



MESSNER REEVES LLP

Latest Employment Law Updates and Risk Management to Protect Your Business

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Important Legal Notice

This presentation is to provide information and updates regarding general legal issues. These materials are not intended to provide legal advice on specific compliance issues and do not establish an attorney-client relationship. Attendees should consult with legal counsel for legal advice about specific facts and circumstances and applicable laws. Companies should ensure that they stay current with changing laws and guidance.

National Trends In Employment Law



National Trends in Employment Law

1. Areas of growing employment litigation include:
 - a. Discrimination based on gender, gender identity, sexual orientation, or transgender status;
 - b. Discrimination based on race – use of the “N” word, visual representations of noose, other derogatory terms;
 - c. Sexual harassment and discrimination, particularly touchings, dating between supervisor and worker, and criminal assaults;
 - d. Retaliation: EEOC telling former employees who file charges to reapply at company to strengthen or add a retaliation claim;
 - e. ADA Accommodation and Failure of Interactive Dialogue
 - f. Equal Pay Act

National Trends in Employment Law

2. Retaliation claims (EEOC, OSHA, wage and hour etc) are some of the most successful claims
3. Trends in ADA Claims
 - a. Disability and associational claims relating to COVID-related disabilities are a new trend
 - b. ADA work-from-home accommodation claims are increasing after COVID required everyone to work from home
4. Wage and Hour Claims and audits continue to increase
 - a. Off-the-clock-work, including travel time
 - b. Breaks and meal periods in states where required
 - c. Up to 25% of claims in federal court brought as class action
 - d. DOL has achieved multiple multi-million dollar settlements in last 3 years

Government Enforcement Initiatives & Changes

1. Increased OSHA investigations and enforcement
 - a. National Emphasis Program – Falls issued 5/1/2023
 - b. National Emphasis Program – Heat Illness issued 4/8/2022
2. Increased NLRB Activity
 - a. Recent NLRB case reversed termination for outburst if related to protected activity
 - b. NLRB issued decision limiting use of non-defamation provisions in separation agreement
3. New FMLA poster was released 5/12/23 – older versions also still valid

Government Enforcement Initiatives & Changes

1. Policy allowing for I-9s to be completed remotely ends July 31, 2023, followed by a 30-day grace period to update all I-9s completed remotely.
2. Original remote inspection notate I-9 "Remote inspection completed mm/dd/yyyy."
3. Update requires employers to physically inspect the original documents used to remotely complete the Form I-9 notate the physical inspection in the "additional information box" in Section 2
 - a. If the same person who completed the remote inspection completes the physical inspection, write "COVID-19, Documents Physically examined on mm/dd/yyyy by [initials]"
 - b. If a different person does the physical inspection of documents than did the remote I-9, write "COVID 19, documents physically examined on mm/dd/yyyy by [Name], [Title]"

Risk Management Considerations – Discipline and Addressing Employee Concerns



Addressing Employee Concerns

1. Conduct investigation.

- a. Talk to the person raising concern and persons allegedly engaging in inappropriate conduct or comment, and potentially witnesses;
- b. Generally, participation in investigation can be mandatory. If employee does not want to participate, contact legal counsel for guidance.

2. Take appropriate corrective action.

- a. Written disciplinary action;
- b. Training;
- c. Suspension;
- d. Termination.

Addressing Employee Concerns

3. Do not transfer, suspend, or otherwise take adverse action against person raising concern pending investigation.
 - a. If employees cannot work together, EEOC guidance states that the person who allegedly engaged in inappropriate behavior should be the one transferred;
 - b. In the moment, you may be able to obtain the voluntary request or consent of person making complaint to be transferred, but it must not result in harm or loss to person.
4. After investigation, make sure to prevent retaliation against person raising concern.
 - a. Retaliation claims can be successful even when the underlying discrimination or harassment claim is not successful

Counseling & Discipline to Mitigate Risk

1. Deal early and directly with problem employee situations.
 - a. Speak to employees about performance and conduct issues as they occur.
 - b. Document that counseling has occurred, even if it was verbal.
 - c. Need to show that counseling occurred before employees engage in conduct that is protected under the law.
2. Retaliation claims provide more risk to employers than discrimination claims.
3. Assume every problem employee is being guided by an attorney.
4. Document, document, document!

Risk Area: Argumentative Employee

1. Managers may be less likely to deal with deficiencies by argumentative employees.
2. Human nature for managers is to avoid conflict.
3. It is especially important to give candid evaluations for argumentative employees. They are more likely to bring claims.
4. If employee makes rebuttal to the evaluation, keep it with the evaluation.

Termination

1. Reasons for termination
 - a. Misconduct or unsatisfactory performance
 - b. Misconduct is legally safer than poor performance
 - c. Juries are more likely to excuse poor performance than misconduct
2. Are the reasons for termination covered in handbook or policies, practices, or procedures?
3. Not every reason needs to be in handbook, however
4. Consider possible alternatives to termination, such as demotion, financial consequence, etc.

Termination

4. Employee may quit instead of accepting demotion, and a resignation is better for company than a termination
5. Employee may accept the demotion
 - a. Employee may perform satisfactorily in lower position
 - b. Employee may perform poorly or have a bad attitude and be terminated later
 - c. A termination from lower position is legally safer for the company than a termination before the demotion

Notifying Employee of Separation

1. Employee generally should be informed of termination in person, not by e-mail, letter or memo
2. Termination meeting should be brief, kind, and with a witness
3. Reasons expressed should be very general
4. **“The decision has been made to separate your employment. We want to do so in a professional and respectful manner. We appreciate your contributions and wish you well in your future endeavors.”**

Notifying Employee of Separation

5. Supervisors should refrain from debating the reasons for termination
6. Supervisors should never give an incorrect reason
7. Employee should be able to leave with respect
8. Give the employee of final paycheck, information re benefits, etc.
9. Inform employee of company's reference policy

Consider Separation Agreements to Close Matters before Litigation

1. The use of a separation agreement/release and payment may help resolve situations before claim or demand letter from attorney occurs.
2. If person quit or threatens to quit because of alleged harassment, discrimination, unfair pay, etc. –consider use of separation agreement .
3. Can often settle significantly less at time of separation than after a person files a charge or lawsuit or retains an attorney.

EEOC Process

1. Charge of Discrimination – 300 day statute of limitations
2. Employer's Response
 - a. Mediation –
 - i. Allow company opportunity to see evidence (video, audio etc)
 - ii. nationally 404 of 580 cases mediated in FY 2022 with EEOC were settled, some without monetary compensation
 - b. Position Statement – accompanied by documentary proof and affidavits or declarations. Be comprehensive up front. First level of discovery and avoids pretext.
3. EEOC investigation and conclusion
 - a. Notice of Right to Sue
 - b. Cause Finding

EEOC Notice of Right to Sue

1. If EEOC does not find cause to believe that discrimination, harassment, or retaliation occurs it issues a Notice of Right to Sue (NRS).
2. Employee has 90 days after receipt of NRS to file lawsuit in state or federal court.
3. Failure to timely file lawsuit or exhaust administrative remedies can be a bar to employee's lawsuit and recover.

EEOC Cause Finding

1. If EEOC believes that discrimination, harassment, or retaliation occurred then it issues a Cause Finding.
2. After issuing a Cause Finding, EEOC attempts a conciliation process to try to find a mutual resolution.
3. If no resolution, either:
 - a. EEOC files a lawsuit against the employer or
 - b. EEOC issues a right to sue and employee has 90 days to file a lawsuit in court.

Court Proceedings

1. The goal is usually to resolve matters before they get to the stage of a lawsuit.
2. To take a lawsuit through trial often costs \$150,000 to \$300,000 depending on circumstances.
3. Motion for Summary Judgment – decided by the judge on undisputed facts, but often not possible in situations where there are few undisputed facts.
4. Company employees and former employees become witnesses.
5. Passage of time may impact memories.
6. Disgruntled former employees may create issues.

Wage And Hour Issues



Top 10 Wage and Hour Issues

1. Misclassification of employees as independent contractors.
2. Automatic deductions for meal periods not recorded on the time card.
3. Off-the-clock work.
4. Misclassification of non-exempt employees as salaried exempt when they do not meet duties test.
5. Failure to have accurate time cards signed by employees as accurate, showing starting and stopping time and unpaid meal breaks.

Top 10 Wage and Hour Issues

6. Failure to track hours and pay overtime to piece rate employees;
7. Failure to include nondiscretionary bonuses in the calculation of regular rate for overtime calculations.
8. Failure to pay non-exempt employees for meetings, training, or preliminary and postliminary work.
9. Incorrect or no payment for travel time.
10. Improper deductions from salaried exempt employees.

Minimum Wage Requirements



Fair Labor Standards Act

1. Federal Minimum Wage: \$7.25/hour
 - a. Last MW increase was July 24, 2009
 - b. Bills have been introduced to increase the federal minimum wage incrementally to \$15.00 and then annual increases thereafter but no bill has yet passed.
2. Federal Overtime: 1 ½ times the *regular rate* of pay for all hours over 40 hours in a work week
 - a. Regular rate is a defined term and includes most compensation received by non-exempt employees
 - b. For certain pay methods, such as piece rate, overtime is an additional ½ the regular rate because the piece rate covers the straight time for all hours worked (but check state law).

