

Thursday, May 18, 2023

Employment Law Midyear Update

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Bonuses: Pay the Reward without the Risk

Pete Hale, Partner

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What we will discuss



DEFINITION/TYPES
OF BONUSES



WHY OFFER
BONUSES?



RISKS ASSOCIATED
WITH PAYING
BONUSES.



MITIGATING RISKS
ASSOCIATED WITH
BONUSES



BONUS OR
COMMISSION?

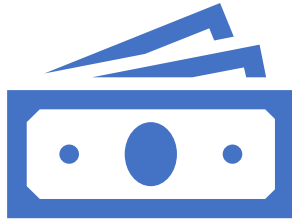


HIRING/RETENTION
BONUSES



QUESTIONS?

Definition and Types



A bonus is a payment, usually discretionary and not formula-based, to employees to reward good performance, encourage or prevent attrition. A true bonus is not considered wages under applicable employment law (but is reported on a W-2 for tax purposes).



Types of bonuses:

Hiring

Retention

Individual Performance

Company or department-wide performance

Annual, or as appropriate (landing big account, winning significant case, etc.)

Why offer bonuses to employees?

- Incentivize strong performance
- Improve employee morale
- Incentivize retention, reduce attrition
- Recruit employees
- Improve compensation based on company-wide results
- Give employer greater budgeting control

Risks

- It's not really a bonus – wage and hour
- Contractual obligation

Wage and Hour

- Actual bonuses are not typically protected under state and federal wage and hour law.
 - › Why does this matter? No multiple damages, fees, etc. for failing to pay.
- Commissions are protected under wage and hour law.
- Is the bonus a “bonus” or is it a “commission”

Commission:

- Formula-based
- Based on individual employee performance
- Not discretionary
- Part of employee compensation
- Predictable, set amount

Bonus:

- Normally discretionary, not determined by formula
- Often based on company-wide performance
- Part of employee compensation but can fluctuate or be eliminated
- Not calculated by individual metrics

Suominen v. Goodman Indus. Equities Management Group, LLC

“The Massachusetts Appeals Court held in *Suominen v. Goodman Indus. Equities Management Group, LLC*, 78 Mass.App.Ct. 723, 737-38, rev. denied, 459 Mass. 1109 (2011), that employee compensation based upon ‘a share of the overall profits generated’ by a business *is not* subject to protection under the Wage Act.” *Element Prods., Inc. v. Editbar, LLC*, No. 1684CV01476BLS1, 2019 WL 4017139, at *1 (Mass. Super. May 7, 2019).

Mitigate Risks Associated with Bonuses

- Written bonus/commission plans and agreements.
- Clarify, in writing, that bonus is at discretion of management.
- Make sure that bonus is not formula-based, tied to individual performance.
- Do not promise that bonus will be paid under any circumstance.
- Specify if bonus is based on company-wide performance.
- If active employment at payment is required to receive bonus, clarify that this is to encourage retention.
- If in doubt, consult counsel.

What if the Bonus is Really a Commission?

- Then treat the commission as wages earned and subject to statutory protection.
- Draft a commission plan/agreement and have employees sign.
 - › Counsel should draft the agreement.
- Agreement should include when the commission is earned, how it is calculated, when it is paid and what happens at termination.
- “[F]or a commission to be definitely determined, the contingency which triggers the commission must already have occurred and the amount due must be capable of being precisely ascertained.” *Lohnes v. Darwin Partners, Inc.*, 15 Mass. L. Rptr. 157 (Mass.Sup., July 23, 2002).

Hiring and Retention Bonuses

- Important recruiting and retention tool for employees.
- Biggest non-legal risk: employee gets paid and then leaves the company. How to mitigate that risk?
- Have employee/candidate sign agreement, or agree in offer letter, that pro-rated portion of bonus must be repaid if they leave within ____ months of hire.
- Include specific terms of repayment, including who is responsible for attorneys' fees if employer must seek repayment.
- Deduction from final paycheck? Check local law.
 - › Typically, can characterize as a forgivable loan and have employee agree in writing to allow deduction.
- Have counsel draft agreement.

