

OLD LAWS, NEW WORLD:

APPLYING EXISTING LAWS TO A CHANGING WORKPLACE

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Employment Law Day

February 24, 2022

OVERVIEW

- Potential Trouble Spots with Remote Employees:
 - Hiring
 - Onboarding
 - Managing
- What to Watch with Hybrid Employees
- Managing in an Employee's Market
- Policy Updates

POTENTIAL TROUBLE SPOTS HIRING REMOTE EMPLOYEES

- Job Postings
- Job Application
- Background Checks
- Drug Tests
- Licensing Issues

POTENTIAL TROUBLE SPOTS ONBOARDING REMOTE EMPLOYEES

- Immigration Law Compliance (Form I-9)
- Employee Classifications (Exempt v. Non-Exempt)
- Protecting Company Property and Confidential Information
- Expense Reimbursements
- Employment Agreements

POTENTIAL TROUBLE SPOTS MANAGING REMOTE EMPLOYEES

- Wage and Hour Laws and Time Records
- Leave Laws
- Personnel File Management and Access
- Discrimination Claims
- Termination

WHAT TO WATCH WITH HYBRID EMPLOYEES

- Place of Work for the Purposes of:
 - Taxes
 - Unemployment
 - Leave
- Time Tracking
- Removal, Transport and Safeguarding of Company Information and Property

MANAGING IN AN EMPLOYEE'S MARKET

DOCUMENT, DOCUMENT, DOCUMENT!

- Performance Issues
- Special Benefit or Arrangements for New Hires

POLICY UPDATES

- Attendance and Work Hours
- Remote Work Policies
- Time Tracking Policies
- Office Closure Policies
- Leave Policies
- Vaccine/COVID Related Policies

HEADS UP!

NEW PRIORITIES FOR ENFORCEMENT BY FEDERAL AGENCIES



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PALEY
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TRENDS OF THE PAST

- Decreased Emphasis On Enforcement Of Wage/Hour Discrimination, Etc.
- Precedent And Interpretations That Favored Business

DOL

(Department of Labor)

- Wage Hour Division Hiring 100 New Investigators
 - Signals FLSA & FMLA as priorities
 - Implicates worker classification issues
- More Claims Expected Against Employers
 - Jan. 2022 suit against home health agency
- Davis-Bacon Prevailing Wage Standards
 - Webinar available Feb. 28 and March 1

OSHA

(Occupational Safety & Health Administration)

- Infectious Diseases
 - “Covid is the workplace hazard of our time...”
 - Potential for new vaccine-or-test rules
- Workplace Violence
- Emphasis On Healthcare Industry
- New Rulemakings Expected

EEOC

(U.S. Equal Employment Opportunities Commission)

- Age Discrimination
 - Recent report focused on pay disparities, etc.
 - over 40 year old
- Doubling Number Of Inspectors
- Shortened EEO-1 Deadlines
 - 100+ employees or federal contractors with 50+ employees
- HIRE – Initiative To Encourage Diversity In Hiring

NLRB

(National Labor Relations Board)

- Use Of Injunctive Relief To Protect Organizing Efforts
 - Prevent “chilling” impact and “escalation” caused by unlawful employer deterrence
- Arbitration Agreements Under Scrutiny
 - Can employers mandate (confidential) arbitration of disputes?
- Joint-Employer Standard
 - Relaxing requirement of exercising control (only need to have such authority)
- Confidentiality Clauses In Termination Agreements
- Misclassification under NLRA – public comment requested in Dec. 2021
 - Rulemaking expected to expand scope of “employee”

DOL/NLRB

Memorandum of Understanding

- “Maximize and improve enforcement of the federal laws administered by DOL/WHHD and by the NLRB.”
- Exchange of Information:
 - Particularly about “unlawful compensation practices,” “retaliation” for exercising protected rights, and “the identification of complex or fissured employment structures ... designed to evade legal accountability, such as the misclassification of employees.”
- Coordinated Investigation and Enforcement:
 - DOL investigators will advise employees of potential for claim to NLRB and *vice versa*.
 - Potential for collaborative investigations and claims.

OFCCP

(U.S. Office of Federal Contractor Compliance Programs)

- Proposed Rule would extend audits to subcontractors
 - Discrimination, affirmative action scrutiny.
- Hiring Initiative to Reimagine Equity (HIRE)
 - Collaborate with EEOC
 - Aims to “identify proactive strategies to support better and more equitable hiring practices.”

