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?

<table>
<thead>
<tr>
<th>Agency</th>
<th>Affected Areas</th>
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<tbody>
<tr>
<td>DOL</td>
<td>• Wage &amp; Hour (FLSA)</td>
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<td></td>
<td>• Unpaid Leave (FMLA/USERRA)</td>
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<td></td>
<td>• Immigration/I-9 issues</td>
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<tr>
<td>IRS</td>
<td>• Federal income and payroll taxes</td>
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<td>• ACA</td>
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<tr>
<td>EEOC</td>
<td>• Employment discrimination</td>
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<tr>
<td>NLRB</td>
<td>• Union organizing, ULPs, and collective bargaining</td>
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<td>The workers</td>
<td>• Overtime, employee benefits</td>
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<td>SSA</td>
<td>• Retirement and disability coverage and payments</td>
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<td>State and Local Agencies</td>
<td>• Unemployment</td>
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<td>• State income taxes</td>
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<td>• Workers compensation</td>
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<td>• Wage/Hour and Wage Payment Laws</td>
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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