A Publication Dedicated To Employers' Current HR Issues & Solutions

The BOTTOM LINE

Volume 8

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YOUR EMPLOYEES ARE NEVER LATE TO WORK. THEY MEET THEIR PROJECT DEADLINES. AND THEY NEVER LEAVE THE OFFICE BEFORE THEIR SHIFT IS OVER. BUT ARE THEY ENGAGED?

HOW ENGAGED ARE YOUR EMPLOYEES?

Employee engagement directly affects an organization's bottom line. Research shows that engaged employees are:

- **More productive**
- **More profitable**
- **More customer-focused**
- **Safer**
- **More likely to withstand temptations to leave**

A 2011 study of 80 global companies conducted by Paul DeYoung, Tracy Shamas and several colleagues from Towers Watson showed that there are two key engagement factors that can improve an organization's bottom line: enablement and energy. These factors influence an employee's desire and willingness to contribute discretionary effort toward their job.

Engagement Aon Hewitt, an expert in employee engagement, defines engaged employees as those who are:

- **Passionate** and **enthusiastic** about their work
- **Devoted** to getting the job done right
- **Immersed** fully in the task at hand
- **Focused** and intensely **concentrated** on the job
- **Driven** to do whatever it takes to complete the task

Enablement exists when employees have the necessary support and tools to work efficiently and effectively over time. ***Energy*** radiates from a healthful work environment that supports employees' physical, social and emotional well-being. According to a Towers Watson study of 50 global companies, the combination of these two elements equals powerful employee engagement (EE). In fact, organizations operating with both enablement and energy experienced operating margins three times greater than companies optimizing only one key engagement element.

However, even though many organizations are aware of the importance of employee engagement—ranking it third among employers' biggest concerns in Aon Hewitt's 2011 Talent Survey—few put the tools and processes in place. The survey reported that 45 percent of employers didn't believe their employees were focused on their jobs, 43 percent felt their employees were not fully immersed in their work, and 40 percent did not believe employees were driven to do what their jobs required. Where would you rank your employees' engagement?

To get your workers more engaged, you must first establish a baseline by measuring their current level of engagement; then create a strategy to improve from there.

Testing Employee Engagement

There are various ways to determine your employees' level of engagement:

- **Conduct annual surveys and/or distribute questionnaires**
- **Track changes in the staff attrition rate**
- **Measure increases in the number of employee referrals for recruitment and commercial purposes**
- **Monitor changes in employee productivity**

Measure Multiple Dimensions

When executing a survey, it's important to test a number of dimensions:

- How employees ***feel*** (about the company, the leadership, the work environment, etc.)
- How they intend to ***act*** in the future (whether they will stay, give extra effort, etc.)
- How ***committed*** they are to working with the organization to improve weaknesses

Annual surveys and/or questionnaires are one of the most valuable tools for measuring engagement.

But how do you know what to measure? Based on more than 30 years of in-depth research involving more than 17 million employees, the Gallup Organization has developed and identified 12 core elements[1] that drive business results.

1. **Do you know what is expected of you at work?**
2. **Do you have the materials and equipment you need to do your work right?**
3. **At work, do you have the opportunity to do what you do best every day?**
4. **In the past seven days, have you received recognition or praise for doing good work?**
5. **Does your supervisor, or someone at work, seem to care about you as a person?**
6. **Is there someone at work who encourages your development?**
7. **At work, do your opinions seem to count?**
8. **Does the mission/purpose of your company make you feel your job is important?**
9. **Are your associates (fellow employees) committed to doing quality work?**
10. **Do you have a best friend at work?**
11. **In the past six months, has someone at work talked to you about your progress?**
12. **In the past year, have you had opportunities at work to learn and grow?**
13. **In addition to the 12 elements, Gallup recommends adding questions that address your company's unique culture or business issues.**

While company-wide surveys can be difficult to accomplish more than once a year (especially for time- and resource-strapped small businesses), conducting quick polls or brief surveys through a free online survey-hosting service makes it easy to test engagement at regular intervals. These polls can address specific issues concerning engagement and morale in order to track the contribution of these elements to the success of the organization. And creating an ongoing flow of data will make it easier to monitor your employees' engagement and make swift adjustments when needed.

[1] *Workforce Management* Online, **October 2003**. Reprinted with permission. Copyright 1992-1999, The Gallup Organization, Princeton, NJ. All rights reserved. Gallup and Q12 are registered trademarks of The Gallup Organization.

Improving Employee Engagement

Engagement goes beyond asking the right questions during one initiative—it must be ingrained in your business's culture. Gallup has observed that world-class organizations make employee engagement a priority by focusing on the following:

- **Strategy** – Dissecting the business problems you face, and then finding the right employees to solve them
- **Accountability and Performance** – Focusing on outcomes, and defining and measuring success at every level of the organization, allowing each person, team and department to take ownership and drive results
- **Communication** – Using clear and effective two-way communication to reinforce commitments to employees and customers
- **Development** – Building your leadership capacity through development programs to increase engagement and create a solid succession plan

While each of these focus areas is critical to the success of an organization, it's important to avoid a one-size-fits-all approach. The best employers customize their internal programs to appeal to diverse employees. Building rapport with each colleague lays the foundation for engagement.

You must help your workers tie the organizational vision to their daily jobs while investing in their professional development. As a small business, you have an advantage: You are uniquely able to help your employees know how their work affects the larger organization, since many workers interact daily with both the company's leadership and its customers. So it's no surprise that for many small businesses, the employee-development part of the equation is harder to find time and resources for. Yet, it's critical: Kathryn Hayley, Aon Hewitt's Americas chief executive officer, focuses on development to drive engagement. "Make your employees more marketable so that they're always growing," she says. "Find training for them, expand their capabilities, and let them take some risks in tackling new projects. Put a safety net in place if they struggle, but give them the chance to do more and learn more."

To reap the rewards of employee engagement, she adds, "It's important to create a vision for the organization's future and its purpose. You want employees excited about the purpose of their work."

TO HIRE OR NOT TO HIRE?

SCREEN AND SELECT TO GET THE RIGHT TALENT

Employee turnover. Lost work days. Accidents. Inefficiency. The number of ways a bad hire can damage your bottom line is paralyzing. Yet hiring the right people for your organization is a never-ending challenge.

