

EMPLOYMENT LAW

At-Will Employment

- At-will employment is a fundamental principal of US employment:
 - Most US employees are employed “at-will” meaning that an employee can leave his or her employment at any time without notice, for any reason (or no reason) AND an employer can terminate an employment relationship without notice, for any non-discriminatory reason (or no reason).
 - If there is an employment contract, employee may be terminated, but employer may be responsible to pay wages until end of contract term.
 - Employer has no obligation to pay severance unless there is a promise to pay.

At-Will Employment

- How To Maintain “At-Will” Status
 - Don’t enter into employment contracts with employees (or do so only with legal advice).
 - Ensure you have an “at-will” statement in your employment policies/handbook.
 - Ensure that employment documents such as applications, offer letters, training agreements, confidentiality agreements, etc., clearly state employment is “at-will” and do not create any terms of employment or implied contracts.

Employee vs. Independent Contractor

- Basic element in determining whether worker is an employee or independent contractor: How much control does the employer exercise over the worker?
 - Employer must balance the evidence of control vs. evidence of independence.
 - Must undertake an individual analysis for each position and not the person in the position.

Employee vs. Independent Contractor

□ Factors to consider:

- Who controls where the person works and when?
- Who provides office space, tools and equipment to use?
- Who determines if a worker needs additional workers to assist, and who hires additional workers?
- Who determines where to purchase supplies or services?
- Who determines whether work is performed by a specific individual versus hiring a company which assigns worker?
- Who provides training and decides on the level of training?

Employee vs. Independent Contractor

□ Other Considerations.....

- How is the worker paid? Per job or by the hour or week?
- Who pays the worker's expenses?
- Does the worker perform services for organizations other than your own?
- Does the worker advertise services to the public?
- Does the worker receive benefits from your organization?
- Are there any written contracts outlining the position?
- How permanent is the relationship?
- To what extent are the services performed by the worker a key aspect of the organization's business?
- Are other people performing the same services for your organization treated as employees?

Employee vs. Independent Contractor

- Why is classification important?
 - Employers are required to withhold taxes from employees.
 - Responsible officers and directors can be personally liable if taxes are not withheld!
 - Employers are not required to pay the employer's share of FICA taxes for independent contractors; they are for employees.
 - Independent contractors are not eligible for worker's compensation or unemployment benefits.
 - Employers do not provide benefits like health care to independent contractors.
 - Independent contractors are not covered by employment discrimination laws.

Employee vs. Independent Contractor

- ❑ Worker and organization cannot agree to treat someone as an independent contractor if they actually satisfy criteria for the employment test.
- ❑ How to mitigate risk of misclassification?
 - Draft job descriptions that clearly state the requirements of the position.
 - Talk to an attorney about how to classify a worker.

Wage & Hour Laws

- ❑ Fair Labor Standards Act (FLSA) covers minimum wages that must be paid to employees and rules regarding overtime pay.
- ❑ FLSA sets the floor for wages and overtime, states and collective bargaining agreements may set higher.
- ❑ Some employees are exempt from FLSA but most are non-exempt employees.
- ❑ The presumption is an employee is non-exempt unless the employer proves otherwise.
- ❑ Federal minimum wage is \$7.25 per hour. State or local jurisdiction may have a higher minimum wage.
- ❑ Overtime must be paid once the employee is on the job more than 40 hours in a work week.

Wage & Hour Laws

- ❑ An exempt employee is NOT subject to overtime compensation provided the employee is paid at least \$455 per week.
- ❑ Exempt employees may not be paid by the hour.
- ❑ If an employee is paid by the hour, he or she is automatically considered non-exempt regardless of salary or job duties.
- ❑ Employees paid on a salaried basis may be classified as non-exempt based on job duties, even though they are not paid by the hour.
- ❑ If employee is not paid for overtime, he or she can go back two years to calculate overtime due. The burden is on the employer to prove what hours the employee actually worked.

Wage & Hour Laws

- An employee must meet one of these tests in order to be “exempt”
 - Executive - Supervise two or more full-time employees (or equivalent). Hire and fire or have “particular weight” in employee decisions; manage recognized unit within organization; exercise independent judgment and discretion.
 - Administrative – Perform office or non-manual work directly related to “management or general business operations“. Exercise of independent judgment and discretion on “matters of significance“. Decider or influential adviser.
 - Professional - Requires knowledge customarily acquired by prolonged course of specialized intellectual instruction.
 - Certain computer & sales employees.

