



Top 5 Employment Issues A New GC/Small Law Department Must Know

Speakers: Tina Maiolo, Member, Carr Maloney P.C.
Aisha Massengill, Managing Counsel, Employment, Under Armour

Association of Corporate Counsel- September 12, 2019

CARR MALONEY PC | WWW.CARRMALONEY.COM | 202.310.5500

Agenda: Top Five Employment Law Risks

- **Class Action Risks**
- **Personnel Policies**
- **Hiring and Firing Practices**
- **Managing Employee Leaves**
- **Managing Contractors**

I. Class Action Risks

Class Action cases are definitely on the rise – and have been for the last several years. The stakes in these types of employment lawsuits can be extremely significant, as the financial risks of such cases are enormous. More often than not, class actions adversely affect the market share of a corporation and impact its reputation in the marketplace.

Primary Class of Risks:

- FLSA classification risk
- Discrimination risk
- Pay discrimination risk

Class Action Risks- FLSA

FLSA Classification Risk:

- Most employees who work more than 40 hours in a work week are entitled to overtime. Federal wage and hour regulations set forth the following exemptions:

Non-Exempt	vs.	Exempt
Entitled to overtime pay at 1.5 times their regular rate		NOT entitled to overtime pay at 1.5 times their regular rate
Could be paid a salary or an hourly wage		MUST be paid a salary, not an hourly wage
Could earn any amount per week		MUST earn at least \$455 per week
Could work in any field		Job must fit into one of eight categories

the balance

Class Action Risks - FLSA

Proposed Changes:

On March 7, 2019, the United States Department of Labor (“USDOL”) issued its long-awaited proposed rule that would increase the minimum salary threshold to qualify for exemption from the overtime provisions of the Fair Labor Standards Act (“FLSA”) from their current level of \$455 per week (\$23,660 annually) to \$679 per week (\$35,308 annually).

The proposed rule would also raise the threshold for “highly-compensated employees” from \$100,000 annually to \$147,414 per year. It is anticipated that the changes will extend overtime coverage to approximately one million United States workers. The proposed rule will be subject to a period of public comment and is anticipated to take effect in January 2020.

Class Action Risks - FLSA

Can Salaried Workers Receive Overtime?

- Yes, many salaried employees who work more than 40 hours a week are eligible to receive overtime under federal law. Companies sometimes tell their employees that because they are paid on a salaried basis, rather than hourly, they are not entitled to receive overtime. Such claims are simply not true. Unless your job duties fall into one of the narrow exemptions to federal overtime requirements, your company should be paying you overtime even if you are paid a salary.

Class Action Risks - FLSA

Contractors:

- While federal law requires companies to provide employees with overtime, no such requirement exists for contractors. As such, many companies may be tempted to misclassify employees as “contractors” to avoid paying them overtime and providing them with benefits.
- There are two types of contractors: “independent” contractors, who are self-employed (most companies don’t use them in significant numbers), and contractors who are employed by staffing and consulting firms and are sent to companies to perform assignments (these are more frequently used).
- **Misclassifying employees is a huge mistake**

Class Action Risks - **FLSA**

- Whether you are an employee or contractor in the eyes of the law depends on your actual job duties and responsibilities. The federal government uses a multi-factor test to determine if a worker has been properly classified as a contractor.

Class Action Risks - FLSA

An individual is an employee if:

- The company exerts a high level of control and instruction over the work (for example, the company directs when, where and how your work is done)
- Work hours are set by the employer and the individual does not have the freedom to make his/her own schedule
- The company provides the tools and materials needed to perform the job (an independent contractor usually must supply his or her own tools and work materials)
- The individual usually works for just one company (an independent contractor usually provides services to more than one company)

Class Action Risks – FLSA

Class Action Suits for Unpaid Wages:

- FLSA provides that an action to recover unpaid overtime may be maintained against any employer in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. 29 U.S.C.S. § 216(b).
- This statutory provision exempts FLSA collective action suits from the typical requirements of a class action under Fed. R. Civ. P. 23, namely, typicality, numerosity, commonality, and adequacy of representation.
- Under the FLSA, a collective action has only two threshold requirements: the plaintiff must show that he is similarly situated to the other members of the proposed class, and those other members must 'opt in' to the proposed class. In FLSA collective actions potential class members must affirmatively join (opt in) the lawsuit

