

SPECIAL SECTION: CONSTRUCTION LAW

Construction

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NEW WARRIOR
TRANSITION UNITS
AID SOLDIERS'
RECOVERY

BATTLE PLAN

THE HR LANDMINE

Awaiting Construction Companies

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Even savvy business people make mistakes. When it comes to employment law, the construction industry is bound by stringent rules and regulations, making mishaps in human resources all too frequent.

Construction companies face many HR challenges, including I-9 compliance, worker classification (employee versus independent contractor), and wage and hour violations—all of which can drive organizations to transform their HR processes and consider outsourcing.

Because of the multitude of laws affecting each stage of the employment process, it is extremely important for an employer to frequently review its policies and practices to ensure regulatory compliance and avoid costly fines or lawsuits, such as:

- a fine of \$1,100 for any violation of the appropriate payment of overtime for non-exempt employees under the Fair Labor Standards Act (FLSA);
- penalties as high as \$10,000 per occurrence for failing to post required safety notices or keep accurate records; and
- fines up to \$1,000 per employee for non-compliance with the Federal Immigration Reform Act.



These penalties help define the risk of non-compliance and signify the importance of conducting periodic HR audits. An audit also can ensure policies and procedures are fair and consistent across the organization, strengthening the workplace. Overlooking, misrepresenting or simply misunderstanding the protocol for these policies can be detrimental to a business.

I-9s AND ICE

The U.S. Department of Homeland Security's Immigration and Customs Enforcement (ICE) agency has embarked on an initiative to pursue employers involved in illegal hiring practices, rather than targeting unauthorized workers. This undertaking—designed to expose employers that knowingly violate hiring and immigration laws—can result in time-consuming and stressful I-9 audits, investigations and immigration inspections, which can lead to significant fines, penalties and even criminal proceedings.

Although no company is impervious to I-9 investigations, the construction industry is more susceptible to scrutiny in its hiring practices. ICE has published a list of best hiring practices that serves as an excellent guideline for employers, available at www.ice.gov/image/best-practice.htm.

In the event of an I-9 audit, it is important to understand businesses have rights. ICE is required to provide a written notice of inspection and allow three business days for the company to turn over its original I-9 forms. However, it's best not to wait for ICE agents to come knocking. Regularly auditing hiring practices can ensure a company is organized, compliant and prepared to respond to an ICE investigation.

MISCLASSIFICATION MAYHEM

It's tempting for employers to classify workers as independent contractors rather than actual employees because it means saving on benefits, insurance and overtime pay, as well as providing greater scheduling flexibility. However, businesses must be extremely careful that a worker classified as an independent contractor meets the U.S. Department of Labor's (DOL) guidelines.

The DOL launched a "Misclassification Initiative" to crack down on employer

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classification violations after the Government Accountability Office estimated more than \$2.7 billion per year is lost in unpaid Social Security, unemployment and income tax as a result of misclassification.

This may result in considerable risks and fines, including compensation for back pay or overtime, back taxes, retroactive workers' compensation and disability, insurance premiums and unemployment benefits.

In order to determine how to properly classify workers, the complete business relationship must be examined—taking into account the degree of control between the person receiving the service and the person providing the service. The Internal Revenue Service (IRS) uses three "Common Law Rules" to determine how a worker should be classified:

- 1. Behavioral.** Who controls what the worker does and how he does his job?
- 2. Financial.** Who controls the economic aspects of the worker's job?
- 3. Type of relationship.** How do the parties work together?

Employers must be proactive in learning and understanding the rules and regulations governing employee classification status. Spending a little time and effort to ensure federal standards are being met will help keep penalties and fines at bay. The IRS website provides helpful classification guidelines at www.irs.gov, under the Businesses (Small Business/Self Employed) tab.

WAGE AND HOUR VIOLATIONS

The construction industry also has become a prime target for the DOL's Wage and Hour Division (WHD). Due to an influx of violations, the agency is developing new ways to investigate infringements in an effort to protect workers from overtime, minimum wage and recordkeeping abuse.

With so many gray areas associated with

timekeeping, it is easy to make mistakes regarding whether meal breaks, rain delays, down time and travel time must be reported.

According to the DOL, following are the most common problems facing the construction industry under the FLSA:

1. failure to record all hours actually worked to include time spent working before or after the shift;
2. shorting of hours by using terms such as down time or rain delay;
3. failure to compensate for meal breaks where the employee is not completely relieved of all duties to enjoy uninterrupted time for the meal;
4. banking of overtime hours or payment of overtime in the form of comp time;
5. failure to combine the hours worked for overtime purposes by an employee in more than one job classification for the same employer within the same workweek;
6. failure to segregate and pay overtime hours on a workweek basis when employees are paid on a bi-weekly or semi-monthly basis; and
7. failure to pay for travel from shop to jobsite and back.

A basic understanding of the FLSA greatly reduces liabilities and can save construction businesses the time, headaches and anxieties of dealing with a fraud investigation.

THE BOTTOM LINE

The penalties for non-compliance can threaten the survival of a business. Hiring an HR expert to ensure compliance can allow business owners to focus on what they do best. If the costs of hiring an internal specialist are unreasonable, or the business is too small for its own HR staff, an experienced third-party firm can be a cost-effective solution to navigate through difficult HR issues.

A third party will have experts trained on the changing laws to ensure their clients comply with industry regulations. In some instances, if a compliance issue is left unchecked, the liability falls on the HR partner, not the employer.

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