Pro-rating for Employees On Leave

- If a formula-based bonus, is it really a bonus?
- If based on department-wide or company-wide profits, why are you prorating?
 - › Do we prorate across the board?
 - › Do we treat some leaves differently than others?
 - › Do we do that for part-time employees?
 - › Could someone on protected leave construe pro-rating a bonus as an adverse action?



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Separation Agreements: Recent Developments and Best Practices

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Separation Agreement Basics

- Not one size fits all
- Consider purpose
 - › Resolving claims
 - › Problem employee
 - › Valued employee
 - › Need for transition period
 - › Reduction in force (RIF)
 - › Need for ongoing protection of confidential information
- Consider age of employee – if over 40, need special provisions

Key Provisions

- Severance payment – amount and schedule
 - › Cannot condition payment of wages and statutorily mandated benefits on signing separation agreement
- Continuation of health benefits – **consult plan documents!**
- Account for other wages and benefits: e.g., 401k, bonus plans, commissions, vesting of stock options
- Release – consider state laws and limitations
 - › Some claims cannot be waived!
- Recovery of property / Future cooperation

Key Provisions (*cont.*)

- Confidentiality of agreement
- Non-disparagement
 - › Nationwide tendency towards greater restrictions
 - › Consider what is most important to protect
- Non-disclosure / non-solicitation / non-compete
- Future employment
 - › Cover parents/subs/affiliates?
 - › Cover mergers and acquisitions?
- Carveout of existing agreements?

Federal Law – Sexual Assault / Harassment Claims

- Speak Out Act (Dec. 2022)
 - › Non-disclosure and non-disparagement clause in any agreement is void with respect to claims for sexual assault or harassment arising before agreement is signed
 - › Covers any provision that would limit employee's right to discuss or disclose information concerning claim for sexual assault / harassment
- Tax Cuts and Jobs Act (Dec. 2017)
 - › Eliminates tax deduction for payments made in settlement of sexual harassment or sexual abuse claim, if agreement contains non-disclosure
 - › Cannot deduct settlement payment or attorneys' fees
 - › Unclear whether separate allocation is an effective workaround

Maine – Confidentiality / Non-Disparagement

- A settlement, separation, or severance agreement cannot include a provision that:
 - › Limits an individual's right to report, testify or provide evidence to an employment discrimination enforcement agency;
 - › Prevents an individual from testifying or providing evidence in court proceedings in response to legal process; or
 - › Prohibits an individual from reporting conduct to a law enforcement agency.
- Requires separate consideration to prevent disclosure of factual information relating to a claim of employment discrimination
 - › Must apply to all parties to agreement

(26 M.R.S. § 599-C)

National Labor Relations Board

McLaren Macomb, 372 NLRB No. 58 (2023)

- Board held that severance agreements with broad non-disparagement and confidentiality provisions violated NLRA
- Section 7 of NLRA grants employees the right to engage in “concerted activity,” i.e. talk to each other and work together to improve pay and working conditions
 - › E.g. discussing wages, benefits and working conditions; discussing unlawful or unsafe practices
 - › Section 7 rights extend to former employees, who have right to communicate with former co-workers or report matters relating to ongoing labor dispute
- Agreement is unlawful if “terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights...”
- Under *McLaren*, many common confidentiality / non-disparagement provisions would be unlawful if they would prohibit an employee from providing information to the Board concerning alleged unfair labor practices or assisting coworkers with workplace issues

McLaren Macomb, 372 NLRB No. 58 (2023)

Confidentiality Agreement: “The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.”

Non-Disclosure: “At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee’s employment. At all times hereafter, the Employee agrees not to make statements to Employer’s employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives. ”

Waiver of Age Discrimination Claims

- General release does not waive age discrimination claims under federal law (40+) without including specific provisions and notices
- Waiver must be “knowing and voluntary”
- Seven requirements:
 - › Written in easily understood, plain language
 - › Specifically refer to ADEA
 - › Advise employee to consult attorney before signing
 - › Provide employee 21 days to review (EE can waive)
 - › Provide employee 7 days to revoke consent (cannot be waived)
 - › Must not include claims arising after date of release
 - › Must be supported by consideration