Class Action Risks – FLSA

Class Action Suits for Unpaid Wages:

- *Stephens v. Farmers Rest. Group*, 2019 U.S. Dist. LEXIS 103031, 2019 WL 2550674
- Plaintiffs, who worked at several restaurants operated by Defendants in Virginia, Maryland, and the District of Columbia, brought claims under the Fair Labor Standards Act (FLSA) and District of Columbia and Maryland law, alleging that Defendants violated federal and state minimum-wage, overtime-pay, and sick-leave requirements.
- Settlement amount: \$1,490,000 in a settlement fund; \$388,484 in attorneys' fees; \$8,516 for litigation costs, and \$35,000 for settlement administrator.

Class Action Risks - FLSA

Class Action Suits for Unpaid Wages

- Tips to minimize exposure:
 - 1: Proper Payment of Wages and Overtime Pay
 - 2: Proper Classification
 - 3: Proper Time Records

- How do we make sure that is happening?
 - Regular Self Audits

Class Action Risks - **FLSA**

Proper Self Audits:

- **Check your job descriptions.** Be sure positions you classify as “exempt” really do fall within the administrative, executive, professional, computer, or outside sales exemptions. This means pay particular attention to lower level employees.
- **Check what employees *actually do*,** because jobs change over time while the paperwork never seems to catch up. Modify the tasks or the job descriptions until they match up.
- **Review your overtime calculations.** If you owe your employees, pay up immediately. It’s likely to be a bargain compared to the cost of a settlement.
- **See if your *state* wage and hour laws differ from the **FLSA**,** which is a federal law. The tougher standard prevails.
- **Be sure you have the latest versions of FLSA-mandated posters** hanging in plain sight. They’re likely to be the very first thing an inspector looks for.

Class Action Risks - FLSA

Proper Self Audits: Specific Steps

- Check current 1099's and agency vendor agreements, as well as those going back several years and review the actual job duties of those persons paid as independent contractors to verify that they were not, in fact, employees.
- Examine very closely all written job descriptions to ensure that they: (i) accurately reflect the work done, (ii) have been updated where necessary, and (iii) indeed justify the applicable exemptions.
- Review time keeping systems to ensure that non-exempt employees are being paid for all work performed, including work pre- or post-shift and during meal breaks; for example, employers should not automatically deduct time for employee meals or breaks without verifying whether they were taken.

Class Action Risks - FLSA

Proper Self Audits: Specific Steps

- Ensure that required payroll records and recordkeeping retention policies and procedures are current, accurate, and compliant.
- Verify that compliant policies are implemented in practice.
- Develop a formal program for reporting and resolving employee wage concerns.
- Train staff in charge of payroll, record keeping, HR

Class Action Risks - FLSA

Proper Self Audits: Specific Steps

- Whenever possible, audits—whether handled by your supervisors, committee, or counsel—should be conducted at the direction of in-house or outside legal counsel to protect the audit findings under the attorney-client privilege.

Class Action Risks - Discrimination/ Harassment Based Claims

Federal Law Protects Based on:

- Race
- Color
- National Origin
- Religion
- Age and Disability
- Genetic Information
- Returning Veterans
- Marital Status
- Personal Appearance
- Sexual Orientation
- Gender Identity or Expression
- Family Responsibilities
- Matriculation
- Political Affiliation

Class Action Risks - Discrimination/ Harassment Based Claims

- Ross v. Lockheed Martin Corp., 267 F. Supp. 3d 174 (Dist. Ct. DC 2017)
- Employees alleged that their employer engaged in race discrimination against its African-American employees through the performance appraisal system used to evaluate and promote all employees
- Class action certification was not warranted because the employees did not establish that the employer's performance review system caused racially disparate outcomes in a manner that could be established through common proof, as required by Fed. R. Civ. P. 23(a)(2);

Class Action Risks - Discrimination/ Harassment Based Claims

The Benefits of Self-Audits:

- Class action employment discrimination suits typically rely heavily upon statistical analysis of hiring, promotion, pay or other employment practices. In order to assess the legal risk of an adverse class action decision, employers should consider a self-conducted statistical audit of those employment processes most likely to draw the attention of the plaintiffs' bar or EEOC.

