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LABOR AND EMPLOYMENT NOTES
WINTER 2005

TITLES - WHAT'S IN A NAME?

Put this in the category of - "What's in a name?" Or "A rose by any other name would smell as sweet." An issue which arises often in the employment area, and about which we receive frequent questions, is the significance of a title given to an employee or to a job. The question arises when an employer enters into a contract with someone characterized as an "independent contractor," or the employer gives a job/position a title such as "salaried administrative." Simply put, you cannot change the nature of an employment relationship by naming a position or entering into a contract. For example, employers often draft written agreements which they call "Independent Contractor Agreements" and then engage someone to fill a staff or professional position in their office. Many times we see these agreements with people who are essentially doing the same type of work or providing the same professional service as others who are employees with the employer. The "independent contractor" is provided with an office and equipment and is expected to work during the same hours as others in the office. Typically, in these arrangements, the only difference between the "independent contractor" and employees in the office is the method of payment to the "independent contractor," who does not receive a salary with withholdings but instead is paid an agreed upon gross amount without withholdings. Also, the "independent contractor" is not included in benefits provided to employees. It is important to recognize that in many such cases, the "independent contractor" is in reality an employee. If a challenge is later made by the "independent contractor" on grounds that he/she did not receive benefits or was not paid overtime, or on some other basis, a court will look at all of the factors set forth in various IRS and wage and hour regulations, and will determine that "the rose" by the name of "independent contractor" was actually an "employee" who was entitled to the benefits of an employee and for whom withholdings should have been made.

This same scenario arises in situations in which a job/position is characterized as falling into one of the three overtime exempt job categories under the Fair Labor Standards Act ("FLSA"), but the job does not meet the requirements and tests of the FLSA. In this situation, the employee filling the job will be entitled to overtime pay based on the facts, despite the title given to the position.

This is a cautionary message which is frequently ignored or misunderstood until an inquiry comes from either a state or federal agency regarding a particular employee or when an on sight investigation is done by one of the various state or federal agencies which administer wage and employment issues in the work place. It is best to consider carefully the proper classification of a specific position or of an "independent contractor" based on the facts involved before going down the road of treating someone as falling into an improper category. These decisions are very fact specific and a mistake can lead to penalties and lawsuits.

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REMIND YOUR MANAGERS TO PROPERLY RESPOND TO INTERNAL COMPLAINTS

Most employer discrimination, harassment or retaliation policies contain a clause that requires an employee who believes that he is being discriminated, harassed or retaliated against to report the incident to his immediate supervisor and/or an upper level manager, including a human resource representative. But do these managers and supervisors know what to do when an employee complains to them about such conduct? Most employers would answer yes, but they may have a false sense of security. The truth is in real-world working relationships, what a supervisor should do versus what he actually does may get muddied by his day to day interactions with his fellow employees that are also subordinates.

Consider this scenario. What would you do if an employee came to you, a manager or supervisor, and complained about discrimination, harassment or retaliation in the workplace, but asked you to not tell anyone else? This scenario occurs particularly where an employee does not want to lodge a formal complaint or investigation, but does at least want to tell someone about the conduct to either protect himself if the conduct escalates, or to get it off of his chest. Unfortunately, some of your managers and supervisors may answer that they would not report the conduct to the appropriate officials because of relationships of trust that develop in the course of being an employee's manager. However, understandable this reaction may be, it is not the correct answer and could have very serious consequences for the employer.

A manager's failure to report this activity could be viewed as inaction on the part of the employer, and could cost the employer dearly. An employer's inaction in response to a complaint of discrimination, harassment or retaliation could form the basis for an award of punitive damages in a Title VII lawsuit. Thus, managers and supervisors should be reminded of their important role as intermediaries for the company to receive complaints of unlawful conduct and their duty in assisting employers in taking prompt remedial action in response to such complaints.

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