NONPROFIT ADVISOR

For DAV Departments and Chapters

Volume 5, No. 1 **Winter 2013**

THE TROUBLE WITH EMPLOYEES
PART ONE

Anyone familiar with the legal news in recent years is aware that there has been a growing emphasis on employee rights and on compliance with federal and state laws pertaining to the workplace. In many ways, this is a positive development. In other ways, it presents a growing risk of problems for the employer or potential employer.

Many DAV departments and chapters employ one or more persons. Quite likely, even more engage workers who should be classified as employees, but are instead treated as "independent contractors" or as "volunteers with an expense allowance." These misclassifications can be extremely dangerous.

In this and the following issue of the newsletter, we will identify some of the principal areas of risk for departments and chapters in the employment area and attempt to give some nuts-and-bolts guidance on how to avoid, or at least mitigate, those risks.

1. MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

This is one of the most common, and most serious, employment errors. Many persons working for an organization would prefer, for various reasons, to receive a check with no deductions and therefore assume responsibility for their own taxes. This also appears to benefit the employer, as there are less bookkeeping issues, as well as no expenses for Social Security, workers compensation and the various other financial obligations that accompany having "real" employees. Big mistake! The question whether a person is an employee or an independent contractor is not a matter of personal choice, or of agreement between the parties. It is a legal conclusion, and, in cases of doubt, it is far better to resolve it in favor of classifying someone as an employee. A mistake in this area can lead to huge tax liabilities for both the employer and the "contractor," as well as substantial penalties and interest. In extreme cases, criminal prosecutions have occurred. For a good summary of the rules on contractor-vs.- employee, check the IRS guidelines at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Employee-(Common-Law-Employee).

2. MISCLASSIFICATION OF EMPLOYEES AS VOLUNTEERS

In some cases, a department or chapter may pay an "expense allowance" to a person who regularly performs a task but prefers to be classified as a volunteer. While reimbursement of legitimate volunteer expenses is certainly no issue, the "volunteer" who receives $300 each week and who regularly volunteers for 40 hours is certainly an employee. Treating such a person as a volunteer raises the same issues as were discussed in the preceding paragraph.

3. FAILURE TO PAY OVERTIME

But he doesn't get overtime! He's on a salary!! This is one of the most common mistakes of all. The fact that an employee's compensation is expressed as a "salary" amount has no bearing whatsoever on whether the employee should receive overtime. The only question is whether the employee is an "exempt" employee (no overtime) or a "non-exempt" employee (overtime). The exempt-vs.-non-exempt determination is a purely legal one, and one that is not always very easy. It is always safe to classify an employee as non-exempt. For an employee to be exempt, she/he must meet the requirements of one of the three possible exemptions from the overtime laws: the administrative exemption, the professional exemption or the managerial exemption. More detail on the requirements for these exemptions can be found on the website of the U.S. Department of Labor at http://www.dol.gov/whd/regs/compliance/hrg.htm.

Remember too that overtime is USUALLY due when an employee works more than forty hours in a single week BUT in some states is due when an employee works more than eight hours in a single day.

4. UNNECESSARY PROMISES

Under most circumstances, the relationship between an employee and an employer is "at will," which means that it can be terminated by either party at any time for any reason, or even for no reason. (Exception: It is not permissible to terminate the employment relationship because of age, or race, or gender or any other factor protected by the various federal, state and local anti-discrimination laws). However, with a stroke of a pen or the slip of a lip, the employer can change all that. An oral promise that "you can work here for as long as you want" or an offer letter asserting that "you will only be fired for just cause" can come back to cause a lot of heartache (and legal bills!). Be prudent!

5. WITHHOLDING MONIES OWED

When the employment relationship ends, and many of them do, the parties are often less than friendly. At this point, the employer sometimes flexes his/her economic muscle and refuses to pay money due to the employee. This is a dangerous practice. In many states, the definition of "wages" is quite broad and can include virtually everything owed to the employee, right down to unused vacation and expense reimbursements. In many states, failure to pay wages is a crime.

Nonprofit Advisor is prepared by the Office of the DAV's General Counsel and is published quarterly for the informational use of DAV Departments and Chapters. This newsletter is not intended to replace legal advice that may be required to address individual situations.

National Headquarters * P.O. Box 14301 * Cincinnati, OH 45250-0301
Phone (859) 441-7300 * Fax (859) 441-1416 * Toll Free (877) 426-2838 * www.dav.org