As the economy continues to defrost, the battle for talent heats up. So far this year, companies with fewer than 500 employees have added an average of 188,000 jobs a month, according to payroll company Automatic Data Processing Inc., the parent company of ADP TotalSource®. Compare that to last year, when that average was just 68,500 jobs a month. Further, according to the 2011 Aon Hewitt Talent Survey, over 40% of businesses anticipate a greater focus on hiring. In the face of increased competition, how do you make sure your new hire flourishes instead of flounders?

"In all my years of hiring and firing, I've learned one important thing: First-rate people hire first-rate people, second-rate people hire third-rate people, and third-rate people hire morons," says an executive in *Five Frogs on a Log: A CEO's Field Guide to Accelerating the Transition in Mergers, Acquisitions and Gut-Wrenching Change*

The Right Talent

In *Good to Great*, author Jim Collins examines how some companies leap from a good company to a great company—defined as having a financial performance several multiples better than the market average over a sustained period of time. What sets great companies apart? A laser-like focus on getting the right talent.

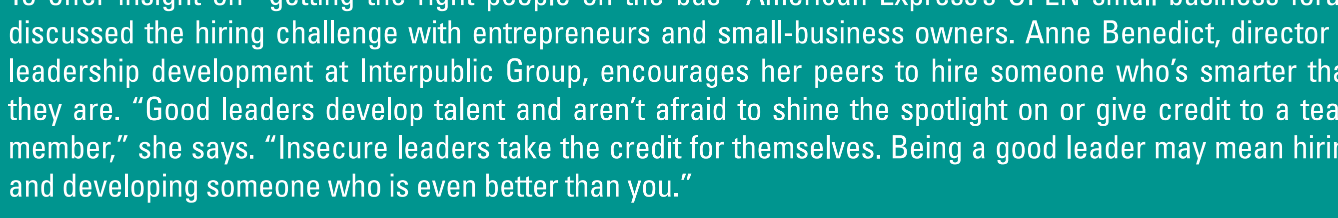
According to Collins, "Leaders of companies that go from good to great start not with where [the company is going] but with who. They start by getting the right people on the bus, the wrong people off the bus, and the right people in the right sets. And they stick with that discipline—first the people, then the direction—no matter how dire the circumstances."

Collins explains three principles of hiring the right people:

1. **If you begin with *who*, you can more easily adapt to a fast-changing world.** Continuing with the analogy, if people get on your bus because of where they think it's going, you'll be in trouble when you get 10 miles down the road and discover that you need to switch direction because the landscape has changed. But if people board the bus principally because of all the other great people already on it, you'll be much faster and smarter in responding to varying conditions.

2. **If you have the right people on your bus, you don't need to worry about motivating them.** The right people are self-motivated: Nothing beats being part of a team that is expected to produce great results.

3. **If you have the wrong people on the bus, nothing else matters.** You may be headed in the right direction, but you won't achieve greatness. Great vision with mediocre people still produces mediocre results.



To offer insight on "getting the right people on the bus" American Express's OPEN small-business forum discussed the hiring challenge with entrepreneurs and small-business owners. Anne Benedict, director of leadership development at Interpublic Group, encourages her peers to hire someone who's smarter than they are. "Good leaders develop talent and aren't afraid to shine the spotlight on or give credit to a team member," she says. "Insecure leaders take the credit for themselves. Being a good leader may mean hiring and developing someone who is even better than you."

So, how do you get the right people on your "bus?" How do you ensure you have bright, motivated people to help your company grow? If this is an area your organization struggles with regularly, you're in good company. According to the 2011 Aon Hewitt Talent Survey:

- Only 28% of organizations believe they are very effective or extremely effective at hiring quality employees
- Roughly half (51%) say they are effective at securing quality hires
- More than one-fifth (21%) think they are only somewhat effective or not at all effective at hiring quality workers.

Why do so many organizations, especially small businesses, feel less than proficient at hiring the talent they need? Many companies simply lack the resources to process and screen the large number of candidates applying for positions—time-consuming tasks necessary for locating key talent. Yet, "as employers begin ramping up the number of hires, this is a great opportunity to significantly improve the hiring process," said Jason Krumwiede, vice president with Aon Hewitt.

Screening and Selecting

With increased competition and changing workforce demographics, many organizations are outsourcing their hiring needs and using screening and selection processes to sign the right talent. Pre-employment assessments are a proven way to predict on-the-job success for entry-level applicants to senior executives, helping to determine who will perform better, sell more and stay on the job longer. Outsourcing your recruiting and hiring can save costs and get the right people to meeting your business goals, thanks to savings in selection, training and turnover.

Finding the right talent is a challenge for organizations in any labor market: When labor markets are tight, competition for the best job candidates gets intense; when they loosen, the challenge lies in identifying the most suitable candidates from among large numbers of applicants. But, for companies that opt to outsource some or all of their recruiting and hiring needs, support is available. Professional Employer Organizations, like ADP TotalSource, can provide flexible solutions that enable you to make smart hiring decisions.

ADP TotalSource offers its clients access to a full range of recruiting, hiring and on-boarding services, with various levels of support.

Basic Services include:

- Online tools, including a salary-comparison wizard, hiring calculators, a job-analyzer tool and candidate assessments, all accessible via My TotalSource® (ADP TotalSource's client portal)

Full-Service, 90-day Recruitment Program includes:

- Employment-advertisement development for targeted, effective recruiting and compliance with applicable employment regulations
- Employment-advertisement posting on two job sites of your choice to reach a nationwide pool of job seekers at a fraction of the cost of traditional print media
- Applicant screening and searching through online databases to find qualified candidates
- Telephone interviews for selected applicants to collect data to help you conduct face-to-face interviews
- Background checks and drug screening once an offer is made to a candidate

Hiring the right talent is a critical but time-consuming part of managing any business. When your organization is poised for growth, partnering with a trusted, experienced adviser can help ensure that your company's "bus" is filled with the people and skills you need for success. ■

EMPLOYERS BEWARE: A NO-SMOKING POLICY COULD BURN YOU

Barring smokers from a company's ranks certainly has its benefits, considering the additional health care costs and lost productivity smokers can bring to the workplace.