State and Local Minimum Wage

1. State Minimum Wage: Must pay highest applicable MW
 - a. 30 states and DC have MW higher than Federal minimum wage
 - b. 45 local governments have MW higher than their applicable state minimum wage
 - c. California has highest minimum wage: \$15.00/hour for companies with 26 or more employees
 - d. Many state minimum wage laws include automatic annual increases
 - e. Arizona minimum wage increased to \$13.85/hour January 1, 2023 and increases annually

Risks And Best Practices Regarding Independent Contractors



Classification of Independent Contractors

1. FLSA and most state labor laws apply only to employees.
2. Different tax treatment of employees and independent contractors.
3. Penalties for incorrectly categorizing employees and independent contractors can be broad, including but not limited to:
 - a. Employment Taxes
 - b. Unemployment Taxes
 - c. Workers' Compensation
 - d. Benefits to Misclassified Workers

DOL Trump-Era Regulations

1. DOL under President Trump issued regulations on January 7, 2021 making it easier to classify workers as independent contractors were withdrawn by Biden Administration
2. District Court in the Eastern District of Texas has held that the Biden Administration's withdrawal of the independent contractor regulations was invalid and that the January 7, 2021 rule became effective as of March 8, 2021 and remains in effect.
3. DOL appealed the ruling to the Fifth Circuit Court of Appeals, and has asked that the case be stayed pending DOL's proposal of new independent contractor rules.

DOL Trump-Era Regulations

1. Regulations implemented under Trump DOL list five factors, with the first two given the most weight, and the last three reviewed only if first two not determinative:
 - a. The nature and degree of control over the work.
 - b. The worker's opportunity for profit or loss.
 - c. The amount of specialized training or skill required for the work that the potential employer does not provide.
 - d. The degree of permanence of the working relationship (focusing on the continuity and duration of the relationship and weighing toward independent contractor status if the relationship is definite in duration or sporadic).
 - e. Whether the work performed is "part of an integrated unit of production."

DOL Proposed Regulations – October 13, 2022

1. On October 13, 2022 DOL published a Notice of Proposed Rulemaking to make new regulations regarding “Employee or Independent Contractor Classification Under the FLSA”
2. Public comment closed December 10, 2022.
3. According to DOL, the proposed rule will
 - a. “Align the Department’s approach with courts’ FLSA interpretation and the economic reality test.”
 - b. Rescind the Trump-era regulations.
 - c. Restore the totality-of-the-circumstances test and ensure all factors are analyzed without a predetermined weight to a particular factor.

DOL Proposed Regulations – October 13, 2022

4. The proposed rules state that the FLSA definition of employee is:

Meant to encompass all workers who, as a matter of economic reality, are economically dependent on an employer for work. A worker is an independent contractor, as distinguished from an “employee” under the Act, if the worker is, as a matter of economic reality, in business for themselves. Economic dependence does not focus on the amount of income earned, or whether the worker has other income streams.

Economic Realities Test in Proposed Regulations

1. Provides 6, non-exhaustive factors.
 - a. Opportunity for profit or loss depending on managerial skill.
 - b. Investment by the worker and the employer.
 - c. Degree of permanence of work relationship.
 - d. Nature and degree of control.
 - e. Extent to which the work performed is an integral part of the employer's business.
 - f. Skill and initiative.
2. Requires that the analysis review the totality of the circumstances. No single factor is determinative or weighted over other factors.

Economic Realities Test in Proposed Regulations

1. “Opportunity for profit or loss depending on managerial skill” considers whether the worker exercises managerial skill that affects their success.
 - a. Do they meaningfully negotiate the pay for the project?
 - b. Do they accept or decline jobs or determine when the jobs are performed?
 - c. Do they engage in marketing, advertising, or other efforts to expand and secure more work?
 - d. Do they make decisions to hire others, purchase materials and equipment, and/or rent space?
 - e. Deciding to work more hours or take more jobs may increase profit but do not reflect exercise of managerial skill.

Economic Realities Test in Proposed Regulations

2. “Investments by the worker and the employer” considers whether investments by a worker are “capital or entrepreneurial in nature.”
 - a. Costs of performing the job, such as tools and equipment to perform the specific job performed by the individual are not “capital or entrepreneurial in nature.”
 - b. Costs that are “capital or entrepreneurial in nature” are things that “serve a business-like function, such as increasing the workers’ ability to do more types of work, reducing costs, or extending the market reach.”
 - c. Worker’s investment should be considered on a relative basis to the employer’s investment, but they need not be equal.

Economic Realities Test in Proposed Regulations

3. “Degree of permanence of the work relationship” favors employee status if the relationship is indefinite or continuous and favors independent contractor if the work relationship is project based, non-exclusive, or sporadic and the worker provides services to multiple entities.
4. “Nature and degree of control” looks at the employer’s control over such things as:
 - a. the worker’s schedule;
 - b. the method of performing work;
 - c. limitations on working for others;
 - d. right to supervise or discipline workers (even if not consistently exercised)
 - e. Whether the employer places demands on the workers’ time that prevent him from working for others.
 - f. Control for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may indicate control by the employer.

Economic Realities Test in Proposed Regulations

5. “Extent to which performed work is an integral part of the employer’s business” weighs in favor of the worker being an employee if they perform work that is “critical, necessary, or central to an employer’s principal business.”
6. “Skill and initiative” considers whether the worker uses specialized skills and whether those skills “contribute to business-like initiative.” If the worker is depending on training from the employer, this indicates employee status.
7. Additional factors may be considered if they indicated whether a worker is in business for themselves.

Independent Contractor “ABC Test”

1. During his campaign, President Biden expressed support for the ABC Test
2. The ABC Test is the independent contractor test that most frequently leads to a determination that an individual is an employee rather than an independent contractor.
3. Some versions of the ABC Test is used in California, Connecticut, Nevada, Vermont, Washington, and a approximately 15 other states.
4. DOL has stated that it does not believe that it has the authority to adopt the ABC test because the Supreme Court has applied the economic reality test under the FLSA.

Independent Contractor “ABC Test”

5. Under the ABC Test, a worker is considered an employee unless all three of the following conditions are satisfied:
- a. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
 - b. The worker performs work that is outside the usual course of the hiring entity’s business; and
 - c. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed

Other Independent Contractor Tests

1. IRS control test
 - a. Behavioral control
 - b. Financial control
 - c. Type of relationship
2. State unemployment compensation laws
3. State tax laws
4. State workers compensation laws

Independent Contractor IRS Guidelines

1. Behavioral Control

- a. Instructions on when, where and how to reach result v. just establishing result.
- b. Training in particular manner of accomplishing result.

2. Financial Control

- a. Whether worker has unreimbursed expenses.
- b. Whether worker makes a significant financial investment.
- c. Whether worker is free to provide services to other companies as well.
- d. The extent to which the worker can make a profit or loss.

3. Type of Relationship.

- a. Whether there is a written contract.
- b. Whether the company provides the worker benefit.
- c. The permanency of the relationship.
- d. The extent to which the services are in integral part of the regular business activity.

Best Practices Regarding Independent Contractors

1. Written agreement signed by independent contractor and identifying factors in relationship making it independent contractor and include compliance with laws section (wage and hour, immigration/I-9, etc.);
2. Signed W-9 form;
3. Independent contractor checklist demonstrating factors that show independent contractor status; and
4. Copies of business cards, business license number, etc. showing that independent contractor is an actual business.
5. Declaration of Independent Business Status (DIBS)

Misclassifying Non-Exempt Employees As Exempt



Misclassifying Non-Exempt Employee as Exempt

1. Classification of workers as exempt or non-exempt from overtime under white collar regulations – requirements for exemption
 - a. Salary Basis
 - b. Minimum Salary Level
 - c. Highly Paid Employee Exemption
 - d. Job Duties
 - i. Executive Exemption
 - ii. Administrative Exemption
 - iii. Professional Exemption
 - iv. Creative Professional Exemption

Misclassifying Non-Exempt Employee as Exempt

2. Classification of workers as exempt or non-exempt from overtime under white collar regulations
 - a. Current salary level = \$684 per week/\$35,568 per year
 - b. Current DOL Administration has stated that salary level is not high enough and are expected to propose regulations increasing the minimum salary level as early as this month
 - i. Expected that DOL proposal will increase annual salary to between \$45,000-\$50,000 with annualize increases
 - c. Last month Democrats proposed Restoring Overtime Pay Act legislation that would immediately increase salary level to \$45,000 per year and apply annual increases that based on estimated data could be approximately \$80,000 by 2027 – not likely to pass

Misclassifying Non-Exempt Employee as Exempt

3. Highly Compensated Test

- a. Not applicable if employee satisfies the executive, administrative, or professional exemption
- b. Total annual compensation of at least \$107,432 (up from \$100,000)
- c. Employer can do make up payment at the end of the year if the employee's total compensation has not reached required amount
- d. At least the minimum salary level for the white collar exemptions paid on a salary or fee basis
- e. Perform office or non-manual work
- f. Customarily and regularly perform any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions

