Employment Law Update

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Introduction

1. Manage resources
2. Mistakes are costly
3. You don’t always get what you want
    a. A duck is not a duck because you call it a duck
    b. Courts do not always honor your contracts
    c. Courts decide by application of law

Part 1: Independent Contractor vs. Employee

An Overview

Independent Contractor v. Employee

Independent Contractor	Employee
No control (hours, other employment, manner of work, etc.)	Control (hours, other employment, manner of work, etc.)
Don't have to provide benefits	Usually provide benefits
Generally can be let go at any time for any reason	More restrictions on termination
Must pay their own Medicare and Social Security under FICA	Employer responsible for FICA withholding
Not eligible for unemployment benefits	Eligible for unemployment benefits
Not covered by state and federal wage and hour laws	Covered by state and federal wage and hour laws
Not subject to workers' compensation	Subject to workers' compensation

Independent Contactors

Advantages	Disadvantages
Save Money in Downtime	Less Control
No Withholding	Loss of Ability to Build Talent
Staffing Flexibility	
Reduced Exposure to Lawsuits	

Staffing Flexibility

- Greater leeway with IC's in hiring and letting workers go, advantageous if fluctuating workload
- Greater efficiency since most IC's bring specialized expertise to the job

No Withholding

- No withholding taxes, workers' comp insurances, Social Security, Medicare, state unemployment etc.
  - SS and Medicare are 7.65% of employee compensation

Reduced Exposure to Lawsuits

- IC's don't have the wide array of rights afforded to employees, such as:
  - Min. wage/overtime
  - Employment discrimination
  - FMLA
  - Workers' compensation

IC or Employee?

- IRS Rev. Rul. 87-41: 20 Factor "Right to Control" Test

  (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) right to terminate.

Case Comparison

C.L.E.A.N., LLC v. Div. of Employment Security

- Each worker signed "independent contractor agreement," and "independent contractor non-compete"
- Workers leased cleaning equipment from employer
- Workers required to follow a cleaning checklist provided by employer
- Workers' pay was deducted 10% if they failed "to maintain the high standards employer upholds.
- Employer did not provide benefits or withhold taxes
- Court ruled employee

Alexander v. Avera St. Luke's Hosp.

- Service agreement stated he was an independent contractor
- Hospital had no right to control manner in which service was rendered
- Doctor set his own schedule , so long as he provided the services required by agreement
- Hospital provided no benefits
- Hospital did not withhold taxes
- Court rules independent contractor

Part 2: Wage and Hour Law

Overview

- Generally, employees are subject to wage and hour laws while independent contractors are not.

- However, there are several exceptions for exempt employees.
  - Executive Employees
  - Administrative Employees
  - Professional Employees
  - Highly Compensated Employees
  - Computer Employees
  - Outside Sales Employees

- FLSA and all states including Missouri and Illinois require payment of minimum wages and time and a half over 40 hours worked in a week
- Minimum wage
  - 29 U.S.C. §206
  - RSMo §290.502
- Overtime
  - 29 U.S.C. §207
  - RSMo §290.505

- Violation of Wage and Hour provisions can result in civil and criminal penalties
- Civil cases are on the uptick
  - 29 U.S.C. §216

Minimum Wage

- Federal minimum wage is $7.25
- Missouri minimum wage is $7.65
  - Expected to increase to $7.70 in January
- Illinois minimum wage is $8.25

- Recordkeeping of hours must be complete and accurate for 3 years
- No other standard

What hours are work?

- Not just shift – all required hours
- Not customary travel to and from home
- Include travel between job sites
- If employee is “allowed” to work, but not “required” – included
- On call at home – No
- On call at work – Yes
- Waiting to be engaged – No
- Engaged to wait - Yes

- CBAs cannot waive FLSA
- But nothing in FLSA relieves employers from CBA

Employees who are exempt:

1. Executives
2. Administrators
3. Professionals (Technical and Creative)
4. Computer Developers
5. Outside Sales
6. Highly Compensated

- Job titles are never determinative of exemption
  - Department of Labor

Executive Employees

- Effective December 1, 2016:
  - Compensated on salary basis of not less that $913 per week
  - Primary duty is management of the enterprise
  - Customarily and regularly directs the work of two or more other employees; and
  - Has the authority to hire or fire other employees
    - 29 USC §541.100
    - Management – 29 CFR §541.102

