

Avoid HR-related derailments: How to evaluate compliance-related risk in due diligence

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Disclaimer



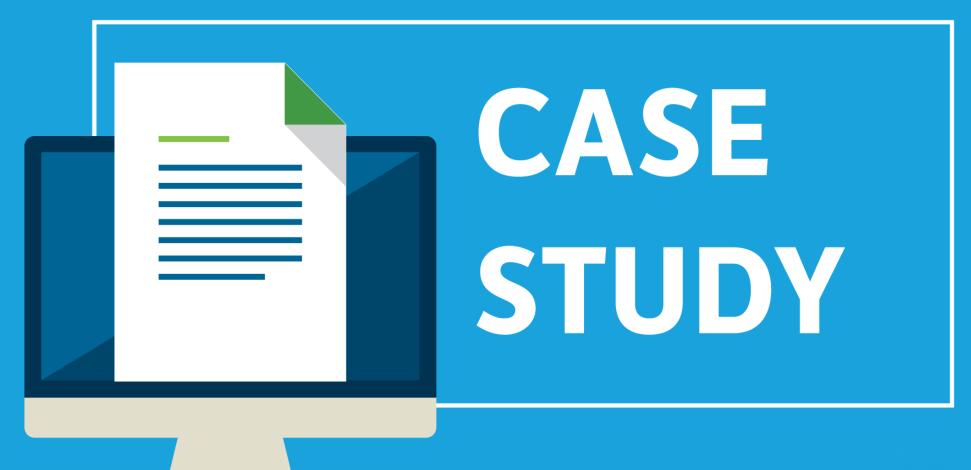
- This information is designed to provide HR best practices guidance.
- Since employment laws change over time and can vary by location and industry, consult an employment attorney for specific assistance.
- Nothing in this presentation should be construed as providing legal advice.

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Objectives

By the end of this webinar, you'll be able to:

- Identify the 5 most critical compliance-related risk areas to include in HR due diligence
- Communicate the importance of each of the risk areas
- Understand what to request from target organizations related to compliance risk
- Determine how to assess each risk area
- Develop your own plan for how to evaluate each of the risk areas





Litigation and regulatory risk



Litigation and regulatory risk

What you need to know:

Governmental rights and protections for employees expanding

 Employer liabilities are growing, primarily at state and local levels

Risks and penalties increasing



Litigation and regulatory risk

Why does it matter?

- Understand depth and breadth of potential employment-related risk you are buying
- Hidden costs impact valuation
- Require seller to remedy deficiencies as condition of closing



Pending, existing and hidden legal claims

What to request:

- Active claims, any federal, state or local enforcement agency notices of complaint, or attorney representation letters
- Internal candidates passed over for promotion
- Complaints of harassment and discrimination within the last 300 days (EEOC)*
- Involuntary terminations occurring within the last 300 days (EEOC)*
- Known wage claims occurring within the last 2 years (FLSA)*
- Worker's compensation claims over the past 3 years (DOL)*
- Health and safety complaints within the last 180 days (OSHA)*
- "Litigation holds" aka preservation letters, stop destruction requests or demand letters threatening to sue



^{*}state law periods may be greater than federal

Pending, existing and hidden legal claims

How to assess potential risk:

Review

- job candidate profiles and job fill records
- historical termination files
- personnel files related to litigation holds

Conduct applicable analysis

- hiring selection process, decision to terminate, equity study
- race, gender, ethnicity, age
- candidate-to-applicant ratios, adverse impact