White Collar Salary Basis Test

1. Salary Basis Test

- a. Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- b. Compensation cannot be reduced because of variations in the quality or quantity of the work
- c. Must be paid the full salary for any week in which the employee performs any work
- d. Need not be paid for any workweek when no work is performed
- e. Up to 10% of salary level may be in bonus

White Collar Salary Basis Test

2. Deductions from Salary

- a. An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- b. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available
- c. Employees need not be paid for work weeks when they do not perform any work

White Collar Salary Basis Test

3. Permitted Salary Deductions - 7 Exceptions from the No-Docking Rule
 - a. Absence from work for one or more full days for personal reasons, other than sickness or disability
 - b. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
 - c. To offset any amounts received as payment for jury fees, witness fees, or military pay

White Collar Salary Basis Test

3. Permitted Salary Deductions - 7 Exceptions from the No-Docking Rule (cont.)
- d. Penalties imposed in good faith for violating safety rules of “major significance”
 - e. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
 - f. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
 - g. Unpaid leave taken pursuant to the Family and Medical Leave Act

White Collar Salary Basis Test

4. Examples of Improper Deductions

- a. Deduction for a partial-day absence to attend a parent-teacher conference
- b. Deduction of a day of pay because the employer was closed due to inclement weather
- c. Deduction of three days of pay because the employee was absent from work for jury duty, rather than merely offsetting any amount received as payment for the jury duty
- d. Deduction for a two day absence due to a minor illness when the employer does not provide wage replacement benefits for such absences

White Collar Salary Basis Test

5. Result of Improper Deductions

- a. Actual practice of making improper deductions = loss of the exemption:
 - i. During the time period in which improper deductions were made
 - ii. For employees in the same job classifications
 - iii. Working for the same managers responsible for the actual improper deductions
- b. Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee

White Collar Salary Basis Test

6. Payroll Practices That Do Not Violate the Salary Basis Test
 - a. Taking deductions from exempt employees accrued leave accounts
 - b. Requiring exempt employees to keep track of and record their hours worked
 - c. Requiring exempt employees to work a specified schedule
 - d. Implementing bona fide, across-the-board schedule changes

Administrative White Collar Exemption

1. Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
2. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Executive Employee Exemption

1. Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
2. Customarily and regularly directs the work of two or more other employees; and
3. Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

Learned Professional Exemption

1. Primary duty must be performance of work requiring advanced knowledge ;
2. In a field of science or learning; and
3. Customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional Exemption

1. Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Overtime Requirements And Calculations



Overtime Requirements

1. All non-exempt employees must be paid overtime after 40 hours per week, regardless of method of pay
 - a. Hourly
 - b. Piece rate
 - c. Salaried
 - d. Commissioned (with some exceptions for retail sales or services)
 - e. Bonuses
2. Overtime = 1.5 times regular rate

Overtime Requirements

3. Overtime is based on the employee's "Regular Rate"
 - a. An equivalent hourly rate of pay, regardless of how the employee is generally paid
 - b. Divide all compensation received for the work week by the number of hours actually worked during the work week
 - c. Must include all forms of compensation, including bonuses, piece rate, tips and room and board;
 - d. May exclude discretionary bonus, expense reimbursement, and payments for time not worked (vacation, etc.)

“Regular Rate” of Pay and OT Example

Two Job Rates

1. 29 hours at \$16.00/hour = \$464
2. 19 hours at \$20.00/hour = \$380
3. Total hours = 48 (29 + 19)
4. OT hours = 8 (48-40)
5. Total straight time pay = \$844 (\$464 + \$380)
6. “Regular rate” = \$17.58 /hour (\$844/48)
7. OT premium (1/2 time) = \$8.79 (\$17.58/2)/hour
8. OT pay = \$70.32 (8 x \$8.79)
9. Total compensation = \$914.32 (\$844 straight + \$70.32 OT)

Piece Rate Pay

1. Must be agreed upon in advance – employer cannot back into rate after seeing if employee works overtime.
- 2. Employee Must Complete Time Card.**
 - a. Employers are required by law to track hours worked because employee is entitled to overtime for hours over 40
 - b. Time records must include daily hours worked
3. Overtime = $\frac{1}{2}$ regular rate because the piece rate covers straight time for all hours

Examples of Piece Rate Overtime Calculations

ABC Company employs Jack to make patio chairs. Jack is paid at the rate of \$15.00 per chair. During a particular week, Jack works 50 hours and turns out 50 chairs. His regular rate for the week is calculated by taking Jack's total compensation of \$750 ($50 \times \$15.00 = \750) and dividing by the number of hours he worked (50). Jack's regular rate for that week is \$15.00 per hour ($\$750 / 50$) and he is, therefore, entitled to an additional \$7.50 per hour ($\$15.00 \text{ regular rate} / 2$) for each of the 10 hours of overtime ($\$7.50 \times 10 = \75). Jack's total compensation for that week is \$825, inclusive of overtime.

Examples of Piece Rate Overtime Calculations

1. ABC Company employs John to install carpet at the rate of \$0.25 per square yard.
2. John installs 2,916 square yard in 46 hours.
3. John's straight time compensation is \$729 ($2,916 \times .25$)
4. John's regular rate is \$15.85 ($\$729/46$).
5. Therefore, John is entitled to an overtime premium of \$7.925 hour ($\$15.85/2$) for 6 OT hours, totaling \$47.55.
6. John's overall compensation for the week is \$776.55

Discretionary Versus Nondiscretionary Bonuses

1. It is important to understand the differences between discretionary and nondiscretionary bonuses because:
 - a. Nondiscretionary bonuses must be included in the regular rate of pay for calculating OT for non-exempt employees.

Discretionary Versus Nondiscretionary Bonuses

2. Discretionary Bonus must meet each of the following criteria:
- a. The employer must retain discretion as to making the bonus payment;
 - b. The employer must retain discretion as to the amount of the bonus payment;
 - c. The employer must retain discretion with regard to actually paying the bonus payment until near the end of the period which the bonus payment is meant to cover (i.e. weekly, monthly, quarterly, yearly);
 - d. The Payment must not be paid pursuant to any prior contract, agreement or promise causing the employee to expect the payments regularly.

Discretionary Versus Nondiscretionary Bonuses

3. The regulations provide examples of factors that would make bonuses non-discretionary and thus included in regular rate:
- a. If a payment is measured by, or dependent on, hours worked, production, or efficiency;
 - b. If a payment is made pursuant to a contract or promise;
 - c. If the payment is announced to induce employees to work more steadily, more rapidly, or more efficiently; or
 - d. If the payment is promised in advance by the employer (employer cannot announce in January the payment of a bonus in June)

Production Bonuses

1. Production bonuses are nondiscretionary bonuses promised to employees to encourage quicker production.
 - a. E.g., paying crew bonus from money left in labor budget on house.
 - b. E.g., paying employee bonus if they meet certain production goals.
2. Bonuses can be used in conjunction with piece rate pay or with hourly or other methods of compensation.
3. If paid yearly or quarterly may be incentive to remain with employer

Production Bonuses

4. Because they are nondiscretionary, production bonuses are included in the regular rate of pay for calculating overtime.
5. If overtime is worked during the time period covered by the production bonus, the additional overtime premium is due when the bonus is paid.
 - a. Bonus paid weekly, then OT is paid weekly.
 - b. Bonus paid quarterly, OT premium paid quarterly for all OT hours worked during the quarter.

Example of Overtime Calculations with Production (or other Nondiscretionary) Bonuses

Susanne earns \$15.00/hour and is given a weekly production bonus of \$0.05 per tile installed. Susanne installs 800 tiles in 44 hours for a total production bonus of \$40.

1. Total Straight Time Pay = (hours worked x hourly rate) + production bonus = $(\$15 \times 44) + \$40 = \$700$
2. Regular rate = Straight Time Pay / Hours worked = $\$700 / 44 = \15.91
3. OT premium = $\frac{1}{2}$ regular rate = $\$15.91 / 2 = \7.955
4. OT pay = OT premium x OT Hours = $\$7.955 \times 4 = \31.82
5. Total pay = Straight Time Pay + OT Pay = Total Compensation = $\$700 + \$31.82 = \$731.82$

Example of Overtime Calculations with Production (or other Nondiscretionary) Bonuses

Hank earns \$15.00/hour and is given a quarterly bonus of \$885. During the quarter, Hank worked 590 hours, including 70 hours of overtime

Hank has already been paid all straight time and regular overtime for the 590 hours. The only additional overtime due is based on the nondiscretionary bonus.

1. OT Rate (half time) = (Bonus / all hours worked in quarter) / 2 = ($\$885 / 590$) / 2 = \$0.75/hour
2. OT Pay = OT hours x OT rate = $70 \times \$0.75 = \52.50
3. Hank is paid a bonus of \$885 plus OT of \$52.50 for a total of \$937.50.

Tracking And Recording Hours Worked



Tracking Hours Worked

1. Employers are required to track hours for nonexempt employees.
2. DOL does not require any specific method of tracking time as long as it is accurate.
3. Best practice is to require employees to track their time and sign a statement verifying its accuracy.

