

ASA North Carolina Staffing & Recruiting Conference

Employment Law Update

A review of trending legal issues in the staffing industry

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Employee Misclassification



Employment Law

EEOC Trends & The Staffing Industry

Non-compete Clauses



Why is this worth my time?



- New law governing Employee Misclassification in NC
- Heightened focus on staffing industry by *federal and state agencies*
- Heightened focus on employment claims by *plaintiffs' bar*



North Carolina Employee Fair Classification Act

Issue: Misclassification of workers as independent contractors

This is a new NC law that allows employees to easily report and the government to easily prosecute any employer that misclassifies an individual as an IC.

Timing:

- Signed into law in August 2017
- Effective on **December 31, 2017**



North Carolina Employee Fair Classification Act

Key components of this new law:

- Creates a new division of the NC Industrial Commission called the “Employee Classification Section”
- This Section is tasked with investigating reports of misclassifications and assisting the NC DOL, NC DOR, and the Industrial Commission in recovering \$\$\$ from employers
- This Section is also responsible for assisting district attorneys’ in prosecuting employers who fail to pay assessed penalties.
- Posting requirement – all employers in NC must post a notice in the workplace informing workers that they should be classified as employees unless they are ICs and how to report a potential misclassification.



North Carolina Employee Fair Classification Act

Why is this important?

- Applies to all private employers in NC
- Employers can expect the government to be much more aggressive in investigating and prosecuting misclassification in order to recover unpaid taxes and wages
- Government can recover state and federal taxes, and individual can recover back pay (for minimum wage and overtime) as well as employee benefits (EEO, FMLA, ADA, vacation pay)



North Carolina Employee Fair Classification Act

Why is this important?

The law's practical effect is that a single complaint could trigger a full-fledged, multi-prong investigation into your company's employee classifications!

- NC employers are expected to be in full compliance
- If you utilize ICs then need to make sure they are properly classified
- Be prepared for responding to an on-site investigation by state agencies



North Carolina Employee Fair Classification Act

What is the applicable legal standard or “test”?

- The new statute does not change the definition of “employee” or “independent contractor”
- The analysis is always case-by-case basis turning on “control”
 - Is the worker truly controlling his/her own work or is the workers’ service controlled and directed by the employer
- At end of the day each law (whether it is wage & hour, workers’ compensation, or tax law) has its own legal standard
- The IRS has simplified its traditional 20-factor test by dividing them into three categories: behavioral control; financial control; and relationship of the parties



North Carolina Employee Fair Classification Act

Contractor or Employee???

The IRS 20-Factor test still serves as a helpful analytical tool to aid employers in determining where the control lies. The following exercise is helpful when analyzing your current Form 1099s.

If you answer “YES” → more likely an employee

If you answer “NO” → more likely an independent contractor



North Carolina Employee Fair Classification Act

Contractor or Employee???

YES = Employee NO= Independent Contractor

Instructions. Is the worker required to comply with the employer's instructions about when, where, and how to work?

Training. Does the worker receive required training from or at the direction of the employer, including attending meetings and working with experienced employees?

Integration. Does the success of the employer's business significantly depend upon the performance of the services that the worker provides?

Services Rendered Personally. Is the worker required to perform the work personally?

Hiring, Supervising, and Paying Assistants. Has the employer hired, supervised, and paid assistants for the worker?



North Carolina Employee Fair Classification Act

Contractor or Employee???

YES = Employee NO= Independent Contractor

Continuing Relationships. Does the worker have a continuing relationship with the employer?

Set Hours of Work. Is the worker required to follow set hours of work?

Full-Time Required. Does the worker work full-time for the employer?

Place of Work. Does the worker perform work on the employer's premises and use the employer's office equipment?

Sequence of Work. Does the worker follow a set schedule?



North Carolina Employee Fair Classification Act

Contractor or Employee???

YES = Employee NO= Independent Contractor

Reporting Obligations. Does the worker submit regular written or oral reports to the employer?

Payment by Hour, Week, or Month. Does the worker receive payments of regular amounts at set intervals?

Payment of Business and/or Traveling Expenses. Does the worker receive payment for business and travel expenses?

Furnishing Tools and Materials. Does the worker rely on the employer for tools and materials?

Significant Investments. Has the employer invested in the facilities or equipment used to perform the services?

North Carolina Employee Fair Classification Act

Contractor or Employee???

YES = Employee NO= Independent Contractor

Risk of Loss. Is the payment made to the worker on a fixed basis regardless of profitability or loss?

Working for More than One Company at a Time. Does the worker only work for one employer at a time?

