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Minimizing Legal Risk: Realistic, Practical, and Financially-Responsible Planning for 2017 and Beyond

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Wednesday, Oct. 26
4-5 p.m.



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Minimizing Legal Risk....

1. Identify risk
2. Determine exposure
3. Determine potential steps to mitigate
4. Prioritize!
5. Take appropriate steps *for your company*



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Legal Risks Facing Staffing Firms



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Legal Risks Facing Staffing Firms

Four big areas we will not cover in depth today:

1. New Overtime Regulations / Exempt Status
 - **VERY** significant risk
 - Increase in minimum salary threshold to \$913/wk (\$47,476/yr)
 - New provision allows \$91.30 of that to be incentive compensation
 - Still need to meet job duties tests
 - **Great opportunity to resolve misclassifications!**
 - inside sales
 - support personnel
 - others who don't really exercise enough discretion and independent judgment
2. ACA Compliance



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Legal Risks Facing Staffing Firms

Four big areas we will not cover in depth today (cont.):

3. Paid Sick/Family Leave
 - Federal Contractor requirements
 - Final rule issued September 2016 provides for up to 56 hours/year
 - State and local requirements
 - Chicago and Cook County – very complicated provisions around carryover
4. OSHA Temporary Worker Initiative & Electronic Reporting
 - Record keeping requirements
 - Personal Protective Equipment
 - Whistleblower protection
 - Safety and health training
 - Hazard communication



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Legal Risks Facing Staffing Firms

What we are going to cover today...

3 hot areas where you can take action now to minimize risk

1. Joint Employment & Union Organization
2. Accommodations (disability, pregnancy, religion)
3. New laws that impact employment applications



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#1: Joint Employment & Union Organization

Poll:

What is your experience with unions?

- a. We have union employees or our employees have tried to organize in the past
- b. At least one of our clients is a union company or has had an organization effort
- c. Both we and our clients have had to deal with unions
- d. No, we stay as far away from unions as possible!



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#1: Joint Employment & Union Organization

Department of Labor Interpretation (January 2016):

"[The] possibility of joint employment should be regularly considered in FLSA and MSPA cases, particularly where:

- (1) *the employee works for two employers who are associated or related in some way with respect to the employee [i.e. horizontal joint-employment]; or*
- (2) *the employee's employer is an intermediary or otherwise provides labor to another employer [i.e. vertical joint employment]."*



Explicit acknowledgement that the DOL will view staffing companies and clients as joint employers, and thus liable for one another's violations.



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#1: Joint Employment & Union Organization

Browning-Ferris Industries (NLRB August 27, 2015)

- Union sought to negotiate with client company (even though workers were employed by temporary labor services company)
- Found that labor services company and client were joint employers
 - *client's actual control was very minimal, if any*
- As a result, union was permitted to file a petition that would have required the client to negotiate with the union even though the employees were employees of the labor services company!



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#1: Joint Employment & Union Organization

Browning-Ferris Industries (cont.)

New standard →

Indirect or reserved authority, even if not exercised, can be sufficient to establish a joint employment relationship!



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#1: Joint Employment & Union Organization

Miller & Anderson (NLRB July 11, 2016)



Old rule: for a union to represent employees of both a staffing firm and the client in the same unit, consent of all parties is required

New rule: *Consent no longer required!*

Staffing firm and client employees can be included in the same unit, even if employed by different companies and viewed and treated as separate groups!



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#1: Joint Employment & Union Organization

Risks to Staffing Firms

- Shared liability with clients for legal violations
- Increased likelihood of unionization
- Perceived negative impact on staffing firm value proposition



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#1: Joint Employment & Union Organization

Ways to Mitigate Risk



1. Revisit client agreements
 - include clear compliance with laws language
 - consider explicit language regarding unfair labor practices
 - make sure allocation of risk and indemnification obligations are fair
 - include opportunities to confirm compliance – *on both sides*
 - include a cooperation provision



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#1: Joint Employment & Union Organization

Ways to Mitigate Risk (cont.)



2. Union avoidance efforts
 - Internal
 - training of all who come into contact with employees
 - open communications
 - What are your clients doing?
 - ask questions
 - talk to employees
3. Make sure door is open to employee concerns/complaints
4. Educate clients on steps you're taking and importance of partnership
 - Include in sales pitch!



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#2: Accommodations

Poll:

An employee who you've placed with a client comes to you and says that she's going to need to leave two hours early every Friday so that she can go to a medical appointment.

Do you consider her request?

- A. No, we're not covered by the FMLA, so we don't have to give her the time off
- B. No, there's no way our client would allow it, so why even engage in the conversation?
- C. Yes, I need to understand more about what she's asking for and why



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#2: Accommodations

Disability

- ADA requires employers to provide reasonable accommodation to disabled employees
 - applies to all with 15+ employees
 - must provide unless creates an "undue hardship"
 - **KEY = Interactive Process**



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#2: Accommodations

Disability (cont.)



- EEOC issued guidance May 9th on leave as a reasonable accommodation
 - unpaid leave with reinstatement right needs to be considered as a reasonable accommodation
 - if FMLA qualified, kicks in after FMLA exhausted
 - can't count leave against employee
 - attendance
 - production



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#2: Accommodations

Pregnancy

- **Young v. UPS** (Supreme Court, March 25, 2015)
 - Opened door to claim for failure to accommodate pregnant employee
 - When accommodation given in some circumstances but not to pregnant employee, case had to go to trial



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#2: Accommodations

Pregnancy (cont.)