Administrative Employees

- Effective December 1, 2016:
  - Compensated on salary basis of not less that $913 per week
  - Primary duty is performance of office or non-manual work directly related to management or general business operations
  - Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
    - 29 CFR §541.200
    - Independent Judgment – 29 CFR §541.202

Professional Employees

- Effective December 1, 2016:
  - Compensated on salary basis of not less that $913 per week
  - Primary duty is the performance of work:
    - Requiring advanced knowledge in a field of science or learning; or
    - Requiring invention, imagination, originality or talent in an artistic or creative field
      - 29 CFR §541.300

Highly Compensated Employees

- Effective December 1, 2016:
  - An employee who receives a total annual compensation of at least $134,004, and
  - Customarily and regularly performs any one or more of the exempt duties or responsibilities of executive, administrative or professional employees described earlier – relaxed standard
    - 29 CFR §541.601

Computer Employees

- Effective December 1, 2016:
  - Compensated on salary basis of not less that $913 per week or an hourly basis of not less than $27.63
  - Primary duty consists of:
    - The application of systems analysis techniques and procedures,
    - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs,
    - The design documentation, testing, creation or modification of computer programs related to machine operating systems, or
    - A combination of the above listed duties
      - 29 CFR §541.400

Outside Sales Employees

- No changes coming December 1, 2016:
  - Any employee whose primary duty is:
    - Making sales, or
    - Obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer, and
  - Who is customarily and regularly engaged away from the employers place of business in performing such duty
    - Not promotion work if not responsible for sale
    - Must make the sale outside

29 CFR §541.500

Employee-Employer Disputes

"At-Will" Employment

- Missouri is an "at-will" employment State.
  - Very employer-friendly concept

- Absent an employment contract with the employee, "an employer may discharge any employee at any time, without cause or reason, or for any reason.*
  - "In such case, no action can be maintained for wrongful discharge where the employment was a hiring for an indeterminate period."

* (Reason = "Non-Protected" Reason,
e.g. not protected by Non-Discrimination Statutes)

THREE exceptions to the "At-Will" Employment Doctrine

1. *Where the employer and employee have a term contract for employment, there is no at-will employment. The terms of the contract govern discharge.*

2. *An employer cannot discharge an employee for a reason that would "contravene a public policy clearly stated in the constitution, a statute or a regulation"*

3. *An employer cannot discharge an employer for a statutorily protected reason.*

Employment Contracts

- At-Will employees cannot maintain claims for wrongful discharge.
- Typically, this takes the form of a term employment contract offered by the employer at the time of hiring
- Oral contracts can be considered "clear contracts" under Missouri law when elements are met.

Employment Contracts (cont'd)

- A lawsuit for "wrongful discharge" can be brought by an employee where a term employment contract exists.
- The benefits of entering into such contracts are the trade-off. In consideration of a guaranteed term of employment, employers can bind employees to a number of protections:
  - Non-Competition Agreements
  - Non-Disclosure & Confidentiality Agreements
  - Trade Secret & Client List Protection
  - Mandatory Arbitration Agreements
- Each of these types of protection should be critical to employers. That is why they are so hotly litigated.

Wrongful Discharge Claims

- Employees with term employment contracts have contractual protections.
  - To state a claim for wrongful discharge, it is a simple breach of contract action.
- If employee is hired for a specific term of time, they cannot be terminated before that term expires without it being "for cause."

What is “for cause?”

- This is nearly always in dispute.
- In general, discharge should be for grounds contemplated by the employment agreement. This can include:
  - Misconduct
  - Gross negligence
  - Dishonesty/theft/fraud
  - Insubordination
  - Excessive absence (taking into account FMLA)
  - Documented poor performance
  - Disciplinary reasons
  - Any other specific provision in contract – violation of trade secret protection, non-disclosure, non-competition provisions, failure to hit sales benchmarks

Avoiding Wrongful Discharge Claims

- It's impossible to simply avoid these claims.
- However, best practices to build and maintain the best defense:
  - *Document, document, document* – keep up-to-date employee files. If a dispute arises or there is an incident worthy of termination, paper your file when it happens.
  - Maintain access to all work email and written communications to and from the employee – especially those of fired employee using company email address.
  - Invest resources and time to craft the strongest, most comprehensive employment agreements with each specific employee.
    - Have experienced employment attorneys draft them.
    - Avoid "copy and paste" jobs
      - Be wary of LegalZoom and other "Legal" web sites.
    - Craft specific provisions specific to the employee's circumstances.
      - Confidentiality provisions
      - Trade secret protections
      - Non-solicitation and non-competition agreements

Non-Competition / Non-Solicitation / Non-Disclosure Agreements

Despite their limitations, these agreements are as important as ever.