1, 2, 3! KNOW YOUR ABC'S ABOUT INDEPENDENT CONTRACTORS

Presented By Jim Hammerschmidt

Employment Law Chair

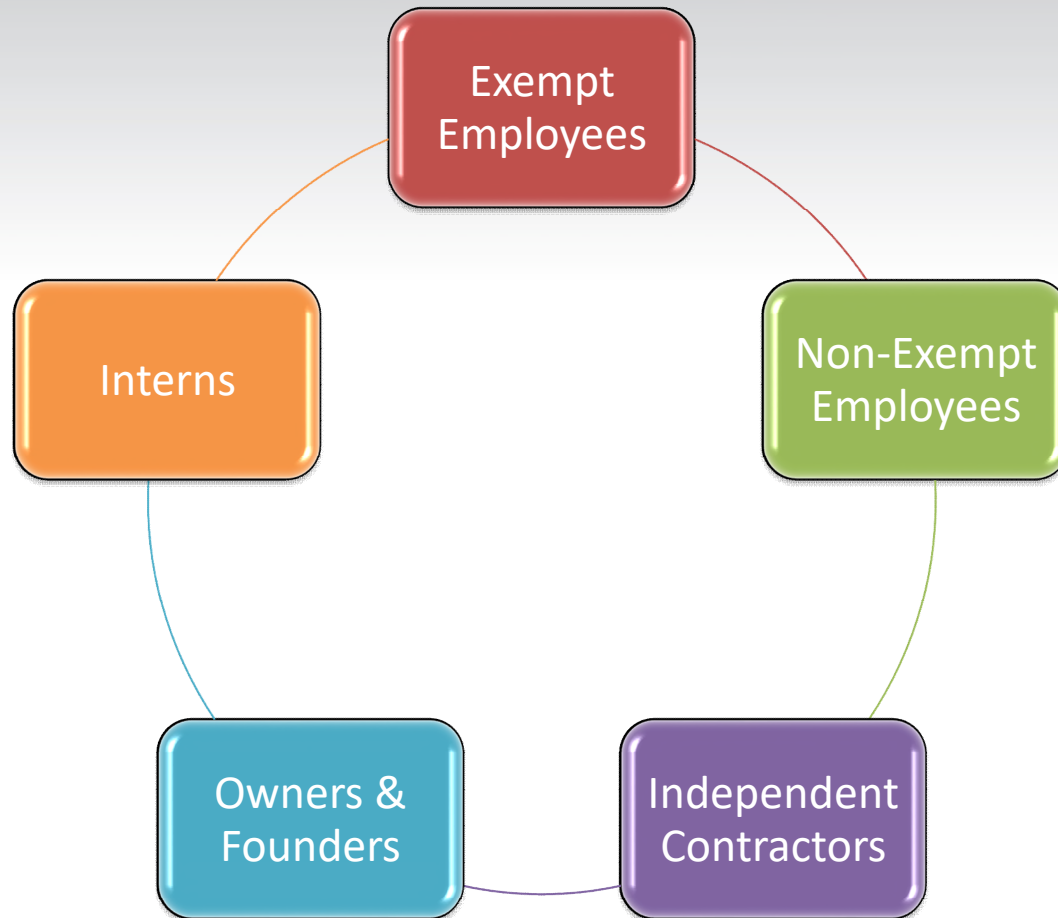
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WORKER CLASSIFICATION & NON-TRADITIONAL LABOR



10 BIGGEST WAGE & HOUR PITFALLS

- Employee Misclassification – Exempt vs. Non-Exempt
- **Employee Misclassification – Independent Contract vs. Employee**
- Failure to Pay Overtime – Involuntary Failure
- Failure to Pay Overtime – Voluntary Failure
- Off-The-Clock Work
- Pay Docking of Exempt Employees
- Pre-Shift/Post-Shift Activities
- On-Call Time
- Travel Time & Training Seminars
- Meals/Rest Breaks

INDEPENDENT CONTRACTORS (AKA “CONSULTANTS,” “FREELANCERS,” “1099S”)



THE CURRENT CLIMATE SURROUNDING INDEPENDENT CONTRACTORS – THE PENDULUM

DEPARTMENT OF LABOR (FLSA)

- During the Obama Administration the Department of Labor (DOL) increased its emphasis on worker misclassification and took steps to clarify DOL “economic realities” test and made it easier for workers to be classified as employees
- Trump DOL withdrew its Obama-era Administrative Interpretation on independent contractors and introduced a more employer-friendly “economic realities” test
- Biden shelved the Trump rule change – DOL stated Trump rule “was not fully aligned with the FLSA’s text or purpose”

