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FLORIDA
EMPLOYMENT LAW LETTER

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EMPLOYER RETALIATION

Think HR reps can't work outside internal procedures? Think again!

by Jeffrey D. Slanker and Jarrett Davis
Sniffen and Spellman, P.A.

The U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) recently issued a decision on a retaliation claim that provides an overview of whether an HR employee is engaging in protected activity under Title VII of the Civil Rights Act of 1964 and 42 U.S. Code § 1981 when she encourages or solicits other employees to file a charge with the Equal Employment Opportunity Commission (EEOC) rather than handling their complaints through internal procedures.

Retaliation under Title VII, § 1981

To establish a *prima facie,* or basic, case of retaliation under Title VII, an employee must show that (1) she engaged in statutorily protected activity, (2) she suffered an adverse employment action, and (3) there is some causal connection between the two. The law is clear that not all activity an employee engages in is protected by Title VII. Rather, two forms of statutorily protected conduct are recognized under Title VII.

First, under the "opposition clause," an employee cannot be retaliated against if she opposes any act or practice made unlawful by Title VII. Second, under the "participation clause," an employee is protected from retaliation that occurs because she made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. Further, to establish a retaliation claim, the employee need only show she had a "reasonable belief" that an unlawful employment practice was occurring; she isn't required to show that the employer actually engaged in an unlawful employment practice.

Once an employee establishes a *prima facie* retaliation case, the burden shifts to the employer to rebut the employee's claims by articulating a legitimate nonretaliatory reason for the adverse employment action. The employee then has an opportunity to demonstrate that the employer's proffered reason was merely a pretext, or excuse, to mask its retaliatory actions. Retaliation claims under § 1981 are analyzed under the same framework.

Background of the case

Andrea Gogel, an HR employee at Kia Motors in Georgia, filed an EEOC charge against her employer for discrimination based on her gender and national origin and retaliation under Title VII and § 1981. Specifically, she alleged that male employees in management roles were designated "heads" of their departments, while she, as the only woman in a similar role, didn't receive that designation. She claimed that she

AGENCY ACTION

OFCCP releases directives on equal employment and religious freedom. The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) in August issued two new policy directives, one focused on equal employment opportunity and the other addressing religious freedom. The equal employment opportunity directive calls for more comprehensive reviews of contractor compliance with federal antidiscrimination laws. The religious freedom directive is aimed at protecting the rights of religion-exercising organizations. The DOL said it is implementing a comprehensive compliance initiative that will include adding focused reviews to its compliance activities. The religious freedom directive instructs OFCCP staff to take into account recent U.S. Supreme Court decisions and White House Executive Orders that protect religious freedom.

NLRB defends its ALJ appointments. The National Labor Relations Board (NLRB) in August rejected a challenge regarding the appointment of its administrative law judges (ALJs), concluding that all of the Board's ALJs have been validly appointed under the Appointments Clause of the U.S. Constitution. In June, the U.S. Supreme Court issued a decision in *Lucia v. SEC,* finding that ALJs of the Securities and Exchange Commission (SEC) are inferior officers of the United States and thus must be appointed in accordance with the Appointments Clause—i.e., by the president, the courts, or the heads of departments. Unlike the SEC's ALJs, the NLRB's ALJs are appointed by the full Board as the head of department and not by other agency staff members. NLRB Chairman John F. Ring was joined by members Mark Gaston Pearce, Lauren McFerran, Marvin E. Kaplan, and William J. Emanuel in the order.

OSHA extends certain compliance dates for beryllium standard. The Occupational Safety and Health Administration (OSHA) issued a final rule in August to extend the compliance date for specific ancillary requirements of the general industry beryllium standard to December 12. The extension affects provisions for methods of compliance, beryllium work areas, regulated areas, personal protective clothing and equipment, hygiene facilities and practices, housekeeping, communication of hazards, and record keeping. The extension doesn't affect the compliance dates for other requirements of the general industry beryllium standard. OSHA has determined that the extension will maintain essential safety and health protections for workers while the agency prepares a "Notice of Proposed Rulemaking" to clarify certain provisions of the beryllium standard that would maintain the standard's worker safety and health protections and address employers' compliance burdens. ✤

expressed her concerns about the company's sexism and bias toward Americans several times, but her supervisors dismissed her complaints rather than investigating. After exhausting the company's internal procedures, she filed the EEOC charge.