Employment arrangements



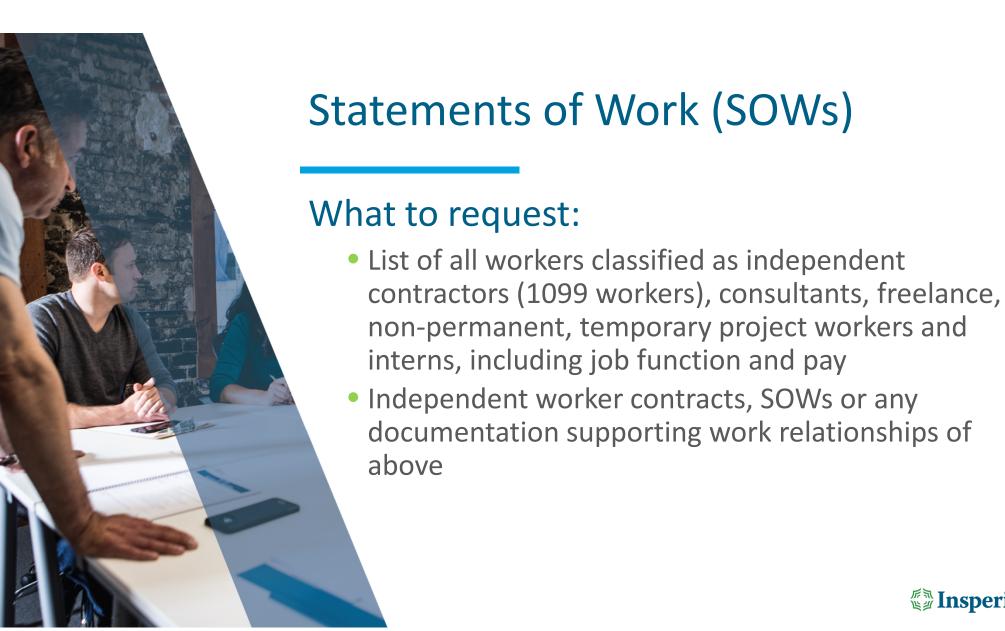


Employment Agreements

What to request:

- Employment contracts
- Non-competition
- Non-disclosure
- Non-solicitation
- Confidentiality
- Collective bargaining (union)
- Severance and release agreement history







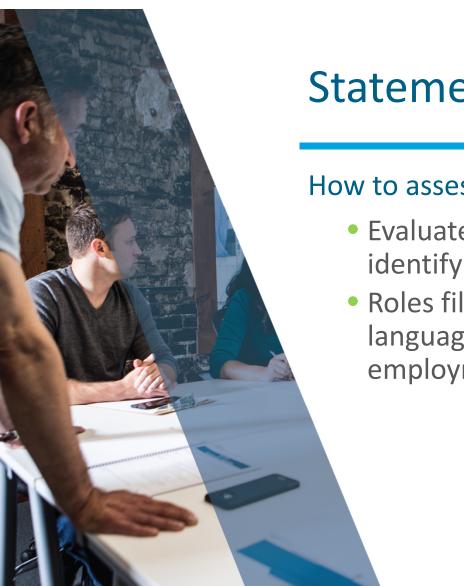


Employment Agreements

How to assess potential risk: engage legal counsel

- Look for agreements missing employee signature or missing agreements
- Look for language that potentially alters at-will employment
- Identify requirements to pay severance or equity compensation
- Review enforceability of restrictive covenants & non-competition (varies by state)
- Establish proprietary agreements for key target company personnel, if none exist





Statements of Work (SOWs)

How to assess potential risk: engage legal counsel

 Evaluate status of independent contractors to identify potential misclassifications

 Roles filled should be project-specific; look for language that inadvertently creates a contract of employment



Work authorization compliance



What you need to know:

- Mandatory
- Increased Form I-9 audits
- Increased number of auditors
- Increased penalties



Substantive (technical) violations

- Penalties incurring on or before 11/2/16:
 \$110 \$1100 per violation
- Penalties incurring <u>after</u> 11/2/16: \$224 \$2,236 per violation

Knowingly hire/continue to employ violations

- Penalties range from \$3,548 to \$19,242 per violation
- Repeat offenders receive penalties at the higher end



What to request:

Previous or current ICE audit results, including notices

inspection results

- suspect documents
- discrepancies
- technical/procedural failures
- warning
- intent to fine
- Physical inspection of Form I-9s
 - Current employees
 - Former employees



How to assess potential risk:

Inspection/internal review of Form I-9s

 Observation of Form I-9 recommended storage and retention guidelines

Risk assessment – willful non-compliance – red flag



How to assess potential risk:

Risk assessment -- typical technical errors include:

