Independent Contractors: Be Careful You May Own Them

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With You Today

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Topics

• Third-Party Vendor Management & Compliance
  • How the IC can get you in trouble
  • Outsourcing
• DOL Fiduciary Duty
• How DOL Affects Independent Contractor ("IC") Relationships
• FCPA Compliance
• Telephone Consumer Protection Act Compliance
• ADA and Third-Party Contractor Supported Websites
Increasingly valuable ways to use independent contractors to supplement business operations BUT:

- What was designed to limit legal exposure and limit costs may have opposite effect:
  - The contractor is both a component of a cost-effective solution and a potential vulnerability.
  - Where are the employer / principal and independent contractor / service provider on issues such as liability insurance, E&O, and indemnification of the employer / principal.
  - How likely is it that the IC has sufficient resources to meet an indemnification claim?
Diligence, contracting and ongoing vendor management are critical: the biggest problem is identifying the line and not crossing it.

Companies cannot “outsource” compliance: when do you cross the line, turn a “blind eye,” rely on assurances without checking, etc.?

Audit your third-party relationships with a view to potential regulatory liability and corporate embarrassment: Make it a condition in your IC contract that an audit will be conducted.
Key risks include data protection, business continuity and customer management.

- The Home Depot malicious code was introduced into Home Depot’s system by an IT consultant.

The more regulated your industry, the greater likelihood you will be deemed “owner” of the IC’s actions.

Third-party relationships receiving increasing scrutiny from regulators (“Pay to Play,” who is getting hired? What protections?).

Fine line between dictating good behaviors and practices in the regulatory and compliance front and creating quasi-employees, e.g. independent broker-dealers who must register their independent contractor registered representatives.

- For years, independent broker-dealers have built errors and omissions (“E&O”) insurance into their relationship with registered representatives.
DOL Fiduciary Rule

The impact of the DOL fiduciary rule on bank broker-dealer distribution of securities and insurance

- Applies to ERISA plans and IRAs
- Broadens the definition of investment advice “fiduciary”
  - Current definition: 5-part test, including conditions that advice is provided on a regular basis, pursuant to a mutual agreement, arrangement or understanding that the advice will serve as the primary basis for any investment decision
  - New definition includes: a “recommendation” to (i) acquire, hold or dispose of securities, (ii) take a distribution / rollover to IRA, or (iii) invest assets after the distribution (rollovers); in a particular context; subject to exclusions
  - New definition excludes: regular basis, mutual agreement and primary basis
- A fiduciary is subject to:
  - Duties of prudence and loyalty: “the highest known to law” (ERISA plans only)
  - “Prohibited transaction” rules against self-dealing, conflicted interests and kickbacks (ERISA plans and IRAs)
The impact of the DOL fiduciary rule on bank broker-dealer distribution of securities and insurance

- Sales of securities and insurance may become fiduciary activities
- Prohibited transaction rules are violated if fiduciary/affiliate receives additional revenue as a result of advice
- Disclosure is not a cure/exemption required
- Exemption may create a private right-of-action against financial institutions
- Financial providers’ standard defense to fiduciary litigation is limited
- Co-fiduciary liability

New Best Interest Contract Exemption
- Exempts compensation paid to “Adviser”, “Financial Institution”, affiliate, or related entity regarding provision of investment advice to retirement investor
- Financial Institution must take on certain responsibilities for adviser, including implementing written policies and procedures designed to ensure that the adviser adheres to “impartial conduct standards”
- Disclosures
How DOL Affects Independent Contractor Relationships

How DOL rules affect the relationships with independent contractors

• BICE: New DOL rules may require financial services firms and their representatives who are providers to IRAs to contractually take on ERISA fiduciary duties

• Financial services firms may have potential fiduciary liability with regard to actions and omissions of independent contractor representatives providing investment advice to IRAs