Soon after Gogel filed her complaint, another Kia employee, Diana Ledbetter, filed an EEOC charge alleging gender and national origin discrimination. Kia discovered that Ledbetter was using the same attorney Gogel had been seen meeting with. The company then fired Gogel for allegedly encouraging or soliciting Ledbetter to file an EEOC charge instead of referring the complaint for an internal resolution.

Gogel disputed the allegation that she encouraged or solicited Ledbetter to file an EEOC charge. However, she did admit to providing the name of her attorney to Ledbetter. Nevertheless, she claimed, encouraging or soliciting Ledbetter to file a charge with the EEOC was protected activity, and firing her for that reason was direct evidence of retaliation. The case eventually made its way to the 11th Circuit.

11th Circuit's ruling

According to past rulings by the 2nd and 11th Circuits, HR employees who support other employees in asserting their Title VII rights in a reasonable manner have engaged in protected activity under the opposition clause. In this case, the 11th Circuit applied a balancing test to determine whether the way in which Gogel expressed her opposition was reasonable. The court noted that although HR employees' actions in opposition to discriminatory practices must be reasonable, all of an HR rep's actions don't have to be proemployer.

The court noted that generally when an HR employee handling another employee's complaint deviates from internal procedures, the manner in which she expresses her opposition is most likely unreasonable. However, the manner of opposition would be reasonable and would further the purpose of Title VII if the HR employee attempted to resolve complaints internally but didn't succeed because the employer's procedures are inadequate. The dissent argued that when an HR employee deviates from internal procedures, the manner of her opposition is always inherently unreasonable. The majority noted that statement isn't consistent with the opposition clause of Title VII, which contains no exception for HR employees.

The court held that Gogel's actions were reasonable because Kia's internal procedures proved to be inadequate and it was reasonable to deviate from those procedures to protect Ledbetter's individual rights. Further, the court looked to the extent of Gogel's deviation from Kia's procedures, comparing her case to previous cases in which employees deviated from internal procedures multiple times. It concluded that she merely provided the name of her attorney to one employee, which was a reasonable deviation based on the employer's inadequate procedures.

The 11th Circuit held that the manner of Gogel's opposition to Kia's allegedly discriminatory practices was reasonable, and her conduct was protected activity because she exhausted the

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ASK ANDY

Revisiting the FLSA travel time rules

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Q *Our Miami-based company is sending a nonexempt employee to Orlando for a three-day seminar. The employee is flying there and back. Do we have to pay him for the time he spends traveling to and from the seminar?*

A The travel time rules under the Fair Labor Standards Act (FLSA) are confusing and often counterintuitive. Here's a brief summary of the more common travel time issues.

Exempt employees

With very limited exceptions, exempt employees must be paid their full salary if they work any hours during a workweek. So, as a practical matter, because exempt employees are not paid by the hour, the FLSA travel time rules apply only to nonexempt employees. But there's nothing to prohibit you from paying an exempt employee an additional amount above his weekly salary as a bonus or stipend for business travel.

Nonexempt employees

Travel to and from work. You are not required to pay nonexempt employees for the time they spend traveling from home to work at the beginning of a shift or from work to home at the end of a shift. The federal regulations provide one exception to that rule: A nonexempt employee who is required to travel a substantial distance from home to respond to a customer emergency after hours must be paid for all of his travel time.

Travel between worksites on the same day. Travel between worksites during the same day is compensable. Also, if a nonexempt employee is required to meet at a central location at the beginning of his shift to pick up tools, receive instructions, or perform any other work, his travel from the central location to the first worksite is compensable.

One-day assignments in another city. If a nonexempt employee is sent on a one-day (not overnight) trip to another city (e.g., traveling back and forth from Miami to Orlando in the same day), all of his travel time, except the time he spent traveling between home and the train station or airport in the city he departed from, is compensable. Deductions may be made for meal periods longer than 20 minutes.

Overnight travel to another city. Travel that keeps a nonexempt employee away from home overnight is compensable during the hours it cuts across his normal working hours, regardless of the day of the week on which it occurs. For example, if an employee's normal work schedule is 9:00 a.m. to 5:00 p.m., Monday through Friday, then any travel time between the hours of 9:00 a.m. and 5:00 p.m. on *any day of the week* is compensable. Of course, any work he actually performs outside normal working hours is also compensable. Deductions may be made for meal periods longer than 20 minutes.

So, a nonexempt employee flying from Miami to Orlando for a three-day seminar must be paid for his travel time if it cuts across his normal working hours. Strangely enough, if you require the employee to travel outside his normal working hours, his travel time is *not* compensable.