Class Action Risks - Discrimination/ Harassment Based Claims

- An audit: assesses potential exposure to liability, prepares defenses and/or modifying potentially problematic policies or practices in advance any claim.
- A properly conducted audit provides the employer with a preview of the statistical evidence that a class statistical expert could present.
- It may serve as a method for determining if there are credible explanations for protected group disparities and addressing any potential problem areas.
- In the appropriate circumstance, audit results might even be selectively shared in the early stages of litigation to demonstrate that an alleged disparity does not exist and that the defendant employer is well-prepared to stand by its practices.

Class Action Risks - Discrimination/ Harassment Based Claims

Steps for Self-Audits:

- First, assemble a team normally consisting of representatives from the employer's legal, human resources and information technology departments, plus experienced outside employment counsel and a knowledgeable statistical and/or labor economics expert.
- Second, decide which employment processes and protected groups to study.
- Third, review corporate policy manuals to understand how the employment processes should work in theory and relevant managers are interviewed to understand how those processes work in practice. It is important to understand not only how the processes work but also the documents generated and factors considered in making employment-related decisions during the course of the processes being studied.
- Fourth, determine if sufficient relevant data exist to study the subject processes. In the event that all relevant data does not exist, steps may be taken to generate the data during the course of the study, if practicable, or to implement procedures so that the data is gathered in the future in the ordinary course of business.

Class Action Risks - Discrimination/ Harassment Based Claims

Steps for Self-Audits:

- Fifth, design an analysis plan to answer three basic questions for each process and protected group that is being studied:
 - (a) what is the magnitude and statistical "significance" of the protected group disparity the plaintiffs' expert would likely find and introduce at trial?;
 - (b) to what extent do refinements to the statistical analysis (changes in the way one defines "similarly situated" employees/applicants such as through the inclusion of additional factors) mitigate (or exacerbate) that disparity?; and
 - (c) are either the "gross" or "refined" protected group differences consistent across time, business unit, job group, geography, etc.? (The latter is useful for assessing the issue of "commonality" and for identifying where follow-up effort might best be focused).
- Finally, provide a statistical consultant with all salient data to preparing the agreed-upon studies. The findings are presented to the audit team and a follow-up plan is developed.

Class Action Risks - Pay Disparity Class Action Lawsuits

- A new analysis of U.S. Census Bureau data conducted by the National Partnership for Women & Families finds that nationally,
 - White women are typically paid 79¢ for every dollar a white man makes.
 - Black women only get 63¢
 - Latinas just 54¢ for every dollar white men make.
 - Asian women may be paid the highest at 87¢. However, some ethnic subgroups of Asian women earn much less.
 - And parenthood further complicates the issue: The wage gap for mothers is around 71¢ for every dollar paid to fathers.

Class Action Risks - Pay Disparity Class Action Lawsuits

- Vice Media, was accused of pay discrimination last year when a female employee claimed that a male colleague she hired made about \$25,000 more than she did—and was then allegedly given a promotion over her.
- The company has agreed to a \$1.875 million deal to resolve a class action lawsuit brought by an estimated 675 of the media company's female employees.
- The payout would have been larger, but Vice's practice of hiring young women helped them avoid a heftier price tag; many of the employees were young, and younger employees tend to earn less than older, more experienced ones. (Vice reportedly had an unspoken "22 Rule": "Hire 22-year-olds, pay them \$22,000, and work them 22 hours a day.")

Class Action Risks - Pay Disparity Class Action Lawsuits

- In May 2018, a Colorado federal judge approved a deal in which the University of Denver agreed to institute salary increases and pay \$2.66 million to settle an equal pay lawsuit filed by the U.S. Equal Employment Opportunity Commission on behalf of seven female professors.
- The EEOC took up the case after investigating a charge of sex discrimination in compensation paid by Sturm College of Law professor Lucy Marsh.
- A 2012 letter from the law school had observed pay differences between male and female professors several years before the filing of the complaint. However, the law school did not take steps to address the gap, and further salary increases widened it. Marsh, the lowest-paid professor, then filed a charge with the EEOC.

Class Action Risks - Pay Disparity Class Action Lawsuits

- It is noteworthy that the women who have most recently been the source of high-profile unequal pay claims have tended to be high earners. These individuals are already in many cases making over \$100,000 annually, and some are even part of the unpopular “one percent.”
- Lately, the headlines in this area have been dominated by plaintiffs who are law firm partners and other highly paid professionals, such as investment bankers, engineers and pharmaceutical sales reps.

