



# THE WORKPLACE WORD

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## Workplace Word—Five New Year's Resolutions for Employers

It's that time again... New Year's resolutions. Get finances in order, lose that extra weight, spend more quality time with the family—we all make countless goals at this time of the year. Hopefully, some we actually accomplish; others we may need to revive again next year. In that spirit, below is a list of five possible resolutions for employers. If you've made and kept these before, then you are one step ahead. For the rest of us, it is a good time to reevaluate, in an effort to get our "house of employment" in order. These suggestions can not only make your life as an employer easier (in the long run), but may eliminate potential problems before they arise and help you cut costs in these critical economic times. As with all New Year's Resolutions, this is by no means an exhaustive list, but includes items that continue to create problems for employers year after year.

### **RESOLUTION 1: I-9 Compliance—Resolve to conduct an independent audit of your I-9 forms, and employment eligibility verification process.**

It is against the law for any employer to knowingly hire an employee who is not authorized to work in the United States. To that end, every employer is required to verify eligibility for employment for every employee hired on a properly filled-out I-9 form. This form must be completed correctly for every new employee, regardless of their national origin or whether or not the employee is a U.S. citizen. Every current employee must have an I-9 form in the file; for terminated employees, the employer must retain the I-9 form until three (3) years after the date of hire or one (1) year after employment termination, whichever is later. Failure to properly verify employment eligibility can subject the employer to significant fines and penalties.

**RESOLUTION 2: Employee Handbooks/Policies & Procedures—Resolve to review and revise employee handbooks and/or employee policies and procedures.** Employee handbooks or other written policies and procedures can be a helpful source of information for employees. However, such documents can create problems for the employer if they are inaccurate, out of date, contrary to new or existing laws, or poorly written. For example, if your employees are at-will, handbooks should not explicitly or implicitly create an exception. Also, pay particular attention to any written policies affecting or addressing an employee's legal rights, such as FMLA, USERRA, NLRA, and immigration, for strict compliance with those laws. Finally, and make sure you



have a clear anti-discrimination/anti-harassment policy.

**RESOLUTION 3: Training—Resolve to train supervisors and other employees regarding anti-discrimination/anti-harassment.** Speaking of anti-discrimination/anti-harassment policies, it does no good to have a clear policy in place unless your supervisors and employees are aware of the policy. Make sure employees know such a policy is in place, that discrimination and harassment will not be tolerated, and that incidents or complaints of discrimination or harassment will be investigated and dealt with. Make sure supervisors understand their role in receiving and reporting complaints of harassment and discrimination, and their responsibilities in acting on behalf of the employer. Conduct periodic training of all employees.

**RESOLUTION 4: Worker Classification—Resolve to verify the correct classification of all workers, both employees and independent contractors, under the FLSA, applicable state law, and tax regulations.** Are your employees exempt or non-exempt from the overtime regulations of the Fair Labor Standards Act and any applicable state laws? Some four years ago, the Department of Labor amended the regulations governing the scope of various exemptions. As positions emerge and evolve, as employee skills expand, or as employer needs change, positions or employees that may have previously been exempt or non-exempt, may no longer be. Failure to pay overtime to an improperly-classified employee can result in hefty back wages, penalties, and attorney fees for the unwary employer. More and more frequently employers are being exposed to class action lawsuits when employees allege they have been misclassified as exempt from overtime or as independent contractors. Additionally, the IRS and other state and local regulatory agencies appear to be aggressively pursuing employers who misclassify employees as independent contractors.

There are numerous factors that the IRS or other regulatory agencies consider, but those factors generally fall into three categories: (1) Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job? If so, the worker is more akin to an employee. (2) Financial: Are the business aspects of the worker's job controlled by the payer (i.e., how worker is paid, expense reimbursement, who provides tools/supplies, etc.)? If so, the worker is more akin to an employee. (3) Type of Relationship: Are there written contracts, will the relationship continue for an unspecified time, are there employee type benefits given (i.e. pension plan, insurance, vacation pay, etc.), and is the work performed a key aspect of the business? No contract, unspecified duration, benefits, and key work all weigh in favor of employee status.

**RESOLUTION 5: Layoffs and other Employment Cutbacks—Resolve to involve legal counsel early if you are planning layoffs or other employee cutbacks.** During times of economic struggle, employers are often left with no choice but to cut back on their labor force. Such cutbacks can create more problems than they solve if done with any appearance of discrimination, without proper notices, or otherwise implemented poorly. If you see such cutbacks looming in the future, early involvement of legal counsel in the planning process can save significant time and effort on the back end.

As you consider these and other resolutions for your own particular situation, keep in mind that the employer-employee relationship is a continuing and evolving process. It requires consistent monitoring and adjustment to keep the relationship healthy and productive. Please feel free to contact Snell & Wilmer's Labor & Employment Group if you have any questions or concerns regarding this article.