

Anticipating the Hazards Ahead – Onboarding, Operational, and Recordkeeping Best Practices for Employee Driver and Owner-Operator Fleets





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LEGAL BACKGROUND AND UPDATES

Overview



Today's Presentation (Recorded 10-28-20)

- Legal Background and Updates
- Fortifying the Independent Contractor Model
- Applying these Standards in your Company Processes

Legal Disclaimer: The following information is offered as educational information only and does not constitute legal advice. We recommend that you consult with qualified legal counsel on all of the issues, laws, and regulations we talk about. The presenters expressly disclaim any warranties associated with this presentation or the information provided herein.

Who is an independent contractor in the trucking industry?



- IC owner-operators are **small business owners** who sell **capacity** – trucks and driving services
- The market for the capacity sold by ICs is comprised of **motor carriers, not shippers**
- This is a **B2B** relationship at its heart
- ICs must be treated differently than employee drivers
- The way operations personnel conduct business and interact with ICs can affect the application of important legal principles governing their IC status

Legal Background



Risk: IC Misclassification

- The Potential Claim: The ICs were never really ICs at all. Instead, the motor carrier should have treated the ICs like its own employees. Thus, the motor carrier must fulfill its legal obligations as the ICs' employer.

Legal Background



The Battlefronts: Primary Areas of IC Misclassification Exposure

- Workers' compensation and unemployment tax laws
 - Long-standing arenas for worker classification challenges
 - “Targeted” audits may capture similarly situated workers
- Federal tax and wage & hour legal audits
 - Federal agencies sometimes share information with state agencies
- Class action litigation under state and federal law

Legal Background



Statutory/Regulatory Tests, Case Law, Agency Decisions

- Myriad sources set various legal standards for determining worker status
- Most Common IC Status Tests:
 - Right to Control
 - ABC
 - Relative Nature of the Work
 - Economic Realities
 - IRS “20 Factor”/Restatement Agency Test
- Courts and administrative agencies apply the relevant legal test to the facts of the relationship at issue to determine if the evidence weighs in favor of an IC or employment relationship

Legal Background



Fundamental: Right-to-Control Test

- Specified recompense/specified result
- Principal controls results of work only – not means of accomplishing result

Many tests, including the IRS 20 (now 11) factor analysis, incorporate this standard: Does the MC exercise or have the right to exercise control over the manner or means utilized to accomplish the result?

Legal Background



ABC Test

- This test has received extra attention lately in light of California's AB5 (a few other states are attempting to enact similar legislation)
- In order to prove IC status, the putative employer must show:
 - A. Worker is free from putative employer's control;
 - B. Services are not in the normal course, occupation, trade, business, or profession of putative employer's business;
and
 - C. Worker is customarily engaged in an independently established trade or profession