Tracking Hours Worked

4. Employers should ensure that time records accurately reflect any unpaid meal breaks (**no automatic deductions for meal breaks**)
5. Employers have numerous options for tracking time:
 - a. Punch clocks;
 - b. Handwritten time cards;
 - c. Smart phone time clock applications;
 - i. Some applications contain GPS information that will only allow the employee to clock in while at the specified location;
 - ii. Some applications use facial recognition or fingerprint recognition to log employees in to the time keeping system
 - d. Computerized time clocks

Tracking Hours Worked

6. Any time keeping system should require that employees verify the time reported – either by signing, agreeing to computerized statement, etc.
7. Employees should be encouraged to review their time cards and paychecks and report any discrepancies or questions to HR or Payroll within 7 days.
8. Employers should have procedures in place to investigate any employee concerns or questions and take corrective action, as necessary.

Tracking Hours Worked

9. Employers should routinely audit a sampling of their time records. Audits can include:
 - a. Reviewing time cards and paychecks for any discrepancies;
 - b. Ensuring OT is properly paid over 40 hours;
 - c. Interviews with employees (consider pros and cons of recording);
 - d. Comparing time cards with GPS records if employee has work vehicle;
 - e. Compare time cards to records of computer usage/log-in/log-out;
 - f. Review security footage if an employee is suspected of falsifying their time.
 - g. Can do meeting with employee to verify accuracy.

Tracking Hours Worked

10. Off-the-clock work that is “suffered or permitted” by the employer is hours worked that must be paid by the employer.
11. During DOL audit, DOL will often rely on the employees testimony of how many hours they worked off-the-clock, which in some instances results in overtime liability for 10-20 hours per week.

Tracking Hours Worked

12.Hypotheticals

- a. Employee spends 15 minutes total, broken over 6 separate occasions in the evening, reading and responding to work email. Is this paid working time?
- b. Employee spends 15 minutes after the end of their shift briefing the next shift. Is this paid working time?
- c. Employer automatically deducts 30 minutes per day for meal breaks without verification that employee took breaks? Is there any potential liability for the employer?

Wage And Hour Self Audits And DOL Audit



Work Time and Hours Worked

1. Compensatory Time – time off in lieu of overtime pay – not permitted for private employers, but permitted for public employers.
2. Unauthorized overtime – employer required to pay for all hours worked, but may discipline employee for unauthorized overtime

Timecards

1. Federal law requires daily record of all hours worked.
2. Do not allow off-the-clock work!
3. All overtime must be properly paid.
4. All meal breaks should be on time card (rest breaks are paid breaks).
5. De minimis exception.

Preliminary and Postliminary Activities

1. Time spent on preliminary or postliminary activities (changing clothes, etc.) is not counted as work time unless:
 - a. Counted by agreement or custom
 - b. Is an integral part of the employee's principal activities
 - c. It is required by law or by the employee's rules
 - i. Ex: time spent changing into clothes required by OSHA rules

Rest and Meal Periods

1. Not required by federal law
2. A break of less than 20 minutes is considered work time and must be paid
 - a. One of first opinion letters from Trump DOL held that employer is not required to pay for 8 15 minute breaks that are necessary due to employee' s medical condition.
3. Meal periods must be 30 minutes or longer and employee must be relieved of all work responsibilities
4. State laws may require meal or break periods

On-Call, Standby, and Waiting Time

1. Time is compensable if the employee is required to remain at the workplace or so close that he cannot use the time for his own purposes.
2. Time does not have to be compensated if the employee has the freedom to use the time for his or her own purposes, just remain within a designated geographical area.

Holiday, Sick or Vacation Pay

1. Vacation, holiday or sick time is not “hours worked”
2. Should not be included for determining if overtime is owed
3. State law may require payment for accrued but unused vacation.

Travel Time

1. Home to work commute is not generally work time.
2. Time spent traveling between worksites after starting work is work time and must be paid.
3. Time spent traveling to a special one-day assignment must be paid, except for the portion traveling to the airport, train depot, etc. which replaces the regular home to work commute.
 - a. State laws may be stricter
 - b. Must pay according to the state or federal law most favorable to employer

Travel Time – Overnight Trips

1. Counts as work time when it falls within the employee's normally scheduled workday, even if it occurs on the employee's day off.
2. Ex. Employee works 8:30 am to 5:30 pm, M-F. Travel on any day of the week must be paid as work time if it occurs between 8:30 am and 5:30 pm.
3. Driving time is work time (for driver), unless employee refuses employers offer of faster public transportation.
4. State laws may have more stringent requirements.
5. Special issues raised by the Davis-Bacon Act for federal contractors.

Lodging/Subsistence

1. Not generally addressed by federal law.
 - a. Exercise caution if requiring minimum wage/low wage employees to pay their own travel expenses.
2. State law may require payment/reimbursement for lodging and other travel expenses.
3. Federal contractors—Davis Bacon being enforced to require lodging to be paid/reimbursed by the employer if failing to do so would reduce employee's daily wage below prevailing wage after deducting cost of lodging from daily wage earned.
 - a. Employer has options to provide lodging directly, reimburse employee, etc.

Payroll Deduction Authorization Form

1. Strongly Recommend Payroll Deduction Authorization Form
2. Include language regarding deductions for:
 - a. Federal income tax
 - b. State income tax
 - c. Social Security tax
 - d. Employee's share of insurance premiums
 - e. Any voluntary deductions
3. State law may limit or prohibits deductions for such things as uniforms, cash shortages/breakages, balloon payments for employee loans

Wage & Hour Self-Audits

1. Conduct regular self-audits
 - a. Minimum Wage (especially for piece rate employees)
 - b. Overtime for non-exempt employees
 - c. Classification of employees as exempt/non-exempt
 - d. Classification of workers as employee or independent contractor
 - e. Accuracy of time cards
 - f. Deductions required by law or supported by signed payroll deduction authorization
2. Consult with legal counsel if self-audit identifies potential issues

DOL Wage & Hour Audits

1. DOL will provide notice of audit and schedule meeting to review records
 - a. DOL may have been investigating and talking to employees before notifying employer of audit
 - b. New trend toward site-wide reviews
2. Opening conference
3. Employee interviews
 - a. Management employees have right to have company attorney or representative present

DOL Wage & Hour Audits

4. DOL reviews paperwork

- a. Generally request enterprise information, list of employees, time cards, and pay records
- b. Keep copies of all documents provided to DOL

5. Administrative Subpoenas

6. Closing Conference and notice of findings/assessment

- a. May take a few weeks or a few months

7. Back Wage Compliance and Payment Agreement or administrative challenge

Remedies & Penalties in DOL Audit

8. Remedies and penalties can include:

- a. back wages for up to 2 years (3 years for willful violation)
- b. Civil monetary penalties of up to \$2,203 per violation in 2022 (maximum penalties are adjusted annually)
- c. Liquidated damages in an amount equal to the back pay (unless employers proves not willful and acted in good faith)
- d. Higher penalties likely if employer has been audited more than one time

I-9 Audits



Top 10 I-9 Errors That Create Liability

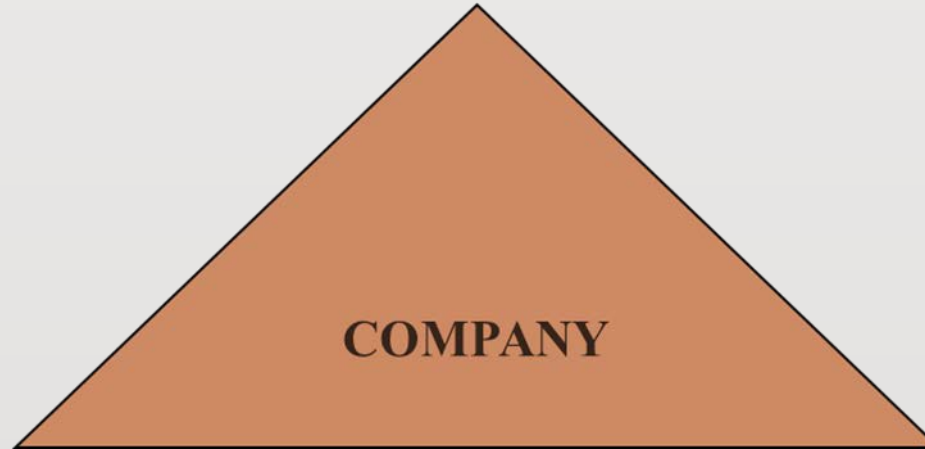
1. Failing to create and maintain an I-9 for employees hired after November 6, 1986.
2. Failure to require employee to complete Section 1 on first day of employment and for employer to complete Section 2 within three business days.
3. Failure to reverify expired work authorization for “alien authorized to work until”
4. No attestation of citizenship or immigration status checked in Section 1.

Top 10 I-9 Errors That Create Liability

5. Section 1 not signed or not dated.
6. Employee name or citizenship status missing in Section 2.
7. Insufficient documentation in Section 2.
8. Document information missing.
9. Date of hire missing.
10. Section 2 not signed by employer representative.

