



# In The Trenches

By Gabrielle Lee Caruso

## Practical Answers to Your HR Questions

**Q** *I own an office cleaning business. I have both direct employees and independent contractors who work for the company. My employees are either supervisors on customer job sites or staff working in our business offices doing filing, payroll, and things like that. The independent contractors are hired to perform the actual cleaning at customer job sites, and work under the supervision of my supervisory employees, who make sure they show up for work on time and get the job done correctly. They are paid on an hourly basis, but because they are independent contractors, I don't deduct taxes from their wages, and I issue them 1099s. Even though I now have about 50 independent contractors working for the company, I have only 10 employees. Is it true that as long as I have less than 15 employees I do not have to worry about the discrimination laws?*

**A** Yes, it is true that only employers who have 15 or more employees are subject to the federal laws prohibiting discrimination based upon sex, race, color, religion, disability, and age. However, when determining whether an employer has the requisite number of employees, a court may question whether the workers you call "independent contractors" are, in fact, true independent contractors rather than employees. Government agencies, such as the IRS and the Department of Labor, may also question the independent contractor status of your workers. In making a determination whether a worker is an employee or an independent contractor, courts and government agencies look at a number of factors. These factors include, among others, the following: Does the worker have a fixed work schedule? Is the worker paid by the hour or week, or is he paid for getting a job done? Does the employer control how the worker does his job? Does the worker have his own tools? Does the worker advertise his skills to the public? Does the worker have other jobs? If it is determined that a so-called "independent contractor" is really an employee, the worker will be counted in determining whether the employer is subject to state and federal antidiscrimination and other labor and employment laws. In addition, an employer who has misclassified employees as independent contractors can be required to pay any unpaid overtime wages, federal employer matching contributions, and the like, and can also be assessed penalties and interest on such

sums and on sums the employer failed to deduct from wages, among other things. Needless to say, it is a situation that all employers want to avoid. If you have any question about the independent contractor status of any of your workers—and it sounds like you have reason for question—you should obtain independent legal advice before you get into trouble.

**Q** *I own an employee drug-testing company that has 12 employees. My wife owns a company that does our book-keeping and payroll. She has 5 employees. My wife does all the human resource type work for both companies, such as putting together the employment manuals and policies, keeping together all personnel files and employee information in her area, and tracking all employee absences, leaves, and overtime. We each supervise our own employees, however. We also keep all of our corporate records separate, although we each own stock in the other's company. My sister told me that it looks like we have 17 employees and, therefore, subject to federal and state anti-discrimination laws. I told her that she was wrong, because we have two separate legal corporations with different legal names. Who is right?*

**A** If I were a betting person, I'd bet on your sister. Under certain circumstances two employers can be considered 'one' employer. This can occur when one human resource department controls or oversees the employees of two different companies, and there exists common ownership between the companies. In addition, if one company pays the employees but another company supervises them, both may be found to be 'joint employers.' In that case each employer may be held liable for the discriminatory acts of the other.

**Q** *I am the HR Manager of a mid-size company. One of our newer employees has missed a lot of work. She always seems to hurt herself on the weekends (one week she returned to work with a broken ankle and a few weeks later she sprained her other ankle). She has missed a lot of Mondays. Lately I have smelled what I think is alcohol on her breath. She seems to perform*

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## ■ In the trenches

*adequately when she is here, but the other employees are starting to talk about her and they think that she may be drunk. She has worked here for about two months, but I am not sure if she is drunk or not. My company does not have a drug or alcohol testing policy, but I think that I will never know if she is drunk unless she is tested. She has not yet completed her probationary period and is considered an at-will employee. What should I do?*

**A** Employers in Utah must have a written drug and alcohol testing policy in place before they can demand that an employee be tested. Since you do not have a policy, you cannot force the employee to be tested. Separately, even though your employee may be terminable at will, you should consider that she may be protected under the Americans with Disabilities Act if she does not have an alcohol problem and you terminate her for that reason. ■



*In the Trenches* is provided courtesy of the Labor and Employment Law Group of Van Cott, Bagley, Cornwall & McCarthy, P.C., and is authored this month by Gabrielle Lee Caruso, former Section Chief of the Employment Section of the Utah Attorney General's office and a current member of Van Cott's Labor and Employment Law Group. You can reach Ms. Caruso at 801.532.3333. If you have questions you would like considered for publication in future issues of *HR Views*, please send them to [pamgunnell@pipelinewireless.net](mailto:pamgunnell@pipelinewireless.net)

## ■ Legal and legislative update

### "TWO MOANS AND YOU'RE OUT"

Giving life to a fantasy probably shared by HR professionals around the world, a German company has made whining in the office a terminable offense, according to an article on [personneltoday.com](http://personneltoday.com). The company reportedly has placed a clause in employee contracts stating, "moaning and whining is forbidden... except when accompanied with a constructive suggestion as to how to improve the situation." The article reports that in response to this new initiative, one employee left the company because "there was nothing to talk about anymore," a comment that in and of itself seems to violate the no moaning rule. Hey buddy, want some cheese to go with that whine? If your company seeks to outlaw moans, or punish moaners, remember that American laws may allow some forms of perceived moaning and possible whining. For example, many laws prohibit retaliation for assisting in discrimination or other legal claims. The National Labor Relations Act allows employees to talk together about acting together to improve their working conditions. So deal with these issues carefully, lest the moaners have the last laugh and turn you into a whiner. ■

Mike O'Brien practices employment law with the law firm of Jones Waldo Holbrook & McDonough P.C. in Salt Lake City, Utah. He serves on various national and local boards and legislative committees for the local and national Society for Human Resource Management ("SHRM") and regularly addresses businesses and business groups on employment law topics. He recently was named Utah State Bar Employment Lawyer of the Year.

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