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Rising Personnel Cost – Should you consider Contractors, Temporary Labor or Freelance Workers?

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- Recent changes in benefits/costs
- What is an Independent Contractor?
- Independent Contractor Test- Maryland & IRS Test
- Penalties for Misclassification
- What is a Freelance Worker?
- What is a Temporary Worker?
- Joint Employer

What?? Rising Cost??

- The Maryland Healthy Working Families Act requires employers with 15 or more employees to provide up to five days of paid sick leave per year. Employers with fewer than 15 employees must give unpaid leave. One hour of leave is earned for every 30 hours worked.
- Minimum wage is currently at \$10.10 per hour. The Maryland General Assembly voted to override Governor Hogan's veto which resulted in the minimum wage in Maryland which will increase to \$15/hourly by 2025.
 - January 2020 - \$11.00
 - \$.75 annually to \$14.00 in 2024
 - 2025 - \$15.00

What?? Rising Cost??

The ACA requires companies with more than 50 full time equivalent employees to provide health insurance or pay a penalty.

- Full-Time Equivalent Employee (30 hours or more a workweek or 130 hours during a month).

What is an Independent Contractor?

- An Independent Contractor is a person or entity contracted to perform work or provide services to another entity as a non-employee. Independent Contractors must pay their own Social Security and Medicare Taxes.

Maryland Independent Contractors Test

- The individual who performs the work is free from control and direction over performance both in fact and under contract.
- The individual is customarily engaged in an independent business or occupation of the same nature as that involved in the work.
- The work is outside of the usual course of business of the person for whom the work is performed, or performed outside on any place of business of the person for whom the work is performed.

IRS 20 Factor Test

The IRS test (also termed “right-to-control test”) because each factor is designated to evaluate who controls how the work is performed.

A worker does not have to meet all 20 criteria to qualify as an employee or independent contractor.

<https://www.irs.gov/pub/irs-utl/x-26-07.pdf>

Maryland Penalties for Misclassification

- \$5,000 per employee penalty for employers who knowingly misclassified workers as independent contractors.
- \$10,000 per employee penalty for subsequent violations.
- \$20,000 penalty for person(s) (attorneys, accountants, HR) who knowingly advise employers to misclassify.

Vizcaino Vs. Microsoft

- Microsoft added pool of workers classified as Independent Contractors paying them a higher rate but not withholding any taxes.
- No fringe benefits were available to the Independent Contractors.
- Workers had specific projects and signed agreements that they were Independent Contractors.
- Microsoft integrated these contractors into their workforce and they worked on-site with hours and supervisors.

<https://caselaw.findlaw.com/us-9th-circuit/1297250.html>

Nemo v. RR Donnelley

- Delivery Driver was classified as an Independent Contractor and dismissed.
- Driver filed Discrimination Claim.
- Company requested to dismiss case because Driver was not an employee.
- Courts refused to dismiss companies request.

https://www.courtlistener.com/recap/gov.uscourts.aInd.164812/gov.uscourts.aInd.164812.27.0_2.pdf

What is a Freelance Worker?

- A Freelance worker is a term commonly used for a person who is self employed and is not necessarily committed to a particular employer long-term.
- Often the term Freelancer is used interchangeably with Independent Contractor.
- Generally work on specific projects and can choose which projects they want.
- Often has multiple clients.

What is a Temporary Worker?

- Temporary workers are hired for seasonal work or hired by a staffing agency.
- Employers should have a clear policy in place for how long employees will remain in temporary status. DOL defines a temporary work appointment as one that lasts one year or less and has a specific end date.

Pros Vs Cons of Using a Staffing Agency

Pros

- Agencies can help staff quickly
- Employers are able to adjust their workforce when business demands change
- Employer can try out a worker before hiring
- Avoidance of ACA limits
- Benefit Cost/WC

Cons

- Temporary Workers are not a long term solution
- Temporary Workers may make more errors
- Temporary Workers may need more training
- Temporary Workers create Security Issues
- Temporary Workers are less invested in Company Success
- Temporary Workers are more likely to be injured

“Joint” Employees

...Sharing of control and supervision of an employee’s activity among two or more business entities (co-employment).

- You and the other employer are jointly liable for any failure to pay overtime or minimum wage. Even if the error is the staffing agencies fault.
- They may be still eligible for participation in your 401(k) plan or for health and welfare benefits.
- You may be liable for any discrimination or harassment.

U.S. Department of Labor Revision – Joint Employer Status under FLSA

- On 4/1/2019 the U.S. Department of Labor proposed a clear, four-factor test – based upon precedent.
 1. Hire or fire the employee
 2. Supervise and control the work schedules or condition of employment
 3. Determine employee's rate of pay and method of employment
 4. Maintain the employee's employment records.

https://www.dol.gov/whd/flsa/jointemployment2019/joint-employment_factsheet.pdf

Joint Employer Status

- Discussion of Examples

Questions

Thank You!

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