Avoid “Knowingly”

**Fully Complete I-9
Forms**



**People and
Comments -
No discussions about
legal status 24/7**

- Response to government investigations
- ICE investigations
- Crisis Communication Plan
- Response to requests for personnel documents
- Response to inquiries
 - SSA
 - DES (State Unemployment Agencies)
 - Police
 - Citizens
- SSA no-match
- Response to customers or third parties

- New hire packet
- W-9 forms
- Employment policies and handbooks
- Anti-harassment, anti-discrimination policies
- Avoiding national origin discrimination
- Agreements with leased employment agencies
- Contract provisions (delay, immigration compliance)
- Attorney-client privilege

Penalties for Substantive I-9 Paperwork Violations

1. During first audit, ICE allows employer an opportunity to correct “technical or procedural” violations.
2. Substantive violations are fined approximately \$252 to \$2,507 per Form I-9 (increases annually)

Penalties for Substantive I-9 Paperwork Violations

3. ICE has created a “Fine Schedule” in which fines are based on:
 - a. Whether it is first, second, or third or subsequent offense
 - b. The percentage of I-9s containing errors
 - c. Enhancement or mitigation of up to 5% each based on:
 - i. Size of business
 - ii. Good faith
 - iii. Seriousness
 - iv. Unauthorized workers
 - v. History of violations

Penalties for Knowingly Employing Unauthorized Worker

1. 1st offense - \$627 to \$5,016 per worker
2. 2nd offense –\$5,016 to \$12,537 per worker
3. 3rd and subsequent offenses - \$7,523 to \$25,076
4. Pattern and practice – potential criminal penalties
5. Penalties increase annually

Penalties for Harboring

1. Knowingly hire 10 or more in 12-month period with knowledge of illegal entry = harboring
2. Penalties can include asset forfeiture and prison time
 - a. E.g. Golden State Fence
 - i. Company and owner paid/forfeited total of \$4.7 million
 - ii. Owner received 6 months house arrest

Immigration Reform and Control Act of 1986

1. When IRCA was implemented in 1986, it was the first time employers became responsible for verifying eligibility of employees to work in the United States.
2. Prohibited conduct under IRCA
 - a. Hire or continue to employ an individual knowing the individual is not authorized to work in U.S.;
 - b. Hire any person without completing I-9 process;
 - c. Discriminate against an employment-authorized individual on the basis of national origin, citizenship status, or immigration status.

The Importance of Fully Completing the Form I-9

1. A Form I-9 must be completed for all employees to confirm their identity and their eligibility to work in the U.S.
2. Follow instructions carefully.
3. Must be filled out completely – generally no blank spaces.
 - a. Put dash or N/A if does not apply to show that there is no missing information.
 - b. Note -- Email and Phone Number in Section 1 is optional and can be left blank unless completing fillable PDF I-9 on computer, which will not allow anything to be left blank. Must insert N/A
4. No extraneous marks, stamps, or information on Form I-9.

Proposed New Form I-9

1. Current Form I-9 has expiration date of 10/31/22
2. Employers are to continue using this Form I-9 until USCIS releases a new one.
3. USCIS has proposed a one-page I-9
 - a. Sections 1 and 2 would be on one page
 - b. Section 3 would be a separate page to “supplement” as necessary.

I-9 Procedures

1. Employee completes Section 1
 - a. Must be completed the first day employee works
 - b. Employer may not request documents to verify information in Section 1
2. Employer completes Section 2
 - a. Must be completed within three business days after employment begins
 - b. Employee selects which documents to provide, except that under E-Verify if employee provides List B document it must contain a photograph

Verification Procedures: Form I-9

3. Employee representative who signs Section 2 must see, touch, and feel original unexpired documents used to complete Section 2
 - a. Same employee representative who signs Section 2 must be the one who reviews the original documents
 - b. Photocopies not acceptable.
 - c. Certified copy of birth certificate is acceptable.

I-9 Form Section 1 Employee Information

► **START HERE:** Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation *(Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.)*

Last Name (Family Name) ?		First Name (Given Name) ?		Middle Initial ?	Other Last Names Used (if any) ?	
Address (Street Number and Name) ?		Apt. Number ?	City or Town ?		State ? ▼	ZIP Code ?
Date of Birth (mm/dd/yyyy) ?	U.S. Social Security Number ?	Employee's E-mail Address ?			Employee's Telephone Number ?	

I-9 Form Section 1 Employee Information

1. Employee must complete on first day they work for pay.
 - a. Failure of employee to complete on first day they work for pay is substantive violation that can result in fines of \$237-\$2,360 per Form I-9 (adjusted annually).
2. If employee uses multiple last names, all should be listed in the last name box.
3. Date of birth should be in mm/dd/yyyy format.
4. PO Boxes were not permitted prior to 2016 but are now permitted for employee only, but not preferred. Company cannot use PO Box for company address.

I-9 Form Section 1 Employee Information

5. E-mail address and phone number are OPTIONAL

- a. Employee can leave boxes blank (or insert n/a if completing on computer) if they do not want to provide email address;
- b. Employee should not use work email address;
- c. Allows DHS to contact employee about potential Social Security mismatch or E-Verify TNC;
- d. E-Verify sends email with referral information to individuals who receive TNC and sign notice to contest;
- e. If completing I-9 using fillable PDF on a computer, employee must put N/A if not providing email or phone number.

I-9 Form Section 1 Employee Information

6. Common errors in this section include, but are not limited to:
- a. Missing date of birth;
 - b. Date of birth in dd/mm/yyyy format;
 - c. Missing partial or complete address information;
 - d. Missing or incorrect SSN

I-9 Form Section 1 – Attestation

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following boxes):

<input type="checkbox"/> 1. A citizen of the United States ?	
<input type="checkbox"/> 2. A noncitizen national of the United States (See instructions) ?	
<input type="checkbox"/> 3. A lawful permanent resident ? (Alien Registration Number/USCIS Number): ? _____	
<input type="checkbox"/> 4. An alien authorized to work ? until (expiration date, if applicable, mm/dd/yyyy): ? _____ Some aliens may write "N/A" in the expiration date field. (See instructions) <i>Aliens authorized to work must provide only one of the following document numbers to complete Form I-9: An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.</i> 1. Alien Registration Number/USCIS Number: ? _____ OR 2. Form I-94 Admission Number: ? _____ OR 3. Foreign Passport Number: ? _____ Country of Issuance: ? _____	QR Code - Section 1 Do Not Write In This Space
Signature of Employee ?	Today's Date (mm/dd/yyyy) ?

I-9 Form Section 1 – Attestation

1. Employee must check one and only box regarding their citizenship status.
2. If employee checks Box 3 (LPR) or Box 4 (AAW), employee must complete the corresponding information, such as A#/USCIS # or expiration date for work authorization.
3. Employer may not request documents to verify the information in Section 1.

I-9 Form Section 1 – Attestation

4. If completing the fillable PDF on the computer, PDF will not allow person to enter information in area that does not relate to box checked and places N/A in those spaces or to check more than one box (provides error message).

I-9 Form Section 1 – Attestation

5. Each date box under attestation has a drop-down calendar.
6. When employer completes Section 2 of the fillable PDF on the on computer, the system will prompt if documents do not match the citizenship status the employee checked.
7. QR Code will be printed on completed I-9 when completed using the fillable PDF I-9. QR scanner will list I-9 information separated by commas.

I-9 Form Section 1 – Attestation

8. Common errors in this section include, but are not limited to:
- a. Failure to check a box;
 - b. Checking more than one box;
 - c. Checking LPR but not providing their A# or USCIS #;
 - d. Checking AAW but not providing expiration date for work authorization (not required for asylee) or other required information;
 - e. Checking the incorrect box;
 - f. Checking LPR but completing A# or expiration date after AAW;
 - g. Checking AAW but completing A# after LPR.

I-9 Form Section 1 – Employee Signature and Completion Date

1. Employee must sign Section 1 – even if using a preparer/translator.
2. If employee cannot write, they can use a mark for their signature.
3. Employee must date Section 1 - make sure that date is on mm/dd/yyyy (or mm/dd/yy) format.
4. Common errors include, but are not limited to:
 - a. Failure to sign;
 - b. Failure to date;
 - c. Failure to complete on or before the first date of work for pay;
 - d. Entering the employee's date of birth instead of the signature date;
 - e. Entering the date as dd/mm/yyyy format.

I-9 Form Section 1 – Preparer/Translator

Preparer and/or Translator Certification (check one): ?

☐ I did not use a preparer or translator.

☐ A preparer(s) and/or translator(s) assisted the employee in completing Section 1.

(Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator ?		Today's Date (mm/dd/yyyy) ?	
Last Name (Family Name) ?		First Name (Given Name) ?	
Address (Street Number and Name) ?	City or Town ?	State ?	ZIP Code ?

Click to Finish



Employer Completes Next Page



I-9 Form Section 1 – Preparer/Translator

1. Required if anyone other than the employee completes Section 1 by writing or typing in the information.
2. Required if another individual translates the Form I-9 so that employee knows what information is being requested.
3. Employee must affirmatively check that they did or did not use a preparer/translator.
4. The preparer/translator certification is currently the most missed box on the Form I-9.

