



3rd Annual CFMA Southwest Regional Conference | Las Vegas, NV

September 24-26, 2017

Employment Law for Construction Employers

Carole M. Ross

Ross Employment Law

www.rossemploymentlaw.com



- Wage and Hour
 - Misclassification of employees
 - Travel time
 - Off-the-clock
- Responding to Claims of Harassment, Discrimination and Retaliation
- Hot Labor and Employment Law Topics
 - Medical Marijuana
 - Ban the Box
 - Pay Equity



- Focus: Federal law
- Employers must comply with federal and state law
- Be familiar with your state's employment laws!



Misclassification: Independent Contractor/Employee



Definition of “employ” under Fair Labor Standards Act

- To suffer or permit to work



- Employees: workers who are economically dependent on the business of the employer, regardless of skill level
- Independent contractors: workers with economic independence who are in business for themselves



Employee or Independent Contractor? Under FLSA, look at:

1. The extent to which the work performed is an integral part of the employer's business
2. Whether the worker's managerial skills affects his or her opportunities for profit and loss



4. The relative investments in facilities and equipment by the worker *and* the employer
5. The worker's skill and initiative
6. The permanency of the worker's relationship with the employer
7. The nature and degree of control by the employer



- Other agencies (IRS, workers' compensation board, etc.) use different criteria
- Consequences of misclassification can be costly





Travel Time



Not Compensable:

- Home to work and work to home



Compensable:

- Travel that is all in a day's work
- Home to work on special one day assignment out of city
- Travel during regular work hours (regardless of day) that requires overnight stay*

* State laws may require compensation in additional circumstances



Off the Clock Work



Why do employees work off-the-clock?

- Manager pressure to avoid overtime
- Want to look efficient or impress managers
- Unclear about what time should be recorded
- Time keeping system that locks out employees or prohibits them from clocking before scheduled start of shift



What employers can do

- Train
- Set reasonable goals
- Clear policy forbidding off-the-clock work
- Review timekeeping system
- Certification



Effective Response to Claims of Discrimination, Harassment & Retaliation





investigate
or
Investigate



Goals:

- Prompt
- Impartial
- Thorough
- Effective

*These goals are used by courts to determine the adequacy of the investigation in light of the underlying circumstances



Who Should Investigate?

1. Impartial
2. Impartial (not a typo)
3. Some states limit to:
 - Internal employee
 - Licensed private investigator
 - Attorney licensed to practice in that state



Preliminary Considerations

- Scope
- Interim measures
- Admonitions:
 - Explain process
 - No retaliation
 - Be cautious about telling non-supervisors to keep confidential



The Investigation Process

- Investigation plan
- Documents and other information
- Witness outlines



Interviews

- Private location
- Who/when/why/how/what
- Anything else?
- Who else should investigator speak to?
- Retain notes



Analyze the evidence - EEOC's Credibility Factors re Witnesses:

- Demeanor (use caution in assessing)
- Motive to falsify
- Inherent plausibility
- Corroborating/contradictory evidence (including documentation)
- Past record
- None of the factors is determinative



Reach conclusions

- Factual conclusions and/or
- Policy violations



After the Investigation

- Meet separately with complainant and respondent
- Remedial measures (if appropriate)
- Reminder re no retaliation



Format of Report:

- Verbal, written executive summary or full report

Elements:

- Scope
- Issues investigated
- Witnesses interviewed and documents reviewed
- Analysis and evidence relied upon
- Credibility assessments
- Conclusions as to each issue





Hot Labor & Employment Topics





Medical Marijuana



Arizona: Medical marijuana only*

California: Recreational marijuana*

Nevada: Recreational marijuana*

New Mexico: Medical marijuana only*

Federal Comprehensive Drug Abuse
Prevention and Control Act:

- Classifies marijuana as Schedule 1 drug





Ban the Box





Pay Equity



Thank You!

Carole M. Ross

Ross Employment Law

3525 Del Mar Heights Road, #223

San Diego, CA 92130

(858) 354-6523

carole@rossemploymentlaw.com

www.rossemploymentlaw.com

