

Managing Employment Law Risks in the CASA Workplace

Lori J. Shapiro

Employment Counsel

Pro Bono Partnership of Atlanta

August 3, 2019

Mission of Pro Bono Partnership of Atlanta:

To provide free legal assistance to community-based nonprofits that serve the poor. We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

Pro Bono Partnership of Atlanta Eligibility & Other Information

- In order to be a client of Pro Bono Partnership of Atlanta, an organization must:
 - Be a 501(c)(3) nonprofit organization.
 - Be located in or serve the greater Atlanta area.
 - Serve low-income or disadvantaged individuals.
 - Be unable to afford legal services.
- *Visit us on the web at www.pbpatl.org*
- We host free monthly webinars and workshops on legal topics for nonprofits
 - To view upcoming webinars or workshops, visit the [Workshops Page](#) on our website

Once Upon A Time CASA, Inc.

- Once Upon a Time operates a CASA program in Georgia.
- Prince is a retired attorney who, Anastasia (Ana), the Volunteer Coordinator, knows. Ana wants Prince to assist with coordinating the volunteers for a new program that the organization would like to implement.
- After he volunteers for a while, helping with recruiting new volunteers and scheduling, Ana is happy with his work, and recommends that Cinderella (Cindy), the Executive Director, bring Prince on as an independent contractor.
- He works 20 hours every week, and submits invoices to be paid.
- **ISSUES?**

MISCLASSIFICATION OF EMPLOYEES

Who is an Employee?

- An employee is anyone “employed” by an “employer”
- “Employ” means to “*suffer or permit to work*”

MISCLASSIFICATION OF EMPLOYEES

Potential Consequences

- Unpaid employment taxes, interest and penalties
- State unemployment compensation insurance and worker's compensation insurance penalties
- Entitlement to Benefits

Independent Contractor v. Employee

- DOL Test:
 - Most important question is whether the worker is economically dependent on the employer
- IRS:
 - Uses a 20 factor test, and focuses on control
- Georgia Unemployment Statute
 - Uses a test that focuses on (1) control and (2) engagement in an independent occupation, profession or business

See this link for more information: <http://www.pbpatl.org/nonprofit-legal-alerts/do-you-have-independent-contractors-who-are-actually-employees/>

Independent Contractor v. Employee

- Behavioral Control: The individual performing the services is absolutely free from the control, direction, or guidance in the performance of the services under a contract of hire, based both on the contract and the actual practice between the parties;
- Core of Business: The individual is performing services outside the usual course of the employer's business; and
- Independence: The individual is customarily engaged in an independently established trade, occupation, profession, or business.

Independent Contractor v. Employee

- Definitions (IRS)
 - **Employee**: A worker in the service of another where the employer has the power or right to control or direct the worker in the material details of how the work is to be performed.
 - **Independent Contractor**: A worker who is self-employed and contracts to do a piece of work according to his or her own methods and who is subject to an employer's control **only** as to the end product or final result of the work performed.

Independent Contractor v. Employee

- Ensure appropriate procedures are in place to differentiate contractors from employees
 - Carefully drafted agreement between the parties
 - Separate policies and procedures
 - Review benefit plans to ensure contractors are not covered
 - Use appropriate terminology

Once Upon A Time CASA, Inc.

- Cindy decides that bringing Prince on as a contractor was probably a mistake. They decide to hire him.
- What steps should they take if they are going to employ Prince?

Hiring Employees

- Application for Employment
- Interviews
- Offer Letter (not employment contract)
- Confidentiality Agreement
- Background Checks
- I-9s

Hiring Employees

- Handbook/Policy Acknowledgement
- Tax Documents/Benefits Information
- Probationary Period- should you have one?
- Set Up Personnel File
- Worker's Compensation/Unemployment

Once Upon A Time CASA, Inc.

- One day, Ana calls Prince, and asks him to go to a hearing where the organization does not have a volunteer.
- Prince agrees to attend the hearing, but he knows that money is a bit tight for the organization, so he says he will volunteer for the hearing rather than getting paid.
- Ana agrees and tells Prince she'll give him some cash for gas when he picks her up to go to the hearing.
- ISSUES?

Employee v. Volunteer

- Can we use volunteers?
 - Nonprofits are permitted to use volunteers
 - Volunteers cannot replace paid staff
 - There are risks involved when employees volunteer in the same organization where they work
 - Advisable to have an agreement recognizing status as a volunteer, disclaiming any pay or benefits, and waiving any liability
 - May need background checks
 - Do not pay volunteers

Once Upon a Time CASA, Inc.

