. Labor Code §§3700 et seq.](#)

<sup>24</sup> For more information, consult [IRS Publication 15, Employer's Tax Guide – Circular E.](#)

<sup>25</sup> For more information consult [California Employment Development Department, Overview—Payroll Taxes.](#)

<sup>26</sup> [Cal. Labor Code § 201.](#)

<sup>27</sup> [Cal. Labor Code § 202.](#)

<sup>28</sup> [Cal. Labor Code § 227.3.](#)