

# ***The Inside Scoop: The HR Professional's Ultimate Checklist For Reducing Legal Risks***

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# Strategic Thinking In All Shapes And Sizes

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- Recruiting Talent
- Talent Management
- Succession Planning
- Compensation and Benefits
- Health, Safety, and Security
- Recordkeeping
- Employee Relations
- Communications
- Reducing Legal Risks?



# Independent Contractors v. Employees

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# Independent Contractor

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- **IRS Test**

- An individual over whom the employer has the right to control or direct only the result of the work, not the means and methods by which the work is accomplished.
- An IC generally has multiple clients, maintains a separate workplace, and is not supervised or controlled by the employer.

- **DOL Test**

- An individual who, as a matter of economic reality, is not dependent upon the employer.
- An IC generally is someone with economic independence who is operating a business of his/her own.



# Independent Contractor Checklist

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- Do you have appropriate written agreements with contractors?
- Is compensation in a form consistent with IC status?
- Does the contractor have control over the manner and means of providing services?
- Is the Company holding the IC out as an employee to others?
- Are there employees who perform the same work as contractors?
- Does the IC provide all equipment and bear the risk of all expenses?
- Is the IC economically dependent upon the Company?

# Management Training

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- Is management training on employment law issues provided periodically?
- Is it provided in a format that is effective?
- Are key areas covered such as interviewing do's and don'ts?
- Is the training instructor qualified to convey the information and respond to questions?
- Are records kept of the training content and who attended?
- Are records kept for each manager's training history?
- Are all levels of management required to attend?
- Is the effectiveness of the training measured?

# Employee Handbooks

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- Do you systematically update your employee handbook?
- Do you have an effective update process for operations/HR/legal review?
- Are you updating your handbook for federal, state, and local law as well as agency guidance?
- Is your handbook consistent with your culture?
- Does your handbook contain all legally required provisions?
- Does your handbook contain all available provisions to help reduce legal risks and establish appropriate defenses to litigation?
- Have you integrated related policies in the handbook, e.g., leave policies?
- Is your handbook a point of reference in counseling managers and employees?

# Non-Exempt/Exempt Status and Gender Equity Pay Issues

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- Do you evaluate exempt status upon hire?
- Do you periodically reevaluate exempt status based on changes in operations, the job, or the law?
- Do you require exempt employees to perform work in a way that maintains their exempt status?
- Do you evaluate gender equity pay issues upon hire?
- Do you evaluate gender equity pay issues based on changes in operations, the job, or the law?
- Do you train managers how to spot potential gender equity pay issues and report them to HR?
- Do you have a complaint procedure for employees?





# FMLA Administration Checklist

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- Are your FMLA Administrators and managers trained on the law (Federal and State)?
- Do you have an effective system for tracking FMLA?
- Have you selected the method for calculating the 12 month FMLA year that is best for your company?
- Have you published to all employees the method for calculating the 12 month FMLA year?
- Do you coordinate FMLA with state leave laws?
- Have you customized the DOL forms or developed your own FMLA forms (Notice of Eligibility/Designation Notice/FMLA Exhaustion Notice)?
- Do you have reminders set for notifying employees in writing when FMLA is exhausted and what policies apply if additional leave is still needed?
- Do you have a system for addressing additional leave under ADA or similar state laws?

# Time Off as a Reasonable Accommodation

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- Employers must consider giving a disabled employee time off as a reasonable accommodation.
- This is true even if the employee has exceeded her FMLA leave entitlement.
- However, it is equally clear that employers are not required to accommodate indefinite leaves of absence; doing so is not considered a reasonable accommodation.
- And, employers are not required to extend a disabled employee's LOA if doing so would cause the employer undue hardship.
- Nevertheless, this is a very challenging topic that requires careful analysis through the interactive process.



# Reasonable Accommodation Interactive Process

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# The Interactive Process

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- "When a qualified individual with a disability requests a reasonable accommodation, the employer and employee should engage in flexible, interactive discussions to determine the appropriate accommodation." *Griffin v. United Parcel Service, Inc.* (5th Cir. 2011)
- Failure to engage in the interactive process is a per se or stand-alone violation of the ADA if it is shown the employer did not engage in the process at all or did so without a genuine effort to explore whether reasonable accommodations were available.
- Both the employer and the employee must participate in the interactive process in good faith.

# Document the Interactive Process!

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- The employer's requests for information from the employee must be clear and rationally related to the goal of exploring reasonable accommodations.
- As a result, best practices mandate that employers completely document each and every step of the interactive process.
- Don't be afraid to ask for the employee's own reasonable accommodation ideas.
- Employers should document all of the accommodation ideas they explored (including both the employee's and the employer's ideas).
- Documenting by email is better than nothing, but consider a "working memo" or journal of the interactive process.



# Use an "ADA Questionnaire"

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- Employers often lack enough information about the employee's impairment to make informed decisions.
- The law allows employers to draft questionnaires for the employee's doctor to complete, asking:
  - Whether the employee can perform the essential functions of the job (enclose the job description).
  - A detailed description of the employee's restrictions.
  - How long the employee will be restricted.
- Remember: Give the questionnaire to the employee with written instructions on what to do with it and when you need it back from the employee or her doctor.

# Interactive Process Checklist

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- Do you have an internal reasonable accommodation process?
- Is the process documented?
- Do you have appropriate form letters to assist in the process?
- Have you determined the employee has an ADA covered disability?
- Have you asked for the employee's input in writing on restrictions and accommodations?
- Have you asked for the healthcare provider's input in writing on restrictions and accommodations?
- Have you asked for input from management about accommodations?
- Have you sought technical assistance?
- Have you analyzed all accommodations for effectiveness?
- Have you analyzed all accommodations for undue hardship?

