

Family Wealth Compass

Charting A Course For Your Family's Future

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THE FIVE THINGS YOU NEED TO KNOW ABOUT HIRING, DOCUMENTING, AND SPONSORING DOMESTIC HOUSEHOLD HELP IN THE NEW ERA OF BROADENED IMMIGRATION ENFORCEMENT

We are in a New Era of Broadened Immigration Enforcement. President Trump is carrying out his campaign promise to target illegal immigration to the United States. In addition to increased enforcement at our borders, enforcement efforts within the United States have a new focus. Whereas the Obama Administration geared its "interior enforcement strategy" to the removal of high risk criminal aliens, the Trump Administration has shifted to the pursuit of deportation and removal of all persons who have violated our immigration laws, even those with minor immigration violations. Applicants in legal immigration processes are being scrutinized. Certain longstanding government programs are ending. For example hundreds of thousands of persons from Guatemala, El Salvador, Honduras, Haiti and Nicaragua who have been work authorized for decades through the Temporary Protected Status ("TPS") program, now face the termination of that program's designation for their home country in the next several years (except that as of October 4th, 2018, a preliminary injunction in the U.S. District Court in California has been issued stopping the U.S. Department of Homeland Security from terminating TPS for immigrants from Haiti, Nicaragua, El Salvador and Sudan; however, the termination of this program still remains uncertain). Foreign nationals affected by these changes may comprise loyal members of your domestic household staff.

What do these changes mean for you and your domestic household employees? Even if you are confident that all foreign nationals working as house staff have legal status, as a prudent employer, it is important to ensure that your house staff's employment eligibility is well documented and that all employment law and tax obligations are being fulfilled. If you are like many of our client employers, you have a long relationship with your house staff. They may consider you a trusted advisor. Based upon the most common questions we receive from employers regarding foreign national domestic household help, here are the five things you need to know regarding the hiring, documenting, and

immigration sponsorship of household help in the New Era of Broadened Immigration Enforcement.

1. Do I need to verify and document the employment eligibility of my house staff?

It is a common misconception that immigration, tax and labor and employment laws can be ignored when it comes to domestic household employees working out of one's home. Yet U.S. immigration laws require documenting an employee's legal status and provide penalties for knowingly employing persons who are not authorized to work in the United States. Generally, all employers must verify the identity and employment authorization for every person they hire, including U.S. citizens, and document such verification on Employment Eligibility Verification Form I-9. Completion of a Form I-9 is generally required for a domestic household employee who performs child care, household tasks, and/or upkeep of a home or surrounding yard, or similar services on a regular basis in return for wages or other benefits. However, you would not be required to complete a Form I-9 for a domestic worker if the domestic worker is providing services as an independent contractor or such services are sporadic, meaning they occur occasionally, singly or in random instances; irregular, meaning the occurrence or activity lacks continuity or regularity; or intermittent, meaning they do not occur continuously but instead come and go at intervals. Independent contractors include individuals or entities that carry on independent business, contract to do a project according to their own means and methods, and are subject to control only as to the results of the work and not how it will be done. Many factors are considered when determining whether or not an individual or entity is an independent contractor. Regardless of who completes the Form I-9, employers or persons using contract services must not employ or use the services of a domestic worker knowing that person is not authorized to work in the U.S. The government's stated "best practices" with respect to the Form I-9 employment eligibility verification process include

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annual training for each person who prepares an I-9 form and regular internal audits of Forms I-9.

Takeaway: Whether you have I-9 Forms for all members of your house staff, or you do not, enlist assistance from immigration counsel now to review your records, provide training to your house staff management and assist them with an internal audit of Forms I-9.