Wage & Hour Laws

□ “Volunteering” to Work

- Non-exempt employees must be paid for hours worked.
- A non-exempt employee CANNOT “volunteer” to work extra hours (during lunch, stay late, come in early) and not be paid.
- An employer is liable for wages, including overtime if applicable, anytime it “suffers” an employee to work or the employee is permitted to work.
- Therefore, an employer must pay all overtime wages, even if the employee did not have permission to work overtime.

Wage & Hour Laws

□ “Comp Time”

- Giving a non-exempt employee compensatory time off in lieu of over time pay is not permitted under the FLSA. This rule applies even if the employee wants compensatory time off.
- The Federal government believes (with good reason) that some employers would pressure employees to accept “comp time” in lieu of overtime pay, and a blanket rule is the only way to prevent the abuse from happening.
- The only exception is if, at the employee’s written request, an employer gives the employee time off equal to 1.5 times the number of hours of overtime worked in the same payroll period – no carry over!

Wage & Hour Laws

- ❑ Paid time-off for holidays, sickness, vacation is not required under federal law.
- ❑ May be required under some state and city laws.
 - CT requires sick leave for service workers.
 - DC has a safe and sick leave requirement.
 - GA, MD, NJ, NY (other than NYC) and VA sick leave is not required.
 - NYC has a sick leave requirement.
- ❑ If an employees takes paid time off (vacation time, etc.) that time does not count towards overtime calculations. (FLSA is concerned about hours actually worked.)

Wage & Hour Laws

- How do you mitigate risks?
 - Ask an attorney to help properly classify your workforce.
 - Draft clear job descriptions for each position.
 - Require non-exempt employees to keep an accurate record of time worked, including break time and meal time. Retain records for at least two years.
 - Make it clear to the employee whether they are exempt or non-exempt and what that means. (NY law requires that employees be told of their FLSA status in writing when they begin employment.)
 - Enact policies that state that all overtime must be approved in advance. If someone works overtime, you must pay them. However, make clear that the employee will be subject to discipline for violating the policy.

Anti-Harassment and Anti-Discrimination

- Federal law prohibits discrimination in job-related activities such as hiring, termination, compensation and other terms of employment on the basis of:
 - race, color, religion, gender, national origin, disability, pregnancy, genetic background (employer must have at least 15 employees to be covered by this law).
 - age (employer must have at least 20 employees to be covered by this law).
- Disability law requires “reasonable accommodation” and “public accommodation” of individual’s disability.

Anti-Harassment and Anti-Discrimination

- Many state and local are more expansive than federal law.
- **Connecticut (3 or more employees)**
 - Prohibits discrimination in employment based on age, ancestry, color, criminal records (state government only), gender identity or expression, genetic information, learning disability, marital status, mental disorder, mental retardation, national origin, physical disability, race, religious creed, sex (including pregnancy), sexual orientation.
- **DC (1 or more employee)**
 - Prohibits discrimination in employment based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, political affiliation.
- **Georgia (15 or more employees):**
 - Same as federal law except does not recognize genetic characteristics.
- **Maryland (15 or more employees):**
 - Same as federal law except it prohibits discrimination based on sexual orientation.

Anti-Harassment and Anti-Discrimination

- **New Jersey (1 or more employees)**
 - Prohibits discrimination based on race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), marital status, domestic partner or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular blood trait, genetic information, liability for military service, mental or physical disability (including AIDS & HIV related illnesses).
- **New York State (4 or more employees):**
 - Prohibits discrimination based on age, race, color, creed, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, domestic violence victim status.
- **New York City (4 or more workers):**
 - Prohibits discrimination based on race, color, creed, age, national origin, alienage and citizenship status, gender (including gender identity), sexual orientation, disability, arrest or conviction record, marital status, partnership status or status as a victim of domestic violence, stalking or a sex offense.
- **Virginia More than five but less than fifteen):**
 - Prohibits discrimination based on race, color, religion, national origin, disability, sex, pregnancy, childbirth or related medical conditions, or of age if the employee is forty years or older

Anti-Harassment and Anti-Discrimination

- There are two types of sexual harassment
 - Quid Pro Quo
 - An employment decision is based on an employee's submission to or rejection of sexual advances, sexual favors, etc.
 - Hostile Work Environment
 - Actions sufficiently severe or pervasive to create a hostile work environment.
 - Lewd jokes, pictures, or comments
 - Unwelcome touching
 - Other gender based comments
 - Includes same sex sexual harassment
 - Harassment can also involve race, color, religion, national origin or other characteristic protected by law.

