



Three Compliance Challenges for 2012

June 2012

Presented by:
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THE FIRST CHALLENGE:

Independent Contractors

Independent Contractor



Independent Contractor



Independent Contractor?





PAYER'S name, street address, city, state, ZIP code, and telephone no.		1 Rents	OMB No. 1545-0115 2011 Form 1099-MISC		Miscellaneous Income			
		\$						
		2 Royalties						
PAYER'S federal identification number		3 Other income	4 Federal income tax withheld	Copy 1 For State Tax Department				
		\$	\$					
		5 Fishing boat proceeds	6 Medical and health care payments					
RECIPIENT'S name		\$	\$					
		7 Nonemployee compensation	8 Substitute payments in lieu of dividends or interest					
		9 Payer made direct sales of \$5,000 or more of consumer products to a buyer (recipient) for resale <input type="checkbox"/>	10 Crop insurance proceeds					
Street address (including apt. no.)		\$	\$					
		11	12					
		13 Excess golden parachute payments	14 Gross proceeds paid to an attorney					
City, state, and ZIP code		\$	\$					
		15a Section 409A deferrals	15b Section 409A income			16 State tax withheld	17 State/Payer's state no.	18 State income
		\$	\$			\$	\$	\$
Account number (see instructions)		\$	\$					
15a Section 409A deferrals		15b Section 409A income	16 State tax withheld	17 State/Payer's state no.	18 State income			
\$		\$	\$	\$	\$			

SELECTED RISKS OF MISCLASSIFICATION

- Back wages and related penalties
- Back taxes and related penalties
- Class Actions
- Benefit issues
- Vicarious liability
- Difficulty enforcing agreements
- Difficult breakups

Highest-Level Analysis

- Contractor free from direction and control; and
- Service performed:
 - (1) outside of client's usual course of business, or
 - (2) outside of all of client's places of business;
 - and
- Contractor customarily engaged in independently established business of the same nature as that involved in the service contract.

Highest-Level Analysis

- (1) Do they bring more than their personal labor to the job?
- (2) Are they working without the employer's supervision?
- (3) Do they have an established, independent business?

Highest-Level Analysis

Is the service provider in business for him or herself?



Tests in Detail

- IRS Test
- Economic realities test
- Workers' comp test
- Unemployment comp test

IRS Test (Three Buckets)

- Behavioral control
- Financial control
- Type of relationship

Behavioral Control ("Right to Control")

- Who
- Where
- Why
- What
- When
- How
 - Training
 - Evaluation

Financial Control

- Significant investment
- Expenses
- Services available to the market
- Opportunity for profit and loss
- Method of compensation
- Investments and expenses
- Use of employees and subcontractors
- Availability to the market
- Risk of loss

Type of Relationship

- Written contracts
- Employee benefits
- Permanency of the relationship
- Termination provisions
- Services a key activity of the business

Economic Realities

- 1) Degree of alleged employer's right to control manner in which work is to be performed
- 2) Alleged employee's opportunity for profit or loss depending upon managerial skill
- 3) Alleged employee's investment in equipment or materials required for task, or employment of helpers

Economic Realities

- 4) whether service requires a special skill
- 5) degree of permanence of working relationship
- 6) whether the service is an integral part of the alleged employer's business

"ABC" Test (WA Unemployment Comp)

- Individual is free from direction and control over the performance of the service; and
- The service is either performed
 - (1) outside of the usual course of business for which the service is performed, or
 - (2) outside of all the places of business of the enterprise for which the service is performed; and
- The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service contract.

RCW 50.04.140

Unemployment Comp Alternative Test

- Free from direction and control
- Place of performance (contractor's place of business)
- Independent business (or contractor's place of business)
- Contractor files taxes as business
- Contractor registered with state agencies
- Business books and records

RCW 50.04.140

Workers' Comp

- Absent exception: a person "who is working under an independent contract, the essence of which is his or her personal labor for an employer" is covered
- "Employer" includes entity "who contracts with one or more workers"
- Exception: see "alternative test"

THE NEXT CHALLENGE:

The National Labor Relations Board

Everything Old is New Again

- The National Labor Relations Act ("NLRA") was passed in 1935.