Unique Considerations for Layoffs

- Do you need separation agreement at all?
- Consider Worker Adjustment and Retraining Notification (WARN) Act
 - › Applies to employers with 100+ EEs when:
 - Closing a facility resulting in loss of employment for 50+ EEs, or
 - Mass layoff of 500+ EEs, or
 - Mass layoff of 50+ EEs comprising at least 33% of workforce
 - › Requires 60 days' notice of closure / layoff, or pay through notice period
- State "Mini-WARN" acts – may have different definitions / thresholds
 - › Maine requires severance payment of one week / year of employment
 - › NH is similar to WARN, but lower EE thresholds
 - › MA reduces employer's unemployment liability for each week of notice (up to 13 weeks)

Layoffs - Avoiding Discrimination Claims

- Determine group(s) of employees eligible for layoff (“decisional unit”) and selection criteria
 - › E.g. 10% reduction of Sales Department; reverse order of seniority
- Evaluate demographic makeup of employees targeted for group layoff and determine adverse impact on protected groups
- Is there alternative selection criteria that would eliminate adverse impact?
- For effective waiver of age claims with RIF, use 7 criteria, plus:
 - › 45-day review period / program time limits
 - › Define decisional unit and eligibility factors
 - › List job titles and ages of all eligible employees and ineligible employees in same job classification or organizational unit

Presenting Separation Agreements

- Best to prepare agreement in advance
- Be honest about reasons for separation
 - › Performance?
 - › Layoff?
- Best practice to have witness



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Microaggressions and Investigations

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Hostile Work Environment 2.0

Microaggressions:

Everyday, subtle, intentional or unintentional interactions or behaviors that communicate some sort of bias toward historically marginalized groups.

ON OUR SLEEVES[®]

Examples - Verbal

"Your English is strong."

"I have Black / gay / etc. friends"

"As a woman, I know what you go through as a person of color."

"Can I touch your hair?"

"Ok, but where are you really from?"

"When I look at people, I don't see color."

Do you have a boyfriend?

Examples - Behavioral

Mistaking female lawyer for court reporter

Giving someone a nickname without permission because uncomfortable saying full name

Scheduling meetings or events that conflict with religious observances

Eye rolling when someone mentions feeling invalidated

Excluding someone from an afterwork event based on assumptions about childcare responsibilities

Assuming an older person isn't able to use or learn technology

Refusing to use someone's pronouns because it's "too confusing" or "ungrammatical"

Gendered uniforms / dress codes

Examples – Phrases to Excise

Black sheep

Sold down the
river

Peanut gallery

Slave driver

Too many
chiefs, not
enough Indians

We got gypped

They're on the
warpath

You guys

Beyond the
pale

“Microaggressions are more similar to ‘mere offensive utterances’ than ‘physically threatening or humiliating statements,’ and are insufficient to support a hostile work environment claim.” *Chambers v. City of Lakeland*, 2022 WL 2356818 (M.D. Fla. 2022) *citing* 2015 case.

“Regardless of whether an aggression is micro or macro, the Court considers the evidence of hostility in totality. Whether the sum comes from a large number of small incidents, or a small number of large incidents, the result is the same.” *Chen v. Yellen*, 2021 WL 4226202, n. 4 (Sept. 16, 2021)

Nichols v. Michigan City Plant Planning Dept. (7th Cir. 2014)

- During first meeting with coworker, she raised a towel and waived her hand as if she were frightened of him.
- Second day of work, purse left unattended in an area he was cleaning, which he suspected was a ruse.
- Employee instructed him not to speak to their grandchild, who was visiting the workplace.
- Someone used the N-word
- Someone else referenced him by saying, “Where that boy at?”

Nichols (cont.)

- Employer granted summary judgment.
- Single racial epithet not sufficiently severe to constitute hostile work environment.
- Remaining allegations not physically threatening, didn't interfere with work performance, and not all directed at him.
- Conduct insufficiently offensive to be actionable.

