



Practice Makes (Almost) Perfect: Leveraging Human Resources Best Practices to Manage Risk*

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HR Best Practices from 10,000 Feet

- Determine your legal and regulatory space
- Understand your workforce
- Create the “right environment”
- Remain vigilant, flexible, and responsive



Step One: Determining Your Legal and Regulatory Space

United States Department of Labor and other federal agencies administer and enforce more than 180 federal laws governing the employment relationship!

Fair Labor Standards Act

Title VII of the
Civil Rights Act

Occupational Safety
Laws (OSHA)

Americans With Disabilities Act

Employee Retirement
Income Security Act
(ERISA)

Internal Revenue Code

The Family and
Medical Leave Act

Source:

<https://www.dol.gov/general/aboutdol/majorlaws>



Determining Your Legal and Regulatory Space

Individual state agencies, such as Indiana Civil Rights Commission and other state government entities, also administer and enforce dozens of laws governing the employment relationship.

*State Specific Wage/Hour
Laws*

*Enhanced/Parallel
Civil Rights
Protections (ICRC)*

*State-driven
Occupational Safety
Laws (I-OSHA)*

State Tax Code

Indiana Right to Work

Unemployment
Compensation

*Worker's
Compensation*

Source: <http://www.in.gov/dol/>

Determining Your Legal and Regulatory Space: Additional Sources of Authority for Healthcare Employers

- Privacy-related Laws (HIPAA, HITECH, state-based laws)
- Professional Licensing/Certification/Accreditation
- Record-keeping Requirements
- Federal/State Program Reimbursement
- Federal/State False Claims Act or Other Whistleblower Protections



Determining Your Legal and Regulatory Space Best Practice = Ask Questions Early and Often

- Public or private?
- Government funding through grants or contracts?
- In what state(s) are you located?
- How many employees do you have (more about this later), and where are they located? Are there related entities?
- If you are in a highly regulated industry (such as healthcare!), which industry-specific laws and regulations apply?

Determining Your Legal and Regulatory Space: Assessing Risk

- Ind. Code 22-9 (Indiana Civil Rights Law):
 - 6 or more employees
 - Prohibits discrimination based on race, religion, color, sex, disability, national origin, or ancestry
 - Also prohibits discrimination by all employers (1+ employees) against employees aged 40 to 75
 - no private cause of action; grants investigative and enforcement rights to Indiana Civil Rights Commission
- Ind. Code 22-5-7:
 - All employers
 - Prohibits termination of an employee for (1) the employee's filing of a protective order; or (2) actions of individual against whom employee filed protective order.
- Multiple local ordinances which prohibit discrimination on basis of sexual orientation and/Or gender identity.

Determining Your Legal and Regulatory Space: Assessing Risk

- Title VII of Civil Rights Act of 1964, as amended (including by the Pregnancy Discrimination Act of 1978, Civil Rights Act of 1991, and the Lilly Ledbetter Fair Pay Act of 2009):
 - 15 or more employees
 - Prohibits discrimination (including retaliation/harassment) based on race, religion, color, sex, and national origin
 - Confers private cause of action (damages, punitive damages, attorney's fees); also grants investigative and enforcement rights (including injunctive relief) to EEOC
- Americans With Disabilities Act of 1990, as amended:
 - 15 or more employees
 - Prohibits discrimination (including retaliation/harassment) and requires reasonable accommodation for qualified individuals with a disability
 - Confers private cause of action (damages, punitive damages, attorney's fees); also grants investigative and enforcement rights (including injunctive relief) to EEOC

Determining Your Legal and Regulatory Space: Assessing Risk

- Age Discrimination in Employment Act of 1967, as amended
 - 20 or more employees
 - Prohibits age-based discrimination against employees ages 40 or older (note: does not prohibit discrimination against employees younger than 40)
 - Confers private cause of action (damages, punitive damages, attorney's fees); also grants investigative and enforcement rights (including injunctive relief) to EEOC

Step Two: Understanding Your Workforce



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- Independent contractor or employee?
- Exempt or non-exempt (note: very important topic currently)?
- Attributes and protected status?
- Roles and responsibilities (including in chain of command)?
- Professional obligations (outside of employment relationship)?
- Role as risk manager and mission-critical team member?

