

Employment Pitfalls to Avoid in 2016

Branson Tri-Lakes Human Resources Association
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Overview

- Is your company a **joint employer**?
- Are you **properly classifying your employees**?
- Are you prepared to defend a **retaliation** lawsuit?
- Are you handling **sexual orientation issues** appropriately?
- Are you **paying employees equally**?

Joint Employer Findings



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Who Is A Joint Employer?

1. There is a single “one-size-fits-all” definition of “employee” for employment purposes?

True

False

Who Is A Joint Employer?

2. An employee who holds a single job can have two different employers?

True

False

Definition of Joint Employer

- When an employee is employed by two (or more) employers such that the employers are both responsible for compliance with statutes.

Expanded Definition of Joint Employer: NLRB

- Employer = Right to Control
 - Browning-Ferris
 - Two entities are both employers of a single workforce if:
 - Both are common law employers
 - Both share or codetermine those matters governing the essential terms and conditions of employment
 - Right to control is sufficient; actual control is not required

Expanded Definition of Joint Employer: NLRB

- McDonald's USA, LLC, 632 NLRB No. 168
 - Alleging joint employer status of franchisor based on its control over labor relations policies on franchisees

Expanded Definition of Joint Employer: EEOC

- EEOC General Counsel filed *amicus* brief supporting expansion of joint employer concept in NLRB's Browning-Ferris case
 - “The EEOC’s joint employer definition is intentionally flexible . . . ‘workplace relationships are becoming more varied as domestic industries continue to seek flexibility and . . . the increasing contracting out of work is blurring . . . distinctions between employer and client contractor.’ . . . A flexible definition of joint employers addresses this changing reality.”
- Likely to impact Title VII, ADA, and ADEA claims

Expanded Definition of Joint Employer: Wage and Hour

- Employer = “Suffer or Permit” standard
- Administrative Interpretation 2016-1
 - Horizontal joint employer
 - Analyze relationship between two companies
 - Vertical joint employer
 - Analyze relationship between individual and potential joint employer

Expanded Definition of Joint Employer: Wage and Hour

- DOL WHD already uses the broader and more flexible economic realities test rather than the narrower common law right of control test used in the past by NLRB
- DOL WHD will use expansive Browning-Ferris decision under NLRA as basis for even a broader economic realities approach under FLSA

Joint Employer Consequences

- If found to be a joint employer, your company could be exposed to liability under:
 - FMLA
 - Title VII
 - FLSA
 - NLRA

How to Avoid Joint Employer Issues

- Evaluate current relationships with other employers
 - Temp agencies
 - Parent/subsidiary companies
 - Any company with whom you share employees

Changes to Employee Classifications



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Are Your Employees Properly Classified?

- Independent Contractor Developments
- Proposed Regulations Regarding Exemptions

Independent Contractor Classifications

- **Administrative Interpretation No. 2015-1 (July 15, 2015)**
 - “Misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States... .”
 - “When employers improperly classify employees as independent contractors, the employees may not receive important protections such as the minimum wage, overtime compensation, unemployment insurance, and workers’ compensation.”
 - “In light of the broad statutory definition of employ, a worker who is economically dependent on an employer is suffered or permitted to work by the employer.”
- **Bottom line: A presumption of employment!**

Independent Contractor Classifications

- Economic Realities Factors Test:
 - Work is integral part of employer's business
 - Worker has opportunity for profit or loss
 - Nature of worker's investment (tools and equipment probably not enough)
 - Worker's use of business skills and initiative
 - Permanence or indefiniteness of relationship
 - Nature and degree of employer's control

Exempt Status: 2016 Proposed Changes

- The DOL proposed:
 - 1) increasing the salary level to expand the class of nonexempt employees;
 - 2) implementing automatic annual updates to the salary level;
 - 3) counting non-discretionary bonuses toward the salary level; and
 - 4) possible yet-undefined changes to the duties test.

Exempt Status: 2016 Proposed Changes

- Salary Level Increase
 - Projected to be \$50,440 in the first quarter of 2016.
 - *Nearly doubles* the current salary level of \$23,600.