Legal Background



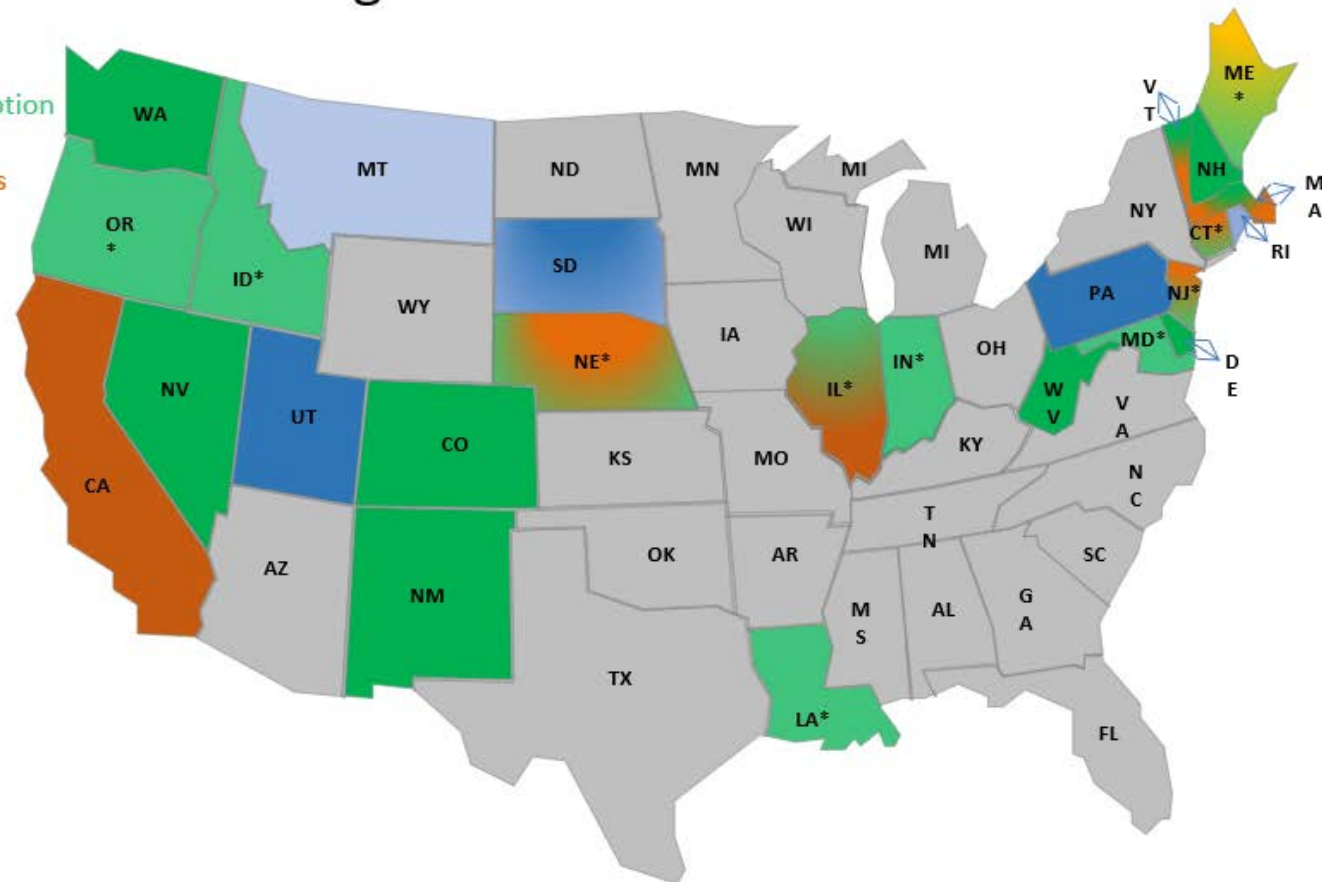
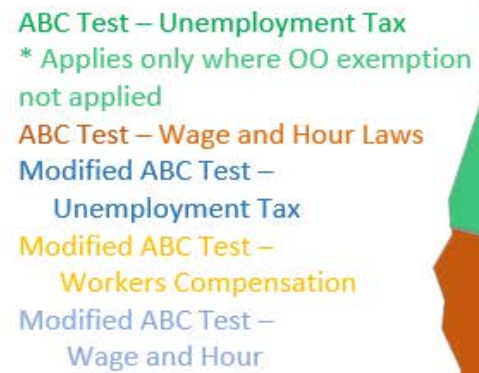
Variations on ABC Test Elements

Bifurcated B Prong (with Standard A + C Prongs) : (b) Such service is either outside the usual course of business for which such service is performed, or **such service is performed outside of all the places of business of the enterprises for which such service is performed.**

- A Prong + C Prong Test
- A Prong + C Prong + Additional Element (e.g., properly licensed)



States Using ABC Test



Legal Background



Additional Factors Considered under Multiple Tests:

✓ Substantial investment in “tools of the trade,” <i>e.g.</i> , truck, communication equipment	✓ Payment by the job and results vs. by the hour
✓ Distinct occupation	✓ Opportunity for profit or loss
✓ Level of supervision	✓ Intent to create IC relationship
✓ Level of skill	✓ Contractor’s right to hire and use helpers and replacements or substitutes
✓ Exclusivity	✓ How is the IC treated for tax purposes – 1099 vs. W-2
✓ Is work part of the regular business of the principal	✓ Employment-type benefits and support (<i>e.g.</i> , health insurance, uniforms)

Legal Update – Case Law



- ***CTA v. Becerra*** (S.D. Cal.)

