



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.

CAVEAT EMPTOR

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



CASE STUDY

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



Statements of Work (SOWs)

What to request:

- List of all workers classified as independent contractors (1099 workers), consultants, freelance, non-permanent, temporary project workers and interns, including job function and pay
- Independent worker contracts, SOWs or any documentation supporting work relationships of above



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

Form I-9s and work authorization

What you need to know:

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

Form I-9s and work authorization

Substantive (technical) violations

- Penalties incurring on or before 11/2/16: **\$110 - \$1100** per violation
- Penalties incurring after 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

Form I-9s and work authorization

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

Form I-9s and work authorization

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**



Form I-9s and work authorization

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) → 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

How much risk are you willing to own?

- 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
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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