- The hearing falls on a Friday, which is not a regular workday for Ana.
- Ana has already worked 40 hours this week because there was a volunteer reception on Tuesday night, and she worked late on Monday and Tuesday to get ready and attend the event.
- She decides to go with Prince, and plans to spend about 5 hours there.
- Cindy does not know that Ana is working that Friday.
- **ISSUES?**

Fair Labor Standards Act (FLSA)

- Establishes a national minimum hourly wage, which must be paid for all hours worked (\$7.25 per hour)
- Requires the payment of overtime at a rate of 1 ½ time an employees “regular rate” for all hours worked over 40 in a workweek
- Requires employers to maintain accurate and complete time records
- Describes employers and employees who are “exempt” from minimum wage and/or overtime requirements

Exemptions to the FLSA

- Since it was passed in 1938, the FLSA has included exemptions from minimum wage and overtime requirements for:
 - Executives
 - Administrative employees
 - Professionals
 - Outside sales employees
- Regulations give more detail, and are subject to change from time to time

Three Tests for Exemptions

- Salary Level (at least \$23,660 per year)
- Salary Basis
- Duties



Duties

- **Executive**
 - Primary duty – managing the enterprise or a customarily recognized department or subdivision
 - Direct the work of two or more FTEs
 - Authority to hire/fire, or change of status recommendations given particular weight

Duties

- **Administrative**
 - Primary duty – office/non-manual work directly related to the management or general business operations of employer or its customers
 - Primary duty involves exercise of discretion and independent judgment on matters of significance

Duties

- **Professional**
 - Learned – primary duty is work requiring advanced knowledge in field of science or learning customarily acquired through prolonged course of specialized instruction
 - Creative – primary duty is work requiring invention, imagination, originality or talent in recognized field of artistic or creative endeavor

Non-Exempt Employees and Overtime Requirements

- Nonprofits are not immune from overtime claims

Font Size:

Suit Says Even Ronald McDonald House Has to Pay Overtime

By Tresa Baldas | [All Articles](#)

The National Law Journal | September 18, 2009

The Ronald McDonald House Charities of South Florida is being sued in federal court for allegedly denying overtime to an assistant house manager. Given the status of the economy, one attorney says, nonprofits should brace for more wage-and-hour suits, especially from departing employees.

Overtime Pay

Are employees entitled to overtime pay?

- Risks arise in failing to comply with FLSA
- Most employees are ***non-exempt*** from FLSA
- Must be paid overtime for every hour over 40 in one week
- Must be paid minimum wage
- Have employees keep accurate time records

Exempt/Non-Exempt and Overtime Pay

- Get help to classify correctly: Pay attention to the distinction between exempt and non-exempt employees.
- For non-exempt employees
 - Keep accurate time records
 - Do not allow employees to work unauthorized overtime
 - Compensate employees for all overtime worked

Once Upon a Time CASA, Inc.

- Prince has been employed for several months now.
- Cindy has received some complaints about the quality of the work he is doing from volunteers. She is concerned that he is not scheduling volunteers properly.
- She decides to terminate his employment.

- **ISSUES?**

Performance Management

- Purposes of Performance Reviews
 - Ensure open and regular communications
 - Outline expectations and any changes to them;
 - Compliment good performance;
 - Discuss areas for improvement; and
 - Support (and defend) employment decisions.

Performance Management

- Keys to Effective Reviews
 - Be Prepared:
 - review job description; expectations and any changes; and have clear metrics
 - Collect performance documentation
 - Determine how expectations measure up to performance
 - Be Honest:
 - Use specific examples in a detailed discussion
 - Communicate clearly and timely

Addressing Performance Issues

- **Be Consistent**
 - Be consistent in how employees are treated and employment decisions are made
 - Follow organizational discipline policies
 - Discuss issues and warn employees that termination could occur if no improvement
 - Allow time to improve performance
- **Document**
 - All steps, including verbal warnings
 - Add: further misconduct may result in termination language

Separation from Employment

- For Performance Reason
 - Verify that performance reviews have been delivered and disciplinary policy has been followed;
 - Ensure employee has been warned – any further violations may result in termination of employment
 - Be Honest
 - Be Professional
 - Don't apologize

Separation from Employment

- Documentation
- Exit Interview
- Return of company property
- Final paycheck
- COBRA notice (20+ employees)
- Georgia DOL 800 Separation Notice

Separation from Employment

1. Terminate at the Proper Time
 - Termination should not be a complete surprise.
2. Establish the Record
 - Full record of disciplinary history including evaluations, counseling notes, and workplace issues.
3. Terminate for the Right Reasons
 - There are many legitimate reasons for terminating an employee but there needs to be a factual basis that supports the reason.