Areas in need of protection:

- Non-disclosure of confidential information
- Non-disclosure or use of trade secrets
- Non-disclosure or use or customer contacts / lists
- Non-solicitation of customers or employees
- Prohibition of employment with competitors or clients
- Prohibition of competing within a time period after separation

Non-Competition / Non-Solicitation / Non-Disclosure Agreements (cont'd)

These are very frequently – and hotly – litigated. The obvious reason for this is that they each involve an employer's legitimate business interests and the employee's potential livelihood.

Disputes are always governed by two real competing principles: the parties' freedom to contract and enter these agreements and the employee's right to work and right to compete in a free marketplace.

Enforceability

TYPICAL SCENARIO:

- Employer and Employee enter into term employment contract. Employer has drafted the contract, which included confidentiality, non-solicitation and non-disclosure protections.
- During employment, Employer gives Employee access to trade secrets, access to contacts with customers and influence over other employees.
- Before term ends, Employee quits and starts his own competing company – or goes to work for one of your chief competitors or clients.
- Employer learns about Employee's intentions and calls their attorney
- Attorney takes immediate action to prevent Employee's breach, but in private, tells Employer not to get its hopes up.
  - Why?

Enforceability (cont'd)

Enforcing these provisions is never a sure bet. Courts will look to a number of factors, not all of which are necessarily taken into account at the time the contract is written.

Test to determine enforceability:

1) Does the agreement protect a legitimate business interest?
2) Is there sufficient consideration for the restrictions?
3) Are the time and territory restrictions reasonable?
4) Is the agreement necessary or is it ancillary to the employment relationship?
5) Does the agreement impose an undue burden on the employee?
6) Does the covenant injure the public or violate a public policy?

Enforceability (cont'd)

1) *Is the business interest legitimate?*
   - Trade secrets
   - Customer contacts
   - Customer relationships

2) *Is there consideration?*
   - If offered at time of employment, consideration should be sufficient.
   - If offered *during* employment, Courts have recently doubted whether continued employment is enough.

3) Is the Agreement reasonably tailored in time and distance?

- Time = how long does the restriction stay in place
- Distance = how far does reach
- No hard and fast rule for what is enough in any given situation

4) Is the agreement necessary or is it ancillary to the employment relationship?

- Must be reasonably related to employee and his relationship with employer

5) *Does the agreement impose an undue burden on the employee?*

- So long as reasonably tailored in time and distance, this is satisfied
- Inconvenience or temporary financial hardship to employee is outweighed by employers' interests

6) *Does the covenant injure the public or violate a public policy?*

- Exceptions where the employee is in a specialty – like skilled surgeon. But this does not extend to professional services like accountants.

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Rule of Thumb: Two years and 50 mile radius is typically enforced.

Mandatory Arbitration Provisions

- Advantages
  - Lower transactional costs
    - Arbitration is a stream-lined process
    - Disputes are resolved more quickly
    - Less formal discovery requirements = lowered costs to work up the case.
  - Generally (but not always), arbitrators are former corporate lawyers or executives and have a more employer-friendly disposition than judges.

- Disadvantages
  - Because of less rigid nature of arbitration, employees have incentive to bring more frivolous claims than they would otherwise bring in formal litigation
  - In nearly all cases, the arbitrator's decision is un-appealable
  - Arbitrator's decisions are typically informal or incomplete.
    - And they are not the law.
  - Arbitration is not binding on the EEOC. We'll get to this later, but the EEOC and the MCHR are not bound by decisions

Mandatory Arbitration Provisions (cont'd)

- Balancing those factors, mandatory arbitration provisions are advisable for employers - but there are important consideration to be aware of.

- Don't count on them to be enforced as a matter of course.
  - While both state and federal courts recognize a policy in favor of enforcing arbitration, they are still viewed with a skeptical eye in the employment relationship context
  - Courts view employers in a superior bargaining position than employees.
  - The Judge being asked to enforce the arbitration is the biggest – and most unpredictable - factor

Mandatory Arbitration Provisions (cont'd)

To best ensure an arbitration provision will be enforced, there are several good practices to keep in mind:

(1) the provision should be bolded and set apart from other provisions in the contract:

- "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."