Work performed while traveling. Work that a nonexempt employee performs while he's traveling (including as a passenger in a car) is compensable. Also, a nonexempt employee who is required to drive a car for business purposes is performing compensable work while driving.

Bottom line

The travel time rules are confusing, and some states' rules—but not Florida's—differ from the FLSA regulations. If you have any questions, be sure to consult with your employment law counsel.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail him at arodman@stearnsweaver.com or call 305-789-3255. Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making any personnel decisions. ✤

continued from page 2

company's internal procedures by making numerous complaints to supervisors that were ignored and were not investigated. Moreover, she only gave another employee the name of an attorney. The court of appeals therefore reversed the lower court's dismissal of her retaliation claims under Title VII and § 1981. The dismissal of her sex and national origin discrimination claims was affirmed because she was terminated for assisting another employee with an EEOC charge, which had nothing to do with her gender or national origin. *Andrea Gogel v. Kia Motors Manufacturing of Georgia, Inc.*, Case No 16-16850 (11th Cir., September 24, 2018).

Takeaway for Florida employers

This decision could have a significant impact on employers. Title VII emphasizes employers' voluntary compliance with the law as the preferred means of achieving its goals. To ensure voluntary compliance, employers hire HR employees to address discrimination complaints internally. An employer's ability to achieve voluntary compliance is reduced if it allows HR employees to work outside its internal procedures.

This case provides a framework for determining when it's reasonable for an HR employee to work outside her employer's internal procedures—specifically, when those internal procedures prove to be inadequate. However, as the dissent noted, it could be difficult for courts to determine which standard to use to review the adequacy of an employer's internal procedures.

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BACKGROUND CHECKS

New FCRA model background check form issued: Did you miss the deadline?

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

On September 12, 2018, the Consumer Financial Protection Bureau (CFPB), the federal agency responsible for oversight of the Fair Credit Reporting Act (FCRA), issued a new version of the model disclosure form "A Summary of Your Rights under the Fair Credit Reporting Act." The updated form now includes a notice to consumers about their right to request a security freeze on their credit reports. The CFPB provided employers very little time to begin using the new form, setting a deadline of September 21. Let's take a look at what you should know about the changes.

A little background on the FCRA

The FCRA is a federal law that applies to employers that use a third party—i.e., a consumer reporting agency (CRA)—to conduct background checks and obtain "consumer reports" on employees or applicants for hiring, promotion, or other employment-related decisions. (A consumer report is broadly defined to include credit, criminal background, motor vehicle, and educational records checks, among other things.) If an employer conducts background checks on its own without a CRA's assistance, the FCRA does not apply.

Before receiving a consumer report, an employer must certify to the CRA that it will follow all the steps set forth in the FCRA. The certification must state that the employer will:

- Use the information for employment purposes only;
- Not use the information in violation of any federal or state equal employment opportunity law;
- Obtain all the necessary disclosures and consents;
- Give the appropriate notices if it decides to take an adverse action against an applicant or employee based in whole or in part on the contents of the consumer report; and
- Provide the additional information required by law if it requests an investigative consumer report.

What does the FCRA require?

Before obtaining a consumer report from a CRA, an employer must obtain written consent from the job applicant or employee and provide clear and conspicuous written notice that it may request a background report. The disclosure must be in a stand-alone document, not part of an employment application; however, the disclosure and consent may be in the same document. If an employer wants authorization to obtain consumer reports throughout someone's employment, the written authorization must state that intent clearly and conspicuously.

A special procedure is necessary when the employer asks the CRA to obtain employment references. An "investigative consumer report" involves personal interviews with people who know the applicant or employee to obtain information about his character, general reputation, personal characteristics, and lifestyle. When requesting an investigative consumer report, an employer must adhere to the following special procedures:

- The applicant or employee must be given notice containing specific language stating that an investigative consumer report is being requested. Unless it is contained in the initial disclosure, the applicant or employee must receive the notice within three days after the request for an investigative consumer report is made.

- The disclosure must tell the applicant or employee that he has a right to request additional information about the nature of the investigation.
- If the applicant or employee makes a written request, the employer has five days to respond with additional information and a copy of "A Summary of Your Rights under the Fair Credit Reporting Act."

Before taking an adverse action based on any information contained in the consumer report (e.g., termination, demotion, failure to hire, or failure to promote), the employer must give the applicant or employee:

- Notice of its intent to take an adverse action and a copy of the consumer report it relied on in making the decision (commonly referred to as the "preadverse action" letter); and
- A copy of "A Summary of Your Rights under the Fair Credit Reporting Act."

