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Relationship Status? It's Complicated. Defining Employees, Independent Contractors, and Others

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Three Primary Kinds of Work Arrangements

1. Employees
2. Independent Contractors
3. “Others”



First Primary Work Arrangement— Employees

1. Who Are Employees?

- No single definition of “employ” or “employee”
- No single definition of “independent contractor”
- No single definition of “volunteer”
- Oregon: “Employ” includes “to suffer or permit to work but does not include voluntary or donated services performed for no compensation or without expectation...of compensation” (ORS 653.010(2))
- Alaska: “Employment” means “services performed by an individual for wages” or “services for remuneration for any person” (AK 23.20.535)
- Washington: “Employ” includes “to permit to work” (RCW 49.46.010(2))

“Right to Control” Test

Typically used for purposes of civil rights and employment laws

- e.g. employment discrimination, whistleblower retaliation, harassment, etc.
- Different tests used for wage laws and workers’ compensation laws

Looks at four factors, not one of which is determinative:

1. Direct evidence of the right to, or exercise of, control of the worker;
2. Method of payment to the worker;
3. Furnishing of equipment to the worker and by whom; and
4. Right to fire the worker.

Starting a New Relationship (How to Hire New Employees)

- Employee hiring process:
 - Job descriptions should be comprehensive, including accurate duties description as well as OSHA-related physical requirements, and should/must include salary range;
 - Generally cannot ask about criminal convictions until after interviews (or in Portland until after conditional offer of employment made);
 - Must ensure non-discrimination in hiring process, cannot exclude persons based on age, race, gender, religion, disability, etc.;
 - Must ensure persons with disabilities have opportunity to request accommodations for the application and interview processes;
 - Use caution with pre-employment drug screenings because state/local laws may restrict use, and tests for marijuana are not always reliable.

How to Onboard New Employees

- Immigration compliance—Form I-9
- Proper payroll setup, correct rate of pay (state and local minimum wage laws), including SSN, payroll tax withholdings, workers' compensation insurance, unemployment insurance, Paid Leave insurance
- Paydays (at least monthly) and paystubs have all state-required information
- Confirm exempt vs. non-exempt status: exempt employees generally must meet FLSA duties test and applicable state law salary thresholds
- Review employee handbook with new employees, especially harassment and discrimination policy and sick leave policy (often required by state law), have employee sign and give a copy
- Make safety and personal protective equipment readily available
- Post **all** required posters and notices (services available for these)

How to Onboard New Employees (cont'd)

- Employee handbook and workplace should include:
 - Harassment and discrimination policy, including new Oregon Workplace Fairness Act requirements (state required)
 - Sick leave policy (state required) including providing mandatory sick leave and Paid Leave (WA and OR state required)
 - Reasonable accommodations for breastfeeding/milk expression
 - Reasonable safety accommodations for domestic violence/stalking victims
 - Reasonable accommodations for disabled employees and engage in interactive process once aware of disability
 - New Pregnant Workers Fairness Act policies and notices

Employee Moonlighting

- Employees often have other jobs or sources of income
- Employers generally **cannot** prohibit employees from having other jobs or sources of income
- Employers **can** take steps and have policies to ensure employees:
 - Do not share confidential business, donor, trade secret, sensitive information
 - Do not let other work interfere with work for employer

Employee Rights under NLRA and State Law

- Employees, whether union members or not, have certain rights protected under the National Labor Relations Act (NLRA):
 - Employees may engage in “concerted activity” —when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment (NLRA Section 7)
 - Employers cannot discharge, discipline, or threaten an employee, or coercively ask employee about, any protected “concerted activity” (NLRA Section 8(a)(1))
- State law protects all employees who are “whistleblowers”:
 - Employees may report activities they believe in good faith are violations of laws, rules, regulations, or constitute harassment/discrimination, or unfair trade practices
 - Employers cannot discriminate or retaliate against whistleblowers

Breaking Up: Employee Terminations and Layoffs

- Unless an employment contract specifies otherwise, state laws make employment “at-will,” meaning an employer or employee may terminate the employment relationship any time for any reason (except for unlawful reasons)
- Typically, employees will receive unemployment compensation, unless termination is for significant violation of law or employer policy
- Severance payments are not required, but can be paid
 - State law may prohibit including non-disparagement, no re-apply, confidentiality, other provisions in severance agreements
- Whether departing employees receive payout of unused sick leave/vacation/PTO time typically depends on employer written policies or past practice
- 60-day prior notice of layoff required for large employers (100+) under WARN Act and comparable state laws

Best Practices & Recommended Policies

Be sure to have the following:

1. Fully Updated and compliant Employee Handbook
2. Job postings that comply with applicable laws, pay transparency
3. I-9 compliance upon hiring
4. Updated and accurate Job Descriptions for all positions
5. OSHA-compliant workplaces, safety gear, safety teams/meetings
6. Updated worksite posters and notices
7. Payroll and pay stubs set up properly and have all required information

Questions on “Employees”?

Who Are Independent Contractors?

