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Recent Developments in Employment Law

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Federal Court Finds that Discrimination Laws Apply to an Independent Contractor

With few exceptions employment laws apply only to employees and not to independent contractors. Federal and state laws vary regarding the criteria to legally determine whether an individual is considered an independent contractor or employee. Generally, an independent contractor is an individual that performs services free from the direction and control by the company with regard to both the manner and method that the work is performed. Because the designation of an individual as independent contact has significant legal consequences for the individual and the business, the relationship should be carefully analyzed and a contract should be prepared which details the terms of the relationship.

To clarify the relationship, it is recommended that the business have a contract which defines the independent contractor relationship. Such an agreement should state that the contractor is not an agent or employee of the company and that the contractor has the sole discretion to determine when, during what hours and where the work will be performed. Additionally, the contract should specify the provisions for termination of the agreement and amount of compensation to be paid for the services performed and will be responsible for the payment of all taxes.

The determination is important since unlike an employee, an independent contractor is not eligible for overtime pay, benefits, unemployment or workers' compensation benefits. Moreover, an independent contractor is exempt from protection under the federal and state laws that protect employees against discrimination. These laws include Title VII (race, color, religion, sex or national origin), the Age Discrimination in Employment Act (40 years of age and older) and the Americans with Disabilities Act. However, employers should be aware that recently an Illinois Federal Court ruled that protection against workplace harassment under Title VII did apply to hold a company liable for the actions of its independent contractor where the company knew or should have known of the harassment by the independent contact against its employee. In *Dunn v. Washington County Hospital*, (05-1277, decided November 17, 2005) the 7th Circuit Court of Appeals held that the employer was responsible for the protection of its own employees and the designation of an individual as an independent contractor was irrelevant if the employer failed to respond to the complaints of the employee.

This recent decision reiterates a now long standing opinion of the United States Supreme Court which outlined the importance for employers to have a written policy against harassment which is distributed to all employees. The policy should inform the employee as to what constitutes illegal discrimination and where to make a complaint if they are a victim of discrimination or harassment whether by another employee, independent contractor or customer.

While a written anti-harassment policy is the first step, providing employee training is an excellent way to educate employees as to the provisions of the anti-harassment policy. An individual knowledgeable about the laws against harassment and discrimination should train all employees including supervisors as the provisions of the policy including the legal definition of harassment, discrimination and retaliation. The training should also include a discussion of the written policy, advice to employees regarding the complaint process and assurance that the complaint will be investigated without fear of retaliation. The training should include both identifying the discriminatory behavior and instruction to those charged with the duty to conduct a proper investigation and to stop the discriminatory or harassing conduct.

As decided recently, if the company fails to appropriately respond to an employee complaint against another employee or an independent contractor, the company can be subject to liability. To the contrary, if the policy is properly prepared and distributed to employees, in some situations the anti-harassment policy can be used to defend the employer where an individual legally pursues a claim for harassment but fails to inform the employer of the complaint as directed by the policy.

**This article is not intended as legal advice. You should consult with an attorney for individual advice regarding your own situation.*

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