The Centers for Disease Control and Prevention estimates that each smoker costs an employer about $3,400 annually in higher health bills, redacted productivity and increased absenteeism. Smokers, on average, miss 6.2 days of work per year due to sickness compared with nonsmokers, who miss an average of 3.9 days of work per year. Smokers lose about twice as much production time per week than nonsmokers.

Plus, it takes approximately seven minutes to smoke a cigarette; therefore, employees who take four ten-minute smoking breaks a day work one month less per year than workers who don't take smoking breaks.

And in recent years, employers also have begun touting wellness initiatives that target unhealthy lifestyle attributes like obesity and tobacco use.

Consequently, many companies are drawn to no-smoking policies, which for purposes of this article means a policy of not employing individuals who smoke, including on personal time. Contrast that with employers who merely prohibit smoking while at work or limit it to particular areas, which they are generally free to do.

No-smoking policies are not difficult to implement. A company may ask applicants whether they smoke, or it can conduct drug testing to detect nicotine use. But be careful. There is a minefield of legal issues to consider.

Lifestyle Discrimination Laws

There is no federal law that prohibits, or permits, no-smoking policies. Therefore, whether a company may have such a policy is determined on a state-by-state basis.

Twenty-nine states and the District of Columbia have enacted laws prohibiting employers from discriminating against individuals because they use tobacco. About two-thirds of these laws target tobacco use only. The rest are broader laws that protect an individual's right to engage in any lawful activities or use any lawful products.

Laws Prohibiting Disability Discrimination

Even in those states that do not have a clear-cut law that prohibits non-smoking policies, employers must be careful. The federal Americans with Disabilities Act (ADA) and many state laws prohibit employers from discriminating against qualified disabled individuals when making employment decisions.

The ADA does give employers the right to have smoke-free workplaces. That, however, is the ADA's only reference to smoking.

Early on, several courts held that smoking and nicotine addiction are not protected disabilities under the ADA. But with the recent passage of the ADA Amendments Act (ADAAA), the term "disability" is now interpreted to the broadest extent possible. With this new law, courts may revisit whether smokers or nicotine addicts are "disabled" under the ADA.

Moreover, many states also have laws that prohibit disability discrimination, and the definition of "disability" differs greatly in those laws. In each state, the question is whether courts would consider smoking or nicotine addiction a disability. Thus far, a few state courts have rejected this argument, but this area of the law is undeveloped, which puts employers in gray area.

Common Law Invasion of Privacy

The majority of states recognize a cause of action for invasion of privacy in employment, whether by statute or case law. The leading case in this area rejected a claim under such a theory because the plaintiff's smoking was open and notorious—he purchased cigarettes, smoked in public and left cigarettes in plain view in his vehicle. The case was dismissed.

Law Prohibiting Benefits Discrimination

Section 510 of a federal benefits law called ERISA prohibits discrimination against an ERISA plan participant or beneficiary for the purpose of interfering with the attainment of any right to which the participant may become entitled under a benefits plan. The trend in this area is that an applicant is not a participant in a benefits plan because Section 510 does not reach hiring decisions. Therefore, ERISA does not prohibit no-smoking policies with regard to applicants. Regarding current employees, courts have likewise been reluctant to say that smoking is an employee's right to which they are entitled under the plan.

Special Issues Related to Unionized Workforces

The National Labor Relations Act (NLRA) requires an employer to bargain with the union representing its employees over "wages, hours and working conditions," otherwise known as "mandatory subjects of bargaining." Employers have much more flexibility in implementing policies that apply to job applicants than to employees. An employer adopting a no-smoking policy with regard to applicants does not likely violate the NLRA, but enforcement of that policy against employees, even against ones who were hired based on their status as non-smokers, is a mandatory subject of bargaining.

Conclusion

If you operate in a state that contains a lifestyle discrimination law, you aren't allowed to have a no-smoking policy. Elsewhere, it depends on how the case law develops. Until there is more direction from the courts and the smoke clears, employers who go beyond educating, encouraging, cajoling or even motivating employees to quit smoking, and adopt smoker-free workplace policies, will do so amid a haze of legal uncertainty.

Clients of ADP TotalSource® can rely on the expertise of their designated human-resources professional to navigate many complex areas of the law, including those regarding no-smoking policies. ■

PLANNING FOR YOUR FUTURE TODAY: SUCCESSION PLANNING

A COMPANY'S FUTURE CAN CHANGE IN A HEARTBEAT. NO ONE KNOWS WHAT TOMORROW WILL BRING, BUT AS BUSINESSES TRY TO ADAPT TO THEIR CONSTANTLY CHANGING ENVIRONMENTS, ONE THING IS CLEAR: PLANNING IS A ***MUST***.

COMPANIES HAVE TO ASK THEMSELVES SEVERAL QUESTIONS TO ENSURE THEY OPERATE EFFECTIVELY: WHAT ARE THE MARKETS DICTATING TODAY? WHAT PRODUCTS WILL OUR CUSTOMERS DEMAND TOMORROW? WILL WE BE ABLE TO SURVIVE? WHERE IS OUR ORGANIZATION RIGHT NOW? WHERE DO WE WANT TO GO, AND HOW WILL WE GET THERE? EVERY WELL-MANAGED ORGANIZATION HAS A STRATEGIC VISION AND PLAN. BUT WHAT MANY FAIL TO CONSIDER IS: ***WHO*** WILL WE NEED TO GET THERE?

Workforce Planning vs. Succession Planning

Workforce planning and succession planning, two critical components to an organization's success over time, are often viewed as different terms for the same goals. Yet, while both aim to make sure your company has the right people in the right positions at the right time, succession planning is a subset of workforce planning, and it focuses on leadership. The main goal of succession planning: securing the right leadership in place at *every* level of the organization.

To assure consistent succession, organizations must:

- Determine the potential for vacancies in leadership and other key positions
- Assess the readiness of current staff to assume these positions
- Develop strategies to address the gaps, including mentoring, formal training in leadership and supervisory skills, developing strategies to retain current and potential staff, etc.