(2) It should clearly lay out what is subject to arbitration:

- What types of claims
- Who is covered
- What remedies are available

(3) Clearly lay out the process

Mandatory Arbitration Provisions (cont'd)

- The arbitration provision has be to bargained for.
  - it should be included in the employment agreement at the time presented and signed by the employee.
  - It cannot be retroactively applied to an employee unless there is some separate consideration offered at the time.
- Example: *Morrow v. Hallmark Cards*
  - Employers must ensure that signing arbitration agreements is a condition at the time of hiring. Good practice to have employee initial next to the exact provision saying this.
- If you have employment contracts with current employees which do not have an arbitration agreement, to impose it now, you need some additional consideration.

2. The Public Policy Exception

This exception applies in the following circumstances:

(1) Termination because employee refuses to commit crime or act contrary to public policy

(2) Termination because employee reports the wrongdoing or illegal acts of the employer

(3) Termination because employee "engaged in actions normally encouraged by public policy"

(4) Termination because employee files a workers' compensation claim.

If any of these exist, the "at-will" employment doctrine does not govern and an employee can sue for wrongful discharge.

Public Policy Claims

- While the exceptions appear ambiguous and employee-friendly, it is actually difficult for an employee to establish:

  (1) The employee must identify a "sufficiently definite" statute or rule that creates a "clearly mandated" public policy

  (2) The employee must specify the exact public policy he is relying upon

  (3) The employee must demonstrate that the public policy is "directed related" to employee's termination.

Avoiding public policy wrongful discharge claims

- Maintain up-to-date employee files
- Establish and continually update proper procedures for workers' compensation claims
- Establish protocol for employees to lodge complaints, not only to their superiors, but about their superiors
  - Example: Employee Handbook provision providing contact for whom to report to in certain situations. However, provide an additional provision for whom to report to when that person is the person being complained of.
- Be proactive – it's easier (and cheaper) to utilize attorneys and HR consultants to avoid these situations than to defend against a lawsuit.

3. Anti-Discrimination & Retaliation Protections

Employees cannot be terminated for certain "protected reasons."

- Title VII of the Civil Rights Act of 1964
- Pregnancy Discrimination Act
- Age Discrimination in Employment Act of 1967 (ADA)
- Americans with Disabilities Act of 1990 (ADA)
- Missouri Human Rights Act
  - Discrimination (race, color, origin, disability, sex, pregnancy, age)
  - Retaliation

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Title VII of Civil Rights Act of 1964

Prohibits employers from discriminating against employees because of employee's race, color, religion, sex or national origin.

Also prohibits discrimination against someone who has *opposed any practice made unlawful* by Title VII – a/k/a anti-retaliation protections

"Unlawful employment practices" prohibited include: discrimination in hiring, compensation, terms, conditions or privileges of employment based upon these factors.

- Interpreted broadly to cover all "adverse employment actions" – employee has to demonstrate that he/she suffered a material difference in his or her terms or conditions of employment.

Covered employers: more than 15 employees.

- Can also include managers, supervisors and executives

Pregnancy Discrimination Act

Expands on Title VII on issue of gender discrimination.

The term "because of sex" or "on the basis of sex" includes pregnancy, childbirth and "other related medical conditions."

Pregnant employees can have valid claims if an employer fails to provide an accommodation to her while accommodating others.

Age Discrimination in Employment Act

Prohibits discrimination based on age.

Employers can still set age limits as condition of employment so long as that limit is a "bona fide occupational qualification."

It is not unlawful to take actions if they are based on reasonable factors other than age.

To sustain an age discrimination claim, employee must prove that age was the "but for" cause of the adverse employment action.

Covered employers – more than 20 employees.

- Can also include supervisors, managers and executives

Americans with Disabilities Act

Prohibits discrimination against a qualified individual with a disability.

"Qualified Individual": employee with a physical or mental impairment that substantially limits a major life activity

Includes decisions made in job application procedures, hiring, advancement, discharge, compensation, job training.

Also prohibits such actions when they are based on an employee's relationship or known association with a person with an individual.

Covered employers – more than 15 employees.

- Can also include supervisors, managers and executives

Missouri Human Rights Act

- It is unlawful for employers to make "employment decisions" or otherwise discriminate against a person because of:
  - Race
  - Color
  - Religion
  - National origin
  - Sex
  - Ancestry
  - Age
  - Disability

Missouri Human Rights Act

- "Employment decisions" go beyond just termination.
  - Encompasses anything "with respect to the employee's compensation, terms, conditions or privileges of employment."