Class Action Risks - Pay Disparity Class Action Lawsuits

- The Marsh decision reinforces that, despite the sense that employees are more individualized at the top, employers will be wise to pay particular vigilance to the compensation of their most highly paid professionals.
- For high earners, one-time pay boosts have the potential to create bigger variances, particularly over time.
- For example, although the University of Denver took the position that the salary differences of its law school faculty were based on lawful factors, the pay gap grew to \$20,000 between female and male professors, whose average annual salary was a respective \$140,000 versus \$159,700.

Class Action Risks - Pay Disparity Class Action Lawsuits

- As with the other class action lawsuits, self audits are essential to prevent exposure to such claims.

Class Action Risks - Pay Disparity Class Action Lawsuits

10 Step Guide Suggested by the National Committee on Pay Equality:

1. Conduct a Recruitment Self-Audit (are you seeking diversity)
2. Evaluate Your Compensation System for Internal Equity
3. Evaluate Your Compensation System for Industry Competitiveness
4. Conduct a New Job Evaluation System if Needed
5. Examine Your Compensation System and Compare Job Grades or Scores
6. Review Data for Personnel Entering Your Company
7. Assess Opportunity for Employees to Win Commissions and Bonuses
8. Assess How Raises are Awarded
9. Evaluate Employee Training, Development and Promotion Opportunities
10. Implement Changes Where Needed, Maintain Equity and Share Your Success

II. Proper Personnel Policies-

Self Audits Underscore the Need for Proper Personnel Policies:

- Why are personnel policies so important:
 - Personnel policies help implement a consistent approach to management.
 - Policies, when applied consistently, reduces perceptions of arbitrary treatment of employees.
 - Policies, when applied consistently, put all employees on notice on how things will run, what is expected of them and how their subordinates or co-workers should be treated in certain situations, including discipline and awards.

Proper Personnel Policies-

What Policies Should Every Employer Have?

- *Generally*: Your personnel policies should cover three areas: employer expectations, employee expectations and administrative issues, and should all be included in your employee handbook or other training or procedural materials.
 - Employer expectations include attendance, punctuality, time off, job requirements, and possibly Internet or drug policies.
 - Employee expectations include compensation, salary, benefits, sexual harassment, privacy rights, equal opportunity employment and any grievance procedures.
 - Administrative issues include any disclaimers or changes to the handbook or other policies.

Proper Personnel Policies-

What Policies Should Every Employer Consider:

- *Specifically:*

- At-will employment clause
- Immigration Statement
- Equal employment opportunity statement
- Conflict of interest statement
- Confidentiality agreement
- Dress code
- Anti-discrimination policy
- Anti-harassment policy
- Substance-free workplace policy
- Disciplinary action
- Benefits
- Severance (if any)

- Work hours
- Work-from-home policy
- Lunch and break periods
- Workplace Safety (OSHA)
- Americans with Disabilities Act (ADA) accommodations
- Use of company equipment
- Social media
- Leave Laws and Policies
- Payment/Compensation Policies (FLSA)
- PTO

III: **Appropriate Hiring and Firing Practices** -

Proper Employment Practices Start with the Hiring Process

- Don't rely exclusively on resumes: Too much faith in resumes and interviews can lead to bad hiring decisions, with negative repercussions, including low morale, high turnover, and the high cost of starting the hiring process all over again.
- In a survey conducted by the Society of Human Resource Management (SHRM), 53 percent of the human resource (HR) professionals who participated said they discovered false information when checking the references of applicants.
- This underscores the importance of going through a rigorous screening process to identify and hire top talent.
- Know your state and county/cities Ban the Box laws. Some jurisdictions restrict when an employer can ask about criminal background.
- Know your state and county/cities laws regarding salary history information prior to hire. Some restrict employers' abilities to ask.

Hiring and Firing Practices -

Criminal Background Checks: Main laws: Fair Credit Reporting Act and EEOC.

The Fair Credit Reporting Act (FCRA) regulates the collection of consumers' credit information and access to their credit reports. It was passed in 1970 to address the fairness, accuracy and privacy of the personal information contained in the files of the credit reporting agencies. These requirements apply to employers who use third parties to obtain background check information on job applicants.