Circuit Split

- Is a single use of the N-word or similar slur sufficient to establish hostile work environment?
 - › Some circuits (3d, 4th, and DC) says yes.
 - Judge Kavanaugh, then on DC Circuit: “No other word in the English language so powerfully or instantly calls to mind our country’s long and brutal struggle to overcome racism and discrimination”
 - › Others (8th, 6th, 7th, 10th, 5th) have said no.
 - *Armstrong v. Whirlpool Corp.* (6th Cir. 2010): “handful of uses of the n-word and its derivatives,” “some racist jokes” and “a few references to the” KKK insufficient to establish HWE.
 - › In 2021, SCOTUS declined to decide.

Why Investigate Microaggressions

- We anticipate an increasing number of HWE cases will be premised on pervasive microaggressions and implicit bias.
- Research shows that microaggressions
 - › negatively affect individuals' mental, emotional, and physical health;
 - › cause loss of self-esteem, exhaustion;
 - › cause mistrust of peers, staff, and the organization; and
 - › characterize a culture that tolerates more overt forms of discrimination.

Purpose(s) of Investigation

Determinative

Defensive



To figure out whether disciplinary action is required in response to employee misconduct

To create an affirmative defense to a potential hostile work environment claim

To correct an injustice or mistake

To pin down witness statements while memories are fresh and to prevent future exaggeration

To make the work environment safer or less hostile or offensive

To be able to communicate the facts in order to obtain legal advice

To correct legal compliance problems before they become liabilities

To figure out facts in order to devise a defense strategy in anticipated litigation

Identifying the investigator

- In addition to determining appropriate organization to lead the investigation, consider who is and is not an appropriate individual to investigate.
- Investigator should be free of actual and perceived bias / conflicts:
 - › Investigator should not also be witness;
 - › Investigator should not have personal connection to parties / key witnesses;
 - › Investigator should not have had any role in the matter (*e.g.* when they worked in a different role or organization);
 - › If this isn't the first investigation involving one of the parties, consider appointing a different investigator.

Interim Measures

- At the outset, determine whether interim steps are necessary:
 - › Should respondent be placed on administrative leave?
 - › Should complainant be permitted to stay out of the workplace?
 - › Should the parties be issued a no contact directive?
 - › Do any steps need to be taken to ensure evidence is preserved?
 - › Is the need for training immediately apparent?

Planning the Investigation

What conduct is alleged?



Is there a policy/rule that may have been violated?



What documents, physical evidence, or data might be relevant?



Who should be interviewed? In what order?

Preliminary Remarks

- This is a company investigation, and it's very important that you be truthful.
- It's also very important that you not discuss this investigation or the things you share with me with anyone else while the investigation is underway.
- I will keep the information you provide to me as confidential as possible.
 - › Do not promise confidentiality, as it's impossible to investigate without allowing accused individual an opportunity to respond.

Preliminary Remarks Cont.

- The company does not tolerate retaliation against anyone who participates in an investigation in good faith. If anyone makes you feel uncomfortable for having spoken with me, let me know right away.
- If you have any documents that relate to the issues we discuss today, it is critical that you provide them to me and not destroy them.

Complainant Interview

- Often the first interview, but not always.
- Be sensitive to reasons Complainant may be a reluctant witness.
- Obtain an exhaustive list of allegations:
 - › What, when, where, how, who present
- Express support without endorsing narrative.
- Ask whether there are others you should interview.
 - › But do not suggest or promise you will speak to everyone on their list
- Seek to understand desired outcome, without suggesting that outcome is likely or feasible.

Tips for Questioning Witnesses

- Use open ended, not closed or leading, questions to obtain narrative.
- Use closed questions to elicit specific information or to confirm understanding.
- Have prepared questions or areas of inquiry but be flexible to deviate or follow up on new information.
- Interview witnesses one-by-one in private space.
- Remain neutral, with an open mind, to the very end.
- Conclude with an open-ended question: Is there anything else you'd like to discuss with me today or that you think I should know?

Concluding Remarks

- I may need to follow up again as the investigation progresses.
- Reminder that you should not discuss the investigation with anyone while it's ongoing.
- Reiterate that retaliation is strictly prohibited, and witness should come forward if they experience retaliation.
- Thank interviewee for their cooperation.

Note Taking

- Typed or handwritten? Whatever allows you to capture more information.
- Notes should indicate witness name, date / time of the interview, location of the interview, and identify all attendees.
- Notes should accurately describe what the witness conveyed and may include your observations, if relevant to credibility.
- Use direct quotes where appropriate (and accurate).
- Clearly delineate what witness knows firsthand, versus what they've heard from others.