Exempt Status: 2016 Proposed Changes

- Automatic Increases to the Salary Limit
 - Most importantly and most concerning – the DOL has now proposed “automatically updating the salary levels based on changes in the economy to prevent the levels from becoming outdated.”
 - Proposes increasing the salary level annually by indexing it to either the Consumer Price Index (“CPI”) or to the 40th percentile of full-time salaried employees’ earnings.
 - Will “ensure the test’s ability to serve as an effective dividing line between exempt and nonexempt employees.”

Exempt Status: 2016 Proposed Changes

- The DOL also proposes increasing the salary level for highly compensated employees (“HCE”) by tying the salary level to the 90th percentile of earnings for full-time salaried workers.
 - Would increase the limit for HCE in the first year to \$122,148.

Exempt Status: 2016 Proposed Changes

- Duties Test:
 - The DOL announced only that it is considering *whether* to make certain kinds of changes rather than proposing a concrete amendment.
 - The DOL requested comments on California's white-collar duties test, which requires that 50 percent of an employee's time be spent exclusively on work that is the employee's primary, exempt duty.

Exempt Status: Timing of Changes

- The final rule would likely take effect near the end of President Obama's second term.
- The DOL will be less inhibited by political pressure and more willing to effect a dramatic change to overtime regulations.
- A dramatic and unprecedented overhaul of the duties test could be President Obama's "midnight regulations" – regulations published by an outgoing President before leaving office.

Misclassification Consequences

- DOL Audit
- Financial Impact
 - Overtime
 - Liquidated damages
- Lawsuits/Class Actions

How to Avoid Classification Issues

- Train supervisors/managers on:
 - The requirements to classify an employee as exempt:
 - Executive
 - Administrative
 - Computer
 - The consequences for misclassification

How to Avoid Classification Issues

- Conduct a wage and hour analysis under attorney-client privilege:
 - Evaluate independent contractor relationships
 - Evaluate current exempt classifications
- Develop a plan for reclassification if necessary

Focus on Retaliation



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Is Retaliation A Big Deal?

- Retaliation claims are the most popular claim that we see from plaintiffs.
- Retaliation is a focus for the EEOC in 2016.

Is Retaliation A Big Deal?

- EEOC's January 2016 proposed guidance:
 - Expands the definition of “participation” activity
 - Lowers the bar for harassment complaints
 - Rejects the “manager rule”
 - Promotes agency cooperation

