LIVINGHR | Q3 2023

The Inside Scoop

By Alexia Benner (she/her)

Coming in hot!

(Get it? Cuz it's summer?!)

Fair warning, I may have been waxing nostalgic writing this, so a lot of 80s and 90s references below. If you're new here, every quarter I take some hot compliance topics (never thought you'd hear that in one sentence), and break them down in a somewhat entertaining, and hopefully much more understandable, way.

Oh, and hey, if you see something in blue, it means it's a clickable link that takes you to the source material.

Religious Accommodations

You may have heard, but the Supreme Court was busy right before their summer break (kind of like how we all magically get a whole bunch of work done right before we go on vacation. No? Just me?) **One of their decisions** is in the spotlight, and that's the one around religious accommodations (R.E.M. reference, anyone?). Before this decision, businesses could decline a religious accommodation if it would be more than a minor (de minimis, if you're being fancy) cost or burden to the organization. The new decision now says companies must show "substantial increased costs" (their words) to decline an accommodation. Things like overburdening other employees and impacting morale could have been considered an undue hardship (something super hard or expensive to an unreasonable level) under the previous standard. With this new decision? Not so much.

So, what now?

If you're thinking about declining a request for a religious accommodation, you call us (or your attorney) first. Counsel is critical here, especially in these early days when we don't know what "a substantial increased cost" actually means. We have a great attorney if you need a referral.

Non-Competes

Ain't no stoppin' us now, we're on the move....to a new job. But wait, what about that non-compete you signed? Our friends at the **NLRB (National Labor Relations Board) have some thoughts about that.** I'll spare you the read, but basically, the NLRB General Counsel's opinion is that – except in limited circumstances - making employees sign non-competes in employment and severance agreements violates the NLRA (National Labor Relations Act) because it chills employees from exercising their rights. And we're not talking about the good kind of chill, this kind of chill is the bad kind that freezes people out of doing legal things. The dude does not abide. There are some exceptions noted (things like managerial or ownership interests, etc.), but not as a general practice for the whole group. It's not a law yet, but only time will tell what happens here, because the NLRB isn't the only one who has beef with these kinds of agreements. The FTC (Federal Trade Commission) and the DOJ's (Department of Justice) Antitrust Division have also said some similar things about the impacts of non-compete agreements, and a bunch of states have laws that don't allow or restrict non-competes.

So, what now?

If you ask all employees to sign a non-compete as part of their standard offer letter, maybe reconsider that (see above: the NLRB's position and various state restrictions). And you get an attorney involved in all separation agreements. Every time. We know one of the best in the biz, we can refer you to her.

Unions

For all the Springsteen fans out there, we're not just talking about factories here. Unions (and strikes) have been in the news everywhere, from S'bux to UPS to the glitz and glamor of Hollywood. So, what's happening here? Unions typically gain traction when people (employees) don't feel that they're being heard when it comes to things like pay, benefits, and working conditions.

So, what now?

Well, for starters, it probably means that whatever movie or TV show you were looking forward to seeing will get released late. But let's not dwell on the negatives – on the positive side, you can almost always prevent unions from taking hold by...wait for it... listening to the people and making traction on the things they want (within reason). Our humanlyX product is an amazing way to learn exactly what the people want, so if it's been a while since you asked your people for their thoughts, this may be the time. Call us on the line, any, anytime for some help.

Contractors/1099s

Not everyone makes a living working 9-5 – some people freelance, freestyle, and do their own thing. But way back in October, the DOL was like, hey, lots of people are misclassifying ICs (independent contractors, sometimes called 1099s because of the tax form they get at year-end). We have an idea for a **new rule**! They collected a bunch of opinions from people and are reviewing those now, so TBD, but we're keeping our eyes on it over here.

To break it down, right now, the test is generally focused on how much control people have over their duties and opportunities to make that cash money. The new (proposed) rule makes it a 6-factor test, all weighted equally:

1. The nature and degree of the person's control over the work (do they really have control, or does the client dictate the schedule, etc?)
2. The person's opportunity for profit or loss (are they in control of that cash money, or are they getting a regular paycheck?)
3. Investments by the person and the employer (who is supplying all the stuff?)
4. The degree of permanence of the working relationship (we keeping it casual, or did we put a label on it?)
5. The extent to which the work performed is an integral part of the employer's business (will we survive without you, or are you essential?)
6. The degree of skill and initiative exhibited by the person (can anyone do this, or do you have fancy skills?)

So, what now?

If you have 1099s, you should call your attorney (or ours) to make sure you're not accidentally misclassifying your people. Believe you me, it's a worthwhile exercise because **those are NOT penalties you want to pay if the DOL says** you've been doing it wrong.

Now go get a nice, cold lemonade.

I won’t tell if you spike it (just maybe don’t do it at work, k?)

Sources

Misclassification of Employees as Independent Contractors. Department of Labor. (n.d.-a). **https://www.dol.gov/agencies/whd/flsa/misclassification**

Notice of Proposed Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235-AA43. Department of Labor. (n.d.-b). **https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking**

Office of Public Affairs. (2023, May 30). NLRB General Counsel Issues Memo on non-competes violating the National Labor Relations Act. National Labor Relations Board. **https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national**

Supreme Court of the United States. (n.d.). Groff v. DeJoy . **https://www.supremecourt.gov/opinions/22pdf/22-174_k536.pdf**