

Philly VIP Guide to PA Employment Law

Developed in partnership with Morgan, Lewis & Bockius LLP

Last Updated: May 2, 2024

Table of Contents

Part I: Pre-Hiring Considerations

Part II: Equal Employment Opportunity

Part III: Leaves of Absence and Sick Time

Part IV: Wage-and-Hour Considerations

Part I: Pre-Hiring Considerations

- Before hiring any employee:
 - Obtain a federal Employer Identification Number (EIN) with the Internal Revenue Service (IRS).
 - Require each new employee to complete and return an IRS Form W-4 (available online) designating the appropriate federal tax withholding.
- **Immigration Compliance**
 - The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits:
 - All employers from hiring or continuing to employ workers who are not legally authorized to work in the United States.
 - Employers with four or more employees from discriminating based on national origin or citizenship.
 - To comply with the IRCA, all employers must:
 - Have each new employee complete Section 1 of a Form I-9 employment eligibility verification form by the first day of starting work.
 - Review original documents presented by the employee to establish identity and employment authorization.
 - Complete Section 2 of Form I-9 generally within three days of hire (for employees whose employment will last fewer than three days, this must be done on the first day of work).
 - Retain a Form I-9 on file for each current employee for the longer of three years from the date of hire or one year after the employment ends.
 - Make all Forms I-9 available for inspection if requested by the US government.
 - Determine whether the business operates in a state or an industry requiring the use of the E-Verify system or uses E-Verify on a voluntary basis.
 - Employers do not need to file the Form I-9 with any federal or state government agency but must maintain proper records as described above.
 - Employers must strictly comply with Form I-9 requirements or risk penalties and fines.
- **Insurance Requirements**
 - In most states, businesses are required to maintain or pay into funds to support insurance to protect their workforce, including workers' compensation insurance, unemployment insurance, and state disability insurance.
 - These insurance schemes are administered by state law and apply in all jurisdictions where a business has employees.
- **Workers' Compensation**
 - Under the Pennsylvania Workers' Compensation Act (PWCA), employers must obtain workers' compensation insurance through the State Workers' Insurance Fund, an authorized insurance company, a mutual association or company authorized to provide workers' compensation insurance, or self-insurance. Employers cannot opt out of workers' compensation coverage.

- Employers must pay workers' compensation to workers who suffer an injury or disease in the course of employment, regardless of negligence.
- Employers cannot retaliate against someone who files a workers' compensation claim.
- Employers cannot include workers' compensation claims in a release agreement (without approval from a workers' compensation judge).

- **Unemployment Insurance**

- Unemployment insurance provides temporary income for eligible workers who become unemployed through no fault of their own; are ready, willing, and able to work; and have sufficient work and wages in prior covered employment.
 - To be eligible for unemployment insurance benefits, a claimant must not have contributed to their termination, also referred to as misconduct or just cause.
- The money for unemployment insurance benefits comes from taxes paid by employers, both at the federal level through the Federal Unemployment Tax Act and the state level through similar state unemployment tax laws.
- Typically, a state's labor or employment development department determines whether an unemployed worker qualifies for unemployment benefits after that worker files an application and the employer has had a chance to respond.
- Unemployment benefits generally are not available to independent contractors, but their pursuit of such benefits can flag misclassification issues for the government.

- **At-Will Employment**

- “At-will” means that an employer can terminate an employee at any time for any reason, except an illegal one (discrimination, retaliation, etc.). Likewise, an employee is free to leave a job at any time for any or no reason.
- Employers must decide whether each employee is being hired on an at-will or some other basis (i.e., pursuant to a contract), but the default rule in the United States is at-will employment.
- If employing at-will:
 - Be sensitive to statements concerning future earnings and length of employment throughout the interview process.
 - Employers should ensure that all employment-related documents, including any employee handbook and workplace policies, expressly preserve and reaffirm the at-will relationship.
 - These documents *should not* contain any provisions creating an express or implied contract undermining an employee's at-will status.
 - These documents *should* include a disclaimer stating that they do not create a contract of employment, and do not modify the at-will employment relationship.