- Granted motion for preliminary injunction because plaintiffs established “serious questions” as to the FAAAA preempts’ application of ABC Test to MCs to motor carriers
- Found “FAAA is likely preemptive ‘all or nothing’ state law like AB-5 that categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees”
- Enjoined State from applying ABC Test in its entirety, but noted the B Prong is the “Achilles heel” because it does not offer “an alternative method for using an independent-contractor driver”



Appeal Pending

Does Federal Law Preempt Application of the ABC Test to Motor Carriers?



California
Illinois
New Jersey
Massachusetts
Washington



Uber/Postmates AB5 Challenge



Olson, et al. v. State of California, et al. (Case 2:19-cv-10956-DMG-RAO)

- Uber, Postmates, **and gig economy workers** claim California unconstitutionally targeted them in enacting AB5
- Bar raised to prove IC status, and no exemption for gig economy workers similar to other industries
- California's Motion to Dismiss granted due to no evidence of "irrational animus" toward gig economy nor favoritism toward unions or industries granted exemptions from AB5; Plaintiffs granted leave to amend their complaint
- Appeal now pending at 9th Circuit Court of Appeals

Legal Update



Recent Unfavorable Case Law

Fournier Trucking, Inc. v. NJ Manuf. Ins. Co. (NJ Super. Ct., App. Div. April 9, 2020)

- Court deemed freight-forwarder liable for WC premiums in connection with its engagement of motor carriers without WC coverage as subcontractors
- Court reached this conclusion even though many of the subcontracted MCs had substantial business operations with up to 15 trucks
- Underscores importance of good recordkeeping

Legal Update



Recent Unfavorable Case Law

Bruger v. Olero, Inc. (ND Ill. Jan. 21, 2020)

- Owner-operators claim motor carrier violated Illinois Wage Payment and Collection Act
- Motor carrier moved to dismiss claims for lack of standing due to owner-operators' status as independent contractors
- Court found owner-operators sufficiently alleged the existence of an employment relationship based on evidence the motor carrier:
 - Required drivers to work on a full-time basis; prohibited drivers from working for other companies; provided all work assignments; set prices for deliveries, billed customers, and collected receivables; specified routes; imposed fines to enforce compliance with strict policies

Legal Update



Favorable ABC Test Case Law

➤ *Q.D.-A., Inc. v. Ind. Dept. of Workforce Dev.* (Indiana)

- ✓ “Drive-away” driver deemed IC under **ABC Test**
- ✓ While MC advertised delivering vehicles and had US DOT authority to do so, it only engaged ICs (no employee drivers) to make such deliveries
- ✓ Court recognized difference between arranging for delivery of commodities and actual delivery of commodities

Legal Update



Recent Favorable Case Law

Beavex, Inc. v. WCAB (Comm. Ct. Penn. April 15, 2020)

- Court reversed agency decision and deemed owner-operator couriers ICs for purposes of Pennsylvania WC laws under control test
- Court relied upon *Universal Am-Can* reasoning, finding ***evidence of compliance with customer requirements is akin to evidence of compliance with government regulations and should not favor finding of employment status***

Legislative and Rulemaking Update



Effect of Compliance with FMCSA Safety Regulations

- Legislative initiative to ensure that efforts relating to safety shall not count against a motor carrier in the misclassification or joint employment context under the FLSA
- Applies to any device, equipment, software, technology, procedure, training, policy, program, or operational practice intended to improve safety

Uniform Worker Classification Act



- Language developed and proposed by Coalition to Promote Independent Entrepreneurs
- Seeks to clarify IC status using two-tiered test of IC status that can be met where best practices present
- Caution
 - Ensure uniform change to laws doesn't inadvertently infringe on good law (either general IC definition or exemption)