Obtaining Background Information (Fair Credit Reporting Act):

- Tell the applicant or employee you might use the information for decisions about his or her employment. This notice must be in writing and in a stand-alone format. The notice can't be in an employment application. You can include some minor additional information in the notice (like a brief description of the nature of consumer reports), but only if it doesn't confuse or detract from the notice.
- If you are asking a company to provide an "investigative report" - a report based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle - you must also tell the applicant or employee of his or her right to a description of the nature and scope of the investigation.

Hiring and Firing Practices -

Criminal Background Checks:

Obtaining Background Information (Fair Credit Reporting Act) :

- Get the applicant's or employee's written permission to do the background check. This can be part of the document you use to notify the person that you will get the report. If you want the authorization to allow you to get background reports throughout the person's employment, make sure you say so clearly and conspicuously.
- Certify to the company from which you are getting the report that you:
 - notified the applicant and got their permission to get a background report;
 - complied with all of the FCRA requirements; and
 - won't discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

Hiring and Firing Practices -

Criminal Background Checks:

Using Background Information (EEOC) :

Apply the same standards to everyone, regardless of their race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older).

Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion; among people who have a disability; or among people age 40 or older.

Make sure your policy or practice is "job related and consistent with business necessity."

Be prepared to make exceptions for problems revealed during a background check that were caused by a disability.

Hiring and Firing Practices -

Firing Best Practices:

- Make sure you have the proper record/documentation before you fire.
- Enforce any disciplinary procedure policies outlined in your handbook.
- Make sure you know the real facts before you terminate, even if that means you have to conduct an investigation.
- Examine the facts in the framework of applicable employment laws. E.g. if you are firing someone because of attendance issues but you know they have been sick, make sure you are not violating any FMLA, ADA or other applicable laws.
- Put the employee on notice. Even though an employee is at-will and doesn't need notice of termination, they should be given notice of problems and a chance to improve. A worker who is aware of the issues is less likely to file a claim. A common theme from plaintiffs: "They never told me I was doing anything wrong."

If It Is Not Documented, A Jury Or Judge Can Easily Determine It Didn't Happen

Why Document?

- Consistent documentation is essential for employers to properly evaluate employees and avoid liability connected with disciplining and terminating employees.
- Accurate documentation allows decisions to be made with as much information as possible.
- It also ensures there's a lasting record of the reasons for a termination or disciplinary action, even if memories fade or the decisionmaker leaves the company and cannot be located.
- Finally, documentation allows companies to be more consistent in their decision making, thereby reducing the risk of perceptions of favoritism or [discrimination](#).

What To Document

- Whenever you document an employee's absenteeism, deficient performance, or misconduct, the documentation could later become the subject of a grievance or a lawsuit. As a result, you should draft your documentation with the idea that a third party who knows nothing about the situation will be able to read the statement and understand what took place.
- The documentation should be dated contemporaneously with the incident. Draft the documentation as soon as possible after the incident so the details are fresh in your mind. A document that is written shortly after the event occurred can be persuasive evidence in a proceeding later. If there are eyewitnesses to the incident, name them in the documentation. Also, identify any work rules that were violated.

What To Document

- Always describe in detail the conduct that occurred, but don't embellish. If a history is necessary to understand the incident, recite the history. If you discussed the incident with the employee (which you should do, by the way), state that you did so in the documentation. If you are administering discipline, have the employee sign a document that acknowledges he received the discipline. If he refuses to sign, document the fact that he was present but refused to sign the disciplinary letter. Finally, the documentation should be signed by the person preparing it.
- What not to document: personal opinions, vagueness

What If The Employee Disagrees With The Discipline?

- If the employee disagrees with the disciplinary document and requests an opportunity to place his version of events in his personnel file, you should accommodate his request. By allowing the employee to document his version of events, you show that you are being fair. In addition, it will be difficult for him to later expand on his account of the incident.