- Disciplinary policies or procedures *should* include a disclaimer stating that the employer maintains the right to skip, repeat, or modify disciplinary procedures at its discretion.

- **Employment Agreements**

- Offer Letters
 - Even when not required to do so, companies should memorialize the employment relationship with a simple offer letter to be signed by the employee containing the key terms and conditions of employment, including the employee's:
 - Title or position
 - Reporting relationship
 - Start date
 - At-will confirmation
 - Term of employment (if any)
 - Rate and frequency of pay (required in PA)
 - Manner of pay (such as salary, wage, or commission, including whether the employee is exempt or nonexempt from federal minimum wage and overtime requirements)
 - Hours of work, including whether full-time or part-time
 - Work location, including whether the employee may work remotely
 - Eligibility for benefits (often spelled out in detail in a separate policy or plan)
 - Conditions of employment, including:
 - Form I-9 compliance
 - Successful completion of background and reference checks (if used)
 - Confirmation that their employment does not violate a noncompete or restrictive covenant with another employer
 - Signing a confidentiality agreement
- Confidentiality Agreements
 - Should be drafted broadly enough to cover information or documents the employee may learn or come into possession of during the scope of their employment that is considered confidential by the employer—but it should not be drafted so broadly as to cover information/documents that are not important to the employer and/or legitimately confidential.
 - Should include carveout language to clarify that employees are not precluded from discussing the terms and conditions of their employment with other employees (Section 7 of the National Labor Relations Act).
 - Should include carveout language to clarify that employees are not precluded from reporting potential violations of law to the government or government agencies, such as the Equal Employment Opportunity Commission, or from participating in a government investigation.

- Arbitration Agreements
 - Cannot cover all possible aspects of employment, such as claims of sexual harassment.
- **Employee Handbooks**
 - Not required by federal or Pennsylvania law.
 - However, note that some laws (such as the Pennsylvania Human Relations Act) have posting requirements.
 - Employee handbooks are a useful tool for managing employees and can limit company liability based on employee misconduct.
 - However, an employee handbook holds little value if its policies are not applied fairly and consistently, so management-level employees must responsibly administer policies.
 - Potential employee handbook policies:
 - At-will employment
 - Prohibition of discrimination, harassment, and retaliation
 - Workplace violence
 - Discipline
 - Treatment of confidential information
 - Conflict of interest
 - Access to personnel files
 - Holiday, vacation, sick time, and other types of leave
 - Overtime
 - Expense reimbursement
 - Avoid any policy you cannot enforce on a fair or consistent basis (progressive discipline, raises, and promotion policies, for example, are fraught with peril).
- **Background Checks: The Fair Credit Reporting Act (FCRA)**
 - The FCRA is a federal consumer protection law that regulates background checks obtained from third-party consumer reporting agencies.
 - The law imposes requirements on employers:
 - Before they obtain a “consumer report,” which is defined to include a background check;
 - Before they take any adverse action based on the consumer report; and
 - At the time they decide to take an adverse action based on the report.
 - Before obtaining a consumer report, an employer must provide a disclosure that notifies the applicant that a consumer report may be obtained for employment purposes that is:
 - Clear;
 - Conspicuous; AND
 - In a document that consists solely of the disclosure.
 - Pre-Adverse Action:
 - Under the FCRA, before an employer can make an adverse employment decision based wholly or in part on a consumer report, it must:
 - notify the applicant of its intention to do so,