THE CURRENT CLIMATE SURROUNDING INDEPENDENT CONTRACTORS – THE PENDULUM

NATIONAL LABOR RELATIONS BOARD

- 2014: Obama-era Board issues a decision that refined the IC test and made it easier for employees to qualify as employees
 - *FedEx Home Delivery Case*
- 2018: Trump-era Board reverses Obama-era Board, deciding that to give equal weight to both the right-to-control element and the role of the worker's entrepreneurship in operating their own business
 - *SuperShuttle DFW Case*
- 2021: In August, Biden gets last of 3 Democratic appointees to the Board and sets the stage for a reversion to the Obama-era IC test
 - *Atlanta Opera Case*

THE CURRENT CLIMATE SURROUNDING INDEPENDENT CONTRACTORS – THE STATES

STATE LAW DEVELOPMENTS

- California AB 5 – Applies the ABC Test across the California labor code
- ABC Test – Assumes the worker is an employee, unless the hiring entity can satisfy **ALL THREE** of the following conditions:
 - A. Worker is free from the control and direction of the employer, both under the contract and in fact;
 - B. Worker performs work that is outside the usual course of the employer's business; and
 - C. Worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed
- Biden has called for a federal standard modeled on the ABC Test – Worker misclassification would be a substantive violation of all federal labor, employment and tax law with additional penalties

THE CURRENT CLIMATE SURROUNDING INDEPENDENT CONTRACTORS – THE STATES

STATE LAW DEVELOPMENTS

- New Jersey – 2015 state Supreme Court decision applying ABC test from unemployment compensation statute to wage payment law (case set the stage for *Dynamex*)
 - New case before court may expand 2015 decision even further
- Massachusetts – 2021 state Supreme Judicial Court declined to apply ABC Test to state wage and hour law

KEY CONTEXTS IN WHICH THE EMPLOYEE VERSUS CONTRACTOR DISTINCTION ARISES

- Workers Compensation
- Unemployment Compensation
- Fair Labor Standards Act (FLSA) – Wage & Hour
- Employee Retirement Income Security Act (ERISA)
- Tort and Contract Liability
- Federal Taxes
- Family and Medical Leave Act (FMLA)
- National Labor Relations Act (NLRA)
- Anti-Discrimination Laws (Title VII, ADEA, ADA)

PERCEIVED PROS AND CONS OF USING INDEPENDENT CONTRACTORS

Pros:

- Cost
- Meeting contractor demands
- Flexibility
- Less legal exposure

Cons:

- Loss of employer control
- Liability for injuries
- Increased risk of government audits
- Risk of complaints by independent contractors



MYTHS ABOUT INDEPENDENT CONTRACTORS

- The distinction between independent contractors and employees only applies in certain industries
- Workers can request or negotiate whether they are classified as independent contractors or employees
- An employer can control whether a worker is classified as an independent contractor by having the worker sign an independent contractor agreement or issuing him or her a 1099 form
- It is possible to distinguish between independent contractors and employees based on their schedules and the number of hours that they work
- All temporary workers are independent contractor

KEY QUESTIONS FOR EMPLOYERS TO ANSWER BEFORE CLASSIFYING A WORKER

- What tasks will the worker perform?
- Do you need to control how tasks are done, not just the results?
- Do employees also do this type of work?
- How long will this assignment last?
- Will the work be key to your core business or ancillary?
- Is the proposed independent contractor actually running a business or are you his/her only client?
- Do you anticipate tasks will involve significant “overtime”?

THE BIG PICTURE: COMMON FACTORS AND THEMES

- Control Factor
- Worker's Independence – Financial And Otherwise
- Employer's Core Business

THE LITTLE PICTURE: CONTROL FACTOR

- Control performance
- Workplace rules & policies
- Direct supervision
- Discipline
- Ownership of vehicle, equipment or tools
- Supplies
- Degree of skill required
- Training/Instruction
- Uniforms
- Restrictive covenants
- Can worker solicit new business
- Can worker work for others
- Rights to inventions & work product

THE LITTLE PICTURE: EMPLOYER'S CORE BUSINESS

- Bargaining power
- Control of pricing
- Method of payment – salary, hourly or project
- Work hours/schedule
- Length of employment
- Reimbursement of expenses
- Employee leave & other benefits
- Written contract
- Is work key part of company business
- Integration into company
- Reporting requirements
- Supervisor duties

THE LITTLE PICTURE: WORKER'S INDEPENDENCE – FINANCIAL AND OTHERWISE

- Worker's investment
- Worker's ability to control profits/losses
- Worker's availability to the public
- Worker's ability to hire her own staff
- Worker's business structure
- Company's right to unilateral discharge
- Worker's right to unilaterally quit
- W-2 or 1099