“At-Will” And “Probationary Periods” Do Not give Employers Free Reign

- Employers often get a false sense of security when terminating employees on a “probationary period.”
- The same “evidence” is needed regardless of “probationary period” status;
- Instead, it should be considered a “training period,” in which for example there are more frequent performance evaluations, but it does not change the employment laws;



IV: Managing Leave Laws

- Employees who are fired when they should have been on protected leave status will almost always claim interference or retaliation. Therefore, it is imperative that employers know how to manage employees' protected leave.
- Critical Federal Leave Laws of which to be aware:
 - FMLA:
 - Employees who have worked for at least 12 months and 1250 hours in the previous 12 consecutive months are eligible for 12 weeks/year of protected, unpaid leave for their own serious health condition, the serious health condition of a family member, or the birth, placement or adoption of a child.
 - 50 or more employees in a 75 mile radius.
 - ADA: Leave can be a reasonable accommodation, even if FMLA does not apply.
- Local Leave Laws may impose additional requirements.

Managing Leave Laws

What Happens When You think the Leave is Being Abused?

Hypotheticals:

Employee claims he was hurt on the job. He goes out with “soft tissue injuries” to his back. He is not FMLA qualified. He claims workers comp, which is denied. His doctor has said he cannot work, but you have seen videos of him jumping and dancing on social media. You want to fire. Should you?

Managing Leave Laws

Hypotheticals:

- Do not let the fact that he claimed workers compensation be a motivating factor.
- Do not play doctor – if the doctor says he is disabled believe it.
- You cannot ask for second opinion because FMLA is not applicable.
- Even though FMLA is not applicable, there is an obligation to consider unpaid leave as a reasonable accommodation.
- At some point, indefinite leave is no longer reasonable.

Managing Leave Laws

Hypothetical:

- You have an employee whose doctor says she needs intermittent leave to deal with episodes of migraine headaches. She is FMLA qualified and has been provided with, and returned, all the appropriate paperwork. Her physician says she may have 1-3 episodes a month, and each episode would require 1-2 days of leave. You think she is abusing her FMLA status by claiming she has a migraine what seems to be every Monday and Friday. The past three months she claims to have had 6 episodes and called in last minute, leaving you without coverage for her job. How do you deal with perceived abuse?

Managing Leave Laws

- Examine her paperwork closely. If she is having more episodes than she requires you should ask her for medical recertification.
- Recertification can be required every six months; however, more frequent certifications are permissible if the circumstances of the original certification have changed. These scenarios include an increase in frequency of absences, if the employer has a reason to doubt the validity of the absence, such as a Friday/Monday absence pattern, or if the employee asks for an extension of the leave. Along with the recertification, provide the doctor with a list of absences to ensure the absences are consistent with the medical condition.

Managing Leave Laws

- A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform.
- Take action if the employee does not comply with the terms of the certification or the notification requirements and hold the employee accountable.
 - Unless additional time off is warranted by an updated medical certification, we will honor the current medical instructions and will consider any additional, unauthorized time off subject to the company's progressive discipline policy. Please note that failure to provide immediate and sustained improvement may result in further disciplinary action, up to and including dismissal.

V: Managing Contractors

- Remember- There are two forms of contractors:
 - Independent contractors who are self-employed
 - Contractors who are employed by a third party.
- Each arrangement has its own legal risks

V: Managing Contractors

- For Independent Contractors:
- Independent Contractors may be paid by the hour or by the project, depending on the type of work done. The independent contractor is not an employee of the company and receives no employment benefits.
- The company does not pay employment taxes on behalf of the independent contractor, including Social Security/Medicare tax and unemployment tax.
- The company also does not withhold income taxes and employment taxes from the independent contractor.
- Independent Contractors are not covered under the FLSA, so they do not have to be paid time and a half for working overtime.

V: Managing Contractors

- For Contractors Hired Through a Third Party:

The Staffing Company

Pays the employee

Pays and withholds payroll taxes

Provides workers' compensation

Provides benefits and pension plans
(if applicable)

Ensures civil rights compliance

Has the right to hire and fire

Hears and acts on complaints from the
employee about working conditions

The Host Employer

Avoids a "joint employer" finding by not acting
in the shoes of the employer in selection,
performance management or control of the
contractor's day-to-day work

Controls working conditions at the work site

Ensures a safe work site, including civil rights
compliance by employees

Determines the length of the assignment

V: Managing Contractors

- Caution: The relationship between Host Employer and Third-Party Staffing Company, if not managed carefully, can create risk of a joint employer finding.
- A “joint employer” relationship is one between two or more entities in which each has actual or potential legal rights and duties with respect to the same employee.
- Generally, in this sort of relationship, the staffing firm is viewed as the “primary employer” and bears most of the responsibility for the employee.
- Joint employer issues for the host company arise when the host company extends its control beyond the normal division of tasks and takes on the role of the *primary employer*, as specified in the IRS’ “common law” test.