- provide the applicant a copy of the report and a description in writing of their rights under the FCRA, and
 - give the applicant a “reasonable opportunity” to dispute the contents of the report.
- This is known as a pre-adverse action notice.
- The pre-adverse action notice must be sent if any information in the report is being used to support the no-hire decision, even if the information in the report merely shows an inconsistency with the other pre-hire materials the candidate submitted.
- Under the FCRA, an employer must wait a “reasonable period” before rescinding the employment offer if the applicant fails the background check.
- The FCRA does not specify how long an employer should wait, but federal guidance on this issue has stated that an individual should be given a minimum of five business days.
- Certain state and local “fair chance” laws (such as the Philadelphia Fair Chance Act) have more particularized timing requirements (some jurisdictions require providing up to 10 business days).
- Final Adverse Action Notice
 - If the applicant does not dispute the accuracy or completeness of the background check and the employer still wishes to revoke the conditional offer of employment, the FCRA requires sending an Adverse Action Notice.
 - The Adverse Action Notice must provide specific pieces of information. As a result, any communication about a no-hire decision based on background check reports must be communicated in a very specific way.
- **Background Checks: State & Local Requirements**
 - Pennsylvania:
 - Employers may only consider felony and misdemeanor convictions in hiring decisions to the extent that they relate to an applicant’s suitability for the job.
 - Employers must notify the applicant if a criminal record is part of the reason for denial of employment.
 - Philadelphia Fair Criminal Records Screening Standards Ordinance:
 - May not ask about criminal background on job applications or during any job interview.
 - May run criminal background checks only after a conditional offer of employment is made.
 - May consider criminal convictions only if they occurred less than seven years prior.
 - Also contains restrictions on the use of credit history.
 - Must provide individuals with 10 business days to respond to a pre-adverse action notice before finalizing an adverse decision based on a criminal background check report.

- **Drug Testing in Pennsylvania**
 - In general, Pennsylvania law does not prohibit drug testing in the private sector, so employers have flexibility in implementing drug-testing policies as needed.
 - In Philadelphia, employers cannot require prospective employees to undergo testing for the presence of marijuana as a condition of employment, subject to certain exceptions (e.g., safety-sensitive positions; positions requiring the supervision or care of children, medical patients, or other vulnerable individuals).
 - Medical marijuana
 - Cannot discriminate against an employee solely because of their status as an individual who is certified to use medical marijuana.
 - Not required to make an accommodation for the use of medical marijuana on the property or premises of employment.
 - May discipline an employee for being under the influence of medical marijuana at work if the employee's conduct falls below the accepted standard of care.
 - May restrict employees from participating in certain high-risk activities while using medical marijuana to ensure a safe workplace.

Part II: Equal Employment Opportunity

Equal Employment Concepts

- **Discrimination**
 - To “discriminate” against someone means to treat that person differently, or less favorably, in the terms or conditions of their employment because of their protected characteristic.
 - For example, taking an adverse employment action (not hiring a prospective employee, disciplining an employee, or terminating an employee) because of an individual’s protected characteristic is discrimination.
- **Harassment**
 - A hostile work environment due to, among other things, offensive banter, off-color jokes, inappropriate entertainment, or exclusionary activities on the basis of a protected characteristic.
 - Quid pro quo harassment is the linking of an employment decision to an employee’s acceptance of romantic or sexual advances.
- **Retaliation**
 - Employers cannot retaliate against an employee who engaged in protected activity.
 - Protected activity includes employees raising a complaint (discrimination, harassment, whistleblower activity), availing themselves of certain legally protected rights (requesting a reasonable accommodation or taking a protected leave of absence), or participating in an investigation.
 - Any adverse employment action or any action that might deter a reasonable person from engaging in protected activity is considered retaliatory behavior.
- **Complaint Procedures**
 - There must be a system in place for employees to safely report discrimination and/or harassment without fear of retaliation.
 - Management employees are required to report any potentially unlawful conduct that they become aware of.

Equal Employment Laws

- **Title VII of the Civil Rights Act of 1964**
 - Applies to employers with 15 or more employees.
 - Applies to applicants for employment, as well as employees, to protect individuals from discrimination based on race, color, national origin, religion, or sex (including sexual orientation, sexual identity, and pregnancy).
 - Also protects individuals from retaliation for complaining about discrimination prohibited by Title VII.
- **Age Discrimination in Employment Act of 1967**
 - Applies to employers with 20 or more employees.