FLSA: RULE

- When classifying a worker for FLSA purposes the focus must be the **economic reality**
 - The Supreme Court has identified the relevant factors to this inquiry to include:
 - Whether the worker's service is an integral part of the business
 - The permanency of the relationship
 - The worker's investment in facilities and equipment
 - The nature and degree of control
 - The worker's opportunities for profit and loss
 - The initiative, judgment and foresight required for the worker's success
 - The degree of independent business organization and operation

ENGAGING INDEPENDENT CONTRACTORS: INDEPENDENT CONTRACTOR AGREEMENTS

- Not Controlling
 - Remember, having an independent contractor agreement is not dispositive when determining if a worker is properly classified as an independent contractor
- Nonetheless, every independent contractor should have a written agreement (just like other vendors)
 - Structures the relationship to increase the likelihood that the worker is properly classified as an independent contractor

KEY POINTS TO ADDRESS IN AN INDEPENDENT CONTRACTOR AGREEMENT

- IC Relationship
- Scope of Work
- Instructions
- Training
- Delegation of Work
- Duration of Work
- Location of Work
- Confidentiality & Nondisclosure
- Reporting/Oversight
- Payments/Invoices
- Tools/Equipment
- Allocation of Loss
- Termination
- Legal Liability & Insurance



THE “DON'TS” OF INDEPENDENT CONTRACTOR AGREEMENTS

- Overall Theme: Don't Exert Too Much Control!!
- **Don't** rely on forms/templates
- **Don't** make the IC subject to employee handbooks or employer policies
- **Don't** include restrictive covenants, non-compete & exclusivity provisions
- **Don't** give the IC management, functional business unit or policy-making duties & responsibilities
- **Don't** include “Work for Hire” provisions

THE “DON'TS” OF INDEPENDENT CONTRACTOR AGREEMENTS

- **Don't** restrict the contractor's ability to delegate and assign tasks
- Try to **avoid** expense reimbursement provisions
- **Don't** require schedules and time-keeping
- **Don't** provide any employee benefits
- **Don't** include “at-will” termination
- **Don't** agree to cover business losses
- **Don't** provide any insurance
- **Don't** limit publicity if not necessary

ENGAGING INDEPENDENT CONTRACTORS: ADMINISTRATIVE CHECK-LIST

- Always have an independent contractor agreement in place
- Always require independent contractors to submit invoices for payments
- Ensure that a 1099 is issued to all independent contractors
- Consider whether it might be appropriate to utilize a temporary staffing agency to mitigate the risks associated with independent contractors
- Try to only hire independent contractors who have organized as a separate entity (company or LLC)
- Consider whether a temporary or part time employee could fulfill your needs

SIGN ON THE DOTTED LINE:



IS THE NON-COMPETE AGREEMENT EVEN ENFORCEABLE NOW?

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THE OLD DAYS



“Upset at you for breaching the non-compete? Of course not.”

THE OLD DAYS:

- A non-compete agreement was enforceable in most states if:
 - Reasonable in scope, duration, geography
 - Protecting a legitimate business interest
- Some companies started to abuse non-compete agreements

UNDER ATTACK



UNDER ATTACK: BY THE FEDERAL GOVERNMENT

- President Biden's Executive Order (July 2021) encouraging the Federal Trade Commission to draft rules to limit the use of non-compete agreements
 - Goal: To protect low-wage workers
 - FTC has recently initiated informal proceeding on the issue



UNDER ATTACK: BY THE FEDERAL GOVERNMENT

- Proposed Federal Legislation:
 - Freedom to Compete Act
 - Would apply to non-exempt employees under the FLSA
 - Workforce Mobility Act of 2021
 - Would only allow non-compete agreement in connection with the sale of business
 - Employment Freedom for All Act
 - Would void a non-compete if fired for non-complying with a COVID-19 vaccine mandate

UNDER ATTACK: BY THE STATES



UNDER ATTACK: BY THE STATES

- Oregon
 - Limits certain non-competes to 12 months
- Nevada
 - Bans non-compete agreements for hourly wage employees
- Illinois
 - Prohibits non-compete covenants with employee earning \$75,000 or less and non-solicitation covenants with employees earning \$45,000 or less
- Colorado
 - Class 2 misdemeanor for a person who violates non-compete statute



THE DMV PERSPECTIVE: MARYLAND

Maryland's Non-Compete and Conflict of Interest Act (Effective Date: October 1, 2019):