2. My foreign national domestic household employee has asked me to sponsor them for a "Green Card". What's involved?

Your foreign national household domestic employee whose TPS status may soon be ending, or who is worried about their immigration issues, may request that you "sponsor them" for permanent residence to obtain a "Green Card". If this occurs, a detailed discussion of what is involved with immigration counsel who regularly handles such matters is warranted. While in some situations this is a feasible strategy, there are many myths regarding this process. For example 1) It will provide the employee a quick and seamless route to legal status; 2) It causes no risks to the employer or foreign national employee; and 3) It will provide an overarching solution to the foreign national's household employee's immigration problem. In fact, the process is lengthy, and generally takes a number of years, during which time the foreign national employee does not immediately benefit with a grant of legal status. From the employer's standpoint, it involves a good faith recruitment effort to advertise the position and show no interested, available or qualified workers applied. Information regarding the employee's employment history is required on the application signed by both the employer and employee. Even if the sponsorship is approved, the employee's past immigration violations, such as a previous deportation order, may complicate the process. Finally, there are often other solutions, such as sponsorship by a U.S. citizen immediate family member, which provide a more straightforward path to legal status for the foreign national employee.

Takeaway: Rather than immediately agree to "sponsor" the employee, explore the ramifications for you and your employee with employment-based immigration counsel, and make sure all available strategies have been considered.

3. How can I make sure my employee gets good legal advice?

Am I at risk if I help them?

Like many other areas of law, Immigration law has many subspecialties, including "employment-based", "family-based", "deportation/removal defense", and "political asylum", among others. While in an employment-based case, using one lawyer to represent the employer and the employee is customary. If your employee needs another type of immigration attorney for his or her individual case, in order to preserve the attorney-client privilege and confidentiality, it is generally a better practice for the foreign national employee to have separate counsel. However, if you desire that your immigration counsel stay involved, a good solution to protect everyone is to enter into a "Common Interest Agreement" where the employer and the employee agree to mutually share information within the parameters of attorney-client privilege.

Takeaway: If you are considering assisting a foreign national household employee with their immigration processes, consult an immigration attorney who customarily represents employers. This immigration attorney can advise you regarding the risks of sponsorship and can assist you to make sure your Form I-9 documentation is in order. If other strategies should be pursued for the type of immigration lawyer your foreign national domestic employee needs, reputable and qualified immigration counsel in the appropriate subspecialty can be identified. A "Common Interest Agreement" can be utilized so that your attorney can monitor the matter while still protecting confidential information between your employee and counsel.

4. Am I at risk criminally if I help an undocumented worker?

The provisions of the Federal Criminal Statute entitled "Bringing in and Harboring Certain Aliens" ("the Harboring Statute") are among those which might apply in the case of a domestic household employee who is not authorized to work. It is a violation of law for any person to conceal, harbor, or shield from detection in any place, including any building or means of transportation, any alien who is in the U.S. in violation of law. Key aspects of the Harboring Statute include:

- The prohibition against harboring applies to anyone.
- Interpretations of Harboring proscribe a very broad range of engagement activities with regard to interactions with illegal aliens.
- Harboring can include:
 - o Providing shelter;
 - o Instructing illegal aliens on how to avoid arrest and detection; and
 - o Conduct that impedes a government investigation.

Although mere employment of an illegal alien appears to fall within the ambit of the harboring statute, most courts seem to require affirmative conduct beyond such employment. There are substantial potential criminal penalties for conviction of harboring including imprisonment, fine, and forfeiture of property.

Takeaway— In today's climate of increased enforcement activity with regard to persons unlawfully in the U.S., it is prudent for individuals utilizing the services of a domestic household employee to review the circumstances of their particular situations in the context of the employment eligibility verification requirements. It is also reasonable to expect that the prosecution of harboring cases will continue and that prosecutors will argue for the broadest possible ambit of the statute.

5. What should my employee do if Immigration and Customs Enforcement (ICE) comes to their home looking for someone in their household? What arrangements should be made for U.S. citizen children if a parent gets taken into custody or deported?