- Applies to applicants for employment, as well as employees, to protect individuals age 40 and older from discrimination based on age.
- Also protects individuals from retaliation for complaining about age discrimination.
- **Americans with Disabilities Act of 1990 (ADA)**
 - Applies to employers with 15 or more employees.
 - Applies to applicants for employment as well as employees to protect individuals from discrimination based on a disability, having a record of a disability, and/or being associated with someone who is disabled.
 - Also protects individuals from retaliation for complaining about disability discrimination.
 - Individuals who qualify for protection under the ADA must have the skills, experience, education, and other job-related requirements necessary for the position and must be able to perform the essential functions of the job with or without a reasonable accommodation.
 - Once an applicant or employee notifies an employer of a disability, the ADA requires an interactive process to determine reasonable accommodation (for both current employees and job applicants).
 - An employer should promptly engage in the interactive process once the need for accommodation has been recognized.
 - As part of the interactive process, and for each accommodation request, the employer:
 - Should document in writing its receipt of the request for accommodation, provide a copy to the individual, and retain a copy for the employer's records. This allows the employer to show that it took the request seriously and responded promptly.
 - Should determine whether the individual seeking the accommodation is a qualified individual with a disability.
 - May ask the individual for information about the extent of the impairment, including notes from doctors or other healthcare providers, and request medical testing relevant to the accommodation at issue.
 - Must confer with the individual to discuss accommodation alternatives, which includes listening to the individual's preference, and may offer alternative suggestions.
 - Should document in writing the discussion about the accommodation and the final determination about how the accommodation request is resolved. The employer should provide a copy to the individual and retain a copy for its records.
 - Is not obliged to provide the specific accommodation requested by the individual seeking accommodation. Although the ADA provides a right to a reasonable accommodation, it does not provide a right to any specific requested or preferred accommodation.

- The obligation to provide a reasonable accommodation is ongoing. An employer may be required to provide more than one accommodation to a covered individual, and the employer may be required to provide a different accommodation if there is a change in the disability or other circumstances.
- Covered employers must provide reasonable accommodation to qualified individuals with disabilities, including both applicants and employees, unless doing so would cause an undue hardship.
 - Examples of accommodation include making the facilities more accessible, providing specific equipment (like a particular chair or computer screen), and allowing a change in a work schedule. Examples of undue hardship include excessive cost, substantial scope, and major disruption.
- **Pennsylvania Human Relations Act (PHRA)**
 - Applies to employers with four or more employees.
 - Applies to applicants for employment, as well as employees, to protect individuals from discrimination on the basis of race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin, the use of a guide or support animal (due to physical handicap), or having a GED instead of a high school diploma.
 - Also protects individuals from retaliation for complaining about discrimination prohibited by the PHRA.
 - Requirement to post any notice prepared and distributed by the Pennsylvania Human Relations Commission and post notice of fair employment practices.
 - Recordkeeping Obligations:
 - An employer must preserve records related to employment, transfer, promotion, and dismissal for at least 120 days following termination of employment. Likewise, the employer must retain applications submitted by unsuccessful applicants for 120 days following the filing of such forms.
 - Employers must provide employees access to certain personnel records upon request.
 - An employer must make information it maintains about employees (including employees on layoff with recall rights or on a leave of absence) available to them but does not have to make these records available to former employees.
- **Philadelphia Fair Practices Ordinance (PFPO)**
 - Applies to employers with one or more employees (exclusive of parents, spouse, or children).
 - Applies to applicants for employment, as well as employees, to protect individuals against discrimination on the basis of age, ancestry, breastfeeding, color, disability, domestic/sexual violence victim status, ethnicity, gender identity, genetic information, familial status, marital status, national origin, pregnancy/childbirth and related medical condition, race, religion, sex, and sexual orientation.