Separation from Employment

- Assess Risk
- Separation Agreement and Release
 - Consideration
 - Knowing and Voluntary
 - Release of all claims
 - Acknowledgement of receipt of all compensation due
 - Older Workers Benefit Protection Act (“OWBPA”)

Once Upon A Time CASA, Inc.

- Since Cindy did not have sufficient documentation to terminate Prince's employment, she decided to wait.
- Jasmine, a volunteer, approaches Cindy at the GA CASA conference, and asks to talk to her privately. They go into a conference room, and Jasmine tells Cindy that Prince is usually very charming to her, and maybe a little too charming. He has asked her out a few times and she has said no.
- She tells Cindy that she really thinks she can handle this issue with Prince. She does not want Cindy to do anything but just wanted her to know. She will talk to Prince again herself about it.
- What should Cindy do?

When an investigation is needed

Prompt, thorough, impartial investigation

When management learns of employee complaint of misconduct:

- Harassment
- Discrimination
- Theft
- Violence
- Substance abuse
- Other misconduct

Who Should Lead the Investigation?

- To promote consistency and to assure things stay on track throughout the investigation, one person should be appointed as “lead investigator” or assigned to investigate.
 - Is legal counsel needed? Board member?
- A good investigator should be experienced, trained, impartial, professional, at the right level of the organization, have good judgment and should be someone who would be able to competently testify if needed.

Guidelines for Investigators

- A good investigator:
 - is a neutral representative of the organization.
 - searches for facts, not opinions or beliefs.
 - builds rapport with the interviewees.
 - is prepared professionally to handle uncooperative persons and/or interviewing requests.
 - Explain that a refusal to be interviewed will be considered failure to cooperate with an investigation and possibly insubordination.

Plan the Investigation

Based on the goals of the investigation . . .

- Who should be interviewed?
 - Personal, relevant knowledge
- Order of interviews
 - Complainant, others, subject
 - Second interviews to follow up on new information
- Outline of questions
 - Cooperation/Confidentiality/Nonretaliation
- Chronology
- Documentation

Essential Rules for the Investigator

- NEVER express opinion or judgment
- NEVER write opinion or judgment in your notes
- NEVER ignore new issues that arise
- Be professional and not overly aggressive
- Keep your cool
- Remain objective

Reaching a Conclusion

- Consider credibility (consistency, demeanor, corroboration, motive, past records, logic)
- Review documentary evidence
- Focus on the information/facts to eliminate personal bias
- Key is ***reaching a reasonable conclusion after a good faith investigation***

Follow up

- Close the loop with the complainant and the subject
- Implement changes to policies and procedures
- Take Corrective Action, if necessary
 - What is appropriate under these circumstances?
 - How has the organization handled similar situations in the past?
 - What makes sense for business needs?
 - Is it “fair” to all parties? What would a juror think?
- Look for indications that training may be needed
- Document these steps in a written report

Create an investigation file

Keep ALL relevant documents, notes, emails, etc. together in one labeled file dedicated to the investigation. File should include:

- Documents reviewed
- Copies of correspondence (including emails)
- Information about third party conversations
- Interview notes
- Written report

Dos of Internal Investigations

1. **Do** be a neutral investigator and listen with an open mind.
2. **Do** document the process.
3. **Do** take interim action (if necessary) to prevent further misconduct and/or retaliation.
4. **Do** be consistent in your adherence to an effective investigation procedure.
5. **Do** tell the complainant how long you expect the investigation to take and when you will get back to him or her so as to set reasonable expectations.
6. **Do** report back to the complainant and to the accused to provide any necessary reports, and/or to enact any corrective, remedial measures.

Don'ts of Internal Investigations

1. **Don't** act or appear to act out of malice toward the complainant regardless of whether you think he or she is making a valid complaint.
2. **Don't** convey information during the investigation that has no proper purpose.
3. **Don't** reveal what you know. The interviewee may assume that you know more than you actually do and will tell you all he or she knows, which may be more than you know yourself.
4. **Don't** put investigation documents into the personnel files of any party. (There should be a separate "investigation" file.)
5. **Don't** engage in conduct that would give the next potential complainant a claim that his or her failure to take advantage of any preventative or corrective opportunities was reasonable (i.e., follow procedures and be responsive to the complainant).

For More Information:

PBPA's website includes resources on many topics covered today: www.pbpatl.org.

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

Phone: (404) 618-0900

Info@pbpatl.org

www.pbpatl.org