Credibility determinations are hard



He
SAID



She
SAID

The fact that the evidence is in conflict is not a valid reason to dodge a credibility finding—that's the investigator's job.

Not Relevant to Credibility

- Character witnesses (“he is such a good guy”)
- Popularity (“everybody likes her”)
- Appearance (“he looks sketchy, I’m sure he took the money”)
- No history of past problems
- Reasonable lapses in memory
- Irrelevant and understandable inaccuracies and inconsistencies

Sometimes Relevant to Credibility

- Delay in reporting, depending on the nature of the report and reason for the delay.
 - › In delayed reporting cases, probe whether / what Complainant reported to others, close in time to when the incident occurred.
- Other allegations / past behavior about the Respondent may impact credibility, if they are similar.
 - › But be careful not to infer responsibility from an unrelated performance issue.
 - › The fact that someone has poor attendance, for example, is rarely relevant to whether they've engaged in harassment or theft.

Core Credibility Factors

Inherent plausibility

Demeanor

Motive (or lack of motive) to falsify

Corroboration

Statements against interest

Level of detail provided

Reasoning to factual findings

Parse the applicable policy

Determine what is undisputed

For disputed facts, review the relevant evidence

For disputed facts, assess credibility

Make a separate determination for each and every material allegation

Is it more likely than not that the allegation is true?

Things to Avoid

- Reach conclusions (factual and about violations of policy), but do not couch in legal language.
 - › *i.e.* “the Respondent violated the company’s harassment policy,” not “the Respondent created a hostile work environment.”
- In most cases, there is evidence that contradicts the conclusion reached. Don’t ignore that evidence – tackle it head on.
- Although your goal is to be able to tell a coherent story, avoid temptation to fill in gaps with speculation.
 - › Not everything makes sense.
 - › It is normal to have a gap in the information – the report should note the gap rather than try to fill it in.

Investigation report: consider your audience(s)

Employee under investigation (if they request personnel file)

Employee's lawyer

Your successors, years from now

MHRC investigator

Jury

Tips for an effective report

- Tell the story as if the reader knows little to nothing about the actors or situation.
- Use clear, grammatically correct sentences; avoid being too cryptic.
- Factual findings should be factual, not generalizations, not loaded or judgmental.
- Don't include irrelevant information, especially when that information suggests an unlawful consideration.
- Ask yourself: will the reader appreciate that the investigation was thorough, careful, objective, and fair and the conclusions well reasoned and justified?

Contents of report

- Identify the complaint or situation you are investigating: how, when, to whom it was directed.
- Summarize investigation process:
 - › Identify (by role or relationship with parties) witnesses and when interviewed;
 - › What documents or data were reviewed, etc.
- Summarize each allegation:
 - › What is alleged?
 - › What does the Respondent say?
 - › If undisputed, say so.

Closing the loop with Complainant

- At conclusion of investigation, Complainant should receive a letter that:
 - › Thanks them for coming forward;
 - › Indicates that the investigator conducted a thorough investigation and:
 - Was unable to substantiate their allegations (*i.e.* conclude that what they reported likely occurred); or
 - Has concluded that what they reported likely occurred;
 - › Where appropriate, indicates that the employer has taken appropriate remedial action;
 - › Reiterates that the employer prohibits retaliation and asks them to reach out if experiencing.

Appropriate Corrective Action

- Must be designed to end the harassment / discrimination.
- In the case of microaggressions, an educational rather than a punitive response might be sufficient if:
 - › The microaggressions were unintentional and not pervasive or egregious;
 - › The perpetrator is open to learning and understanding the impact of their words; and
 - › You are comfortable the behavior will not repeat / continue.



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Independent Contractor Classification

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Independent Contractor Statutes (MA)

M.G.L. c. 149, sec. 148B (“ABC” test) – to be an IC, must show that work:

- › Is done without the direction and control of the employer;
- › Is performed outside the usual course of the employer's business; and
- › Is done by someone who has their own, independent business or trade doing that kind of work.

