



Meet Compliance Challenges in 2018 and Beyond

In the ever-changing world of people management, non-profit organizations face many of the same workforce performance and legal compliance challenges that are faced by the for-profit sector, but often with less resources. Additionally, the inherent nature and structure of non-profits often presents a variety of unique HR obstacles that, if not managed effectively, may threaten to interfere with the fulfillment of the organization's mission.

Over the last few years, there has been a shift in the HR function toward a less administrative and more strategic role in both the for-profit and non-profit sectors. In the non-profit sector, strategic planning within the HR function can directly increase the organization's ability to achieve its mission by freeing up time and funds. By the same token, a failure to appreciate and address HR-related risk can quickly undermine an organization's mission. HR compliance, which includes benefits and employment law compliance must be a key part of any non-profit organization's strategic plan. Below are some high risk areas for non-profits and some recommended steps any organization can take to address compliance in the New Year and beyond.

Volunteers and Interns

The ability to use volunteers to perform certain functions is a unique advantage to non-profits that is not available in the for-profit sector. However, it can also create unique risk. The federal Fair Labor Standards Act ("FLSA") requires all employers, with few exceptions, to compensate each employee for all hours worked. The FLSA and state laws also dictate the minimum pay per hour and overtime pay of 1½ hours for every hour worked over 40 in a workweek unless the employee is exempt.

Volunteers who donate hours of service to a non-profit for civic, religious or humanitarian reasons are not employees under the FLSA or Massachusetts law so long as there is no promise or receipt of compensation for the services rendered. Similarly, non-profit employers may also use unpaid interns. However, there is risk hidden within this benefit. The Department of Labor has taken the position that volunteers and interns cannot displace paid employees. In other words, a non-profit cannot allow a volunteer or intern to perform a job that paid employees also perform. Additionally, if the volunteer or intern is paid at all, he or she may then be considered an employee and be subject to the minimum wage and overtime requirements of the FLSA.

An additional complication may arise if your paid employees would also like to volunteer for the organization. Employees who volunteer for your organization cannot provide services that are "the same as, similar, or related to" their regular job duties. Additionally, a non-profit organization cannot request or direct employees to perform volunteer work during the

employee's normal working hours, even if the requested duties are not the same as or similar to the employee's regular job duties.

Independent Contractors

Without question, there has been a dramatic shift in the workforce in recent years. The workplace has evolved from the traditional model of each employee working from 9 to 5 for one employer in a single building. In today's workplace, telecommuting, flex time, job sharing, and the "gig" economy have become commonplace and certainly provide non-profits advantages they did not previously enjoy. However, with the growing number of workers who participate in the freelance economy as independent contractors, there exists a growing risk of misclassifying those workers as independent contractors, when in fact they meet the legal definition of an employee.

Massachusetts has adopted a strict independent contractor law that makes it virtually impossible to hire independent contractors to provide services within the scope of an organization's usual course of business. Unfortunately, neither the use of a 1099 form, or the existence of a written agreement establishing an independent contractor relationship, is determinative. The Attorney General and courts will look beyond any such agreement in order to examine the facts that characterize the parties' actual relationship and make their determination accordingly. In Massachusetts, courts will use a three-part test to determine whether a contractor is in fact an employee. The first prong is freedom from control. This means the contractor has a set project to complete and how he or she completes it is free from the organization's control. The second prong is that the service being contracted for is outside the employer's usual course of business. This means that employees and independent contractors should not be performing the same job. The final prong is that the contractor should be engaged in an independently established trade or business that is the same as the service being performed. Organizations looking to use contractors should look at whether the contractor is working with other companies, and has taken steps to establish a business presence.

Solutions

While there is no magic solution that will protect any organization from lawsuits or a state or federal audit, there are tools that allow employers to drastically lower their risk. By focusing on employment law compliance as a key part of HR's strategic plan, organizations can proactively identify and manage risks before they become costly distractions. Below are steps any non-profit organization can take to substantially reduce their risk:

- 1. HR Audit.** While an HR audit alone will not guarantee that an organization's workplace will be free from all legal challenges, it will serve as an important guide in implementing best practices and complying with employment law regulations. HR audits are designed to help organizations focus their attention on their HR management practices, policies, procedures, processes, and outcomes by providing them with a structured series of questions about key compliance, risk management, internal auditing, and HR management issues. By reviewing internal processes and policies, the organization can identify potential and actual problem areas, assess the effectiveness of HR management activities and weaknesses in HR internal control processes, and assess human capital strategic and compliance related risks. When administered by an outside law firm, the organization will not only receive recommendations regarding addressing compliance problems, but the findings and recommendations will be protected by the attorney/client privilege.

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- 2. Handbooks.** A well written handbook provides employees with an overview of your organization's mission as well as expectations of employees. Equally importantly, it helps ensure that your organization's policies are clearly and consistently communicated and enforced. Finally, it helps achieve compliance with state and federal laws by communicating rights and obligations regarding leaves and complaint processes.
- 3. Partnerships.** While outsourcing is a popular trend, a better step in strategic planning is to empower your existing staff with strategic partnerships that educate them and support them to better understand their compliance obligations.