I-9 Form Section 1 – Preparer/Translator

5. If more than one preparer/translator is used then the employee with a “Form I-9 Supplement, Section 1 Preparer and/or Translator Certification” that can be found online at I-9 Central.
6. If completing the Form I-9 electronically and the company representative physically types in information, they must complete the preparer/translator certification.

I-9 Form Section 2 – Employee Information

Section 2. Employer or Authorized Representative Review and Verification

(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")

Employee Info from Section 1 ?	Last Name (Family Name) ?	First Name (Given Name) ?	M.I. ?	Citizenship/Immigration Status ? <input type="button" value="v"/>
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- 1. Company representative should review Section 1 to make sure it is fully complete before beginning Section 2. If information is missing, request employee complete it.**
2. Company representative must complete the employee's last name, first name, and middle initial as shown on page 1



I-9 Form Section 2 – Employee Information

3. Company must complete a “Citizenship/Immigration Status” box at top of Section 2:
 - a. Can use numbers 1-4 in box to match attestation number in Section 1 or write in abbreviation for status;
 - b. Employer representative should ensure that documents presented are consistent with the Citizenship/Immigration status checked in Section 1.
4. Employers' failure to write the employee's name and/or citizenship status at the top of Section 2 is one of the most common Form I-9 errors.
5. Do not use “USA” as abbreviation for citizenship status.

I-9 Form Section 2 – Documentation

List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title ?		Document Title ?		Document Title ?
Issuing Authority ?		Issuing Authority ?		Issuing Authority ?
Document Number ?		Document Number ?		Document Number ?
Expiration Date (if any)(mm/dd/yyyy) ?		Expiration Date (if any)(mm/dd/yyyy) ?		Expiration Date (if any)(mm/dd/yyyy) ?
Document Title ?		<div>Additional Information ?</div> <div>QR Code - Sections 2 & 3 Do Not Write In This Space</div>		
Issuing Authority ?				
Document Number ?				
Expiration Date (if any)(mm/dd/yyyy) ?				
Document Title ?				
Issuing Authority ?				
Document Number ?				
Expiration Date (if any)(mm/dd/yyyy) ?				

I-9 Form Section 2 – Documentation

1. Must be completed within 3 business days after employee's first day of work.
 - a. If employee will work for 3 days or less, both Sections of the I-9 must be fully complete on the first day they work.
2. Can be completed before employee starts work as long as the employee has accepted a bona fide offer of employment.
3. Employee must provide one document from List A OR one document from both List B AND List C.
 - a. Employee must be permitted to choose which documents to provide from the List of Acceptable Documents, except that if a company uses E-Verify they can accept a List B document only if it contains a photograph.
 - b. Over documentation (recording List A, List B and List C) can be a violation of the nondiscrimination provisions of IRCA.

I-9 Form Section 2 – Documentation

4. If completing the fillable PDF I-9, List B and C will be completed with N/A if employer enters information in List A and List A will be completed with N/A if employer enters List B and List C.
5. If using the fillable PDF I-9, the document title and issuing authority is a drop-down menu.
 - a. The I-9 instructions contain summary of abbreviations used in drop down menu.
 - b. Even if not completing the Form using the fillable PDF, it can be a useful resource to help identify issuing authority or related information.
6. Be sure to include all relevant document information, including:
 - a. Document Title
 - b. Issuing Authority
 - c. Document Number
 - d. Expiration Date (if none, put N/A or --)

I-9 Form Section 2 – Documentation

7. Additional Information box added to allow employers room to record E-Verify number, insert additional document information that does not fit in regular boxes, or insert information that used to be in the margins (such as TPS information).
8. We recommend not placing extraneous information in the additional information box and using that only for additional document information, such as EAD extensions.
9. QR Code will print on form if completed on a computer using the fillable PDF I-9.

I-9 Form Section 2 – Documentation

10. Errors in this section include, but are not limited to:

- a. Overdocumentation (recording List A & List B or C documents);
- b. Failure to obtain proper documentation, e.g.,
 - i. List B but no List C (may involve recording a List B or C document in List A);
 - ii. Accepting a document that is not on the List of Acceptable Documents, such as foreign driver's license or foreign passport that does not contain I-551 stamp or visa;
- c. Failure to record the correct document title;
- d. Failure to record the correct issuing authority, e.g.,
 - i. DMV or MVD must include the state name, unless State is listed in document title;
 - ii. Just the state name is acceptable as issuing authority for DL or State ID;
 - iii. Using US, USA, US Govt., or Govt. as issuing authority.
- e. Failure to record expiration date – best practice is to enter N/A if the document has no expiration date.

I-9 Form Section 2 – Certification

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): (See instructions for exemptions)

Signature of Employer or Authorized Representative <input type="text"/>	Today's Date (mm/dd/yyyy) <input type="text"/>	Title of Employer or Authorized Representative <input type="text"/>	
Last Name of Employer or Authorized Representative <input type="text"/>	First Name of Employer or Authorized Representative <input type="text"/>	Employer's Business or Organization Name <input type="text"/>	
Employer's Business or Organization Address (Street Number and Name) <input type="text"/>		City or Town <input type="text"/>	State <input type="text"/> <input type="button" value="v"/>
		ZIP Code <input type="text"/>	

Click to Finish

I-9 Form Section 2 – Certification

1. Employer's duty is to touch and review the original document to determine if it reasonably appears to be genuine and relate to person providing it.
2. Photocopies are not acceptable (other than certified copy of birth certificate).
3. Look for misspelling or photo not matching person or age being significantly different than they appear.
4. After employer representative completes Section 2 on fillable PDF on computer, they must select "Click to Finish."

I-9 Form Section 2 – Certification

5. Box pops-up with message:
The Form will check to ensure that each field in Section 2 is filled out. Would you like to perform this check now? Click Yes to continue; click No to make any corrections.
6. Similar to warnings on Section 1, the fillable PDF will highlight missing information in red and request that it be completed.

I-9 Form Section 2 – Certification

7. Warnings include messages that the information cannot be left blank or if a document entered in Section 2 is expired, the interactive PDF pops up a message that among other things, reminds the user that “the date entered cannot be earlier than today’s date.”
8. When I-9 is complete, the fillable PDF pops up a reminder:

You must print Section 2, then sign and date in the appropriate fields for this form to be considered complete for Form I-9 purposes.
9. The I-9 is not complete until signed.

I-9 Form Section 2 – Certification

10. Common areas in this section include, but are not limited to:

- a. Failure to complete Section 2 within 3 business days;
- b. Failure to record the employee's starting date;
- c. Failure to sign or date;
- d. Failure of employee representative to record their name and title;
- e. Failure to record Company name or address;
- f. Using a PO Box for the Company address.

I-9 Form Section 3 – Reverification Rehires

Employee Name from Section 1:			
Last Name (Family Name) ?	First Name (Given Name) ?	Middle Initial ?	
Section 3. Reverification and Rehires (To be completed and signed by employer or authorized representative.)			
A. New Name (if applicable) ?			B. Date of Rehire (if applicable)
Last Name (Family Name) ?	First Name (Given Name) ?	Middle Initial ?	Date (mm/dd/yyyy) ?
C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.			
Document Title ? <div></div>	Document Number ?	Expiration Date (if any) (mm/dd/yyyy) ?	
I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.			
Signature of Employer or Authorized Representative ?	Today's Date (mm/dd/yyyy) ?	Name of Employer or Authorized Representative ?	
<div>Click to Finish</div>			

I-9 Form Section 3 – Reverification & Rehires

1. Employers may update employee's name in Section 3.A. for name changes if it does so in a non-discriminatory fashion, but is not required to do so.
2. Best practice is to have employee provide evidence of their new name and complete a new W-4 and W-9 for payroll.
3. If you do not update the I-9, put a sticky note on it with the employee's new last name so that the document can be identified if necessary.

I-9 Form Section 3 – Reverification & Rehires

4. Employers may complete Section 3.B. for a rehired employee except a new Form I-9 must be completed:
 - a. If original I-9 was completed more than 3 years prior to the rehire date,
 - b. If the original I-9 was previous version of Form I-9.
5. Employers always have the option to complete a new Form I-9 for rehired employees.
6. If the employee is still work authorized, just record the rehire date, then sign and date.
7. If the work authorization on the previous I-9 expired, then record rehire date in Section 3.B. and new work authorization document in Section 3.C.

I-9 Form Section 3 – Reverification & Rehires

8. Section 3.C. is used to reverify expired employment authorization.
9. Must be completed on or before the date that the employment authorization expires.
10. Employee can provide any List A or List C document to complete Section 3. An employer cannot require them to provide a new version of the document originally used for the Form I-9.
11. The employer representative must examine the original document to determine it reasonably appears to be genuine and relate to the employee
12. Record the document title, issuing authority, & expiration date and sign Section 3.