Anti-Harassment and Anti-Discrimination

- ❑ Who can be a “harasser” or a “discriminator”?
 - Supervisors
 - Other Employees
 - Contractors/Consultants
 - Volunteers & Directors
 - Vendors
 - Donors
 - Clients
 - Other Third Parties
- ❑ Employer is responsible for maintaining a harassment-free work environment – no matter who is the source of the harassment.

Anti-Harassment and Anti-Discrimination

□ Retaliation:

- The law prohibits employers from retaliating against an employee for making a good faith claim of harassment or discrimination or for any other employee that cooperates in the investigation of that claim.
- Retaliation is defined as any action that might dissuade a reasonable worker from making or supporting a charge of discrimination. Specifically, the law forbids retaliation when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Anti-Harassment and Anti-Discrimination

- How do you mitigate risks?
 - Clearly stated policy that prohibits harassment and discrimination.
 - Must have a mechanism by which employees can report claims of harassment and discrimination AND you must follow up on the claims in a timely manner.
 - Train employees, volunteers and Board members regarding your anti-discrimination and anti-harassment policies.
 - Be proactive in preventing retaliation – especially if an employee files a claim against supervisor.
 - Make employment decisions based on ability/inability to perform the functions of the job.

Leaves of Absence

- FMLA Leave (Family Medical Leave Act)
 - Employers are required to provide leaves of absence for the birth, adoption or foster placement of a child, an individual's medical needs or the medical needs of a family member.
 - Must have 50 employees in the workforce.
 - Employee must have worked 1250 hours in the 12 months prior to the leave.
 - Leave can be as long as 12 weeks.
 - Leave is un-paid, unless the employee otherwise uses paid personal leave.
 - Leave can be intermittent.

Leaves of Absence

- ❑ Some states and cities have their own leave acts, which are often provide more benefits than federal law.
 - DC has its own FMLA and Parental Leave Act (Applies if employer has 20 employees. Allows parents time to go to their children's school events. Leave can be as long as 16 weeks.)
 - NJ and CT have leave acts that differ slightly from the federal.
- ❑ Employers may also be required to allow leaves for:
 - Military service.
 - Family members of active duty service members.

Volunteers

- Who is a volunteer is based on the facts and circumstances:
 - Does the individual expect to receive compensation for services.?
 - Does the organization normally compensate others for the type of service performed by volunteer?
 - Was a regular employee displaced by the volunteer?
 - Is there a promise of future employment?
 - Is there any economic coercion to perform services for the organization?

Volunteers

- What about employees who want to volunteer for the nonprofit they work for?
 - Could be risky for non-exempt employees
 - Need to make sure that the non-exempt employee is not doing the same or similar duties when volunteering as he or she does in the normal performance of the job. If so, then he or she must be paid.
 - Need to make sure there is:
 - an absence of coercion, such as peer pressure, to volunteer, and
 - no real or perceived job related benefit for volunteering.

Volunteers

□ How do you mitigate risks?

- Do not pay your volunteers money or a monetary equivalent (like a gift card). This will be treated as payment for services and is subject to withholding and tax reporting if it is greater than the dollar limits.
- Have volunteers perform tasks that are not being performed by employees.
- Consider drafting written volunteer policies.
- Avoid “special event” volunteering – such as having non-exempt workers “volunteer” to work at the gala dinner. The fact that it is not part of employee’s regular duties may not be enough, since it is not part of anyone’s regular duties, and therefore could be a gray area.
- Have the non-exempt employees volunteer for organization’s normal volunteer opportunities that are open to the public (i.e., Saturday Habitat for Humanity build.)