APPLICATIONS AND INTERVIEWS

Employment Applications

- Employment applications can lead to liability for the employer if certain questions or information are excluded or included.
- To avoid liability, your application should:
  - Include a statement of nondiscrimination and that the employer is an “equal opportunity employer;”
  - Include a statement that the application is not a contract of guarantee of employment;
  - Not ask about medical conditions; and
  - Require the applicant to sign the application indicating that all information is true and correct.
Employment Applications

- Ban the Box Laws
  - Prohibit inquiring about an applicant’s criminal history in the early stages of the interview or application process.
  - Promote employers considering a candidate without being influenced by his/her background.
  - Six states (including Illinois, Massachusetts, and the District of Columbia) and 25 counties and cities have enacted legislation applicable to private employers.
    - There is momentum behind passing these laws, so it is likely more states will continue passing such laws.
    - 14 states and 100 cities and counties have such legislation for public employers.

Interview Questions

- Interviews are another point during the hiring process at which employers can be accused of being discriminatory. Certain questions should be avoided.
- Topics that can often lead to issue and in which caution should be taken include:
  - Marital and Familial status
  - Disabilities/Illness/Physical Abilities
  - Nationality/Race/Ethnicity
  - Age
  - Religion

Interview Questions

- There are often alternatives questions that can be asked to obtain the same information.
- All candidates should be asked the same questions; i.e., do not ask certain questions to a specific candidate based on suspicions.
Interview Questions

To avoid potential liability, the following questions should be avoided during an interview:

- Do you have a disability?
- Are you pregnant? Or do you expect to become pregnant?
- How old are you?
- How long before you retire?
- Are you a U.S. citizen?
- Have you been arrested?

Note: These questions should not be asked on the employment application either.

What questions are okay to ask?

- What are your long-term career goals?
- Are you able to perform the duties required of this position?
- Have you worked or received a degree under another name?
- Would you be able to work late or travel with limited or no notice?
- Are you authorized to work in the United States?
Background Checks

- A background check is a collection of information about a prospective employee to verify his/her claims or obtain additional information.
  - Fair Credit Reporting Act governs the collection of background checks by third parties.
  - A background check can include financial history, criminal history, and employment references.
  - Over the past few years, federal and state government/agencies have enacted legislation and initiated claims targeting the use of information obtained in a background check. There are concerns such information is being used to discriminate against applicants.

To reduce the likelihood that your use of such information is deemed discriminatory, consider:

- Is a background check necessary?
- What information is being collected? Is it all necessary?
- How is the information being used?

If background checks are used:

- They should be used for all applicants/employees
- The way background checks are used should be the same for all applicants/employees regardless of race, national origin, color, sex, religion, disability, genetic information, and/or age

If you do obtain background checks, the following steps should be taken in accordance with the Fair Credit Reporting Act:

- Obtain a validly signed disclosure and authorization form from an applicant/employee, prior to obtaining a consumer report;
- Provide an applicant/employee with a pre-adverse letter before taking an adverse action;
- Issue an adverse action letter if the adverse action is based on a report provided by a credit reporting agency;
- Retain personnel records for the appropriate time under applicable federal and state law; and
- Dispose of consumer reports and associated materials in a proper manner after record-keeping period is complete.
Background Checks

- If you decide to obtain criminal history, the EEOC recommends the following:
  - Arrest records should not be considered.
  - Criminal history should not be inquired about on the initial job application.
  - Convictions should only be considered if they are related to the job in question and consistent with a business necessity.

When considering the use of convictions, the EEOC recommends the following factors are applied to avoid an allegation that such information was used to discriminate:

1. The nature and gravity of the offense or conduct;
2. The time that has passed since the offense, conduct, and/or completion of the sentence; and
3. The nature of the job held or sought.