NLRA Section 1

It is national labor policy to:

- **Encourage** collective bargaining, and
- **Protect** workers' rights to
 - associate,
 - organize, and
 - designate representatives of their own choosing,

for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

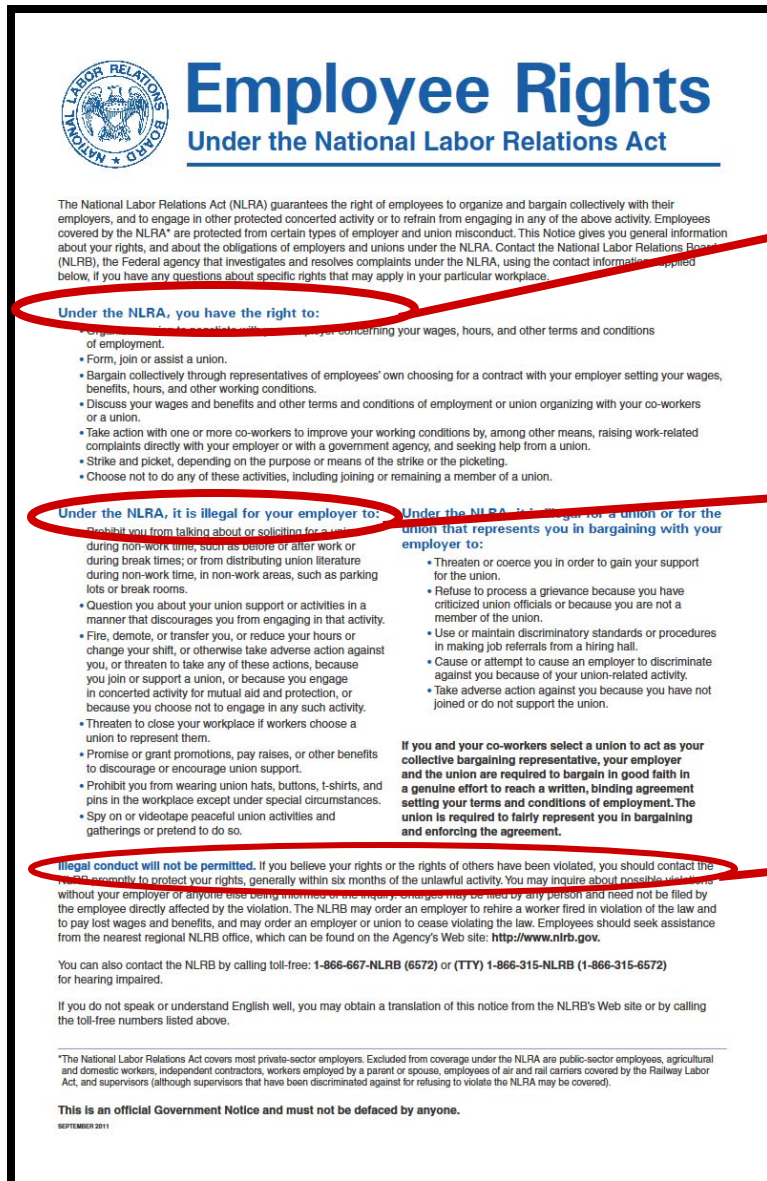


NLRB Rulemaking

- Two new rules:
 - Employee rights poster
 - Election procedures
- Both:
 - Effective April 30, 2012
 - Challenged in court
 - On hold



NLRB Poster



The poster features the NLRB logo at the top left, followed by the title "Employee Rights Under the National Labor Relations Act". The main text is organized into several sections: a general introduction, a list of employee rights, a list of employer prohibitions, a list of union prohibitions, and a section on illegal conduct. Red circles and arrows highlight key phrases: "Under the NLRA, you have the right to:", "Under the NLRA, it is illegal for your employer to:", "Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:", and "Illegal conduct will not be permitted." The poster also includes contact information for the NLRB and a disclaimer at the bottom.

Employee Rights
Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize or assist others to organize, or to bargain collectively with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible actions without your employer or anyone else being informed. Complaints may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: <http://www.nlrb.gov>.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

SEPTEMBER 2011

Under the NLRA, you have the right to . . .

Under the NLRA, it is illegal for your employer to . . .

If you believe your rights or the rights of others have been violated, you should *contact the NLRB*



Legal Counsel to Great Companies®

Under the NLRA, you have the right to:

- Organize a union . . .
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing . . .
- Discuss your wages and benefits and other terms and conditions of employment or union organizing **with your co-workers** or a union.
- Take action **with one or more co-workers** to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket . . .
- Choose not to do any of these activities, including joining or remaining a member of a union.

