



FRASER STRYKER®
Attorneys at law, since 1898

FRASERSTRYKER.COM

Non-Profit Series

SESSION 2: EMPLOYMENT ISSUES

PRESENTERS



MARK L. BRASEE



SALLY L. MCGILL



RHIANNA A. KITTRELL

Topics Covered



Executive Compensation



Classification Issues



Volunteer Issues

Employment Issues



Executive Compensation

Mark L. Brasee

mbrasee@fraserstryker.com

EXECUTIVE COMPENSATION

The IRS requires compensation packages for non-profit executives to be fair and reasonable.

The IRS has no standard formula, such as percentage of total revenues or expenses, for determining compensation, nor are there any tables or schedules that define fair and reasonable compensation for an organization.

REBUTTABLE PRESUMPTION OF REASONABLENESS

A Board may establish a *rebuttable presumption of reasonableness* with respect to executive compensation by:

- Approving compensation *in advance* and ensuring that no one who participates in the decision has a conflict of interest concerning the compensation;
- Basing its decision on comparability data obtained *before* the compensation is approved; and
- Documenting the decision-making process *at the time* it approves the compensation.

1. IDENTIFY CONFLICTS OF INTEREST

Consider adopting a Conflict of Interest Policy to define and assist in identifying conflicts of interest.

If a member of the Board is found to have a conflict of interest, the rebuttable presumption procedure requires that the organization take steps to address the conflict and record those steps in its meeting minutes.

2. OBTAIN AND USE APPROPRIATE COMPARABILITY DATA

To satisfy the rebuttable presumption procedure, the Board must rely on **comparability data** to make its determination regarding compensation issues.

2. OBTAIN AND USE APPROPRIATE COMPARABILITY DATA (CONTINUED)

(1) Like Services. The comparison must be based on substantially similar duties and responsibilities, considering:

- the individual's duties and responsibilities;
- the number of employees the individual manages;
- the size of the budget or assets the individual manages;
- the number of hours worked;
- whether the job is national or local in scope; and
- whether the individual manages multiple functions or departments.

2. OBTAIN AND USE APPROPRIATE COMPARABILITY DATA (CONTINUED)

(2) Like Enterprise. The comparison must be based on entities of similar size. Indicators of size include number of employees, number of persons served by the organization, budget and revenues.

(3) Like Circumstances. Compensation packages being compared must consist of a similar mix of compensation items.

- All forms of compensation must be properly aggregated and accounted and included in total compensation.

Use comparables from the same geographic area where possible.

2. OBTAIN AND USE APPROPRIATE COMPARABILITY DATA (CONTINUED)

- The IRS is less likely to scrutinize compensation which is at or below the 50th percentile for the relevant market.
- For compensation above the 50th percentile, be prepared to show that the compensation awarded is reasonable and to justify why the compensation is greater than the compensation of comparable organizations (e.g., the executive has special knowledge, experience or relationships that would be difficult to replace).

3. DOCUMENT THE DECISION-MAKING PROCESS

Documentation of the decision-making process should be made at the time of the decision and should include:

- The terms of the compensation,
- The date of its approval,
- The members of the authorized body present during the debate and vote on the transaction,
- The comparability data obtained and relied upon,
- The actions of any members of the authorized body having a conflict of interest, and
- Documentation of the basis for the determination.

ADOPT A COMPENSATION POLICY

- To increase consistency in setting compensation and to ensure compliance with the requirements for creating a rebuttable presumption of reasonableness, non-profits should consider creating a **Compensation Policy**.
- A **Compensation Policy** is a useful tool to set forth the process for setting executive compensation, including the source of comparability data that may be considered in setting salary and the documentation procedures required for approving executive compensation.

CONSEQUENCES

- Intermediate sanctions for board members.

Employment Issues



Classification Issues

Rhianna A. Kittrell

rkittrell@fraserstryker.com



Employee v. Independent Contractor



Exempt v. Nonexempt

EMPLOYEE V. INDEPENDENT CONTRACTOR

Independent contractors are people with independent trades, businesses, or professions who offer services to the public.

Employees are people who perform services for your company in a manner which provides you with the right to control what work is done and how the work is completed.

WHY DOES PROPER CLASSIFICATION MATTER?

- Employers must withhold income taxes, withhold and pay Social Security and Medicare Taxes, and pay unemployment tax on wages paid to employees but not to independent contractors.
- Employees (unless exempt) must be paid overtime.

DETERMINING IF A WORKER IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR

- Different governmental agencies use different tests to determine if a worker is an employee or independent contractor.



IRS 20 factor test



DOL 6 factor test

DETERMINING IF A WORKER IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR

- Most important factors:
 - Extent of control the employer exerts over the worker
 - Whether the worker is engaged in a business separate from the business of the company
 - Whether the worker is doing what other employees are doing

- Other factors

INDEPENDENT CONTRACTOR COMPENSATION

- Independent contractors should be paid on per project basis (not weekly or bi-weekly).
- Independent contractors should not receive employee benefits.
- Contractors should not be reimbursed for equipment, tools, or expenses.

INDEPENDENT CONTRACTOR WORK HOURS AND GOALS

- Contractors should set their own schedules.
- Contractors should not be required to work on the employer's premises unless required by the nature of the work.

INDEPENDENT CONTRACTOR TRAINING AND SUPERVISION

- Employers should not require independent contractors to undergo training.
- Employers should not be involved in day-to-day oversight of the contractor's work.
 - Employers should judge the work but not the means of achieving the work (when, where, and how the work is completed).