- Also protects individuals from retaliation for complaining about discrimination prohibited by the PFPO.
- Reasonable Accommodations:
 - Employers must provide reasonable accommodations for employees who have needs related to pregnancy, childbirth, or a related medical condition unless doing so would cause undue hardship. Reasonable accommodations in this instance may include, but are not limited to, restroom breaks, periodic rest for those who stand for long periods, assistance with manual labor, leave for a period of disability arising from childbirth, reassignment to a vacant position, and job restructuring.
 - Employers must provide reasonable accommodations for an employee to express breast milk. Reasonable accommodations in this instance may include providing unpaid break time, allowing an employee to use paid break or mealtime breaks, or both, to express milk, and providing a private, sanitary space that is not a bathroom where an employee can express breast milk, unless doing so would cause an undue hardship.
- **Federal Equal Pay Act & Pennsylvania Equal Pay Law**
 - Applies to all employers.
 - An employer cannot discriminate between employees in the same establishment who perform equal work (i.e., performance requires equal skill, effort, and responsibility under similar working conditions) on the basis of sex by paying wages to employees of one sex at a rate less than the rate at which the employer pays employees of the opposite sex.
 - Exceptions include a seniority or merit system, a system that measures earnings by quantity/quality of production, or a differential based on any factor other than sex.
 - An employer must post an abstract of the law in a conspicuous place at the employer's place of business.
 - Employers must keep records of wages.

Part III: Leaves of Absence and Sick Time

- **The Family and Medical Leave Act (FMLA)**
 - Applies to employers with 50 or more employees.
 - Employees are eligible for leave if they have worked for their employer at least 12 months and at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles.
 - The FMLA provides 12 weeks of unpaid, job-protected leave per year.
 - Leave can be used for the birth of a child or placement of a child with the employee for adoption or foster care; the care of a child, spouse, or parent who has a serious health condition; a serious health condition that makes the employee unable to work; or reasons related to a family member's service in the military.
- **The Pregnant Workers Fairness Act**
 - Applies to employers with 15 or more employees.
 - Requires covered employers to provide "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would cause the employer an "undue hardship."
 - Applies only to accommodations (although existing laws prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions), e.g., ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities not safe during pregnancy.
- **Philadelphia Paid Sick Leave Law**
 - Employers with 10 or more employees must provide paid sick leave; employers with nine or fewer employees must provide unpaid sick leave.
 - Applies to employees who work at least 40 hours/year in Philadelphia.
 - Does not apply to independent contractors, seasonal workers, adjunct professors, employees hired for less than six months, interns, pool employees, employees covered by collective bargaining agreements, or state and federal employees.
 - Employees can earn one hour of sick leave for every 40 hours they work, payable at the worker's normal rate, up to a maximum of 40 sick leave hours per calendar year.
 - Sick leave may be used after an employee has worked a minimum of 90 days.
 - Sick leave can be used for an employee's own health needs, to care for a family member, or for leave due to domestic abuse or sexual assault.
 - Employers have an obligation to keep a record of employee hours worked, sick time taken, and payments for sick leave for a period of two years.
 - Employers are required to post a notice informing employees of their rights under the sick leave law.

- **Other Protected Leaves in Pennsylvania**

- **Crime Victim/Domestic Violence/Sexual Assault Leave**
 - All employers covered.
 - No unpaid leave mandated but protected if taken.
 - Employers must provide leave to employees so they may attend court proceedings as a victim of a crime, a witness to a crime, or a member of a victim's family.
- **Disaster and Emergency Services Leave**
 - All employers covered.
 - No unpaid leave mandated but protected if taken.
 - Unpaid leave is protected if taken by volunteer firefighters, fire police, or volunteer members of an ambulance service or rescue squad who, in the line of duty, responded to a call before their work start time. The leave is only allowed where the call was taken before the employee was to report for work. The employer cannot discriminate against volunteer emergency worker employees injured in the line of duty.
- **Jury Duty**
 - No unpaid leave mandated but protected if taken.
 - Unpaid leave is protected if taken to comply with a summons for jury duty, which includes serving as a juror or attending court for prospective jury service.
 - This law covers all Pennsylvania employers except for employers in any retail or service industry employing fewer than 15 people, or manufacturing industry employing fewer than 40 people.
- **Military Leave**
 - This law covers all employers.
 - Unpaid leave is protected if taken with reemployment and reinstatement rights. Employers must continue benefits for at least the first 30 days of leave; following the 30-day period, the employee must be given the option to continue health insurance/other benefits coverage at their own expense by paying the same rates paid by the employer.
- **Other Leave Considerations**
 - Employers may not automatically require leave for pregnancy.
 - However, workplace policies regarding employment benefits and security during disability must be equally applied to conditions due to pregnancy or childbirth.
 - Workplace policies regarding employment benefits and job security must be equally applied to conditions due to pregnancy or childbirth. Employers shall not automatically require leave for pregnancy but may grant leave for purposes of child-rearing beyond the period of actual disability; however, the leave may not include payment of sickness or disability benefits. This