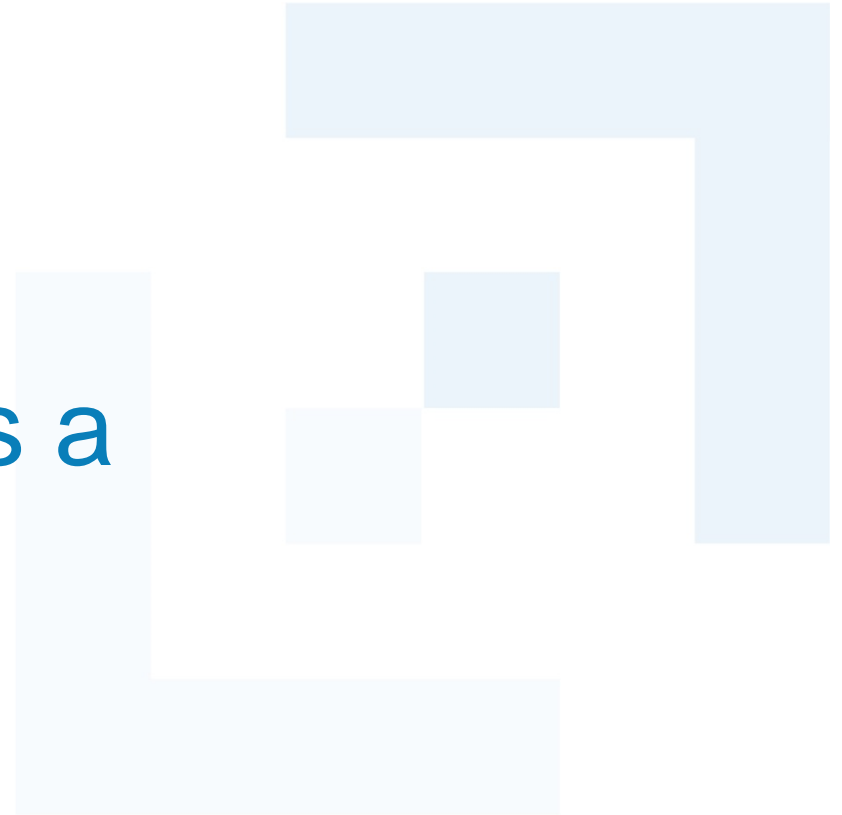
Retaliation Consequences

- Increased lawsuits
 - Turning a meritless discrimination claim into a strong retaliation claim
 - Wrongful termination in violation of public policy claims

How to Avoid Retaliation Issues

- Train your supervisors!
- Implement a strong retaliation policy.
- Implement an open door policy.
- Conduct thorough and timely investigations.
- Follow up with employees.

Sexual Orientation as a Protected Category



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Do We Need to Be Concerned About Sexual Orientation Issues?

- Sexual orientation is not yet listed specifically as a protected category under Title VII.
- Some courts have held that discrimination based on “sexual orientation” is prohibited because it is sex discrimination.

Do We Need to Be Concerned About Sexual Orientation Issues?

- On March 1, 2016, the EEOC filed two suits alleging that “sexual orientation” falls within the protected category of “sex”.

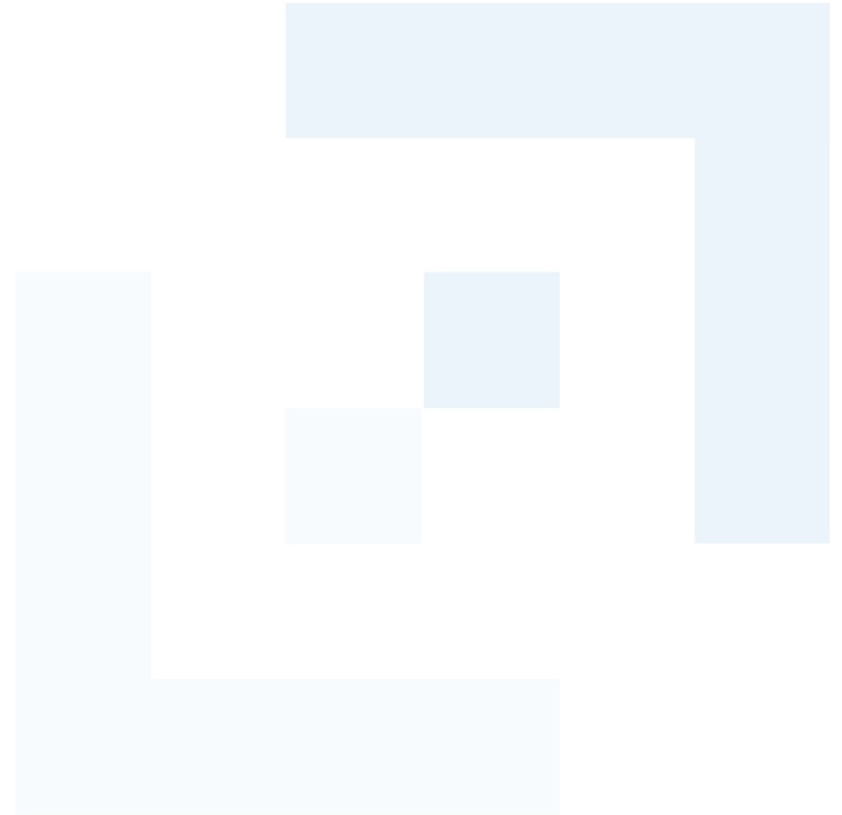
Sexual Orientation Discrimination Consequences

- Exposure to increased Charges of Discrimination
- Exposure to more Title VII claims
- Exposure to additional retaliation claims
- Confusion/conflict with existing policies

How to Avoid Sexual Orientation Discrimination Issues

- Update your policies.
- Train your supervisors on how to handle sexual orientation (and transgender) issues.
- Reinforce prohibition on retaliation.

Pay Gaps



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Do We Need to Be Concerned About Pay Gap Issues?