- It also prohibits employers from limiting, segregating or classifying employees based on race, color, religion, national origin, sex, ancestry, age or disability. (NOTE: Missouri law does not offer protection based on sexual orientation.)

Missouri Human Rights Act

- "Covered employers" under the MHRA = any employer with six or more employees.

- Both Missouri and Federal Courts have recently held that in addition to the corporate employer, managers, supervisors and executives can all be personally liable under the Act as well.
  - It covers "any person acting directly in the interest of the employer" and there fore even "supervisory employees" like managers can be subject to the MHRA

Missouri Human Rights Act

- "Covered employees" under the MHRA = not defined in the MHRA.
- However, Courts have interpreted broadly as "one employed by another, usually in a position below the executive level and usually for wages," as well as "any worker who is under wages or salary to an employer and who is not excluded by agreement" to actually be an employee.
- This does not mean that executive-level employees are excepted out completely. They still can theoretically maintain claims under the MHRA.

Retaliation

In addition to discrimination, the MHRA also prohibits taking adverse employment actions against employees for:

(1) Opposing any practices made unlawful by the MHRA
(2) Refusing to perform illegal acts under the MHRA
(3) Reporting violation of the MHRA to superiors
(4) Filing a complaint with the Missouri Commission on Human Rights

Employee-Friendly Burdens

- Burden of Proof: what evidence/proof is necessary is necessary for an employee to bring the case to trial and ultimately prevail.
- Under all of these statutes, it is employee-friendly - none more so than the MHRA:

MHRA Claims in State Courts	MHRA & Federal Claims in Federal Court
Employee must prove that the protected characteristic (age, sex, etc) was "a contributing factor" to the employment action. That is it.	Employee must provide evidence (direct or circumstantial) that discrimination occurred
	Burden shifts to Employer to provide a legitimate, nondiscriminatory reason for the action
	Burden then shifts back to Employee to prove that those reasons were not true, but rather pretext to justify their actual discrimination

Damages available

- Back pay – pay lost due to the discrimination
- Front pay – additional damage Court may award
- Pain & Suffering Damages – emotional distress
- Medical damages – if applicable
- Attorneys' Fees – potentially the largest exposure
- Punitive damages – where employee can show reckless indifference to their rights
- Civil penalties –where MCHR takes action

Practical Considerations Under the MHRA

- All actions have to go through the Missouri Commission on Human Rights before a lawsuit can be filed
  - Employee files a claim
  - MCHR performs an "investigation"
  - MCHR will be request or require a mediation among the parties
  - Has to be filed within 180 days of the complained-of action
  - Often dually filed with federal claims with the EEOC
  - MCHR can take up own investigation, or issue a "right to sue" letter
- Rarely resolved at this stage
  - Simply a necessary step for Plaintiff to file suit, where the real $$ and exposure is

Practical Considerations Under the MHRA

- These claims are often covered, at least in part, by general liability insurance policies
  - "Employee practices" coverage
  - When notified of the claim, bring it to attention of your provider ASAP
    - Make a demand for coverage ASAP.
      - If done early enough, can often get your own counsel to be retained – and not be stuck with an unfamiliar insurance defense counsel, who may not have your best interests in mind.
    - Defending a discrimination/retaliation case is expensive
      - Heavy on discovery
      - Heavy on lawyers drafting legal briefs
      - Rarely disposed of without settlement or trial
  - These claims should always be treated like a case like this is going to trial, so it is important to be proactive with getting coverage procure immediately. Reduces expenses and any potential denial of coverage

Practical Considerations Under the MHRA

- For all employment actions, maintain personnel files. If it is adverse to employee, document the non-discriminatory reason
  - If there is even a question (problem employees?), consult with an attorney.
  - This can be good evidence later on that you were acting prudently and in a non-discriminatory way.
  - Maintain all written communications with employee, before and after termination.
- Monitor social media postings from employees and others
- Beware any initial attempt to resolve "without attorneys"
  - Plaintiffs are often coached by their attorneys and these overtures can be wolves in sheep's clothing
- Where you employ the employee is critical.
  - Venues like St. Louis City and Jackson County, Missouri (Kansas City) are very dangerous with very employee-friendly juries
  - Venues like St. Louis County and St. Charles County are viewed as better, but can be just as dangerous with the wrong facts.

Questions?