leave must be equally applicable to both male and female employees, and “children” encompasses children by birth or adoption.

Part IV: Wage-and-Hour Considerations

- **Fair Labor Standards Act (FLSA)**
 - Covers employees (not independent contractors).
 - Minimum wage requirements for employees.
 - Overtime wage requirements (based on “regular rate”) unless employee qualifies for at least one of the statutory exemptions:
 - Administrative employees
 - Executive employees
 - Professional employees
 - Computer professionals
 - Outside sales employees
 - Highly compensated employees
 - Combination exemption (whereby an employee performs a combination of exempt duties for the above-referenced exemptions)
 - Posting Requirement:
 - Employers must post a notice in a conspicuous place at every establishment where employees are employed. The notice must summarize the FLSA’s basic requirements, as required by the Department of Labor.
 - Employers of employees exempt from the FLSA’s overtime requirements can modify the posted notice to state that the overtime provisions do not apply to certain employees.
 - Among joint employers, if only one employer actually pays employees for their work, that employer is responsible for the posting requirement.
- **Pennsylvania Minimum Wage Act of 1968 (PMWA)**
 - Provides at least the minimum wage set by the FLSA, which is currently \$7.25 an hour. The state minimum wage increases automatically to match federal wage increases.
 - Employers must pay nonexempt employees at least 1.5 times the employee’s regular rate of pay for all hours worked over 40 hours in a workweek.
 - Every employer must give each employee a statement with every paycheck that lists:
 - Beginning and end dates of the pay period
 - Hours worked
 - Rates paid
 - Gross wages
 - Allowances, if any, claimed as part of the minimum wage
 - Deductions
 - Net wages
 - Under the PMWA, “hours worked” includes time during which:
 - The employer requires the employee to be:
 - On the premises of the employer;
 - On duty; or
 - At the prescribed workplace.
 - The employee travels as part of normal duties and working hours.

- The employee is employed or permitted to work.
 - Employers must post a summary of the PMWA in a conspicuous place.
- **Pennsylvania Wage Payment and Collection Law (PWPLC)**
 - Employers must notify employees at hiring of their rate of pay and amount of any fringe benefits or wage supplements. Employers must also communicate upon hire the frequency of pay and overtime wages that an employee is eligible for.
 - Employers may only deduct from employee paychecks for specific reasons and may do so only for the convenience of employees. These specific reasons include, but are not limited to:
 - Deductions provided by law (e.g., taxes);
 - Contributions to welfare or pension plans;
 - Contributions to a personal savings account (if authorized in writing);
 - Deductions for a charitable purpose (if authorized in writing);
 - Dues for a labor organization;
 - Deductions for the purchase or replacement by the employee of goods, wares, merchandise, services, facilities, rent or similar items (if authorized in writing);
 - Deductions for repayment to the employer of bona fide loans
 - Other deductions that are in conformity with the intent and purpose of the PWPLC (if authorized in writing).
- **Payment Following Termination**
 - Whenever an employee leaves the employer, voluntarily or involuntarily, compensation earned is due by the next regular payday.
 - Wages include all earnings, fringe benefits, wage supplements, expense reimbursement, or other guaranteed pay.
 - There is no requirement to pay out vacation time upon termination unless provided by policy or agreement.