Availability of Services to the General Public. Are the services offered to the employer unavailable to the general public?

Right to Discharge. Can the worker be fired by the employer?

Right to Quit. Can the worker quit work at any time without liability?



EEOC's Focus on Staffing Industry

The EEOC issued a “Strategic Enforcement Plan” for 2018-2022.

- The SEP was approved and went into effect in February 2018
- The SEP provides a framework for the EEOC and identifies its “top” priorities over the next 4 years

“The purpose of the SEP is to focus & coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.”

-EEOC Executive Summary



EEOC's Focus on Staffing Industry

Among its top priorities is enforcing anti-discrimination laws in the context of **temporary workers, staffing agencies**, independent contractors, and the on-demand economy (e.g., Uber, Airbnb, freelancers).



EEOC's Focus on Staffing Industry

- The EEOC will focus its resources on pursuing charges of discrimination involving temporary workers.
- You can expect to see more on-site investigations, lawsuits and class actions.
- Double the trouble: Eliminating barriers in **recruitment & hiring** also remains a top priority! This makes the staffing industry even more susceptible to charges and litigation.



EEOC's Focus on Staffing Industry

The same is true for **North Carolina**

The primary legal issues:

1. Recruiting and hiring practices

- “Post-Offer” employment screening (medical questionnaires; criminal background reports; drug testing)
- Conditional Job Offer → timing is everything!

2. ADA

- Offering an appropriate “reasonable accommodation” for temp workers
- Working with your client is key!

The EEOC has been aggressive in its investigation of charges filed by temporary workers! Resulting in more RFPs and on-site investigations. This translates into more time and resources (\$\$\$) for employers!



EEOC's Focus on Staffing Industry

The EEOC is already focusing its efforts on staffing agencies

- *EEOC v. Diverse Lynx, LLC* – (March 8, 2018) EEOC sued a New Jersey based IT Staffing Firm for age discrimination under the ADEA
 - Applicant was told “age will matter” and no longer considered for a specific client site after learning his DOB.
 - Staffing firms may not request DOB from applicants until after they are referred to a prospective job assignment.
 - Diverse Lynx paid the EEOC \$50,000 to settle the lawsuit and agreed to significant remedial measures (including training of recruiters and management team)
 - Kevin Berry, district director of the EEOC's New York District Office, "This case should send a clear message that federal anti-discrimination laws apply to employment agencies as well as employers. An employment agency's refusal to refer a qualified applicant because of the applicant's age is a plain violation of the ADEA."



EEOC's Focus on Staffing Industry

The EEOC is already focusing its efforts on staffing agencies

- *EEOC v. Strataforce* – (November 14, 2017) EEOC sued a staffing firm with offices in California, Indiana, North Carolina, and South Carolina, for disability discrimination
 - Issue: pre-offer health inquiries of applicants in violation of ADA
 - Strataforce asked applicants to complete an **application package** that included a detailed medical questionnaire before the company offered the applicant a position or placement
 - Strataforce agreed to settle the lawsuit within 1 week of filing
 - Strataforce will be required to provide notice to applicants of their rights under the ADA and submit annual compliance reports to the Commission during the Judgment's four-year term.



EEOC's Focus on Staffing Industry

EEOC v. Strataforce – (November 14, 2017)

Kenneth Bird, EEOC regional attorney:

"As staffing agencies now play a large role in our nation's workforce, eliminating any discrimination in their screening practices is increasingly important to ensuring that workers with disabilities have equal access to work opportunities. Here, EEOC's investigation showed Strataforce has hired many individuals with disabilities, and we are pleased that in the future Strataforce will conduct its hiring processes in compliance with the ADA. I commend Strataforce for entering an early resolution of the case."



EEOC's Focus on Staffing Industry

The EEOC is already focusing its efforts on staffing agencies

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- *EEOC v. KB Staffing LLC* – (August 28, 2017) EEOC sued a KB Staffing LLC, a staffing firm servicing central Florida, for violating the Americans with Disabilities Act (ADA) when hiring temporary workers
 - Legal issues: Conditional Job Offer and Medical Questionnaires
 - KB Staffing asked all applicants to complete a paper application package with a detailed medical questionnaire *before* the company offered the applicant a position or placement.
 - The EEOC's position is that a "conditional job offer" is not extended until a temp applicant is assigned a specific job assignment
 - KB Staffing settled the case and agreed to pay \$22,500 class fund, representing compensatory and punitive damages, designed to compensate applicants who were forced to disclose their sensitive medical and disability-related information in the application process
 - In addition, KB Staffing agreed to several remedial measures (policy changes; training; and affirmatively recruiting individuals with disabilities.
 - The court explained "[i]t is reasonable to infer that emotional or other damages may have been caused by the embarrassment or distress of answering the specific question ... regarding private and/or sensitive medical information, which include questions about mental health conditions and/or treatment, or disabilities."