Understanding Your Workforce: Employee or Independent Contractor?

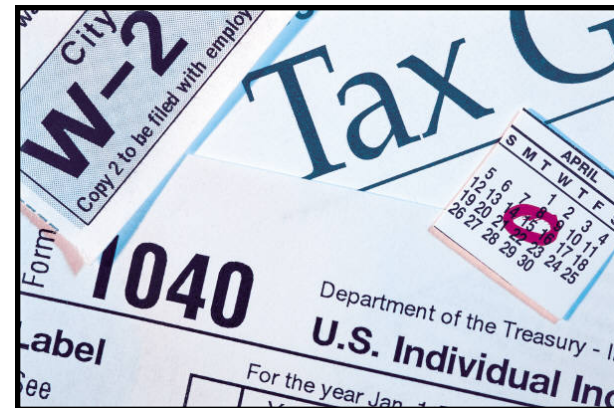


- Prior to 1987 = Common law (i.e. court-based) factors, but no comprehensive guidance document
- 1987 = IRS issues official guidance¹ listing 20 factors influencing worker classification based upon common law factors
- IRS subsequently identifies three broad categories of evidence which must be considered in determining whether a worker is an employee or independent contractor
- Currently, the IRS methodology is most widely cited and referred to, though the methodology varies by jurisdiction. Stringent and comprehensive.

¹ Rev. Rul. 87-41, 1987-1 C.B. 296

Understanding Your Workforce: Four Types of Workers

1. **Common law employee** = Worker who meets common law test for employee
2. **Independent contractor** = Worker who does not meet common law test for employee
3. **Statutory employee**
4. **Statutory non-employee**



Understanding Your Workforce: THE IRS 20 FACTOR TEST



Does the recipient of the services have the right to control what is done and how it is done?

Understanding Your Workforce: Factors #1-10

1. Instruction (Must worker comply with instructions?)
2. Training (Is on the job training provided?)
3. Integration into business operations
4. Personal rendering of services (Must the worker personally perform?)
5. Hiring, Supervision, and Paying Assistants
6. Continuing Relationship
7. Set Hours of Work
8. Full Time Required?
9. Work Done on Premises?
10. Order or Sequence Set (Does the person receiving services get to choose the order or sequence of tasks?)

Understanding Your Workforce: Factors #11-20

11. Regular Oral or Written Reports
12. Payments by Hour, Week, or Month
13. Payment of Expenses
14. Furnishing of Tools and Materials
15. Significant Investment (Does the worker have a significant investment in the work facilities?)
16. Profit or Loss (Can the worker make a profit or loss, or is pay regular and predictable, e.g., hourly rate of pay?)
17. Working For More Than One Firm At a Time
18. Are Services Available to the General Public
19. Right to Discharge (Can worker be discharged by receiver of services?)
20. Right to Terminate (Can the worker quit at any time without incurring liability?)

Understanding Your Workforce: Additional Guidance From IRS

IRS has identified three categories of evidence that will support a determination: *behavioral control*, *financial control*, and *type of relationship*.

1. Factors in addition to the 20 factors may be considered.
2. Weight of each factor may vary based upon circumstances.
3. Relevant factors may change over time.
4. All facts must be examined.



Understanding Your Workforce: Why IRS Analysis?

IRS guidance provides most comprehensive analysis of employer-employee relationship. Its analysis was developed as a formal statement of common law analyses already in place.

State and federal courts typically apply some version of these rules, but the specific analysis varies. This may mean the court is applying a specific statutory analysis (e.g. Fair Labor Standards Act) or a common law analysis (e.g. based upon case law, such as Indiana's common law test).