- The Act bans non-compete agreements with employees who earn less than or equal to (1) \$15 per hour, or (2) \$31,200
- The Act invalidates all applicable agreements entered before this date
- The Act explicitly does not ban confidential agreements that prohibit the taking or use of client lists or other proprietary client-related information.
- The law is silent on the subject of non-solicitation of customer agreement
- The Act does not specifically provide for penalties or provide for a private cause of action against an employer

THE DMV PERSPECTIVE: VIRGINIA

Virginia's non-compete law:

- Prohibits employers from entering into, enforcing or threatening to enforce a covenant not to compete with a “low-wage” earner
- Applies to covenants not to compete entered into on or after July 1, 2020
- “Low-wage” earner is defined as:
 1. An employee, intern, student, apprentice, or trainee whose average weekly earnings are less than the average weekly wage of Virginia: **Current average weekly wage in Virginia is approx. \$1,257/week (\$65,364/annum).** This figure is updated quarterly
 2. An independent contractor who is compensated for services at an hourly rate that is less than the median hourly rate for Virginia as reported by the Bureau of Labor statistics: **Current average hourly wage in Virginia is approx. \$21.74.**
- “Covenant not to compete” is defined as any agreement, or provision of an agreement that restrains, prohibits or otherwise restricts an individual’s ability to compete with his former employer
- Prohibition includes prohibiting the employee from providing services to a client/customer of the employer if the employee *does not initiate contact with or solicit the customer*

THE DMV PERSPECTIVE: VIRGINIA

- Does not prohibit the use of non-disclosure agreements
- Excludes employees whose compensation is predominantly from sales commissions, incentives, or bonuses
- Provides a private cause of action by the employee for injunctive relief, liquidated damages, lost compensation, attorney fees and costs, and expert witness fees
- Two year statute of limitations from date of attempt to enforce such provision
- Employers must post a notice approved by the Virginia DOL in the workplace and are subject to a civil penalty after the first failure to do so
- Anti-retaliation provision

THE DMV PERSPECTIVE: DISTRICT OF COLUMBIA

DC's Ban on Non-Compete Agreement Amendment Act of 2020:

- Signed by Mayor Muriel Bowser on January 11, 2021 but the “applicability date”—the date when employers are subject to the terms of the Act-- is currently set for April 1, 2022.
- Law will apply prospectively only, so non-competes in existence prior to “applicability date” will still be valid
- ***Law forbids agreements or policies that prohibit an employee from being employed by another person or company both during employment and post-termination***
- Applies to all workers, not just low-wage earners, “who perform work in the District” and prospective employees reasonably expected to perform work in the District (but no threshold for the amount of work?)
- Applies to employers “operating in the District” but does not provide a definition of what that means (office, remote work, workers at worksite?)

THE DMV PERSPECTIVE: DISTRICT OF COLUMBIA

- Exceptions:
 - Volunteers at educational, charitable, religious or non-profit organizations
 - Lay members elected or appointed to office with a religious organization or engaged in religious functions
 - “Medical specialists” defined as licensed physicians who have completed residency and earn at least \$250,000 per year
 - Agreements entered into in connection with the sale of a business

THE DMV PERSPECTIVE: DISTRICT OF COLUMBIA

- Employers may have agreements restricting the use of confidential/proprietary information, client/customer lists and trade secrets
- Employers may not retaliate against an employee who:
 - Refuses to sign a non-compete agreement
 - Complains about a non-compete agreement
 - Fails to comply with a non-compete agreement
- Employee may file a private cause of action against an employer who violates the law
- Administrative action may also be taken and penalties assessed from \$350-\$3,000 per violation

THE DMV PERSPECTIVE: DISTRICT OF COLUMBIA

- Mandatory employer notice to employees:
 - **“No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020.”**
- Notice must given:
 - Within 90 days of the applicability of the Act
 - Within 7 calendar days after the date of hire
 - Within 14 calendar days of an employee’s request

BEST PRACTICES MOVING FORWARD IF A NON-COMPETE IS BANNED

- Non-Solicitation Agreements are still valid (with some exceptions)
- Implement polices to protect proprietary information and/or trade secrets
 - Use Non-Disclosure Agreements
 - Limit access to proprietary information and/or trade secrets
 - Develop data security policies
 - Destroy unneeded data
 - Monitor employee actions
 - Ensure that all confidential data is returned upon termination

FOLLOW-UP QUESTIONS?
PLEASE CONTACT THE
EMPLOYMENT LAW GROUP