- Federal agencies are focused on addressing pay gap issues:
 - 2010 Task Force on Equal Pay
 - OFCCP requires compensation data
 - EEOC has proposed changes to its EEO-1 Report regarding requiring pay data

Do We Need to Be Concerned About Pay Gap Issues?

- Who has to provide EEO pay data:
 - Employers with 100 or more employees
 - Government contractors with 50 or more employees and \$50,000 or more contracts

Do We Need to Be Concerned About Pay Gap Issues?

- What to report:
 - The applicable EEO-1 category (10 different categories)
 - The applicable pay band (12 pay bands)
 - Actual hours worked (but not for exempt employees)

Do We Need to Be Concerned About Pay Gap Issues?

- What counts as earnings:
 - Hourly wages/base pay
 - Bonuses
 - Commissions
 - Tips
 - Taxable fringe benefits

Do We Need to Be Concerned About Pay Gap Issues?

- If we are not required to submit EEO-1 pay data, do we need to be concerned about pay gap issues?

YES!!!

Pay Gap Consequences

- Increased legal exposure:
 - Equal Pay Act
 - No Charge required
 - Title VII
- EEOC attention

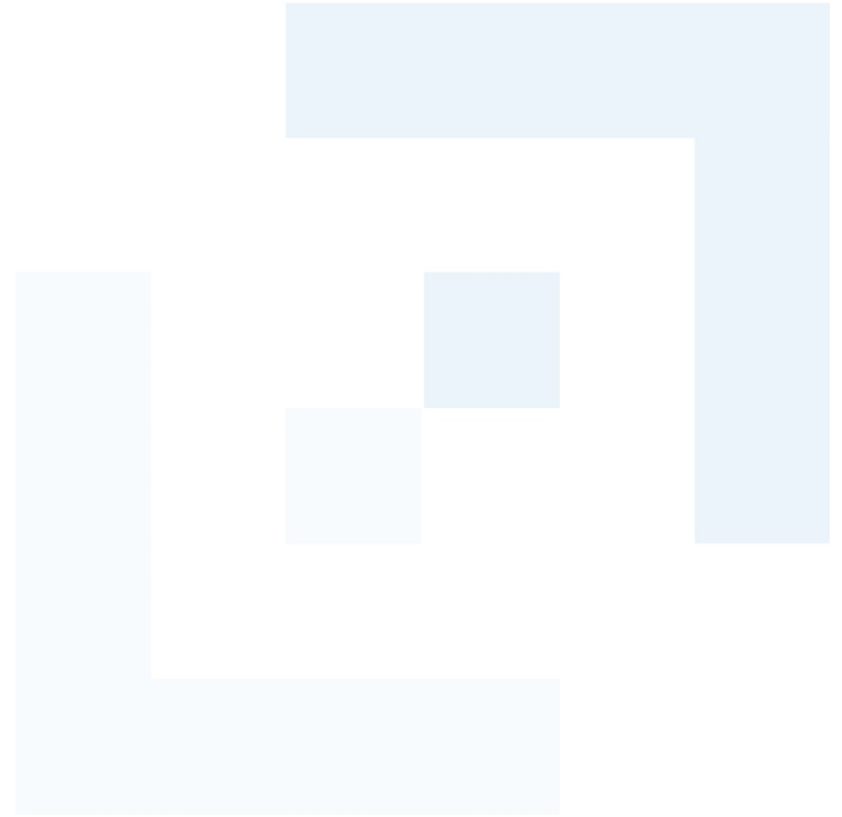
How to Avoid Pay Gap Issues

- Conduct a self-evaluation of pay data under attorney-client privilege
- Implement system updates to capture the required data

Evaluating Exposure to Pitfalls

- Are you potentially liable as a joint employer?
- Are you at risk for damages due to improperly classified employees?
- Have you taken the proper steps to limit exposure to retaliation claims?
- Do your managers know how to handle sexual orientation issues to limit exposure?
- Are your pay practices discriminatory?

Questions?



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Upcoming Events:

- Joplin Labor and Employment Seminar
June 8, 2016
- Springfield Labor and Employment Seminar
June 9, 2016



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Thank you!



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