Proposed U.S. DOL Rule



- Synthesizes various courts' approaches to implementing SCOTUS' economic realities test.
- Court must evaluate whether a worker is economically dependent on alleged employer or in business for herself by examining two "core" factors: (1) the nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss based on initiative and/or investment. If both core factors indicate either independent contractor status or employee status, no further inquiry would be needed under the proposed rule.
- If both core factors do not lead to the same result, the proposed rule provides three additional "guideposts" for consideration: (1) the amount of skill required; (2) the degree of permanence of the working relationship; and (3) whether the work is part of an integrated unit of production.

COVID-19 Impact



- Unemployment
 - Changes made necessary by CARES Act
 - Watch for opportunistic amendments
 - Audits resulting from PUA applications?
- Workers Compensation
 - “Essential worker” presumptions?
 - Changes to definitions of employment?
- Paid sick leave
 - Attempts to enact paid sick leave?
 - Who is eligible?



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FORTIFYING THE IC MODEL

Fortifying the IC Model



Settlement Carrier (Brokerage) Model



- Voluntarily revokes motor carrier authority
- Obtains property broker or freight forwarder authority
- Not directly responsible for motor carrier compliance with federal safety regulations
- Compensates IC carriers via settlements

- Operates as a formal business entity
- Obtains motor carrier authority
- Directly responsible for motor carrier compliance with federal safety regulations
- Issues invoices for completed loads/stops

Settlement Carrier (Brokerage) Model



What is the Difference Between a Settlement Carrier and a Traditional Carrier?



