



Charting the course for business success

STRATEGIC WORKPLACE SOLUTIONS, LLC

# The Lighthouse Report

JANUARY 2009

## Happy New Year!

We hope you enjoyed the holiday season and we wish you a happy and prosperous 2009!

We are pleased to announce that this is the last time you will receive our newsletter as a pdf email attachment. All future issues will be completely electronic, using Constant Contact, an online newsletter service.

We are making this change so you can read the articles of most interest without having to scroll through everything. We hope this change saves you time, while allowing you to get the information that you find most useful for your organization.

We have always provided an unsubscribe option, but your first electronic Lighthouse Report will also ask you to specifically confirm that you wish to stay on our email distribution list. We know that you get a lot of email and we want to be sure that you are getting ours by choice.

So, please enjoy this last "old-fashioned" version as we prepare to catch up with the latest technology.

## Our Articles:

With continual changes in HR legal issues and best practices, we are forced to select just a few to share with you in each **Lighthouse Report**. These articles are never intended to imply that they are all inclusive nor are they intended to substitute for legal or other professional advice. We hope you find them useful and encourage you to contact us for further assistance, when needed.

## FAQ: Are we legally required to provide breaks and vacations?



There are no federal or NC laws that require breaks or vacations, with the exception of break requirements for employees under 18 (child labor laws) and specific professions, such as commercial truck drivers (OSHA and DOT). Allowing employees to take breaks is a good business practice, however, because it gives them an opportunity to rest and socialize with their coworkers, contributing to overall productivity.

If you give your employees vacation time, you are then legally obligated to inform them in writing if this paid time off will be forfeited under any circumstance. Most employers provide this written notification in their employee handbook.

By Carol Rovello

### FIND THESE LINKS ON OUR WEBSITE:

US Dept. of Labor

EEOC

NC Dept. of Labor

IRS

WNC HRA

### INSIDE THIS ISSUE:

The Americans with Disabilities Amendments Act takes effect 2

New Military Provisions in the FMLA 2

Employee or Independent Contractor? 3

SWS Contact Information 4

SWS News 4

## The ADA has been updated!

Employers having at least 15 employees are presently subject to the Americans with Disabilities Act (ADA). Title 1 of this federal law addresses consideration of disabilities with regard to hiring and other terms, conditions, and privileges of employment. In summary, the ADA:

- Prohibits discrimination against "qualified" applicants and employees with disabilities
- Requires "reasonable accommodations" that do not create an "undue hardship" for the employer
- Restricts pre- and post-employment medical inquiries
- Protects the confidentiality of medical information

The Americans with Disabilities Amendment Act of 2008 (ADAAA) **became effective on January 1st**. Many requirements remain the same. It still prohibits medical inquiries and examinations, except in limited circumstances such as if an employee requests a reasonable accommodation and the employee's disability isn't obvious. The confidentiality of medical information that employers retain has to be maintained in files that are separate from personnel files. Employers are still only required to provide reasonable accommodations to individuals who, with or without accommodations, are qualified to perform the essential functions of their positions. And the ADAAA does not change the fact that employers do not have to provide accommodations that will result in an undue hardship.

Of primary concern to employers is the **expanded definition of "disability."** For example:

- Employers no longer may take into account mitigating measures such as hearing aids or insulin when determining whether someone has a disability. However, eye-

glasses and contact lenses still may be taken into account.

- "Major life activities" is expanded, including a lengthy illustrative list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working and the operation of a major bodily function, such as functions of the immune system, normal cell growth and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.
- The "substantially limits" requirement from the "regarded as" prong of ADA disability is removed. Now someone with an impairment can be regarded as having a disability, even without the perception that the impairment limits a major life activity, provided that the impairment is not an impairment with an actual or expected duration of six months or less.
- An impairment that is episodic or in remission is now a disability if it would substantially limit a major life activity when active.