When done right, succession planning is an investment in both the company itself and the people it employs, says Lois Melbourne, president of TimeVision Inc.: "The entire organization can benefit by creating career paths and developing criteria to fill various positions."

Planning for the Future by Learning From the Past

The events of September 11, 2001, jolted many organizations into shock as they tried to comprehend the horrific events that unfolded—the loss of colleagues, friends and, in some cases, key leaders of their organizations. The remaining leaders were forced to identify gaping holes in management and the crucial skills their organizations needed just to stay afloat.

"Without a well-designed succession-management system, an organization can find itself thrown into chaos and confusion," says William C. Byham, CEO of the consulting firm Development Dimensions International, in Bridgeville, Pennsylvania.

While devastating events and natural disasters bring the painful reality of the importance of succession planning, a sudden departure or illness of a key executive can also have a drastic impact on an organization. That's why it's important for the long-term survival of every organization, big or small, to complete both workforce and succession planning to maintain the health of its business.

If you're nodding because you understand that succession planning is important but you're also concerned because your organization's workforce and succession plans are lacking or nonexistent, you're not alone. According to Aon Consulting's 2010 Benefit and Talent Survey, 70% of respondents ranked talent management and succession planning as areas of high importance, but only 22% of survey respondents ranked their organization as being highly effective in these areas.

Creating Your Succession Plan

Succession planning is not as easy as updating the organizational chart that displays your company's job hierarchy. Yet, while large corporations employ sophisticated software for tracking skills, competencies and 360-degree feedback data, you don't need to go that far, either. Your succession-planning effort can involve as little as a spreadsheet or simple database. You must determine:

- What talents will be required in the future
- Which employees have the particular skills and competencies required to assume positions higher on the corporate ladder
- Whether it's best to train employees for management positions or hire from the outside

Impact on Family-Owned Businesses

Failure to plan for succession in a family-owned business creates a unique set of challenges. Without proper plans in place, the loss of a key company leader can cause monetary losses or even loss of the business itself. For example, in the case of an owner's death, estate taxes alone can claim 18 percent to 55 percent of a taxable estate, frequently resulting in the business's having to liquidate or take on tremendous debt just to stay afloat.

According to a recent PricewaterhouseCoopers survey, more than a quarter of family businesses anticipate a change in leadership during the next five years. And while most survey respondents expect the company to stay in the family, almost half the companies (skewed toward the smaller organizations) have no succession plan. Even more surprising: Only half of those that ***do*** have designated a particular individual to take over the top job.

For family-owned businesses, Gregory K. Amundson, a business, estate and philanthropy consultant affiliated with National Financial in Louisville, KY, recommends the following seven steps in creating a succession plan:

01

Survival – Once a business has survived the start-up stage, the owner should consider a succession plan.

02

Commitment – The owner must be committed to the concept that the business must continue to create opportunity for those to come. This commitment must be communicated clearly, extensively and often.

03

Recruitment – Finding and hiring good people always pays dividends and is a key area of importance in succession planning.

04

Development – Investing time in training family members, key employees and management team members, and subsequently allowing them to exercise authority and control, is vital to success.

05

Selection – Once the owner has developed a transition plan and recruited the right people, choosing a successor or successors becomes easier. By empowering a broad range of key people, the selection process is simplified and the owners' options are enhanced.

06

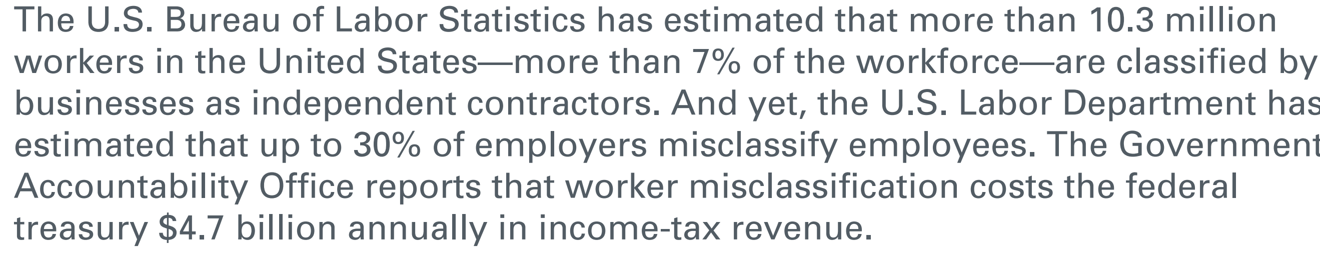
Announcement – Once a succession plan is in place, key management and/or family successors must be provided with a clear understanding of the path to the future and any role they may play in it. It also allows them to begin setting future goals and objectives for themselves.

07

Implementation – In implementing the succession plan, the owner must be ready to step aside and allow the successor(s) to take over.

While planning for the future of your company is not an easy task, failing to do so could mean that your company will have no future. Whether a change is required because of normal business conditions, death or disaster, creating a succession plan for your organization will help ensure your company's future.

THINK YOUR CONSULTANTS ARE INDEPENDENT CONTRACTORS? THINK AGAIN



The U.S. Bureau of Labor Statistics has estimated that more than 10.3 million workers in the United States—more than 7% of the workforce—are classified by businesses as independent contractors. And yet, the U.S. Labor Department has estimated that up to 30% of employers misclassify employees. The Government Accountability Office reports that worker misclassification costs the federal treasury $4.7 billion annually in income-tax revenue.

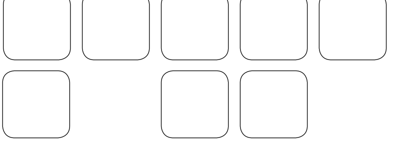
This is not just a problem for the federal government. State and local governments lose millions of dollars in revenue each year because of employee misclassification. One study found that nearly 1.8 million workers were misclassified in Illinois, Maine, Massachusetts and New York.

Perhaps these statistics should not be surprising. Companies that improperly classify employees as independent contractors, intentionally or not, gain an economic advantage. They do not pay Social Security and Medicare taxes, benefits or overtime; withholding taxes are not withheld from paychecks. Companies do not pay unemployment taxes to state governments, so a worker who loses his job will not receive unemployment benefits. They may avoid payment of workers' compensation premiums, locking injured workers out of the system.