Fortifying the IC Model

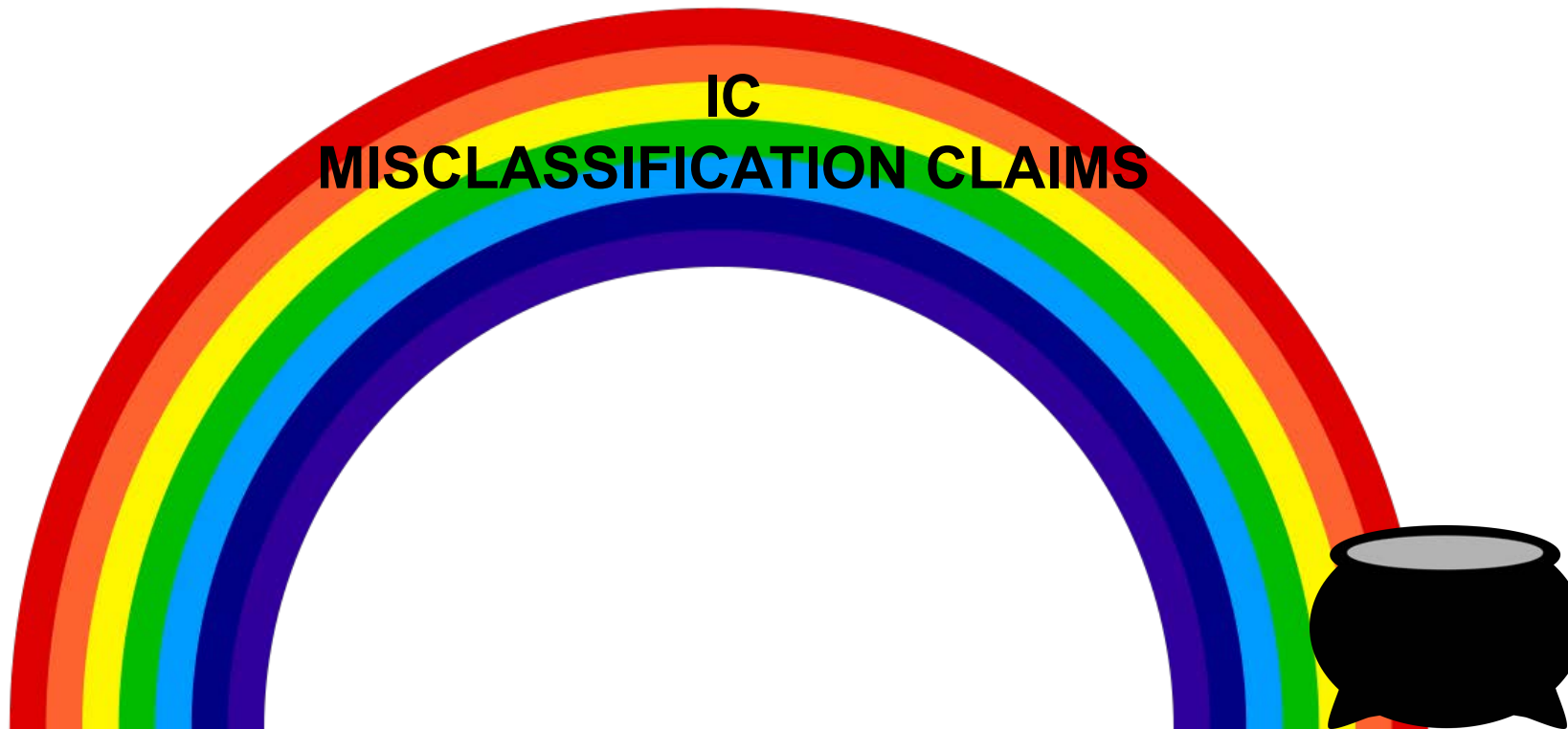
Multi-Unit Contractor Model

- Only contract with business entities that furnish multiple tractors with drivers
- Communicate with the contractor, **not** the contractor's drivers
- Benefits of model may be negligible if contractors do not employ the drivers they furnish

Fortifying the IC Model



Minimize Potential Damages





Fortifying the IC Model



Reduce Potential Damages:

- **Modify Compensation Structure**
 - Expressly identify compensation attributable to labor v. other expenses
 - Offer accessorial pay for rest breaks and other non-productive time
- **Minimize Settlement Deductions**

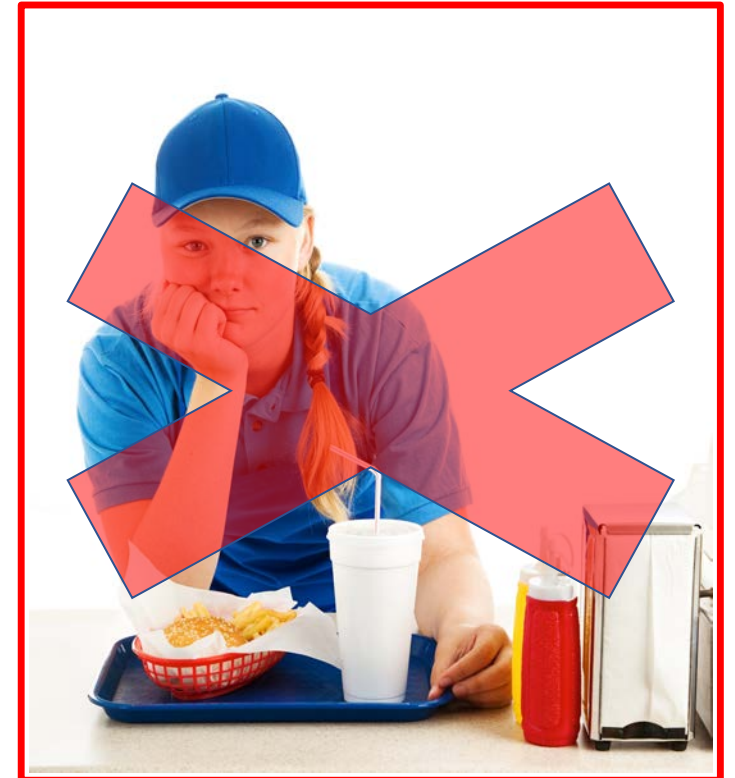
Fortifying the IC Model



Recruiting Sensitivity



- ✓ Is the candidate a business-savvy entrepreneur looking to grow its business?
- ✓ Or is the candidate an order taker?