- No single definition of “employee” or “independent contractor” or “volunteer”
- “Independent contractors” are not employees for purposes of wage and hour laws, including minimum wage, overtime, meals/breaks, etc.
- They are free from direction and control other than customer specifying desired result
- States generally apply “economic realities” test for definition for wage and hour laws, unemployment compensation, workers’ compensation, but...
- States generally apply “right to control” test for civil rights and employment laws

Who Are Independent Contractors? (cont'd)

For Example:

- Under ORS 670.600, worker must meet all of these criteria to be an independent contractor for purposes of Revenue, Employment, Workers' Compensation, CCB, and Landscape Contractors Boards:
 1. Free from direction and control over means and manner of services provided;
 2. Customarily engaged in an independently established business;
 3. Licensed by CCB or Landscape Board or Architect Board etc., if license required for work being performed;
 4. Responsible for other licenses or certificates necessary to provide the service.
- Consequences of failed test: could owe taxes, overtime, minimum wage, workers' compensation, noncomplying employer, etc.

Who Are Independent Contractors? (cont'd)

- Under “economic realities” test for purposes of wage and hour laws, worker must meet three of these criteria:
 1. Customarily engaged in an “independently established business” such as separate location away from the customer’s workplace and not just working remotely at home;
 2. Contractor bears risk of loss such as warranting work and purchasing own liability insurance or errors and omissions insurance, performance bonds;
 3. Contractor contracts with other customers (at least 2 in 12 months);
 4. Contractor invests in own business and tools/materials/training, or pays for workspace and equipment; and
 5. Contractor can hire and fire its own employees.

“Independent Contractor” — Changing Rules

In March 2024, the U.S. Department of Labor rescinded the Trump era focus on two factors—control and opportunity for profit or loss—for determining whether a worker was properly characterized as an “independent contractor.” The new rule reverts back to the prior six-factor “economic reality” analysis:

- Opportunity for profit or loss depending on the worker’s managerial skill, such as through negotiating the worker’s price/fee, the worker’s ability to accept or decline jobs from the potential employer, the worker’s engaging in marketing and advertising efforts for the worker, and whether the worker can hire others or lease/purchase office space and equipment;
- Investments by the worker and the potential employer, such as the worker making investments to grow the worker’s own business or skillset;
- Degree of permanence of the work relationship, including whether the relationship is continuous, the duration is indefinite, or the relationship is exclusive for the potential employer;
- Nature and degree of control [of the worker’s work] such as work scheduling, supervision rights or reservation of such rights (excluding mandatory compliance with applicable federal, state, tribal, and local laws), mandatory trainings beyond those required for relevant licensing, price-setting, and ability to work for others;
- Extent to which the work performed is an integral part of the potential employer’s business; and
- Worker’s use of the worker’s own specialized skill combined with business-like initiative of the worker.

NOTE: Workers cannot request or “declare” themselves to be independent contractors!

How to “Hire” Independent Contractors?

- Independent contractors are not “hired” like employees, they are contracted with:
 - Contracts can be oral, but should be written
 - Contracts should ensure all parts of rules for being considered “independent contractor” are met and identified in contract
 - Contracts should describe what work is being performed, when it is due, and who bears responsibility if work not done or incorrect (including who has insurance)
 - Contracts should have end date and fixed compensation terms
 - Contracts should have carefully-written termination clause
 - Payments under the contract should be tied to certain performance metrics

How to “Hire” Independent Contractors? (cont’d)

- Independent contractors should be provided with copies of employer policies on harassment/discrimination and sign as having received because independent contractor should be required to comply with those policies, and
- Independent contractor can be considered an “employee” for purposes of harassment/discrimination and can lead to employer liability even if not considered an “employee” for wage and hour and other laws

How to “Hire” Independent Contractors? (cont’d)

- Examples of common independent contractors include:
 - Technical expertise services not available in-house
 - Construction, landscape, architect, engineer, cleaning services
 - Consultants
 - Website/computer network service providers
 - Payroll/HR service providers
 - CRM service providers
- Note: be sure **all** independent contractor contracts protect your customer contact lists, financial data, trade secrets, and other sensitive information!

Breaking Up: “Firing” Independent Contractors

- Since independent contractors are not “hired” they also are not “fired”—instead the contract for their services is terminated
- Termination clauses in contracts are very important, entity will want to be sure contract can be terminated on 30 days’ written notice for no reason
- Termination clauses also should provide parameters around when and how independent contractor can terminate contract and what is owed by each side in case of termination
 - (e.g. website contract states when website due and no final payment until complete, and if not complete then contract terminated with no further payments due?)

Best Practices & Recommended Policies

1. Have written independent contractor agreement in place
2. Make sure person/entity hired meets all applicable tests for “independent contractor” status
3. Be sure not to “control” the independent contractor’s means and methods of performing work, such as hours, worksite, etc.
4. Follow the agreement terms for all purposes

Questions on “Independent Contractors”?

Other Quasi-Work Arrangements

- **“Interns”**: likely “employees” for wage and hour laws!
- **“Job shadowing”**: have written agreement that person is not asked or expected to work while there and only present to view the worksite as an educational opportunity.
- **“Volunteer”**: have written agreement or volunteers handbook in place defining their role(s); a worker cannot “volunteer” to perform same services that they also are employed to perform.
- **“Vendors”**: vendors and third-party service providers on site should comply with all applicable harassment/discrimination policies as well; agreements with vendors should ensure workplace professionalism.
- **“Customers”**: even customers can become a liability for an employer if the customer is harassing or discriminating against employees!

Best Practices & Recommended Policies

1. Consider posting a general “professionalism” or behavior expectations at entrances that everyone is expected to comply with
2. Ensure agreements or handbooks are in place for all “other” categories of persons, except customers (maybe)
3. Ensure vendor/third-party service provider agreements allow entity to request a person be removed/not return if the person is found to be engaging in unprofessional behavior

Any Other Questions?

Thank You!

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