EXEMPT V. NONEXEMPT

- Most employers are subject to the Fair Labor Standards Act ("FLSA") which establishes minimum wage and overtime pay requirements.
 - Overtime must be paid to employees unless the employees fall within a specific FLSA overtime exception.

EXEMPT V. NONEXEMPT-COMMON MISCONCEPTIONS

- Paying an employee a salary or classifying an employee as a supervisor does not make the employee exempt from overtime.
- Analysis of the employee's job duties needs to be done to determine if the employee qualifies for a specific exemption.

CLASSIFICATION ISSUES

Overtime Exemptions

- Administrative
- Professional
- Executive
- Computer Professional
- Outside Sales
- Commissioned Sales
- Other specialized exemptions
 - Farmworker
 - Driver
 - etc.



EXEMPTION REQUIREMENTS-UNIVERSAL REQUIREMENTS

Employees must be paid a salary basis compliant with FLSA regulations.



Employees must use discretion and independent judgment.

EXECUTIVE EXEMPTION

Must supervise at least two full time employees



Must influence hiring and firing decisions



Must spend over 50% of time managing organization or subdivision of organization

See 29 C.F.R. § 541.100.

PROFESSIONAL EXEMPTION



Must be employed in a position that requires a certain kind of academic degree in a field of science or learning

May also be classified as a creative professional



See 29 C.F.R. § 541.300.

ADMINISTRATIVE EXEMPTION



Employees must perform non-manual work related to management or general business operations

Cannot be clerical, routine, or repetitive work



Should plan, develop, and strategize for the business

See 29 C.F.R. § 541.200.

CONCERNS ABOUT POSSIBLE MISCLASSIFICATION

- Penalties for misclassification can be large.
- Steps to take to prevent misclassification:
 - Audit workforce;
 - Interview supervisors; and
 - Review job descriptions.

Employment Issues



Volunteer Issues

Sally L. McGill

smcgill@fraserstryker.com

VOLUNTEERS

- Non-profits may use unpaid "volunteers" so long as their services are offered freely and without pressure or coercion from an employer.
- Hours of service must be performed for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered.

See 29 C.F.R. § 553.10.

VOLUNTEERS – COMPENSATION ISSUES

- Volunteers should not be compensated in accordance with minimum wage or overtime laws.
- Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof for their service without losing their status as volunteers.

See 29 C.F.R. § 553.106.

VOLUNTEERS – COMPENSATION ISSUES

Offering stipends to volunteers may inadvertently convert your “volunteer” into an “employee.”

If you wish to offer stipends to your volunteers, obtain legal counsel regarding the risks and requirements associated with providing stipends.

Payroll taxes must be withheld from stipends, reimbursements, and in-kind benefits provided to volunteers.

EMPLOYEES WHO WANT TO "VOLUNTEER"

- Employees of a non-profit organization generally should not volunteer for their employer unless they volunteer to perform work that is different from their regular duties. *Even then, proceed with caution and err on the side of paying wages for time spent on employer activities.*
- If employees want to “volunteer” to do the same or similar type of work that they perform as a part of their normal work duties, the work must be included in the employees’ hours worked.
- Remember: The nonexempt employee who is content to volunteer today could be an aggrieved plaintiff demanding unpaid wages and penalties six months from now.

VOLUNTEER RISK MANAGEMENT

Although good volunteers provide invaluable assistance, volunteers can also expose non-profits to liability.

- A non-profit may be held liable for the actions of a volunteer who is acting in the course and scope of his volunteer relationship with the organization.
- Non-profits may also be liable for injuries suffered by the volunteer while providing volunteer services.

RISK MANAGEMENT – VOLUNTEER INJURIES

- Volunteers are not covered by workers' compensation insurance.
- A broadly written **general liability policy** may include coverage for bodily injury, property damage or personal injury to or caused by volunteers.
Examine your insurance policies to determine whether they provide sufficiently broad coverage for actions taken by volunteers or losses suffered by volunteers.
- Non-profits may elect to purchase "volunteer accident insurance" or require volunteers to execute waivers of liability, particularly where volunteers engage in tasks that have the potential to result in bodily injury.

RISK MANAGEMENT – LIMITING LIABILITY FOR VOLUNTEERS

Volunteers should be screened prior to being selected for service.

- Selection criteria typically depends on the responsibilities given to the volunteer.
- Selection criteria for volunteers who serve vulnerable populations, such as children or disabled individuals, may include a background investigation and criminal history check.
- Document the screening process (applications, reference checks, etc.).

RISK MANAGEMENT – LIMITING LIABILITY FOR VOLUNTEERS

Volunteers should be trained on what the tasks they will perform and the organization's expectations of volunteers.

- Define the volunteer's role in writing.
- Developing a Volunteer Handbook for your volunteers is helpful.
- Identify risks created by volunteer activity and provide training to reduce the likelihood of risks.
- Document training provided to volunteers (orientation completed, waivers, training sessions completed, receipt of Volunteer Handbook, etc.).

RISK MANAGEMENT – LIMITING LIABILITY FOR VOLUNTEERS

Volunteers should be supervised, especially when they are working with vulnerable populations or driving vehicles.



Develop criteria for discontinuing volunteers who demonstrate that they are unfit for the task.



Document all hours volunteered and any supervisory concerns

Employment Issues

FS

FRASER STRYKER®
Attorneys at law, since 1898

Questions?



FRASER STRYKER®
Attorneys at law, since 1898

FRASERSTRYKER.COM