The use of credit/financial history obtained from a background check has also been limited by certain states. Generally prohibit use of credit history, except in positions or institutions where such information is substantially related to the position or industry, i.e., financial institutions or positions dealing with money.
Background Checks

- 11 states currently limit the use of credit history in employment decisions.
  - States include Maryland, California, Illinois, Nevada, and Colorado.
  - In 2014, legislation was introduced in 19 states and the District of Columbia.
- An employee has the right to dispute what is contained in a credit history report if it is used to make a negative employment decision.

OFFER LETTERS AND EMPLOYMENT AGREEMENTS

Offer Letters

- At a minimum, all employees should receive a document (e.g., an offer letter) containing:
  - Job title;
  - Salary or applicable wage rate;
  - Employment classification (full-time or part-time);
  - Duties;
  - Employment Status (at-will in most cases); and
  - Overtime classification (exempt or non-exempt).
  - Consider including nondisclosure/confidentiality provisions.
- CAUTION: Certain states (e.g., California, Washington, and New York) have mandated what information is to be included in an offer letter/notice of wages.
### Employment Agreements

More complicated arrangements (ones that involve severance, termination for cause, restrictive covenants, etc.) should be formalized in an employment agreement.

Employers should keep the following in mind when drafting employment agreements:

1. Employers should ensure provisions are up-to-date and tailored to the specific position;
2. Agreements should be succinct and to the point; and
3. Employers should consider location of the business and employee when drafting.

The best practice is to consult counsel.

### Worker Classification: Independent Contractors and Employees

Worker Classification

Classification of workers is a two-step process:

1. Must first determine whether a worker is an independent contractor/consultant or an employee.
2. If the worker is an employee, the employer must then determine whether the employee is "exempt" or "non-exempt" from overtime.

It is not the worker’s choice how he/she is classified.
Worker Classification

- Both the federal government and the states set guidelines/factors for determining whether a worker is an independent contractor or employee
- CAUTION: State guidelines may differ from those set forth by the IRS

Independent Contractor Classification

- Many employers apply the IRS guidelines for making independent contractor classification determinations; the more factors that are met, the more likely the worker is an independent contractor.
- The presence of an LLC aids in classifying a worker as an independent contractor, but it is not definitive.
- This is not definitive, the true test requires an examination of the day-to-day relationship between the parties.

Independent Contractor Classification

- IRS Guidelines include:
  - Behavioral Control
    - Instructions given to worker
    - Training provided to worker
  - Financial Control
    - Whether the worker’s services are available to the market
    - How the worker is paid
  - Type of Relationship
    - Provision of benefits
    - Permanency of relationship
    - Whether workers’ services are key aspect of business
# Independent Contractor Classification

- Improperly classifying an employee as an independent contractor can result in the following liabilities:
  - Employment taxes
  - Income taxes
  - Worker's compensation insurance
  - Unemployment insurance
  - Health and welfare benefits
  - Bonus opportunities
  - Unpaid overtime

## Overtime Classification

- If the worker is an employee, the next step is determining overtime classification.
  - Non-exempt = eligible for overtime pay
  - Exempt = ineligible for overtime pay
- Governed by the Fair Labor Standards Act (FLSA) sets forth the circumstances under which an employee may be considered “exempt.”
  - If an employee meets one of the statutory exemptions, an employer is not required to pay overtime.

## Most common exemptions include:

- Executives
- Administrative employees
- Professional employees
- High level computer-related jobs
- Outside sales persons
- Highly compensated employees
- Most of the exemptions require the employee meet two tests:
  - 1) Salary Basis Test
  - 2) Duties Test
Changes to overtime classification regulations are expected this year.

- March 2014: President Obama directed the DOL to update overtime regulations, particularly for white collar workers.
- The healthcare industry will likely be very impacted by these changes.

Implications of the expected changes include:

- Employers will need to engage outside counsel or a consultant to review classifications to ensure compliance.
- Fewer employees will be considered “exempt” and thus eligible for overtime pay.
  - This may result in higher payroll costs.
- Employers will have to change payroll practices for currently exempt employees.