I-9 Form Section 3 – Reverification & Rehires

13. MAKE SURE COMPANY HAS TICKLER SYSTEM FOR EXPIRING WORK AUTHORIZATION

- a. Employer cannot allow individual to work after temporary work authorization expires until employee brings in new documents and updates the I-9 Form
- b. Anyone that checks box 4, “alien authorized to work until ____” (other than asylees whose work authorization does not expire) must be reverified when their work authorization expires, regardless of what documents they provide
- c. Upon reverification, employee can present List A or List C document
- d. If work authorization status has changed (e.g. AAW to LPR), then complete new Form I-9

I-9 Form Section 3 – Reverification & Rehires

14. Company should have tickler system for receipts

- a. Generally receipts, such as receipt for SS replacement card, are valid for 90 days
- b. Receipt for permanent resident card (Arrival portion of Form I-94/I-94 A containing photo and unexpired temporary I-551) is valid until expiration date on temporary I-551

I-9 Form Section 3 – Reverification & Rehires

15.Errors in this section include, but are not limited to:

- a. Failure to reverify expired work authorization on or before the day that it expires;
- b. Failure to record correct document title, issuing authority, or expiration date;
- c. Failure to sign or date.

General Tips for Completing I-9 Form

1. Use black or blue ink or complete on a computer (note that the fillable PDF I-9 must be printed and signed)
2. No whiteout, scratch-out, or mark-through
3. Do not use different color ink in same section
4. Write all dates as mm/dd/yyyy
5. If a new form is redone, keep it with the previously completed I-9
6. If mistake occurs - complete new form

General Tips for Completing I-9 Form

7. Birth Certificate should be listed as either “birth certificate” or “certificate of live birth” in Section 3. If document says “Certification of Vital Records” you can use “birth certificate” or “Certification of Vital Records-Birth Certificate”
 - a. Certification of Vital Records can include death and divorce records, so best practice is to specify the type of record
 - b. Drop-down menu on the interactive I-9 lists “U.S. Birth Certificate” as the appropriate choice for birth certificate, certificate of live birth, or vital records-certificate of live birth

General Tips for Completing I-9 Form

8. You do not need to keep photocopies of documents unless required by E-Verify (photo tool)
9. Make sure Section 1 is fully complete before completing Section 2
 - a. Email address and phone number are OPTIONAL but employee should insert N/A if choosing not to provide
 - b. Make sure that employee completed citizenship or immigration status and related information
 - c. Make sure date is written mm/dd/yyyy – if completing I-9 on computer using interactive PDF, user will receive an error message if the date is in the incorrect format.

General Tips for Completing I-9 Form

10. Do not request documents to verify information the employee provided in Section 1

11. Allow employees to select which documents to provide, either:

- a. One document from List A (do not complete anything under List B or C); OR
- b. One document from List B AND 1 one document from List C
 - i. E-Verify requires that List B document have a photograph
 - ii. Explain to individual it is requirement of E-Verify, provide the list of acceptable documents, and ask if they have other List A or List B document

General Tips for Completing I-9 Form

12. Document must be unexpired at the time it is used to complete the I-9

- a. TPS Auto Extensions – EAD for employee with TPS may be accepted if expired on its face but auto extended by notice in the Federal Register (print USCIS TPS page from relevant country - <https://www.uscis.gov/humanitarian/temporary-protected-status>)
- b. Permanent Resident Card expired on its face is acceptable with Form I-797 indicating that card is valid for another year as long as the extension is not expired (considered a List C document and must be reverified after the extension expires)
- c. High school ID card expires the year after it is issued – i.e. identification card for junior year is valid for junior year and following summer
- d. If document does not have expiration date, draw a line or put N/A to make it clear that there is no expiration date

General Tips for Completing I-9 Form

- 13. Do not accept SS card that says “valid for work only with DHS authorization,” “not valid for employment” or similar restriction
- 14. Do not accept photocopies – must be original documents
 - a. Certified copy of birth certificate is acceptable

General Tips for Completing I-9 Form

15. When completing document information, complete:

- a. Document Title
- b. Issuing Authority (as it appears on the card)
 - i. Note that the fillable PDF I-9 has a drop down menu that will identify potential issuing authority for documents, such as U.S. Department of State for the passport or choice of SSA, DHHS, Social Security Board, or Dept. of Health, Education and Welfare for Social Security card
- c. Document Number
- d. Expiration date (if any—if none put a line in the box or N/A)

General Tips for Completing I-9 Form

- 16. Same person completing Section 2 must see, touch, and feel the original documents and compare the photo to the person
- 17. Receipts for documents, such as SS Card, permitted if it is a receipt for a replacement for a lost or stolen card. Receipt for original document is not acceptable.
 - a. Generally must update the I-9 with actual document within 90 days after completing the I-9
 - b. Make sure to create a tickler system to ensure that the I-9 is updated before the 90 days expires

General Tips for Completing I-9 Form

- 18. Do not make extraneous notes on the Form I-9
- 19. Do not accept a permanent resident card from someone who attests to being a citizen or non-citizen national or temporarily authorized to work
- 20. Do not accept U.S. passport from someone who attests to being a permanent resident or alien authorized to work
- 21. If something does not seem right, ask the employee to verify that they checked the correct box.
- 22. Note that the fillable PDF I-9 provides a warning notice if the documents entered into Section 2 are inconsistent with the citizenship status in Section 1.

I-9 Retention

ALWAYS KEEP CURRENT EMPLOYEES' I-9 FORMS. After an employee has resigned or is terminated from the company, the length of time after separation the company must keep the I-9 depends on the duration of employment. An easy way to make sure the Company is in compliance with the retention of I-9 forms is to abide by the following rule:

1. Enter date employee started work: _____
Add 3 years to Line 1. A. _____
2. Termination date: _____
Add 1 year to Line 2 B. _____
3. Which date is later: A or B? Enter later date here.
 C. _____
Store Form I-9 until this date.

Enforcement of IRCA

1. Primarily enforced by ICE
2. May involve audit after 72-hour notice or “raid”
 - a. No right to review I-9 without notice or subpoena
 - b. Current trend is to issue subpoena with every audit notice
 - c. Do not waive 72-hours permitted in “Notice of Inspection”
 - d. Make sure to keep copies of all documents provided to ICE
3. Possible Notices from ICE during inspection
 - a. Notice of Technical or Procedural Failures
 - b. Notice of Suspect Documents
 - c. Notice of Discrepancies

Enforcement of IRCA

4. Possible Outcomes of ICE inspection

- a. Warning Notice – there were errors but ICE will not fine
- b. Notice of Intent to Fine – Informs employer of fines for I-9 violations

5. Employer may contest through administrative hearing process and appeal to federal court

Additional Fines During Second or Subsequent Audit

1. Illegal Immigration Reform and Immigrant Responsibility Act created a “good faith” defense to violations of the Form I-9 requirements.
 - a. An employer will be considered to have satisfied the I-9 requirements notwithstanding a “technical or procedural failure” when the employer made a good faith attempt to comply with the requirements.
2. Employers can correct “technical or procedural defects” on the Form I-9 within 10 business days and will not be fined for the violations

Additional Fines During Second or Subsequent Audit

3. Under ICE “Virtue Memo,” during second audit “good faith” defense is not available for same type of technical or procedural defects that were subject of first audit
 - a. If first audit results in Warning Notice, “good faith” defense may be permitted on second audit
4. On second or subsequent audit, ICE may not allow employer to correct technical or procedural defect and may impose fines for even minor errors on the Form I-9

Tips Regarding ICE Investigations

1. 72-hour notice
2. Keep copies of I-9 forms provided to ICE
3. ICE will review and provide a variety of notices based on the results of the audit

Tips Regarding ICE Investigations

4. Employees may be identified for re-verification or having used counterfeit documents
5. Undocumented employees must be terminated upon notice, after being given a chance to contest ICE's determination
6. Employee surveys/raids sometimes occur
7. Crisis Communication Plan
8. Continue correcting Forms I-9 and following best practices.
 - a. ICE may not allow an employer to correct technical or procedural errors in a subsequent audit that have been previously cited on a Notice of Technical or Procedural Failures.

Trends in Criminal Enforcement: Real Life Cases

1. Record ICE Penalty issued against national Tree Service Company for \$95 million after contractor pled guilty to scheme to hire undocumented workers.
 - a. \$80 million civil forfeiture
 - b. \$15 million civil penalty
 - c. Between 2010-2014, company allegedly hired thousands of unauthorized workers across the U.S. using knowingly fraudulent documents.
 - d. Upper management accused of being “willfully blind” to hiring practices of mid-level regional supervisors.
 - e. Decentralized hiring practices criticized by ICE.

Trends in Criminal Enforcement: Real Life Cases

2. Record ICE Settlements

a. Washington-based Orchard

- i. June 2015
- ii. \$2.25 Million
- iii. 2012 audit found over 1,700 unauthorized workers
- iv. 2014 audit found that over 950 of those unauthorized workers were still employed
- v. No criminal action being pursued in exchange

b. Manufacturer of abatement, homeland security, and military industry supplies

- i. \$2 Million forfeiture and immigration compliance measures in exchange for agreement not to criminally prosecute company
- ii. 44% of workforce undocumented
- iii. Many employed with numerous "egregiously suspect" identification documents, including misspellings of agency names and/or containing the words "novelty item."