However, the consequences of misclassification are severe, and the chances of an audit are increasing as the federal government and most states are scrambling for revenue. The president's budget for the 2011 fiscal year includes provisions that target the misclassification of employees as independent contractors and are estimated to raise more than $7 billion in revenue over 10 years.

Now is the time to evaluate whether your independent contractors may be employees.

BACKGROUND



The proper classification of workers is tricky. There is no single test. The laws are vague. Government agencies and courts sometimes use different standards. Court cases can conflict with one another, and the independent-contractor label is often tossed aside.

Instead of having a single, clear rule, most agencies and courts use a list of factors to make the determination, which is subjective. Agencies may differ in which factors they emphasize over others in a given situation.

As a result, courts and agencies vary widely in their determinations. This often makes it difficult for employers to determine exactly how a worker should be classified. Unfortunately, there are penalties for guessing wrong. A worker who is improperly classified as an independent contractor may be entitled to overtime pay and benefits, and the company will also likely owe federal, state and local authorities taxes and penalties.

Are Your Contractors Correctly Classified?

As previously discussed, federal agencies often use different tests to determine whether a contractor is correctly classified. Below is a description of the tests used by two federal agencies that are commonly encountered by employers: the Internal Revenue Service (IRS) and the Department of Labor (DOL).

IRS RULES

To determine whether a worker is an employee or a contractor, the IRS divides some employees into "statutory employee" and "nonstatutory employee" categories. For workers who fall outside of those categories, the IRS uses multiple factors to make a determination.

Even if workers are independent contractors under the common-law rules/factors listed below, they may still be treated as employees by statute (statutory employees) for certain employment-tax purposes if they meet three conditions and fall within one of the following categories:

A worker is deemed a statutory employee if (1) substantially all of the worker's services are performed personally by the worker (rather than by individuals the worker hires); (2) the worker does not have a substantial investment in the tools and property used in performing the services; and (3) the worker's services are performed on a continuing basis for the same company and the worker is:

- A non-milk beverage, produce, bakery, laundry or dry-cleaning delivery driver for the company;
- A full-time life insurance agent working primarily for one life insurance company;
- A person who works for the company at home, under its specifications, with tools and materials the company supplies; or
- A full-time traveling salesperson who turns in orders to the company for merchandise for resale or for supplies (such as office supplies).

Individuals deemed statutory nonemployees under federal law are those who are direct sellers, licensed real estate agents, and some companion sitters. They are always treated as self-employed by the IRS as long as most of their compensation is derived directly from their sales or work output, and a written contract controls their services to the company.

Job positions falling outside the statutory employee and nonemployee definitions must be analyzed using 20 or so factors that, in the aggregate, determine for federal tax purposes the nature of the relationship between the worker and the company. The factors fall under the following broad categories:

- Behavioral control – the amount of direction and control the company has over the worker's work location, choice of tools, assistants, purchases of supplies and priority of tasks
- Financial control – the extent to which the company dictates what expenses should be reimbursed, how much money the worker invests in the acquisition and performance of the work, the extent to which the worker provides the same services to other parties, and the manner in which the worker is paid (i.e., by the hour or by the task)
- Nature of the relationship – the permanency of the work relationship, whether it's controlled by contract, whether insurance and benefits are provided, and whether the tasks performed by the worker are integral to the retaining company's business

Industry practice and custom also weighs on the determination of whether a worker is an employee or independent contractor. If workers are misclassified under federal tax law, the employer will be responsible for federal payroll taxes going back three years and liability for state-income-tax withholding penalties, unemployment taxes, and disability-program taxes (because of the information-sharing program with the states).

DOL RULES

The DOL, which enforces the federal Fair Labor Standards Act, uses an "economic reality" test to determine whether workers are properly classified, taking into account these factors:

- The extent to which the worker's services are an integral part of the company's business
- The worker's opportunity for profit and loss, and the amount of judgment the worker must possess as to how to compete in an open market
- The degree to which the worker maintains an independent business organization and operation

Under the FLSA, therefore, the degree to which a worker clearly maintains a separate, independent and competitive business substantially affects the outcome of the classification decision.

Workers newly classified as employees are subject to minimum wage and overtime under the FLSA and may be entitled to additional compensation going back two to three years, depending upon whether the company's compliance failure is deemed willful.

Liquidated damages (which are double actual damages) are also customarily awarded to misclassified workers. Minimum-wage and overtime laws in certain states and the statutes of limitations for back-pay claims that are more favorable to workers than the federal law is can add to liability in misclassification cases.

THE BOTTOM LINE

An employer may save money classifying an employee as an independent contractor, but misclassification can be devastating, leading to audits, penalties, lawsuits and substantial unforeseen costs. Be careful. The short-term reward is not worth the risk.

If you have true independent contractors, they should be required to sign an agreement acknowledging their status. Doing so will help you defend your position. A good agreement covers the following:

Services to be performed. Outline the job requirements. This section should also briefly explain that the contractor retains behavioral and financial control.

Timing. State when the services are to be performed. Consider a late-penalty fee if they are not performed on time or a bonus if finished early.

Payment. Explain when the payment is earned, how it is calculated, the amount (if possible) and when it will be paid.

Insurance. Require the contractor to have appropriate insurance to cover his or her work.

Termination. Explain how the agreement can be terminated.

Warranties. Have the contractor warrant that the services will be performed in a high-quality, professional and timely manner.

HOW ADP TOTALSOURCE® CAN HELP

This is a risky area, but ADP TotalSource has the tools and resources to lead you in the right direction. Its Human Resources Business Professionals can help you make a fully informed decision. ■

SHOULD YOU BE TAKING ADVANTAGE OF EMPLOYMENT AND SEVERANCE AGREEMENTS TO PROTECT YOUR BUSINESS?

WRITTEN POLICIES AND PROCEDURES, SUCH AS EMPLOYEE HANDBOOKS AND OFFER LETTERS, ARE TRIED-AND-TRUE STAPLES OF GOOD HUMAN-RESOURCES PRACTICES. USUALLY, HOWEVER, NEITHER IS A BINDING CONTRACT. INDEED, MANY EMPLOYEE HANDBOOKS AND OFFER LETTERS EXPRESSLY STATE THAT THEY ARE NOT CONTRACTS. THIS BEGS THE QUESTION: DO YOU NEED MORE PROTECTION, AND IF SO, SHOULD YOU USE WRITTEN EMPLOYMENT OR SEVERANCE AGREEMENTS TO ACHIEVE IT?

