

Optimizing Your Most Important Asset: Human Resources

Marine Terminal Management Training Program

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Employee or Independent Contractor:

Why it Matters and
Where it is an issue
(hint – it involves drayage)

Why Do Companies Try to Use Independent Contractors Instead of Employees?

Cost

- Independent contractors can't unionize
- Payroll Taxes – as much as 30% of payroll costs (competitive advantage over other employers)
 - Social Security
 - Medicare
 - Unemployment Compensation
 - Workers' Compensation (but Comp Bar)
- Decreased Administrative Costs
- Benefit Plans and Overtime
- Affordable Care Act

Exempt from Coverage Under Workplace Laws

- Employment laws are based on employee/employer relationship
 - Federal wage and hour laws
 - State wage payment laws
 - Many anti-discrimination laws (e.g. Title VII, ADA, ADEA)
 - National Labor Relations Act
 - FMLA
 - WARN Act
 - Unemployment Compensation
 - Workers' Compensation
 - Less exposure for torts committed by independent contractors
 - No requirement to obtain proof that workers are eligible to work in the US (I-9)
- No legal responsibility for withholding taxes

Who's interested in misclassification?

Agency

DOL

Affected Areas

- Wage & Hour (FLSA)
- Unpaid Leave (FMLA/USERRA)
- Immigration/I-9 issues

IRS

- Federal income and payroll taxes
- ACA

EEOC

- Employment discrimination

NLRB

- Union organizing, ULPs, and collective bargaining

The workers

- Overtime, employee benefits

SSA

- Retirement and disability coverage and payments

State and Local
Agencies

- Unemployment
- State income taxes
- Workers compensation
- Wage/Hour and Wage Payment Laws

Independent Contractor or Employee?

Different Laws Apply Different Tests

- DOL “Economic Reality” Test (FLSA)
 - Wage and Hour
- Common Law Test
 - NLRA & ERISA
- IRS Three-Factor Test
- State Law Tests
 - A/B test
 - ABC
 - Common Law

Social Media and Bring Your Own Device Issues

What rights do employees have?

- While private employees generally have fewer rights than public employees since no First Amendment protection in private employment some states have privacy rights
- Host of other electronic communications laws apply – traps for the unwary
- Public employees also have First Amendment rights on matters of public concern
- NLRB has stepped in for private sector

Bring Your Own Device (BYOD)

- Employment law concerns
 - Personal privacy
 - Off duty monitoring/tracking - FLSA
- Record retention
- Expectation of privacy
- Litigation impacts
 - Discovery Burdens
 - Discovery Benefits

BYOD Policies

- Limit expectation of privacy in device
- Sets rules for safe use (NEVER while driving)
- Consider whether to require a remote-wiping application
- Specifies whether off-duty nonexempt employees are expected to check email and addresses FLSA implications
- Restrict sharing of confidential information where legal

How to Balance the Rewards and the Risks

- Well drafted social media policy
- Well trained employees
- Oversight by appropriate employees prior to employer-generated content
- Monitoring of sites
- Know what you can and can't do, at the federal level and in your state

Trends - 2015 and Beyond

- More federal and state agency enforcement activity – especially in port trucking
- More class/collective actions, especially misclassification
- More employee protective legislation, especially as to wages, time off, sexual orientation and gender identity
- Continuing issues around the Affordable Care Act, including employee classification and employer coverage challenges
- Public sector benefit plans