NLRB Poster Status

- Effective date: April 30, 2012
- D.C. Circuit injunction: April 17, 2012
- Government contractors
 - Executive Order 13496

The "Ambush" Election Rule

- **April 30:** "NLRB representation case amendments take effect today"
- **May 15:** "NLRB suspends implementation of representation case amendments based on court ruling"

Eighty percent of success is showing up.

-- Woody Allen

When is employee use of social media "concerted activity?"



NLRA Section 7

Protects employees' rights to:

- Self-organize
- Form, join, or assist labor organizations
- Bargain collectively through representatives of their own choosing, and
- Engage in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection
- Also protects the right to *refrain* from any or all of those activities.

Examples of "Concerted Activity"

- Two or more employees addressing their employer about improving their pay
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other
- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions

Complaining about the Job on Facebook

Headlines | Pictures | Most Read | News Board

Teenage office worker sacked for moaning on Facebook about her 'totally boring' job

By ANDREW LEVY

Last updated at 8:09 PM on 26th February 2009

[Comments \(113\)](#) | [Add to My Stories](#)

Like many teenagers, Kimberley Swann was underwhelmed by the menial tasks she was given in her new job.

But while other 16-year-olds might have confided in friends and family about the filing, stapling and hole-punching, she decided to let off steam by posting comments on the social networking website Facebook.

Three weeks later, the words 'first day at work. omg (oh my God)!! So dull!!!' came back to haunt her when her boss discovered them as he surfed the net.



- "first day at work. omg (oh my God)!! So dull!!!"
- "all i do is shred holepunch n scan paper!!! omg!"
- im so totally bored!!!!"

NLRB Guidance on Social Media

- **August 18, 2011**
 - Memo OM 11-74
 - 14 cases

- **January 23, 2012**
 - Memo OM 12-23
 - 14 more cases

- **May 30, 2012**
 - Memo OM 12-59
 - 7 more cases

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Social Media

- **Protected speech includes:**
 - Concerted activity for “mutual aid or protection”
 - “Truly group complaints”
- **It does not include:**
 - “Mere griping”
 - Unlawful or violent behavior, trade secrets/ confidential information, disruptive, harassment, maliciously false



THE THIRD CHALLENGE:

Seattle Paid Sick/Safe Leave



Key Dates

9/12/2012 – ordinance passes

6/13/2012 – comments due on final rules

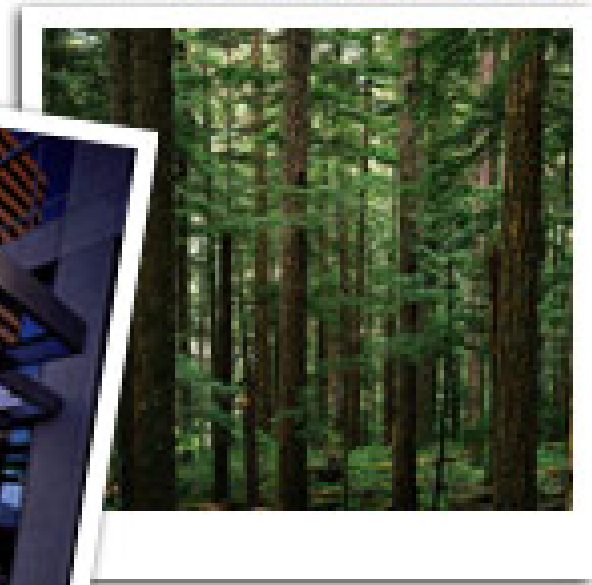
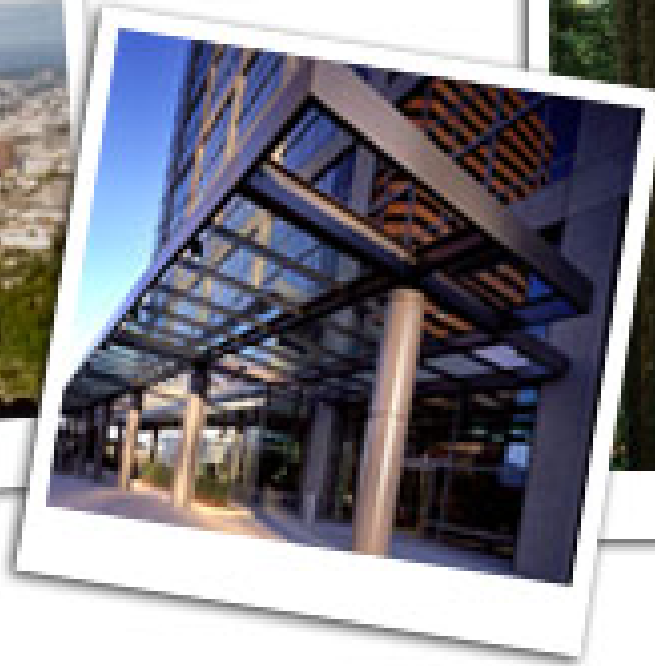
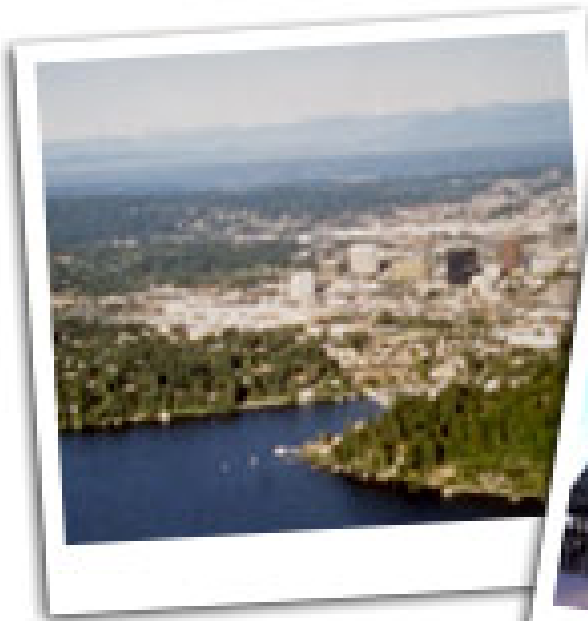
7 & 8/2012 – public awareness campaign