Written Employment Agreements

There is no U.S. requirement stating that employers need written employment agreements with their workers. Businesses are free to decide for themselves whether to use them.

Some businesses use employment agreements for all their employees. This may be dictated by industry standard. Generally, employers should use them selectively. Written employment agreements are most appropriate for high-level managers and for employees who have special skills and abilities.

There are good reasons to use them for such key employees. A business may spend a substantial amount of time and money recruiting and training key employees, so it may want to lock them into a specific duration of employment. Or, the employees may have access to the company's intellectual property, which it needs to protect. Or, a business may want to have more control over how key employees work, which a written agreement will certainly cover. A good written employment agreement can address these areas and many more.

So, what is usually included in a written employment agreement? Here are some common provisions:

- **Duration of Employment Period** – The agreement may specify the length of employment, though this is not required. If it does, an employer may not be able to terminate the agreement before the end of the term without cause. However, the agreement can say the worker is employed at will, without a specific length of employment, and that the relationship can be terminated with or without cause.
- **Employment Duties Description** – Employers will most often want to retain the flexibility to use the employee where needed, especially if conditions change during the term of employment. The employer and employee should understand and agree upon the duties the employee will be responsible for performing. The description of job duties may be specific but broadly stated, so as to permit the employer to reassign the employee to another position with different responsibilities.
- **Conflicts of Interest and Best Efforts** – Such a provision makes sure that employees are not distracted from maximum performance because they have another job or are involved in other competitive activities.
- **Employee Compensation and Benefits Description** – The agreement should definitively state how much and when the employee will be paid.

  Bonuses come in many varieties, including a sign-up bonus, a regular periodic or annual bonus, a stay bonus and incentive bonus. Unless the bonus is for specific measurements of performance, such as units produced or hours worked, the key is to make the determination to pay and the amount of any bonus subject to the employer's sole discretion.

  The employment agreement should make the employee aware of the benefit plans available from the employer. It should state how much vacation time the employee is eligible for, when it may be taken, and whether the employee will be paid for unused vacation upon termination. And it should specify the business-related expenses that will be reimbursed to the employee.
- **Termination of the Employment** – The agreement should state that the contract terminates upon the death of the employee.

  The employment agreement should anticipate that the employee may be unable to perform his or her responsibilities because of a disability. However, it does not supersede the employer's obligations under the Americans with Disabilities Act, Family and Medical Leave Act or similar state laws.

  Most employment agreements reserve the right of either party to terminate the employment relationship after a specified notice period. The notice-termination provision should expressly provide for the ending of the employer's obligations (except for accrued salary and benefits) and the continuation of the employee's obligation to comply with any non-compete clause or other restrictive covenant.

  Employment agreements often specify cause for discharge to avoid uncertainty over the circumstances under which the employer, employee or both may terminate the agreement without continuing liability for the balance of its terms. If the parties do not specify what constitutes cause, and one believes the other has done something that violates the agreement, the decision will be left to the court.
- **Restrictive Covenants** – The agreement may state that the employee will not (i) compete either during or for a specified time period after employment; (ii) induce other employees to leave the employer; and (iii) divulge the employer's trade secrets or confidential information.
- **Post-employment Duties** – The agreement should require the employee to return all of the employer's property and business-related materials prepared by the employee when the employment relationship ends.
- **Applicable Law** – The agreement should specify the state law that will be applicable to resolving disputes about the employment agreement.
- **Judicial Forum** – The agreement may identify a judicial forum for litigation of disputes concerning the interpretation of the agreement and enforcement of restrictive covenants. The forum should be conveniently located for the employer and offer familiar court rules and procedures.
- **Modifications** – Amendments to the agreement must be in writing and signed by the parties. This prevents entanglements that result when a party claims a contract was modified by an oral agreement or understanding.

Severance Agreements

As with written employment agreements, there is no U.S. requirement that employers use severance agreements. Businesses are free to decide for themselves.

A severance agreement is a written contract that an employee signs at the end of his or her employment. In it, the employer promises to give the former employee something of value, most commonly (but not necessarily) a monetary payment. In exchange, the former employee waives and releases his or her right to bring a legal claim against the employer.

Any time an employer voluntarily gives an employee something of value upon termination, a severance agreement should be considered. This way, the employer gets something in exchange, and guards against getting sued by an employee that just received a severance.

Indeed, avoidance of lawsuits is the most common reason for using severance agreements. Lawsuits are expensive, disruptive to business operations and can be demoralizing to employees. As a result, paying a little money at the end of employment in exchange for obtaining a release of claims can potentially save a business a lot of money and heartache down the road.

Nonetheless, severance agreements are not bulletproof: By signing a severance agreement, employees don't waive their right to file a lawsuit under the Fair Labor Standards Act, the federal law governing wages. A severance agreement also does not prevent an employee from filing a charge of discrimination with an administrative agency, though he or she should not be entitled to any monetary damages under those circumstances.

Lastly, there are some laws that govern how a severance agreement must be written. For example, federal law provides that an employee who is age 40 or older cannot waive and release a potential age-discrimination claim unless he or she is given 21 days to consider the severance agreement and seven days to revoke it. The requirements are more onerous for group terminations, such as a reduction in force.

The decision to use an employment agreement or severance agreement is one that must be carefully considered. Competent legal counsel should be consulted.

Whether it is employment agreements, severance agreements, or other policies and procedures, ADP TotalSource® makes sure you are thinking strategically about your business and using all available resources to protect yourself. ■

Ask the Experts: HR Business Partners

Hiring new employees is a process that can be full of compliance pitfalls for the unwary. ADP TotalSource® spoke with several members of our Human Resources Business Partners—the HR professionals who work the front lines with employers every day—to gain answers and insight into some of the questions employers are asking.

In our company, we prefer to recruit from our current employee base or from employee referrals. Is there anything wrong with this?