Tests for Determining Appropriate Classifications

- There are several tests used to determine whether independent contractors are properly classified as contractors rather than as employees, depending on the applicable law.
- Although no one factor is determinative, the IRS test considers several factors grouped into three general categories:
 - **Behavioral control** (the right to control the manner in which work is performed):
 - the type and degree of instructions given (independent contractors generally control how, when, and where the work is performed, while employees generally must follow their employer's instructions)
 - requiring the use of company equipment, such as computers and tools (independent contractors generally use their own equipment)
 - the evaluation system used (independent contractors are typically evaluated only by the end result of the work, while employees may be evaluated on how the work is actually performed)

- the application of employee policies and procedures (independent contractors are not covered)
 - training (independent contractors generally do not receive training from the company that retains their services)
- **Financial control** (the right to control economic aspects of a worker's activities):
 - the contractor's degree of investment (independent contractors often make a significant investment in the tools and equipment they use to perform the work)
 - reimbursement of business expenses (independent contractors are typically responsible for their own expenses and overhead)
 - the contractor's opportunity for profit or loss (independent contractors run a greater risk of incurring a loss in connection with a particular engagement)
 - the contractor's ability to service multiple clients at the same time (independent contractors generally do not have exclusivity obligations)
 - method of payment (independent contractors are often paid a flat fee for an engagement, while an employee is generally guaranteed a regular wage for the period during which the employment relationship continues).
- **The relationship between the parties:**
 - written contracts (while written contracts are not sufficient to determine a worker's status, they can help indicate the parties' intent)
 - employee benefits (independent contractors typically are not entitled to receive retirement benefits, health insurance, and other similar benefits an employer provides to its employees)
 - permanency of the relationship (employees are typically engaged for indefinite periods and can be discharged for any or no reason without notice, while independent contractors are typically engaged for specified periods or projects and cannot be discharged except under the terms of their contract)
 - whether the services are provided through a corporate entity or through an individual service provider (employees are hired in their individual capacities while independent contractors who provide services to the general market typically form a business entity, such as a limited liability company or corporation)
 - whether the services provided are key aspects of the business (where the individual's services are a key aspect, it is more likely that the worker is actually an employee of the company)
- Under the FLSA, courts examine the "economic reality" of the individual's relationship with a putative employer by assessing these factors:
 - the degree of control exercised by the employer over the workers;
 - the workers' opportunity for profit or loss and their investment in the business;
 - the degree of skill and independent initiative required to perform the work;
 - the permanence or duration of the working relationship; and

- the extent to which the work is an integral part of the employer's business.
- Under Pennsylvania common law (which has been used for several of the statutes above, such as the PMWA and PWPLC), a right-to-control test is used to determine whether the company may control the individual and their physical conduct in the performance of services.
 - If the company has the right to control the manner and means by which the individual's work is accomplished, then it is likely that an employer-employee relationship exists.
 - If, however, the individual has the exclusive right to control the manner of performing their work, it is likely that an independent contractor relationship exists.
 - Courts consider the following factors in determining whether an employer-employee or independent contractor relationship exists:
 - The skill required to perform the job
 - The source of the tools or instruments used to perform the required work
 - The nature of the work or occupation
 - Who controls the manner of the work performed
 - The method of payment
 - Whether the work is part of the regular business of the company
 - The terms of the agreement between the parties
 - Whether the individual is engaged in a distinct occupation or business
 - Whether the individual is free to perform services for anyone who wishes to contract with the individual, including competitors
 - Whether the company has the right to terminate the individual's work at any time
- **Classifying Temporary Workers**
 - A temporary, seasonal, or contingent worker who is placed on-site may still be an employee if the employer exerts sufficient control.
 - PEOs (professional employer organizations): Responsible for such things as taxes and workers' compensation, but if the service recipient exercises discretion and control over services, it may be considered a joint employer.
- **Why Does Misclassification Matter?**
 - Misclassification of employees exposes an employer to significant financial and legal risk. Misclassification of an employee can result in litigation, tax penalties, insurance obligations, and mandated compensation of back wages and overtime pay, double damages, or employment benefits.
 - Most federal and state labor laws only protect employees and not independent contractors.
 - An employer should regularly evaluate its use of independent contractors to ensure compliance with all relevant statutes and ensure that similar workers are classified in the same way.