V: Managing Contractors

- **Dealing with Staffing Firms:**
- Companies should clearly set forth in their contracts with Independent Contractors (ICs) and with staffing agencies that the ICs and the agencies' employees are excluded from participation in company benefit plans, that the staffing company is the primary employer, pays the employee and assumes responsibility for taxes, benefits.
- Company benefit plans and benefit documentation should explicitly exclude ICs and staffing firm employees from eligibility to participate in benefit plans.
- Companies should avoid controlling the manner and hours of performance put forth by ICs and employees of staffing firms so that these individuals do not become common law employees.

FIVE: Managing Contractors

Effects of Misclassification:

- You have not paid an “employee” correctly. You may have missed overtime.
- You have not recorded work time correctly.
- You have not filed the appropriate federal and state tax forms.
- You may not have made appropriate contributions to retirement plans.
- You may not have complied with the ADA.
- You may not have provided them with the appropriate protections under either OSHA or the NLRA.
- You may not have been paying appropriate workers’ comp premiums.
- You likely have not given them the appropriate benefits notices and statements.
- You may have violated ACA by not providing 95% of your FTE employees with health care coverage.

**This is NOT comprehensive!

Managing Contractors

Some of the penalties

- Misclassifying employees as independent contractors and failing to provide W-2 forms can subject an employer to back taxes of as much as 41.5%* of the contractors' wages, according to the IRS. And these penalties can go back for three years.
- If the IRS concludes that you intentionally misclassified workers they may seek a criminal conviction with up to a year in jail and a fine as high as \$500,000 for a corporation.
- The Independent Contractor himself may be audited and may be forced to repay any business deductions he or she took during that time.
- The US Department of Labor will require you to pay back wages for up to three years and will levy fines for improper recordkeeping. The company will also get an audit that may then uncover other wage and hour violations. Penalties can also be assessed.

FIVE: Managing Contractors

Some of the penalties:

- State insurance agencies and departments of labor will also be seeking back payments on unemployment insurance and workers' comp premiums. They will likely levy recordkeeping fines.
- Misclassification can trigger substantial ACA penalties. Under the ACA, employers must offer health care coverage to 95% of their common law employees – a legal definition that can include contractors for whom the host employer controls the day-to-day work. Penalties are significant - \$2,500+ for each common law employee whether they were offered health care coverage or not.

Managing Contractors

Tips to avoid Misclassification:

- Do make sure you have a clear contractor's agreement.
- Follow the terms of the agreement, including its termination provisions.
- Don't give the contractor new work after the original project is completed without signing a new agreement.
- Consider limiting contractors to set term (e.g. 12-18 month) projects, and then requiring a 3-6 month "cooling off" break. (This avoids the impression that the contractor is actually an at-will employee with indefinite employment terms.)
- Don't supervise the contractor. The contractor should perform services without your direction.
- Prohibit the contractor from using subcontractors.
- Don't let the contractor work at your offices unless the nature of the services absolutely requires it.
- Don't give the contractor employee handbooks or company policy manuals.
- Don't establish the contractor's working hours.

Managing Contractors

- Don't provide the contractor with equipment or materials unless absolutely necessary.
- Don't give an contractor business cards or stationery that have your company name on them.
- Don't give an contractor a company email.
- Don't give an contractor a title within your company.
- Don't pay the contractor's travel or other business expenses, unless they are unique to the project and have been negotiated in advance.
- Avoid giving contractors so much work or such short deadlines that they have to work full time for you.
- Don't prohibit contractors from working for other companies.
- Don't provide ongoing instructions or training on how to do the work. (Giving specifications for the final product is generally fine.)

Questions?





2020 K ST NW SUITE 850,
WASHINGTON, DC 20006
202. 310. 5500
CARRMALONEY.COM



SPEAKER CONTACT INFO:

TINA MAIOLO
202.310.5585
Tina.Maiolo@carrmaloney.com