• Missing forms, pages, supporting documentation, blank sections

Omission of dates, signatures, required information

- Errors
 - Transposed/mismatched data
 - Not following guidelines under www.uscis.gov/i-9
 - Error if page 1 completed after day 1
 - Error if page 2 completed before day 1 or more than
 3 business days after day 1
 - Error if authorized representative did not personally validate identity



E-Verify

What you need to know:

Voluntary program for most employers, with exceptions:

- Federal contractors subsequent to Federal Acquisition Regulations (FAR)
- Many states have laws that either require or encourage employers to use E-Verify
- Effective 1/1/17, private employers with 50 or more employees under the same FEIN are required to use the federal E-Verify
- Trump Administration supports expansion of E-Verify as mandatory nationwide

Penalties:

- Possible fines/penalties per knowing violation up to \$1,000
- Additional fines as high as \$2,500 plus for repeat offenders
- When suspected misuse, abuse and/or fraud, business may be referred to agencies that investigate illegal employer activities (i.e., ICE, DOJ)



E-Verify

How to assess potential risk:

- Determine applicability first
- Internal review of E-Verify enrollment, compared with new hires
- Identify gaps and errors (i.e., missing social security number on I-9)
- Assess if technical mistakes or knowing violations



Benefits evaluation



Benefits evaluation

What to request:

Retirement plan

- Qualified/non-qualified retirement plans
- IRS determination letter
- Form 5500 and applicable schedules

Health & welfare

- List and description of benefit plan documents and required notices
- All health and welfare policies or self-funded arrangements

Benefits administration

- Administration guidelines and policies
- Reconciliation process



Benefits evaluation

How to assess potential risk: engage broker

- Conduct plan comparison
- Map benefit plan compatibility
- Prepare to address incongruent elements and potential fallout
 - Turnover
 - Low morale
 - Culture clash
- Review benefits configuration and reconciliation practices



HR infrastructure



HR infrastructure

What to request:

- Employee handbook and employment-related policies and procedures
- Hiring documents (i.e., employment application, offer letter)
- Vacation, sick (paid & unpaid) and PTO plans
- Organizational chart showing all positions, including open positions
- Executive compensation plans
- Bonus plans
- List of exempt employees
- Copies of required documentation (AAP, EEO-1, OSHA log)



HR infrastructure

How to assess potential risk:

- Language that alters "at-will" employment
- Language construed as creating an employment contract
- Calculate financial impact for obligations to carryover PTO balances and/or pay any accrued but unused PTO upon separation of employment

Employee classifications and exemption status

What you need to know:

- Wage/hour and misclassified worker claims are skyrocketing
- Proposed amendments to DOL salary test for "white collar" employees and financial implications
- Proposed amendments also affect highly compensated employees
- Employer's duty to keep accurate time and attendance records of wages and hours under Fair Labor Standards Act (FLSA) guidelines



Proposed revisions in the law effective 2020

- "White collar" exemptions:
 - Executive, administrative, professional and computer
 - Salary threshold level increase from \$455/week (\$23,660/year) \rightarrow to \$679/week (\$35,308/year)
- Highly compensated employees
 - Salary threshold level increase from \$100,000/year → to \$147,414/year
- Otherwise, these roles will qualify for overtime pay



Employee classifications and exemption status

What to request:

- List of employees, indicating job title, exemption status, rate of pay
- Report indicating hours worked by title and exemption status
- Salary paid to exempt employees to identify employees potentially impacted by change in minimum salary thresholds
- Time and attendance records

Employee classifications and exemption status

How to assess potential risk:

- Look for potential exemption misclassifications in target company
- Evaluate and rank FLSA risk high, moderate, low
- Determine whether misclassifications are due to gross negligence/willful misconduct - red flag
- Compute potential damage



Risk evaluation summary





Calculate your target company's known and unknown risk

It all adds up!

Re-evaluate your valuation

Make an educated, dispassionate decision

"know before you go"

• What's the impact?

Use what you learn to apply to your own company





Questions?

Reach out to lisa.bauer@Insperity.com





Thank you for joining us!

For more information, or to speak with an Insperity® business performance consultant, visit insperity.com/acg or email us at alliance@insperity.com