### Strategies for Compliance

1. Evaluate related policies/procedures and update them as needed.
2. Adjust recruitment, selection, and hiring documents as needed.
3. Ensure that job descriptions accurately describe the essential functions, minimum qualifications, and working conditions/environment (e.g. physical, mental, and emotional demands of the job).
4. Have a process and documents in place to receive, consider, and implement reasonable accommodations in a manner that promotes comfortable conversations and consistent decisions.
5. Train supervisors regarding ADAAA basics and how to handle requests for accommodations.

Source: [www.shrm.org](http://www.shrm.org)

## New FMLA Military Provisions

If you have at least 50 employees located within a 75 mile radius, your organization is subject to the Family Medical Leave Act (FMLA).

Among other things, section 585 of the National Defense Authorization Act (NDAA) amends the FMLA to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 workweeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is other-

wise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."

The NDAA also permits an employee to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."

These new rules **become effective on January 16th**. If you would like a free pdf of the new FMLA poster, email us at: [info@strategic-workplace-solutions.com](mailto:info@strategic-workplace-solutions.com)

Source: [www.dol.gov](http://www.dol.gov)

# Independent Contractor or Employee?

When we ask small business owners how many employees they have, we often hear that they use independent contractors instead of employees to perform the work of their company. Since so many employees are incorrectly classified as independent contractors, we thought you might like some information related to this issue before you incur the liability associated with misclassification.

\*\*\*\*\*

It is critical that you, the employer, correctly determine whether the individuals providing services to your business are employees or independent contractors. Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.

Classifying a worker as an independent contractor seems like a good deal, but misclassification can be very costly. If that "independent contractor" is really an employee, you will owe back payroll taxes, possibly with penalties and interest. If the worker is non-exempt and worked over 40 hours a week, you may also owe back overtime pay at 1 1/2 times the regular pay rate with the associated taxes.

If your "independent contractor" gets hurt on the job and you should have, but haven't, paid workers compensation, gets who covers the injury-related medical payments/lost time? Yes, that would be you, the employer. Did you know that NC requires you to cover independent contractors who cannot provide proof that they are covered by their own worker's compensation policy?

Before you can determine how to treat payments you make for services, you must first know the business relationship that exists between you and the person performing the services. In determining whether the person providing service is an employee or an independent contractor, all infor-

mation that provides evidence of the degree of control and independence must be considered.

## Common Law Rules

Facts that provide evidence of the degree of control and independence 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?
2. **Financial:** Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
3. **Type of Relationship:** Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

**"Classifying a worker as an independent contractor seems like a good deal, but misclassifying can be very costly."**

Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no "magic" or set number of factors that "makes" the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another.

The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

By Carol Rovello



Charting the course for business success

# STRATEGIC WORKPLACE SOLUTIONS, LLC

**71 Broadway, Suite 201  
Asheville, NC 28801**

**Office: 828-545-6130  
info@strategic-workplace-solutions.com**

**The right human resource decision today  
improves your profitability tomorrow.**

**SWS helps organizations to:**

- Improve individual and organizational performance
- Identify and resolve HR/OD challenges
- Build effective leaders and teams



## Strategic Workplace Solutions News

Since the last **Lighthouse Report**, we have welcomed several new clients:

- Mountain Area Child and Family Center
- FLS Energy
- Julie Duriga Accounting

We are also working with Armed Forces Service Corporation and Delmarva Foundation through our affiliation with Workplace Dynamics, LLC in MD.

\*\*\*\*\*

If your organization has plans for change, we can help you with all of the "behind-the-scenes" strategies that facilitate success.

\*\*\*\*\*

Carol Rovello presented **HR Basics for Small Business** for the Small Business Technology

Development Center counselors/consultants located at SBTDC offices throughout the state and **Building an Ethical Organization** sponsored by NC FARO for leaders of mental health agencies located throughout the state. She will facilitate a teambuilding session for Leadership Asheville later this month.

Bonnie Snyder will present **Succession Planning: Building Bench Strength in a Competitive Labor Market** at the WNC Human Resource Association meeting on January 14th. This program will offer HR professionals one strategic recertification credit.

If you are interested in building leadership competence and continuity within your organization, you may want to attend this program. Program and registration information can be found at: [www.wnchra.info](http://www.wnchra.info).