The employer also must wait a reasonable period of time before making a final decision (e.g., five days).

After the adverse action is taken, the employer must give the applicant or employee a notice of adverse action. The notice must contain:

- A statement that the adverse action was taken based on the consumer report;
- The name, address, and telephone number of the CRA that supplied the report;
- A statement that the CRA did not make the adverse decision and cannot explain why the decision was made;
- A statement that the applicant or employee may obtain a free copy of her consumer report from the CRA within 60 days; and
- A statement that the applicant or employee may dispute the accuracy or completeness of the consumer report with the CRA.

Failure to comply with the FCRA can have serious consequences. The Act allows individuals to pursue litigation against employers that fail to satisfy any of its requirements. Negligent failure to comply with the FCRA's requirements can lead to actual damages and attorneys' fees, while willful failure to comply can result in statutory damages of between $100 and $1,000 per violation, attorneys' fees, and punitive damages.

Why was the new form issued?

The updated notice is the result of the passage of the Economic Growth, Regulatory Relief, and Consumer Protection Act in May 2018. The Act requires CRAs to provide consumers free "national security freezes," which will restrict prospective lenders from obtaining access to their credit reports, thereby making it harder for identity thieves to open accounts in a consumer's name.

In addition to requiring CRAs to provide free national security freezes, the Act mandates that a notice about consumers' right to the new security freeze be included in the summary of

WORKPLACE TRENDS

Salary increases expected to remain flat. Research from workforce consulting firm Mercer shows salary increase budgets for U.S. employees are at 2.8% in 2018—no change from 2017. Salary increase budgets for 2019 are projected to be just 2.9%, despite factors like the tightening labor market and a high rate of workers voluntarily quitting their jobs. The information comes from Mercer's "2018/2019 US Compensation Planning Survey." Mercer's research shows that even newly available investment dollars from the new Tax Cuts and Jobs Act aren't enhancing the compensation budgets for most companies. Mercer says just 4% of organizations have redirected some of their anticipated tax savings to their salary increase budgets.

Study shows fewer workers relocating for jobs. Data from global outplacement consultancy Challenger, Gray & Christmas, Inc., shows the percentage of jobseekers relocating for new employment has fallen dramatically since the late 1980s, when over one-third of jobseekers were willing to move for a new position. Just 11% of jobseekers relocated for work over the last decade, compared to nearly 19% of workers who relocated for new positions in the previous decade. Just over 10% of jobseekers relocated for work in the first six months of 2018, virtually unchanged from the relocation rate in the first two quarters of 2017. The relocation rate in the third quarter of 2017 was 16.5%, the highest quarterly relocation rate since the second quarter of 2009, when 18.2% of jobseekers moved for work. But by the fourth quarter of 2017, just 7.5% of jobseekers relocated. The data is based on a survey of approximately 1,000 jobseekers who successfully found employment each quarter.

Report shows how employers are taking advantage of the gig economy. A new report from Deloitte details how midmarket and private enterprises are taking advantage of the gig economy. Sixty-two percent of respondents to a survey of 500 executives in the midmarket and private company segment say the rise of the gig economy has allowed their companies to become even more agile in product and service development, while half of companies surveyed are leveraging gig workers to develop entire new lines of business. In addition to greater utilization of the gig economy, the Deloitte report, "Technology in the mid-market: Embracing technology," says that employers are placing a premium on talent as being a critical factor in technology deployment. The Deloitte researchers found that 46% of the executives surveyed plan to hire more people than before emerging technologies came on the scene. Only 26% saw digital disruption as shrinking the workforce. ✤

UNION ACTIVITY

AFL-CIO leader hails defeat of right-to-work law. AFL-CIO President Richard Trumka has spoken out to praise the August referendum in Missouri that struck down the state's right-to-work law. "Missouri is the latest sign of a true groundswell, and working people are just getting started," Trumka said after the vote. Calling the right-to-work law "poisonous anti-worker legislation," he said the law's defeat represents a victory for workers across the country. "The message sent by every single person who worked to defeat Prop. A is clear: When we see an opportunity to use our political voice to give workers a more level playing field, we will seize it with overwhelming passion and determination." A day after the election, the AFL-CIO announced an advertising campaign aimed at drawing attention to the "wave of collective action happening across the country and showing that anyone can join the momentum working people are generating."