9/1/2012 – effective date

Seattle Employers Are Covered



Bellevue Employers Are Covered (Potentially)



New York Employers Are Covered (Potentially)



SIZE MATTERS

Employer Size	Accrual Rate	Use Per Calendar Year	Carryover to Next Calendar Year
Tier One more than 4 but fewer than 50 FTEs	1 hour PSL / 40 hours worked	40 hours	40 hours
Tier Two at least 50 but fewer than 250 FTEs	1 hour PSL / 40 hours worked	56 hours	56 hours
Tier Three 250 or more FTEs	1 hour PSL / 30 hours worked	72 hours (if separate sick leave and vacation banks)	72 hours (if separate sick leave and vacation banks)
		108 hours (if combined or universal leave policy)	108 hours (if combined or universal leave policy)

Any Employee Who Works *At All* in Seattle Could Be Covered



- Part-timers (no hours threshold)
- "Occasionally" in Seattle
- Telecommuters

Rules About Accrual

- No waiting period before accrual starts
 - 180-day waiting period before use okay
- Accrual on hours worked, not status or % FTE
- Frontloading okay (but monitor)
- Caps?

Rules About Use

- Limits allowed (by employer tier)
- Calendar year leave year
- Limiting use to scheduled work in Seattle

DEFINITIONS

- (28) "Paid safe time" and/or "paid safe days" shall mean accrued hours of paid leave provided by an employer for use by an employee for an absence from work for any of the reasons specified in SMC 14.16.030(A)(2), for which time an employee shall be compensated at the same hourly rate and with the same benefits, including health care benefits, as the employee would have earned during the time the paid leave is taken.
- a. For the purposes of determining eligibility for "paid safe time":
- i. "Family or household members" shall mean, as defined in RCW 49.76.020, spouses, domestic partners, former spouses, former domestic partners, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons 16 years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons 16 years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.
- ii. "Domestic violence" shall mean:
- (1) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members;
 - (2) sexual assault of one family or household member by another; or
 - (3) stalking, as defined below in SMC 14.16.010(P)(1)(c), of one family or household member by another family or household member.
 - (4) "Stalking" shall be defined as in RCW 9A.46.110,
 - (5) "Dating relationship" shall mean, as defined in RCW 49.76.020, a social relationship of a romantic nature.
 - (6) "Sexual assault" shall be defined as in RCW 49.76.020.

Rules About Pay

- Pay that the employee would have earned for scheduled work
 - Mandatory scheduled overtime
 - At least minimum wage
 - Not tips or commissions

Employer Policies



No-fault attendance policies



Notice requirements for absent employees



Documentation requirements for absent employees

PTO Policies in Tier Three

- 108 hours of use and carryover
- PTO by another name?
- Proposed rules