While there is nothing illegal about this practice per se, solely recruiting from within and/or relying on employee referrals can cause a workforce to be too homogenous. This approach can have an adverse effect on minority groups that may not be well represented in your organization. Diversifying the recruiting pool may yield a wider range of perspectives, ideas and skill sets. For this reason, it is best to vary recruiting practices to include outside sources, such as trade boards, newspaper ads, online job boards, state job placement offices, schools and universities.

Do I need a job description before I recruit for a position?

It is definitely advisable to prepare a job description before recruiting for a position. First and foremost, it details the functions to be performed and the qualifications and background necessary. A well-written job description also sets expectations for potential employees. It helps with interview questions, serves as a basis for reviews and is also important for the proper classification of employees as exempt or nonexempt under the Fair Labor Standards Act and comparable state laws. Additionally, it can help your company comply with the Americans with Disabilities Act by helping ensure that hiring decisions are based on job-related qualifications and that accommodation requests are reviewed taking into account documented essential job functions.

What can or cannot be asked in an interview?

Innocent questions asked in good faith can get an employer into trouble if the interviewee does not know what questions are impermissible during an interview. Under Title VII of the Civil Rights Act and many state laws, impermissible questions can lead to claims of discrimination. The important rule to remember is that the questions should be designed to determine whether the applicant is qualified to perform the job.

It is impermissible to ask any questions about race, gender, color, age, national origin, religion, marital status, disability, sexual orientation or any other non-job-related question. Questions about height and weight are also impermissible unless there is a justifiable business necessity. In addition, you should not ask about financial status (e.g., whether an applicant owns or rents his home or car or whether wages have been garnisheed); arrest record; military record (e.g., what type of discharge the applicant received from military service); family status (e.g., whether an applicant has children or child-care arrangements); citizenship status (e.g., where an applicant's parents are from); native language (although you may ask about languages spoken if relevant to the position); workers'-compensation history (e.g., whether the applicant has ever filed a claim or been injured on the job).

In short, avoid any question that may be directly or indirectly viewed as being designed to elicit information on a protected status such as those discussed above.

How long should I keep employment applications?

There are many federal and state employment laws that dictate retention periods for specific employer-maintained information. Some of this information may be included on employment applications. In light of the passage of the Lily Ledbetter Fair Pay Act, as well as existing Title VII and ADEA laws, the recommendation is that you maintain employment applications (including résumés) for up to five (5) years after a worker's employment is terminated (voluntary or otherwise). It makes good sense to include an employee's job application and résumé in his or her personnel file. Once employment is terminated, the personnel file can be stored and eventually purged in accordance with the retention period.

For those candidates whom you do not hire, the best practice is to maintain the job application and résumé for up to one (1) year from the date of interview or hiring decision, whichever is later.

It's important to note that if your business is deemed a federal contractor, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) regulations requires that personnel records, such as job applications and résumés, be maintained (including those of individuals not hired) for at least two (2) years, provided your company has 150 or more employees and a government contract of $150,000. However, if the business has fewer than 150 employees or a government contract of at least $150,000, then these documents need be maintained for only one (1) year. For purposes of OFCCP compliance, the retention period commences when the record was created or received or when the most recent personnel action associated with that record took place, whichever is later.

These retention periods are designed to ensure that any relevant information required under specific employment laws is maintained. They also address why, for example, an employer hired a specific candidate or decided to promote an employee, which is crucial if you ever find yourself addressing an employment claim or action.

When should a credit check be included in a background check?

This continues to be an area of intense scrutiny at the federal and state levels. The Equal Employment Opportunity Commission (EEOC) has made clear that an employer should be able to establish credit-history information if it is essential to the particular job in question. Several states have passed laws or have bills pending which significantly restrict the use of credit history to bar employment.

Employers using credit history in selection and employment-related decisions should ensure that they do so only when it is substantially job-related, even where no state law specifically restricts it.

Whether credit history is substantially related to employment depends on the particular job. A job that involves managing money in the financial sector, for example, may be substantially related, while one that may not be involves handling cash at a store checkout counter, or a professional position that does not have access to funds.

Finally, even when reviewing credit information for hiring or retention purposes for positions where the information is job-related, you should make individualized decisions and not impose a per se disqualification standard unless you are required by law to do so.

I think one of my employees is stealing from me. Can I make him take a lie-detector test?

The use of a lie-detector, or polygraph, test is not recommended. Use of polygraph tests is governed by the Employee Polygraph Protection Act (EPPA), enforced by the Department of Labor, which imposes severe restrictions.

Generally, employers may not require or request any employee to take a lie-detector test. Nor may they discharge, discipline or discriminate against an employee for refusing to take a test or for exercising other rights under the Act. The only exception is for investigations involving a specific economic loss or injury to an employer's business. This includes theft, embezzlement, misappropriation, or an act of industrial espionage or sabotage. However, under these circumstances, the employer must still have a reasonable suspicion that the employee was involved in the incident being investigated, and the employee must have had access to the property at issue. Moreover, even where polygraphs are allowed, they are subject to strict testing standards.

Because of these limitations, the use of a lie-detector test could render an unknowing employer in violation of the EPPA. The Secretary of Labor can file a court action to restrain violators and assess civil money penalties up to $10,000 per violation. Also, an employee who is affected by an employer's violation of the Act can maintain a private civil action for employment, reinstatement, promotion and payment of lost wages.

We hired an employee, but before he started work, we sent him to a weeklong training so he could learn how to do his job. Do we have to pay for this?

Yes. Under the Fair Labor Standards Act, time spent in training is considered work time unless all of the following conditions are met:

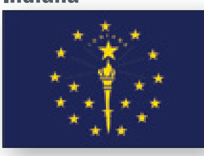
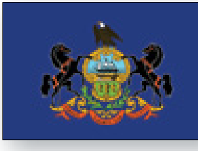
- Attendance is outside of the employee's regular work hours.
- Attendance is voluntary.
- The course, lecture or meeting is not directly related to the employee's job.
- The employee does not perform any productive work during such attendance.

In this case, attendance is not voluntary and the training is directly related to the employee's job. Therefore, the time would be considered working time and compensable. ■

STATE EMPLOYMENT LAW UPDATES

ADP TotalSource® offers clients relief from legal and regulatory burdens, including the legislation shown here. Timely communication, clear action plans and helpful resources allow ADP TotalSource clients to focus on their business objectives.