Understanding Your Workforce: Key Points on Worker Classification

- Certain tax, liability, and other advantages to having an independent contractor relationship, but misclassification carries huge disadvantages. Err on the side of caution.
- Pay attention to the rules and the jurisdiction. (Note: IRS test is stringent and comprehensive. It is a good benchmark, but you should always investigate the specific rules applicable to your situation.)
- All worker classification inquiries are fact-intensive and must be considered in light of the circumstances. Some answers are clear; many are not. Seek guidance and counsel when needed.

Step Three: Best Practices to Create the “Right Environment”

- **Implement proactive, thorough training for all employees on issues of key importance:**
 - Routine policies and procedures (including handbook provisions – don’t forget to update handbooks!)
 - Disciplinary policies and procedures, including chain of command regarding hiring/firing decisions (case study: *Vance v. Ball State University* - 2012)
 - Compliance-centered, non-discriminatory, and anti-retaliatory environment (case study: *Young v. UPS* – 2015)
 - Be consistent and actually follow stated policies(!!!)
- **Develop a mission-centered approach to employee engagement:**
 - Make it clear that each team member counts
 - Reinforce the reason everyone comes to work each day
 - Respect and reinforce initiative and engagement by employees
 - Give tangible feedback of goals reached and achievements earned

Best Practices to Create the “Right Environment”

- **Invest time and resources on training, development as necessary, and invest early in heading off difficult situations:**
 - Seek expert advice and guidance sooner, rather than later.
 - Support and encourage HR professionals to engage with industry specific organizations (e.g. Society of Human Resource Management) to maximize ongoing knowledge and compliance
 - Consider implementing high-quality HR programs and software to make compliance easier (note: high-quality)
- **Consider seeking outside assessments, evaluations, or training when difficult situations arise.**

Step Four: Remain Vigilant and Flexible (This is where “almost” comes in!)

All of the above situations and circumstances **will** change over time. The entity and its human capital must change as well. An entity will encounter issues – the only question is whether the entity is prepared to encounter those issues and has exercised its due diligence in heading them off.



Remaining Vigilant and Flexible Example: An Aging Workforce

- 2011 census: The number of people ages 55–64 will increase to almost 40 million in 2014 and 42 million in 2024.
- Workers 55 and over will make up 25% of the workforce by 2020.



Sources:

[https://www.shrm.org/hrdisciplines/Diversity/Documents/7-14 Roundtable Summary.pdf](https://www.shrm.org/hrdisciplines/Diversity/Documents/7-14%20Roundtable%20Summary.pdf)

<http://www.forbes.com/sites/kerryhannon/2015/01/12/new-shrm-survey-finds-organizations-unprepared-for-aging-workforce/#71073c3416f1>



Remaining Vigilant and Flexible: Why This Is Important

HR professionals identified pressing issues relating to older workers:

- New strategies needed to retain older workers
- Structured method of knowledge transfer
- Family-related issues or personal health concerns (e.g. need for flexibility)
- More than two-thirds of HR professionals agreed that large numbers of Baby Boomers leaving around the same time in the next five years would have a major impact on the workplace.
- Two-thirds of the HR professionals reported hiring older workers who had retired from other organizations or careers.

Source: Society for Human Resource Management 2014 Study, available at:
<https://www.shrm.org/research/surveyfindings/pages/aging-workforce-research-initiative.aspx>



Recap: Best Practices to Manage Risk and Maximize Human Resource Capital

- Know your entity and workforce
- Create the “right environment”
- Be proactive – plan ahead
- Re-evaluate often – be flexible
- Be prudent in responding to situations (e.g. anti-retaliatory culture)
- Manage risk through compliance mindset and ancillary strategies (e.g. evaluate appropriate insurance coverages)
- Maximize human capital by communicating appropriate information early, clearly, and often – keep your workforce in the loop!
- When in doubt (and sometimes even when not), seek outside counsel or assistance.

Questions?