- EEOC Guidance issued June 25, 2015
 - Title VII / Pregnancy Discrimination Act require accommodation of pregnant employees in certain limited circumstances
 - equal access to light duty
 - can't compel pregnant employee to take leave unless BFOQ (high bar)
 - must permit leave for those who need on same terms as non-pregnant employees
 - can't impose shorter maximum leave for pregnant employees than for other types of medical leave
 - Breastfeeding
 - can't take adverse action against employee for breastfeeding schedule
 - Also, ACA requires reasonable break time and no retaliation



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#2: Accommodations

Pregnancy (cont.)

- State Laws
 - Requiring accommodation of pregnant employees
 - California, Colorado, Connecticut, Delaware, DC, Hawaii, Illinois, Louisiana, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, Rhode Island, Utah, West Virginia
 - Requiring accommodation of breastfeeding mothers
 - 27 states



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#2: Accommodations

Religion



- EEOC Guidance (March 2014)
 - raised bar for employers to claim request for accommodation was unreasonable
- Abercrombie Case (June 1, 2015)
- EEOC Press Release (July 22, 2016)
 - New one-page fact sheet
 - aimed at younger workers
 - employers have to make "workplace changes" if "little to no burden" on business
 - Announced that EEOC will coordinate with OFCCP



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#2: Accommodations

A word about retaliation....

- EEOC Final Guidance issued August 25, 2016
 - Not new standards but a good reminder of EEOC's position
 - what is protected activity?
 - includes requesting accommodation!
 - also includes workplace inquiries, complaints, etc.
 - what is adverse action?
 - work-related
 - non-work-related
 - causal connection
 - timing
 - statements
 - comparative evidence
 - inconsistent or shifting explanations
 - importance of policies and training



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#2: Accommodations

Ways to Mitigate Risk



1. Teach managers red flag words
 - doctor, having trouble...., medical, condition, hurts, I'm not sure I can...
2. Put accommodation process in place
 - Include accommodation policy in handbook
 - Develop accommodation request form
 - Go through the process!
 - Communicate and Document, Document, Document!!!
3. Client Interaction
 - Make sure cooperation is reflected in client agreements
 - Communicate with client about accommodations
4. Keep potential for retaliation claims in mind



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#3: Employment Applications

Poll:

Do you ask about criminal record on your job application:

- a. Yes, we ask about any arrests or convictions
- b. Yes, but only about felonies
- c. Yes, but only about convictions
- d. Yes, but only about felony convictions
- e. No



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#3: Employment Applications



"Ban the Box" Laws

- Prohibit asking about criminal background until later stage in hiring process
- When you may ask depends on the particular law
- 9 states prohibit private employers from asking on job applications
 - Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont
 - Many cities and counties as well
 - Even more for public employees
- In addition to EEOC Guidance on use of criminal history
 - Asking causes disparate impact against certain minority groups



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#3: Employment Applications

Poll:

Do you ask applicants about their current pay?

- a. Yes, it's on our job application
- b. Yes, it's not on our job application, but we ask in an interview
- c. No, we only ask what pay they're looking for
- d. No, we don't ask about pay at all



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#3: Employment Applications



New Mass. Equal Pay Law

- On August 1st, Massachusetts became the first state to prohibit asking about past compensation
 - Covers current pay, benefits and other compensation (including salary history)
 - Also prohibits asking former employers for compensation information
 - Specifically prohibits using a third party to get around requirement
 - Concern is that asking about past compensation perpetuates pay discrimination
 - Law goes into effect July 1, 2018
- Likely to spur similar laws in other jurisdictions



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#3: Employment Applications

Ways to Mitigate Risk



1. Update employment applications
 - If in a jurisdiction with "Ban the Box," remove questions about criminal history
 - Remember that if you're a government contractor, may apply in additional states/localities
 - If in Massachusetts, remove questions about pay history
 - Use as an opportunity to generally update
 - remove requests for SSNs
 - remove questions regarding year in which degrees were earned or other age-based questions
 - make sure asking about "eligibility to work in U.S. for this employer" rather than "are you a U.S. citizen"



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#3: Employment Applications

Ways to Mitigate Risk (cont.)



2. Train interviewers in appropriate interviewing
 - When/if can ask about criminal background
 - When/if can ask about pay history
 - General interview training
 - Subjects to avoid
 - How to respond when those subjects are raised
 - Responding when accommodations are referenced
3. Ask candidates about interviews with clients
 - What did they ask?
 - Any tough questions?
 - Anything that made you pause?



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Top 10 (Relatively) Easy Steps You Can Take to Minimize Legal Risk in 2017 and Beyond



1. Revisit client agreements
 - cooperation
 - compliance with laws
 - audit opportunities (mutual)
 - risk allocation and indemnification
2. Make sure employees know they can come to you with concerns and ask them about their experiences
 - ask about interviews with clients
 - consider formal hotline, etc.
3. Implement union avoidance efforts
 - training, employee outreach/education, partnership with clients



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Top 10 (Relatively) Easy Steps You Can Take to Minimize Legal Risk in 2017 and Beyond

4. Teach managers red flag words for accommodations
5. Put accommodation process in place
6. Update employment applications
 - remove criminal background questions
 - if in MA, remove requests for past compensation
 - remove requests for years of degrees



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Top 10 (Relatively) Easy Steps You Can Take to Minimize Legal Risk in 2017 and Beyond

7. Train interviewers on best practices and legal issues
8. Educate clients on steps you're taking to comply with laws and importance of partnership
9. Visit the workplace regularly
10. Communicate, communicate, communicate!



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Thank you.

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Thank You for Attending



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