The following updates reflect sample developments from May to August 2011.

State	Regulatory Development	ADP TotalSource Action
Florida	On June 1, 2011, the Florida minimum wage increased to $7.31 per hour. Under the Florida Minimum Wage Act, which applies to all workers covered by the federal FLSA, the state's minimum wage is adjusted using a formula that reflects the percentage change in the Consumer Price Index for urban wage earners and clerical workers in the South.	Alerted clients to the update; modified payroll system to help ensure compliance with the new minimum wage.
Indiana 	The state recently amended a law enacted in 2010 that prevents employers from maintaining a policy prohibiting possession of a firearm in an employee's vehicle at the workplace. An employee who legally possesses a firearm is permitted to keep the firearm in his/her vehicle at work, as long as it is locked in the trunk or stored in the glove compartment or elsewhere out of plain sight. The amendments prohibit employers from requiring an employee or applicant to disclose whether he or she owns, possesses, uses or transports a firearm. Additionally, employers may not make employment or any related rights, privileges, benefits or opportunities conditional upon employees' giving up their rights under the law.	Alerted clients to the update; provided general guidance and model language for amending workplace-violence policies to comply with the law.
Maryland	The Job Applicant Fairness Act, which will take effect on October 1, 2011, significantly limits an employer's use of an individual's credit-history report for hiring and other employment-related decisions. Certain employers, such as banks, state-approved credit unions, and companies required by federal law to examine credit-history data, are exempt. In addition, certain exemptions apply when a prospective or current employee's credit-report information is deemed "substantially job-related."	Alerted clients to the change; provided HR guidance and best practices to help clients stay in compliance with the law.
Pennsylvania 	The City of Philadelphia has enacted a new ordinance that applies to all employers with 10 or more employees in Philadelphia. The Fair Criminal Record Screening Standards Ordinance prohibits Philadelphia employers from obtaining criminal-background information on an initial employment application and prior to or during the first interview. The ordinance does not supersede state law permitting employers in certain industries (banking, child care and others) to inquire into applicants' criminal histories and use criminal-background information.	Alerted clients to the restriction; updated standard employment application to comply with ordinance; helped affected clients modify their hiring processes as needed.
South Carolina	The South Carolina Illegal Immigration Reform Act prohibits employment of persons who are not authorized to work in the United States and requires. It also mandates that employers verify workers' legal status using the E-Verify system, an S.C. driver's license or ID card, or a license from one of 26 other states deemed to have suitable license-eligibility requirements. Recently the state announced plans to audit 4,000 employers for compliance with the Act. Employers found in violation of it face significant penalties, up to and including shutdown by the S.C. Department of Labor, Licensing and Regulation.	Alerted clients to the planned audits and provided HR guidance and best practices to help clients stay in compliance with the law.

What ADP TotalSource® Clients Are Saying

Growing to Scale—With the Help of ADP TotalSource

As a company whose business is providing outsourced building services, SAFEbuilt understood better than most the value of outsourcing certain responsibilities. **To get help with the compliance and issues related to its rapid growth, SAFEbuilt turned to ADP TotalSource.**

SAFEbuilt's biggest challenge was maintaining compliance as the company's operations grew from four offices in one state to 20 offices in nine states. "We didn't understand what unique documents each state required," says company president Mike McCurdie. "It became a huge burden trying to understand the various local and regional employment laws. With ADP TotalSource, we don't have to worry about the differences between employment laws in Michigan, Georgia, or any other states we expand to. Their experts manage it for us. Even if we hired an extra person, we wouldn't be able to match ADP's expertise."

Another major challenge for SAFEbuilt was managing the cost of benefits. "Before ADP TotalSource, the cost of health insurance was pretty unpredictable," McCurdie explains. "We were on a self-funded plan, and it was very difficult to budget because the costs were so volatile from month to month, and we changed providers every year to get the best rates. As a result, our HR person had to re-enroll every employee every year, and our employees often had to switch doctors if their old ones weren't on the new plan.

SAFEbuilt

Industry: Professional Services

Type of Business: Provides building-department services to municipalities and contracts with towns, cities and counties to provide outsourced building services.

Location: Windsor, Colorado

Number of Employees: 64

ADP TotalSource Client: Since 2009

Why ADP TotalSource? "We chose ADP TotalSource as our PEO because they were in all 50 states, they had the strongest financial position, and they had the broadest and deepest experience. They give us the support, expertise and scalable systems we need to expand our competitive advantage."

– Mike McCurdie, president, SAFEbuilt

We knew it was tough on them, but it was the best way we knew to keep the costs down. Through ADP TotalSource, we've been able to stabilize our costs while providing our employees with multiple, quality options for health-care coverage. Each employee now chooses the plan they're most comfortable with from both a service and cost standpoint."

Given SAFEbuilt's rapid growth rate, focusing on core competencies is essential. McCurdie explains that SAFEbuilt's in-house model was getting in the way: "We knew that our model wasn't scalable and that if we didn't make a change, we weren't going to be able to achieve what we wanted with the company. We decided it would be best to keep the HR functions where we could add value—like attracting and developing employees—and hand over the rest to an experienced HR partner. In addition to handling all the employment components for us, ADP TotalSource provides employee manuals, job descriptions and many other resources that wouldn't be cost-effective for us to develop internally."

"We want to continue our phenomenal growth—with help from ADP TotalSource." McCurdie summarizes his comments by articulating how ADP TotalSource helps him to concentrate on building his company: "ADP TotalSource acts as our true partner, supporting our needs and respecting our expertise. Their help has enabled us to focus on what we do best: growing our people and our business." ■

ADP TOTALSOURCE® SOLUTION

With ADP's dedicated team of experts as your partner, you can:

- Increase employee productivity, which leads to increased profitability
- Focus on core competencies
- Reduce administrative burdens
- Help mitigate risk/liability and protect assets
- Become an employer of choice

Take the first step to more streamlined, cost-effective and productive HR management.

Call ADP TotalSource at 1-800-HIRE-ADP or visit us at www.adptotalsource.com

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