Expected Changes to Overtime Regulations

- Increase the minimum weekly pay from the $455 per week set in 2004 ($23,660 annually).
- Increase the minimum salary for the highly compensated employee exemption (currently $100,000), or eliminate the exemption entirely.
- Revise or eliminate the concurrent duties section of the executive exemption, which permits managers who perform the same duties as their direct reports to qualify.
- Revise the “primary duty” test and replace with quantitative test keyed to time spent managing.
- Modernize computer professional exemption to delineate between specific exempt and non-exempt types of computer work.
COMPENSABLE TIME
FOR NON-EXEMPT EMPLOYEES

Compensable Time

- Employees are actively filing lawsuits alleging they were required to work during hours for which they were not compensated.
- “Non-exempt” employees must be paid for all hours in which they work, prepare for work, or are available to work.
- Failure to properly compensate for all such hours can result in liability for an employer.
  - These hours are counted as working hours for purposes of calculating overtime as employees must be relieved of all duties to be considered “off the clock.”

Compensable Time

- Donning and Doffing
  - Pre- and post-shift activities that are integral and indispensable to an employee’s principle activities
  - FLSA requires employees are compensated for such activities
  - Examples:
    - Preparing for and cleaning up after patients
    - Putting on any required uniform
Compensable Time

- Training Time
  - Attendance at training programs during or outside normal working hours is compensable unless:
    - Time is outside normal working hours
    - Attendance is completely voluntary
    - Program is not directly related to job, and
    - No productive work is performed during the training
  - Compensation is not required for attendance at training or similar programs to obtain or maintain licenses, certifications, etc. that are required to maintain a position.

- On-Call Time
  - If an employee is required to be available for work outside of normal business hours, he/she may be eligible for compensation
  - Dependent on whether the employee can use the time for his/her personal needs which is based on the restrictions posed during the on-call time

- Waiting Time
  - Time an employee spends waiting to do work and during which he/she is not free to leave the workplace is considered waiting time and is compensable
    - e.g., time spent waiting for patients to arrive or for the last patient to depart
### Compensable Time

- Checking emails or logging in from home
  - This is “work time,” if not de minimus
  - Might also cause otherwise non-compensable commute into compensable commute

### Compensable Time

- Meal Breaks and Rest Periods
  - Time periods during which an employee is completely relieved of work.
  - Approximately half of states require meal breaks for non-exempt employees working more than six hours.
  - Close to 10 states require employers to provide rest periods to non-exempt employees.

### ALSO KEEP IN MIND…
Also Keep in Mind…

- An employee handbook should be maintained, updated and made available to all employees
  - All employees should sign acknowledgement forms upon receipt of the handbook
  - Handbooks should be updated periodically
- Thorough employee records should be maintained and Company policies followed with respect to all employees
  - Provides support for future employment decisions

- If you have at least 50 employees, the Affordable Care Act may be applicable to your business
  - Certain part-time employees may thus become eligible for health and welfare benefits
- Employees, especially those in contact with patients, should be provided with a safe environment in which to work
  - Procedures and protocols should be put into place and implemented to ensure worker safety
  - OSHA is the most active section of the Department of Labor and has recently implemented new requirements

- States have their own employment-related laws which may differ from federal laws
  - Policies should be reviewed to ensure they comply with applicable state law, especially where a practice has locations in more than one state
  - May need to implement different policies in different offices
- Special attention should be paid in states such as California and New York which tend to have more stringent, employee-friendly, laws
Also Keep In Mind…

- Use of Waivers and Releases
  - The EEOC has recently filed lawsuits against employers challenging the legality of waivers and releases in separation agreements.
  - As a result, if you are required to implement a severance, separation, or release agreement with an employee, the agreement should clearly state that the employee is not giving up the right to file an EEOC charge or provide information to the EEOC.

QUESTIONS?