• Financial Institutions may be required to exercise some supervisory authority over their independent contractor representatives:
  - Ensure that advisers comply with the impartial conduct standards (e.g., best interest, reasonable comp.)
  - Identify material conflicts of interest
  - Include measures to prevent violations of impartial conduct standards
  - Designate a person responsible for procedures and for monitoring advisers’ adherence to impartial conduct standards
  - Prohibit any incentive that is intended or would reasonably be expected to encourage advisers to make recommendations not in the best interests of retirement investors

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FCPA Compliance

How to rein in rogue third-party providers for FCPA Compliance

• Communication of company’s anti-bribery policy
• Reciprocity of compliance
• Annual compliance certifications
• Clawbacks
• Report of third-party violations to DOJ
Telephone Consumer Protection Act (TCPA) Compliance

Independent contractor activity must be monitored for TCPA compliance to avoid liability

• TCPA prohibits the telemarketing (particularly to cell phones) and requires consumer consent for the use of
  - Automatic dialing systems
  - Prerecorded voicemails
  - Texts
  - Faxes

• Imposes statutory damages of $500 per violation and up to $1,500 if willful or knowing

• Class actions based on:
  - Formal agency
  - Apparent authority
  - Ratification

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Telephone Consumer Protection Act (TCPA) Compliance

### OUTLINE OF TCPA RULES

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<th>LANDLINE</th>
<th>CELLPHONE</th>
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<td>Marketing</td>
<td>Non-Marketing</td>
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<td>Autos called Calls/Texts</td>
<td>Do not call list</td>
<td>prior express written consent</td>
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<td>Prerecorded Voice</td>
<td>prior express written consent</td>
<td>prior express written consent</td>
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<tr>
<td>Manually Dialed</td>
<td>Do not call list</td>
<td>Do not call list</td>
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<tr>
<td>Fax</td>
<td>Prior express permission or established business relationship</td>
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1- Prior “express written consent” requires a written agreement, signed by the consumer, that includes among other things the telephone number, that specifically authorizes telemarketing by automatic dialing/texting or prerecorded voice, and that is not required as a condition of purchase. 47 C.F.R. § 64.1200(f)(8).

2 - For non-marketing purposes, providing a cell number in connection with a transaction generally constitutes prior express consent to be contacted at that number with information related to the transaction. 7 F.C.C.R. 8752 ¶ 31 (1992).

Do Not Call List restrictions apply broadly to telemarketing to both cell phones and landlines, but can be overridden by written consent from the consumer.

* Opt-out notice and mechanism must be provided. Specific requirements vary.

Where do they commonly get in trouble?

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ADA and Third-Party Contractor Supported Websites

Third-party contractor supported websites must be compliant with the Americans with Disabilities Act

- ADA requires that places of public accommodation be available and accessible to individuals with disabilities, which includes the blind.
- Publicly available (not private / password protected) websites are considered by many courts to be places of public accommodation
  - Example: retail store, restaurant, banking, insurance, utility etc.
- Companies often outsource development and maintenance of websites to third-parties but remain liable for compliance
- Recent settlements and consent decrees involving the DOJ demonstrate the potential liability that corporate entities face, including government agencies

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Resources

DOL Fiduciary Rule

• Sutherland Videocast - DOL Fiduciary Litigation Impacts
• [Sutherland White Paper - DOL's Expanded Definition of Investment Advice Fiduciary Under ERISA and Revised Complex of Exemptions](#)

FCPA Compliance

• [Sutherland Webinar - Impact of the Yates Memo, the FCPA Unit Pilot Program and Recent Legal Decisions](#)
• Sutherland Legal Alert - Cooperate or Terminate: Second Circuit Protects Companies that Terminate Employees for Failure to Cooperate with Internal Investigations

TCPA

• [2015 TCPA Year in Review](#)
• Sutherland Legal Alert - Applying Spokeo, Court Finds Plaintiff Incurred No Actual Harm

ADA Website Compliance

• [Sutherland Article - The Circuit Split on Whether Websites Constitute Places of Public Accommodation](#)
Questions?