The best course of action is for the foreign national who is at risk to be prepared in advance. There are numerous resources currently available through public interest groups that represent and provide information to immigrants. The American Immigration Lawyers Association (www.aila.org) has compiled helpful "Know your rights" fact sheets in multiple languages to inform foreign nationals of their rights if ICE comes to their home, stops them in public or comes to their work place. These fact sheets explain in detail that all persons living in the United States, even undocumented immigrants, have certain constitutional rights and discuss what to do if questioned by an ICE agent, explain the right to remain silent, and advise that if the foreign national is detained or taken into custody, they have the right to contact a lawyer. Immigrants' rights groups also often provide counsel and forms that can be signed in advance to authorize a third party, such as a friend or relative to care for children in an emergency situation.

Takeaway— The foreign national domestic employee will benefit from access to available resources to become better informed regarding their options and risks, and to explore legal options to authorize friends or relatives to care for their children in the event they are separated from them in an immigration emergency.

Gunster's immigration attorneys are available to consult with you and provide training for your household staff management regarding compliance with Form I-9 employment eligibility verification requirements and to guide you and your foreign national domestic worker employees to identify appropriate immigration counsel and immigration strategies in the New Era of Broadened Immigration Enforcement. 

ESTATE PLANNING RECORDS

The execution of estate planning documents is often a relief to our clients. Many times, after putting it off for months and even years, it represents the culmination of much hard work and thought. However, one often over-looked aspect of the estate plan is maintaining your information in an organized manner to allow the orderly administration of your estate after your passing.

The Personal Representative of your estate (and/or the Trustee of your Revocable Trust) is the party that will be primarily responsible for the administration of your estate. Many times this will be your surviving spouse, your children or a bank or trust company (or a combination of the foregoing). The more information you can provide in advance, the more organized the administration can be during this stressful time.

Some of the information that you should compile is as follows:

1. **Funeral Instructions** such as burial, funeral or cremation arrangements, and any instructions for the type of ceremony desired.
2. **Contact Information** for family members, business partners, financial advisors, insurance agents, doctors, attorneys and accountants.
3. **Legal Documents** such as your estate planning documents (Wills, Trusts, Separate Writings, etc.), deeds, automobile titles, operating agreements for entities and promissory notes.
4. **Personal Information** such as computer user names and passwords (for e-mail accounts, social media accounts, etc.), safety deposit box information (including keys and contents), credit cards, driver's license, birth certificate, combination to any safe, club membership records and military service records.
5. **Insurance Policies**, including life insurance, homeowners, medical, dental, personal property, automobile, long-term care and umbrella.
6. **Financial Information**, including names of financial institutions, account numbers and passwords. For retirement accounts and life insurance policies, this would also include beneficiary designations. Also, information on any pensions should be maintained.
7. **Tax Documentation** such as income tax returns and gift tax returns, and information you have been collecting to prepare your tax returns for the current years (including 1099s, W-2's, charitable contributions, etc.).

Traditionally, this type of information would be kept in a binder in a secure place in your residence (such as a safe). However, clients have increasingly been maintaining this information electronically on their personal computers. Regardless of how this information is stored, it should be periodically updated from time to time. In addition, it may be advisable to provide your estate planning attorneys with the location of this stored information.

Please let us know if you would like any assistance in putting together this type of information in an orderly manner. 

FUNDING OF REVOCABLE TRUSTS

You have just signed your new Will and Revocable Trust. You can now cross one task off of your "to do" list and move on to the next task. Or can you? The execution of your Revocable Trust is only one part of completing the task. The second part, which is often over-looked, is the funding of your Revocable Trust.



As a reminder, some of the benefits of creating a Revocable Trust include the following:

1. **Avoidance of Probate** – The assets that you retitle from your individual name into the name of your Revocable Trust will avoid the probate process. Often, probate can be a costly and time-consuming endeavor. In addition, courts have increasingly been exerting additional judicial oversight over the probate process, as compared to the judicial oversight associated with the administration of revocable trusts. Also, if you own out-of-state real property, you can avoid additional probate in those jurisdictions by transferring such real property to your Revocable Trust. Please note that although it may be possible to avoid the probate process, it still may be advisable to open a probate proceeding to shorten the time period within which creditors can file a claim against your estate from two years to a few months.
2. **Disability Planning** – If you were to become disabled, the successor Trustee named in your Revocable Trust can seamlessly take over the administration of the assets titled in the name of your Revocable Trust without any delay. If, however, your assets remain titled in your individual name, the party named in your Financial Durable Power of Attorney would need to take over the administration of those assets, and, despite the legal validity of these Financial Durable Power of Attorneys, third parties are often hesitant to communicate with those named in Durable Powers of Attorney. In addition, a court supervised guardianship proceeding may be necessary.