UAW announces petition for postdoctoral researcher union. The United Auto Workers (UAW) announced in August that postdoctoral researchers at Columbia University had filed a petition with the National Labor Relations Board (NLRB) to initiate the certification process for a union. If a majority votes yes for Columbia Postdoctoral Workers-UAW as their union in an NLRB election, organizers believe the union would become the first certified union of postdocs at a private university in the United States. Postdocs are researchers who have earned a doctoral degree and work under the supervision of a faculty member on research projects. A statement from the UAW said the union now represents roughly 75,000 academic workers across the United States. The UAW also represents support staff at Columbia and graduate student workers who voted in favor of unionization in 2016. The union says the administration has refused to bargain with the graduate worker union based on the claim that student employees don't have union rights.

CWA criticizes AT&T's use of tax cut. The Communications Workers of America (CWA) announced over the summer a multistate political effort focused on the Midwest with radio ads spotlighting what the union calls AT&T's cuts to U.S. jobs in the wake of the new tax cut law. The union claims that AT&T has eliminated over 7,000 jobs since the tax cuts took effect in January despite seeing $20 billion in tax savings. The union says AT&T plegeded before the tax plan passed to use tax savings to create jobs. The CWA says it has has been leading the charge "to hold AT&T and other corporations accountable to their tax bill promises by publicly challenging them to reveal their spending plans for the tax windfall." ✤

rights notice required under the FCRA. Employers must ensure that all FCRA disclosures meet the new requirements.

Takeaway

The simplest way to comply with the new disclosure requirement is to download the new form, although substantially similar forms and disclosures will also constitute compliance. (The updated form can be found at https://files.consumerfinance.gov/f/documents/bcfp_consumer-rights-summary_2018-09.docx.) To avoid potential liability, employers that haven't already done so should have legal counsel review their other background check forms to ensure compliance with the overall requirements of the FCRA.

You may contact Lisa Berg at lberg@stearnsweaver.com. ✤

FAMILY AND MEDICAL LEAVE

DOL issues FMLA opinion letters after a long break

For the first time in nearly a decade, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) has issued opinion letters interpreting the requirements of the Family and Medical Leave Act (FMLA). This may be a sign that the Trump administration intends to rely heavily on opinion letters as a form of guidance for employers, a practice that had been discarded by the Obama administration.

Regardless, the new letters offer interesting insight into several topics that aren't directly answered by the regulations or case law. Let's take a look.

FMLA leave for organ donors

An issue that comes up more often than you might think is whether an otherwise healthy employee who voluntarily donates an organ is entitled to FMLA leave. While the opinion letter doesn't specifically say so, the question seems to be whether organ donation is treated the same as other vo\luntary medical procedures, such as elective cosmetic surgery, which is never considered a serious health condition under the FMLA.

The WHD has concluded that organ donation can be an FMLA-qualifying serious health condition when it involves either "inpatient care" or "continuing treatment." Organ donors are usually required to stay at least one night in the hospital, which would qualify as "inpatient care." It's also possible that FMLA leave would be allowed in the rare case that an overnight stay isn't required, assuming the employee must undergo continuing treatment as defined by the Act (i.e., the employee is incapacitated for three or more days and receiving treatment from a healthcare provider).

In short, based on this opinion letter, it appears there is no situation in which an organ donor should be denied FMLA leave.

No-fault attendance policies

The second letter considered whether an employer's no-fault attendance policy violates the FMLA. Under the policy in question, employees accrue points for tardiness and absences and are automatically discharged when they reach 18 points. There are no "excused" or "unexcused" absences under the policy, but employees aren't assessed points for FMLA leave, workers' compensation leave, vacation, and similar absences. In addition, points remain on an employee's record for 12 months after accrual.

The issue addressed by the WHD involved the fact that when an employee takes FMLA leave, the 12-month period is temporarily frozen, meaning:

- When the employee returns from FMLA leave, he has the same number of points as before taking leave; and
- The 12-month accrual period pauses during leave and starts back up upon return to work, potentially resulting in points that may remain on an employee's record for more than 12 months.

The WHD approved of the policy because employees "neither lose a benefit that accrued prior to taking leave nor accrue any additional benefit to which they would not otherwise be entitled." The policy doesn't violate the FMLA as long as attendance points accrue (and the 12-month period is frozen) the same for FMLA leave as for equivalent types of leave.