Independent Contractor Statutes (NH)

NH RSA 281-A:2 VI(b) – the presumption that all workers (with limited exceptions) are employees will be rebutted if the worker satisfies **all** of the following criteria:

- (A) The person possesses or has applied for a *federal employer identification number* or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter;
- (B) The person has *control and discretion over the means and manner* of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer;
- (C) The person has *control over the time when the work is performed*, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented;

Independent Contractor Statutes (NH)

(*cont.*)

- (D) The person *hires and pays the person's assistants*, if any, and to the extent such assistants are employees, supervises the details of the assistants' work;
- (E) The person *holds himself or herself out to be in business for himself or herself* or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations;
- (F) The person is *responsible for satisfactory completion of work* and may be held contractually responsible for failure to complete the work; **and**
- (G) The person is *not required to work exclusively* for the employer.

Independent Contractor Statutes (ME)

26 M.R.S. § 1043(11)(E) – to be an IC:

1. *All* of the following criteria must be met:

- The individual has the essential right to control the means and progress of the work except as to final results;
- The individual is customarily engaged in an independently established trade, occupation, profession or business;
- The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;
- The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; **and**
- The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted; **and**

Independent Contractor Statutes (ME)

(*cont.*)

2. *At least three (3)* of the following criteria must be met:

- The individual has a substantive investment in the facilities, tools, instruments, materials, and knowledge used by the individual to complete the work;
- The individual is not required to work exclusively for the other individual or entity;
- The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;
- The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;
- Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual;
- The work is outside the usual course of the business for which the service is performed; **or**
- The individual has been determined to be an independent contractor by the federal Internal Revenue Service. *(an SS-8 determination)

The Pending New Federal Rule

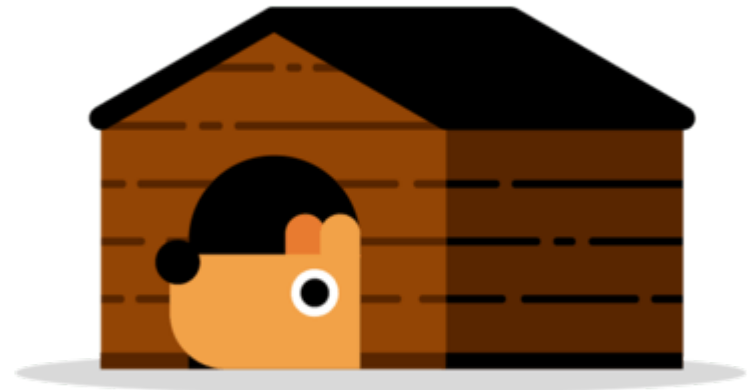
- Pending rule as of October 13, 2022 would replace the revised standard (revised during Trump administration on January 7, 2021) and based on current information likely would return to a totality of the circumstances of the economic reality test, which considers:
 - › Opportunity for profit or loss depending on managerial skill;
 - › Investments by the worker and the employer;
 - › Degree of permanence of the work relationship;
 - › Nature and degree of control;
 - › Whether work performed is an integral part of the employer's business;
 - › Worker's skills; and
 - › Other relevant factors.

Stay tuned!



Why does classification matter?

- *Wage claims*
 - › Minimum wage and overtime
 - › Sick leave
- *Benefit/Insurance claims*
 - › Health insurance
 - › Unemployment insurance
 - › Workers' compensation
- *Fines/penalties* (civil and potentially criminal!)
 - › For unpaid taxes
- MA: personal liability for president, treasurer and/or any officer or agent having the management of the corporation



When does this come up?

- Transactions
 - › Buyer's counsel and underwriters focus on classification and potential wage claims
- Governmental agency inquiries
 - › Unemployment
 - › Workers' Compensation
- Employee claims
 - › Administrative agencies → court
 - › Direct reporting to DOL



Independent Contractor Agreements

- Very good to have once you have properly classified the worker
- Should include:
 - › Scope of services
 - › Fees with payment schedule
 - › Ability to terminate and any required notice
 - › Identification of contractor relationship
 - › Contractor's responsibility to pay for taxes and related indemnification for the company
 - › Restrictions on use of Confidential Information and Intellectual Property
 - Beware: do not include non-compete restrictions





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