When retitling your assets, you will need to provide the name and date of the Revocable Trust, the identity of the Trustee of the Revocable Trust (often yourself and sometimes you and your spouse) and, for financial related accounts, the taxpayer identification number for the trust (often your social security number).

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Below is a non-comprehensive list of assets to consider retitling into the name of your Revocable Trust:

1. **Bank Accounts and Financial Accounts**— You should contact your financial advisors to assist you with the retitling of these types of assets into the name of your Revocable Trust.
2. **Interest in Closely Held Entities**— You should contact your legal counsel to assist in the preparation of any transfer documents (such as stock powers and assignment documents). The operating agreements for these closely held entities will need to be reviewed to ensure compliance with any transfer restrictions contained in the operating agreements.
3. **Real Property**— You should contact your legal counsel to assist with the preparation of any deeds to transfer your real property to your Revocable Trust. Please note that if the real property is subject to a mortgage, approval from the lender will likely need to be obtained in advance of the transfer. In addition, there are additional issues to consider in transferring your homestead to your Revocable Trust (these issues are beyond the scope of this article,). For out-of-state real property, local counsel will need to be obtained to prepare the appropriate deeds. Insurance on such real property should also be addressed.
4. **Tangible Personal Property**— Some tangible personal property (such as jewelry and furniture) do not have recorded legal title and can be transferred to your Revocable Trust through a simple

assignment document. Other types of tangible personal property (such as cars and boats) do have recorded legal title and can be transferred by signing legal title over to the Revocable Trust. You should consider, however, whether ownership by the Revocable Trust would cause any inconvenience to you with respect to such assets (for example, insurance companies may be reluctant to issue insurance policies in the name of the Revocable Trust).

5. **Notes Receivable** If someone owes money to you, the obligation can be transferred either by endorsement or assignment of the promissory note. As each situation may have different facts and circumstances, the transfer should be discussed with your legal counsel. Mortgages you own should be transferred to the Trust by a recordable assignment to avoid any possible future problems.

Retirement accounts, such as Individual Retirement Accounts and 401K Plans cannot be transferred to your Revocable Trust. However, in certain situations, it may make sense to name your Revocable Trust (or specific trusts to be created under your Revocable Trust) as the beneficiary. Life insurance that is not already owned by a trust could be transferred to your Revocable Trust (and the Revocable Trust, or specific trusts to be created under your Revocable Trust), could be named as the beneficiary. However, you should consult with your legal counsel before making any such changes to your retirement accounts and life insurance policies.

If you would like our assistance with the retitling of your assets into the name of your Revocable Trust, please let us know. 

1. All references to available/allowable estate tax exemptions and credits relate only to persons who are U.S. citizens; references to gift tax exemptions/exclusions generally apply to U.S. citizens and U.S. Lawful Permanent Residents (i.e., "green card" holders). While most transfer tax savings techniques discussed can be fine-tuned to benefit non-U.S. citizens, the results will differ and must be addressed on a case-by-case basis.

2. The 2018 Annual Exclusion is an aggregate of \$15,000 per donee, from each donor, or \$30,000 per couple, if a husband and wife file a "split gift" Gift Tax Return on gifts made from either of their assets this year. **Medical/Tuition ["ed/med"] Exclusion Gifts** allow a donor to pay an unlimited amount for anyone's medical or tuition expenses (including health insurance premiums), if paid directly to the service provider, without incurring any gift tax or use of their unified credit; and, if properly structured, ed/med gifts should not reduce the \$15,000 amount available to be given to the same person by a donor each year.

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