Compensation for FMLA-covered rest breaks

While technically an interpretation of the Fair Labor Standards Act (FLSA), this letter is relevant for those who administer FMLA leave for obvious reasons. The employer requesting the letter stated that several of its nonexempt employees had been approved for FMLA leave in the form of a 15-minute break every hour. As a result, the employees performed only six hours of work in a typical eight-hour shift.

Under the FLSA, short rest breaks of up to 20 minutes in length are usually compensable because they primarily benefit the employer, not the employee. However, the DOL concluded that short rest breaks that are necessitated by an employee's FMLA-covered serious health condition are for the benefit of the employee, not the employer. Consequently, such breaks don't have to be paid.

It's important to note, however, that employees taking FMLA-protected breaks must receive as many compensable rest breaks as their coworkers receive. For example, if an employer generally allows employees to take two paid 15-minute rest breaks during an eight-hour shift, an employee who needs 15-minute rest breaks every hour because of a serious health condition would be paid for two of them, and the rest would be unpaid.

Final thoughts

While the attendance policy is a somewhat obscure issue, the other two opinion letters answer questions that come up surprisingly often. It's good to have a clear answer on those questions. We hope the DOL will issue similar opinions in the future. ✤

INDEPENDENT CONTRACTORS

Don't forget to properly classify independent contractors

You likely recall a time not so long ago when the improper classification of employees as independent contractors was the hot topic for the IRS and the U.S. Department of Labor (DOL). In 2011, the agencies entered into a "Memorandum of Understanding" in which they agreed to share information about potential misclassifications in an effort to crack down on the common practice. The DOL also entered into similar agreements with roughly 30 state departments of labor.

If you haven't heard much about independent contractors lately, you're not alone. Nevertheless, we consider this an important issue that presents serious risks to employers that get it wrong. So in case it has fallen off your radar, consider this your refresher course.

General principles

Employers are prohibited from classifying a worker as an "independent contractor" if the nature of the working relationship is, for all intents and purposes, that of "employer-employee." If certain factors are met, you cannot classify employees as independent contractors even if, for example, they are begging you to do so or they sign an apparently ironclad contract in which they specifically acknowledge being independent contractors.

The IRS is concerned about misclassification because employers that misclassify employees as independent contractors don't pay employment taxes or withhold them on the employees' behalf. The DOL's concern lies primarily in the fact that employees who are misclassified as independent contractors are deprived of key benefits and legal protections under such laws as the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Employee Retirement Income Security Act (ERISA).

Factors to consider

So how can you be sure your independent contractors are properly classified? The easier question is, how can you tell they aren't? Here are some of the biggest red flags that employees have been misclassified as independent contractors:

- You require them to follow instructions on when, where, and how the work is to be done. This is the single most important factor.

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10-25 Is Your Hiring Manager Ghosting You? How to Overcome Hiring Manager Roadblocks

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10-30 Recruiting & Engaging Veterans: How to Increase Quality Hires and Brand Equity for Your Business

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11-13 Drugs and Alcohol in the Workplace: Marijuana and Other Considerations

- You provide training for them (which can be as informal as requiring them to shadow more experienced employees).
- The nature of the relationship precludes them from making a profit or suffering a loss. (In other words, employees get paid no matter what, while independent contractors have a financial stake in their enterprise.)
- You pay them on an hourly, weekly, or monthly basis (as opposed to a per-project fee).
- They provide services that are integral to the success of your business. (In other words, they do what your business was formed to do.)
- They perform services for you on an ongoing (not necessarily continuous) basis.
- You require them to perform the work personally.

On the other hand, there are certain factors that may weigh in favor of concluding the workers are properly classified as independent contractors:

- You have a written agreement with them reflecting that (1) they are independent contractors who will be paid by the job or project, (2) they will provide all necessary tools or equipment for the performance of the work, and (3) there is a defined duration for the contract/project and a set project fee.
- They are incorporated or have their own employees.

Just keep in mind that you can't be certain either of those "green flags" will protect you if other factors weigh in favor of classifying the workers as employees.

Final thoughts

While the federal agencies may be taking a less aggressive (and less collaborative) enforcement approach, remember that the underlying legal requirements have not changed. If someone you have classified as an independent contractor files a complaint with the DOL (or a state agency), there's a good chance you will receive a call or visit from an agency official who will want to take a close look at your independent contractors. Once the DOL is involved, there is a chance the IRS will come knocking as well.

More important, if one of your contractors consults an attorney, you could quickly find yourself on the receiving end of a lawsuit. If you happen to have a number of independent contractors performing similar services, that lawsuit could turn into a costly and time-consuming class action. ✤

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