EEOC's Focus on Staffing Industry

EEOC v. KB Staffing LLC – (August 28, 2017)

Eliminating barriers in recruitment & hiring has been a priority in the EEOC's 2013-2016 Strategic Enforcement Plan.

Exclusionary policies and practices, restrictive application processes, and the use of screening tools such as pre-employment tests, background checks and medical questionnaires.

Robert Weisberg, the EEOC's regional attorney:

"As staffing agencies now play a large role in our nation's workforce, eliminating any discrimination in their screening practices is increasingly important to ensuring that workers with disabilities have equal access to work opportunities."





Harassment

January 2017 – EEOC issues proposed guidance

- Due to harassment accounting for more than 31% of private sector charges, and 44% of federal employee charges.
- Previous guidance is over a decade old.
- The guidance defines harassment types, liability for unlawful harassment, and requires employers to implement programs to combat “known and obvious risks of harassment.”





Harassment

Feb. 2, 2018 → EEOC Chair Victoria Lipnic said the enforcement guidance is coming “soon”

Lipnic spoke about the larger problem of harassment both before and after the Harvey Weinstein sexual abuse scandal that broke in October and helped spur the #MeToo movement.

When asked if harassment has gotten worse or if it is talked about more often, Lipnic stated:

“I don’t think it’s getting worse, I think we’re just exposing what’s been there for quite some time”



Harassment

The EEOC is already focusing its efforts on staffing agencies

- *EEOC v. SMX Staffing* – (Feb. 2, 2018) EEOC sued an international industrial staffing company (SMX is a subsidiary of True Blue, Inc.) for sexual harassment
 - An on-site male account manager repeatedly made explicit sexual comments to female employees and demanded sexual favors: calling them “baby” “sexy” and requesting sexual favors in exchange for PTO.
 - Despite reporting these complaints to a supervisor nothing was done, and eventually employee reported it to a different supervisor who began an investigation. The manager was allowed to return to work and he continued harassing the female employee.
 - Case is one of “constructive discharge” in violation of Title VII of the Civil Rights Act and is pending in federal court (the EEOC’s pre-litigation conciliation efforts allegedly failed)



Harassment

EEOC v. SMX Staffing – (Feb. 2, 2018)

James R. Neely, Jr., director of the EEOC's St. Louis District:

"Employers - including staffing firms - are responsible for ensuring their workplaces are free from any type of sexual harassment. Companies that tolerate sexual harassment - or fail to adequately punish harassers - do so with blatant disregard for the law."

Harassment

The EEOC is already focusing its efforts on staffing agencies

- *EEOC v. Anchor Staffing* – (November 1, 2017) EEOC sued a Chicago based Staffing Firm for sexual harassment and retaliation in violation of Title VII of the Civil Rights Act
 - Female employee was hired by staffing agency to work as a telephone operator at the Illinois Department of Human Services (IDHS)
 - Female employee was sexually harassed on her first day of work by another Anchor Staffing employee
 - After the employee complained to management, Anchor Staffing immediately removed the employee from her assignment at IDHS and failed to provide her any other work assignments
 - The EEOC is pursuing full make-whole relief, including back pay, future employment opportunities, punitive damages, and non-monetary measures to correct Anchor Staffing's practices in the future



Harassment

EEOC v. Anchor Staffing – (November 1, 2017)

Greg Gochanour, the EEOC's regional attorney for the Chicago District:

"Employees of staffing agencies, who constitute a large and growing share of the American workforce, are protected by federal civil rights laws. Like any employer, staffing agencies must react appropriately to complaints of sexual harassment. Here, Anchor Staffing responded unlawfully to an employee complaint by making her worse off when it terminated all her work assignments, both present and future."





Harassment

2017 EEOC Proposed Guidance

Expectations for employers:

- Commitment by leadership
- Accountability
- Strong, clear, comprehensive policies
- Effective and accessible complaint procedures
- Regular and interactive training tailored to the audience





Harassment

2017 EEOC Proposed Guidance

EEOC's expectations for effective training:

- Explain that examples of behavior and conduct that are not addressed could rise to the level of unlawful harassment
- Provide information about employees' rights and responsibilities if they experience or observe harassing conduct
- Detail the Company's complaint process
- Explain consequences of violating the policy
- Provide clear anti-retaliation statement



QUESTIONS?



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