Anti-Discrimination Under the IRCA

1. Forbids discrimination on the basis of national origin, citizenship status, or immigration status – any different treatment based on national origin or citizenship presumed discriminatory
2. National origin discrimination also prohibited by Title VII
3. Retaliation prohibited by the Act

Anti-Discrimination Under the IRCA

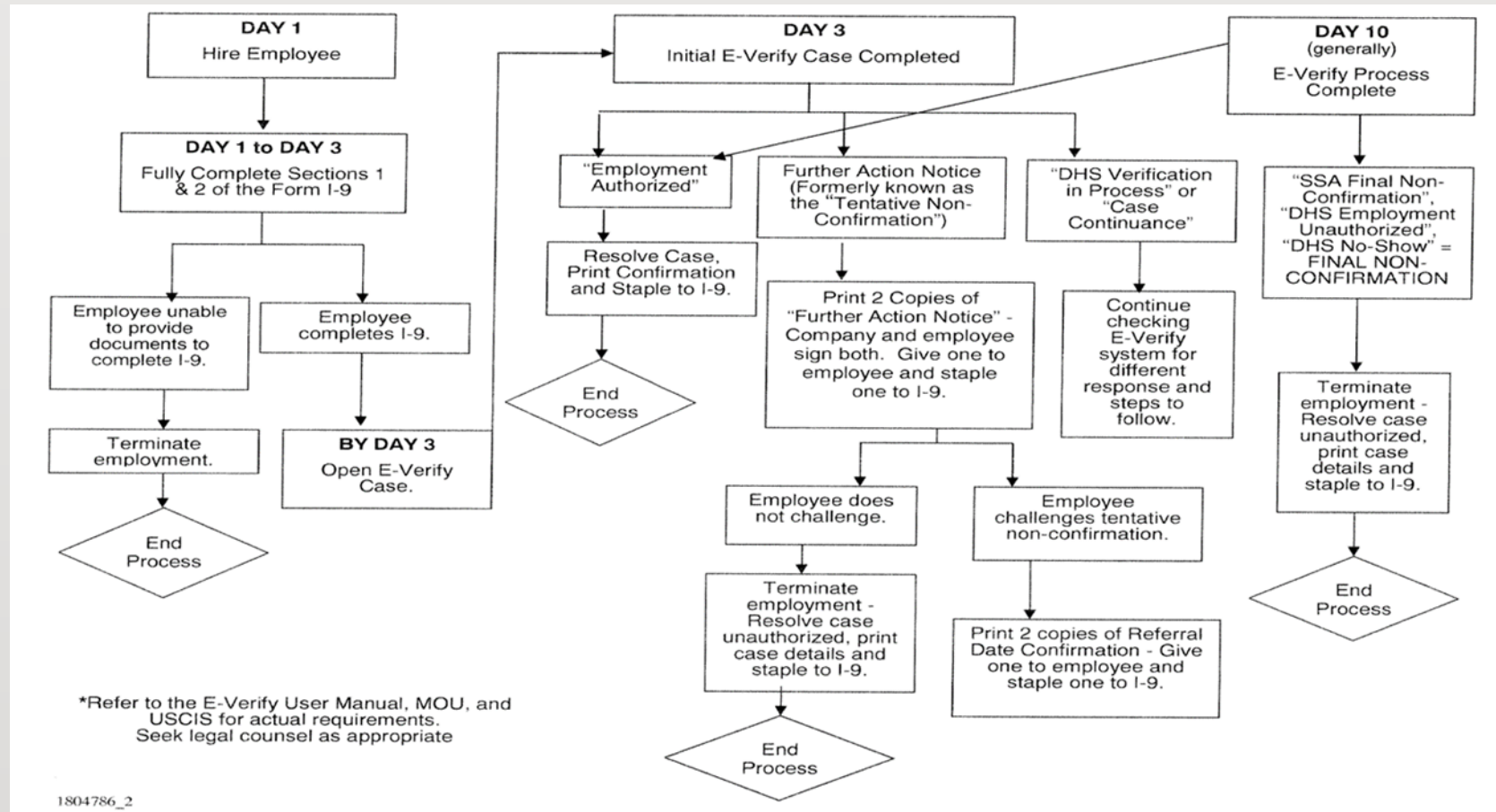
4. Key elements of antidiscrimination provisions

- a. Employer must accept documents that reasonably appear genuine and relate to the persons;
- b. Prohibits asking for more or different documents than those the employee presents from the List of Acceptable Documents;
- c. Generally prohibits refusing to hire or to continue to employ a work authorized individual because work authorization expire in the future.

Enforcement of Anti-Discrimination

1. Enforced by the US DOJ Civil Rights Division
Immigrant and Employee Rights Section (formerly
Office of Special Counsel for Unfair Immigration
Related Employment Practices)
2. Any person believing discrimination occurred can file
charge with DOJ IER Section within 180 days
3. IER must investigate and make determination within
120 days
4. If IER does not bring complaint, individual may do so
within 90 days after IER determination

Requirements of I-9 and E-Verify Programs



National Labor Relations Act



10 National Labor Relations Act Considerations

1. Section 7 of NLRA guarantees employees “The right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” or “to refrain from all such activities.”
 - a. In a nut shell, Section 7 provides a right to engage in protected concerted activities relating to terms and conditions of employment

10 National Labor Relations Act Considerations

2. PRO Act being pushed by Democrats. Cannot pass Senate, despite being cosponsored by 47 senators.
3. NLRA applies to both union and non-unionized workplace.
4. Current Administration is pro-union.
5. NLRB General Counsel appointed by President Biden is looking to overturn many Trump-Era decisions.
6. One rule NLRB GC wants to establish is that the simple fact of misclassification of an employee as an independent contractor violations NLRA without any other violation.

10 National Labor Relations Act Considerations

7. Handbook rules are being closely scrutinized by NLRB, which wants to reverse Trump-era standard.
8. Current NLRB also looking to provide employees and unions with greater access to employer property and facilities (such as email, etc.)
9. Unfair Labor Practice Charge can be filed within 6 months of alleged violation.
10. Remember “TIPS” if there is union organizing activity – do not threaten, interrogate, promise benefits if employees do not join union, or spy on organizing activities.

PRO Act

1. Passed the House of Representatives in 2020 but was not heard by the Senate
2. Was reintroduced on February 4, 2021
3. Passed the House again in March 2021 but has not gotten past committee in Senate.
4. Would drastically change Labor Relations.
5. Not likely to be adopted by current Senate but still being pushed by Senate and Democrats
6. Makes it easier for workers to unionize by requiring union recognition through submission of pledge cards, without a vote, and other organizing reforms

PRO Act

7. Would require interest arbitration if employer and union don't reach agreement on collective bargaining agreement – meaning arbitrator would set the wages and benefits
8. Would prohibit “Right to Work Laws” such as the Arizona law
9. Would prohibit mandatory arbitration in employment contracts
10. Would restrict ability to classify workers as independent contractors

NLRB General Counsel Memos

1. NLRB General Counsel Jennifer Abruzzo has issued a number of General Counsel memos seeking to overturn cases and precedent set under the Trump NLRB
2. Democrats now have a majority on the Board.
3. One issues that Board wants to address is whether misclassification of workers as independent contractors is in itself a violation of the NLRA without further adverse action by employer.
4. Handbook policies are open to attack.
5. NLRB said they will pursue more complete remedies for violations.

NLRB Litigation Priorities Memo

1. On Aug 12, 2021 General Counsel Abruzzo issued a memo listing the legal areas she believe demand the NLRB's attention.
2. Chiefly, in the decision to review legal decisions, on of the areas up for examination are cases involving employee status or independent contractor misclassifications. Specifically, she is looking for cases to overturn *SuperShuttle DFW, Inc.*, in which the NLRB adopted "entrepreneurial opportunity" as the primary indicator of independent contractor status and overturn *Velox Express, Inc.*, which held that the mere misclassification is not in itself a violation of the NLRA.
3. Additionally, employers could be found to have committed a ULP by simply maintaining an employer handbook that constrains NLRA protected activity.
4. Also discusses off-duty activities/protected concerted activity, union access, right to use employer email for protected concerted activity, etc.

NLRB Litigation Priorities

5. The current *SuperShuttle* emphasis on “entrepreneurial opportunity” provides employers with an avenue to prove that workers are independent contractors when the companies give workers significant entrepreneurial opportunities and freedom.
6. As a result, employers should expect a more “anti-independent contractor, pro-employee stance” by NLRB Regional Directors around the country.
7. NLRB also attempting to reverse rules passed under Trump that make it easier for employees to decertify unions.

Questions?

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Julie Pace's practice handles employment law, handbooks, drug and alcohol policies, I-9 and E-Verify compliance, OSHA, independent contractor and alleged misclassification issues with DES and other government agencies, and defends claims of sexual harassment, employment discrimination, retaliation, whistleblower, and wrongful discharge, and against charges by the EEOC or ACRD.

She handles matters involving OSHA, ICE, OFCCP, DOL, NLRB, ADA, FMLA, ERISA, ACA, PPA, CARES Act, SIGPR Audits, COVID-19, PPP, FCRA, Davis-Bacon, wage and hour laws, FAR, SCA, and government contracts. She regularly provides training to companies and assists with investigations. Julie can be reached at 602.397.9871 (mobile) or jp pace@messner.com.

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