# Reasonable Accommodation Order

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- Are effective reasonable accommodations available to assist the employee in performing the current position?
- If not, the employer must determine if there are vacant positions available which the employee can perform with or without reasonable accommodations? (NOTE: An employee cannot be required to compete for a vacancy as part of this process)
- If not, the employer must determine whether leave time is a reasonable accommodation and, if so, for how long and will there be a job available upon return from leave that the employee can perform with or without reasonable accommodations?
- Do any of the accommodations pose an undue hardship?



# Undue Hardship

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- Employers are exempt from making accommodations if they can prove that doing so would cause the business "undue hardship."
- "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer compared to the cost or difficulty of providing the accommodation at issue. 29 C.F.R. §1630.2(p)
- The focus is not only on the financial cost, but also whether the accommodation is unduly extensive, substantial or disruptive, or would fundamentally alter business operations.
- This question is very fact-specific and must be assessed on a case-by-case basis.

# Internal Investigations

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# Investigation File Checklist

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- ✓ Prepare summary, notes, or get a written statement of complainant's Issues following meeting with complainant or receipt of written complaint.
- ✓ Letter/Email to complainant acknowledging receipt of complaint, explaining next steps, setting out initial time line, advising no retaliation and how to raise concerns about retaliation
- ✓ Meet with accused to advise of complaint and next steps.
- ✓ Letter/Email to accused confirming meeting to advise of allegations, explaining next steps, setting out initial time line, outlining any interim actions being taken (such as complainant reporting to another supervisor), advising no retaliation, and consequences of retaliation.

# Investigation File Checklist (continued)

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- ✓ Gather documents/tangible items
- ✓ Investigation Outline – who to interview, order, timing, general and specific questions, additional documents to compile, general information to give everyone interviewed about internal investigations, confidentiality, no retaliation, how to raise concerns about retaliation, who to contact about additional information or concerns
- ✓ Conduct witness interviews and any follow-up interviews
- ✓ Gather additional documents/tangible items
- ✓ Make a determination
- ✓ Write conclusion letter to complainant and accused
- ✓ Follow-up with complainant and accused



# Terminations

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# The Involuntary Termination Decision Checklist

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- ✓ Who is the decision-maker?
- ✓ Can the decision-maker articulate a reasonable business basis for the termination decision?
- ✓ Is the termination for a series of incidents (poor performance or behavior) or one serious incident that warrants termination?
- ✓ If a series of incidents, is there evidence of prior warnings, coaching, or counseling, and have all relevant company policies been followed for progressive discipline?
- ✓ How have similarly situated employees been treated in the past for doing the same thing?



# The Involuntary Termination Decision Checklist (continued)

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- ✓ Are there any indicators of discrimination, harassment, retaliation or other inappropriate/unlawful behavior by management?
- ✓ Has an appropriate investigation been done to confirm relevant facts and collect pertinent documents/evidence to support termination?
- ✓ Is termination consistent with the Company's culture?
- ✓ Have all Company policies been followed?
- ✓ Is management prepared for any negative reaction from staff as a result of the termination decision?
- ✓ Is management prepared to make sure Company operations needs are covered immediately following the termination?



# The Involuntary Termination Checklist

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- ✓ Who will communicate the termination and how?
- ✓ Who will be present in the termination meeting?
- ✓ Where will the meeting take place?
- ✓ Are there security/safety concerns?
- ✓ Is management prepared for a variety of responses from the separated employees?
- ✓ How will the employee exit the building?
- ✓ How will the employee's personal belongings be collected and returned?
- ✓ How will all Company property be returned?



# The Involuntary Termination Checklist

## (continued)

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- ✓ Are there agreements with the employee that remain in effect following termination and how should they be emphasized?
- ✓ Is IT prepared to stop network access, security access etc. during the termination meeting?
- ✓ Will a written separation notice or other written explanation of the reasons for termination be provided?
- ✓ How will benefits continuation, COBRA, 401k, final paycheck, accrued PTO and other separation issues be addressed with the departing employee.
- ✓ Will the company fight unemployment?
- ✓ Will a severance agreement be requested?

# Union Avoidance

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- Is your Company at risk?
- If so, have you had a union avoidance assessment done to gauge risk?
- Do your managers understand the Company's position on union avoidance and their role in carrying out Company goals?
- Have you done union avoidance practical and legal training for management?
- Is troublesome behavior by management addressed promptly to reduce union organizing risks?
- Are there opportunities for open communication between employees/management and are they utilized and effective?

# Quirky State/Local Laws

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- Additional protected classes for discrimination/harassment
- Different standards for accommodating pregnant employees
- Paid Sick Leave
- Wage Theft Protection/Disclosure Laws
- State/City Family Leave Laws
- Ban the Box Laws
- Payment of accrued vacation and time limits on final paychecks upon termination
- State Immigration Laws (Tennessee Lawful Employment Act)



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# Upcoming Events

**April 21**  
**TBD**

**May 19**  
**Mediation, EEOC, Judicial Settlement Conferences & Negotiating Skills**

**June 16**  
**TBD**

For more information or to register for these upcoming webinars, please contact Chris Johnson at [rsvp@bakerdonelson.com](mailto:rsvp@bakerdonelson.com).

# Quick and Easy Guides to Labor & Employment Law App

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## App-tastic!

Our Easy Guides are now available as an app in the iTunes Store! Now you can have the same great information at your fingertips.



This app contains Quick and Easy Guides to the primary labor and employment laws of the identified states. We've also provided a summary of primary federal laws.