Fortifying the IC Model



Terminology Matters

Employment Jargon	Contractor Jargon
Employee	IC, Contractor, Owner-Operator
Employer	Company, Carrier
Wage, Salary, Paycheck	Compensation, Financial Obligation
Training	Orientation, Information-Sharing
Hire	Contract
Fire, Discharge, Separate	Terminate (K), DQ (driver)
Duties	Contractual Obligations
Supervisor	IC Liaison, Terminal Manager
Vacation, Holiday	Not In Service, Truck Unavailable

Fortifying the IC Model



Traditional Best Practices | Embracing Technology

- Avoid business coaching
 - Refer to third-party vendors
- No direct or indirect forced dispatch
 - Retain evidence of rejected loads
- Focus on compliance with FMCSRs and customer specifications, NOT carrier policies and procedures
- Limit exclusivity
 - Retain evidence of trips for other customers
- Provide opportunities for negotiation
 - Retain evidence of negotiations
 - Federal Leasing Regulations apply
- **Revise/update documents**



Fortifying the IC Model



The Contract Governs the Business Relationship

- The service agreement between MC/IC states the parties' respective obligations, including IC service expectations
- Otherwise, the IC should have discretion over its own business/operations
- Federal Leasing Regulations (49 C.F.R. Part 376)
- Breach of contract or termination of contract vs. punishment/penalty/probation





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APPLYING THESE STANDARDS TO YOUR COMPANY PROCESSES

Real-World Challenges in Distinguishing Owner-Operators



- Required Compliance with FMCSA Regulations
 - DOT application
 - Verifications
 - MVRs
 - Clearinghouse
 - DQF
 - Part 40 testing requirements
- Lowering Risks of Accident Liability
 - Safety Qualifications
 - Safety training
- Orientation Process Complexity





DOT Application Best Practices

Owner Operator App

- Stick to FMCSA requirements
- Limit custom questions to only equipment info
- Eliminate “employee” language associated with application
 - Requirements page
 - Questions
 - Consent language

Company Driver App

- Company hiring requirements
- Custom questions around employment
- Employee/Employer language

Consent Language



Owner Operator

“In connection with owner-operator application...”

“If engaged as an owner-operator...”

“during my contract period”

Employee Driver

“In connection with my employment application . . .”

“if hired. . .”

“during my employment”

Other FMCSA Regulations



- Same DOT Verification Process under §391.23
 - Review language in drug and alcohol release
- Same MVR Process – initial (§391.23) and annual (§391.25)
 - MVR monitoring
- Same Cert. of Violations (§391.27)
- Same Road Test/Equivalent (§391.31/ §391.33)
- Same Medical Exam Process (§391.41-391.49)
- Same DQF Requirements (§391.51)
- Same Part 40 testing requirements



DOT Verification Practices



Use caution in language when providing verifications after contract period has ended:

- Position information
 - Owner-operator/ independent contractor vs employee
- Reason for Leaving/Termination Reason
 - Don't say: quit, company policy violation, or refused loads
 - Do say: contract ended, terminated contract, disqualified
- Comments
 - Use discretion, best practice not to have any comments

Clearinghouse



- Contractor operating under Carrier's DOT authority
 - Run full query – prior to engaging contractor
 - Run limited query, at minimum annually
- Contractor operating under own DOT authority
 - Required to designate C/TPA to comply with requirements of part 382 and Clearinghouse queries
 - Best practice – require evidence of queries or still conduct queries on drivers



Contractor-Specific Safety Qualifications



- Separate safety qualifications for contractors
 - Evaluate eligibility on:
 - CSA scores
 - Accidents/incidents
 - Violations
 - Equipment
- Separate written policy for contractor qualifications
- Separate written policy for contract process with contractors versus hiring policy with employees

Distinct Contractor Orientation Process



- Separate and distinct orientation process for contractors
- Distinct workflow with contractor-specific forms and requirements:
 - W-9 / 2290
 - Lease agreement (addendums)
 - Insurance info
 - Equipment info
 - Certificate of Violations
 - Drug and Alcohol policy
 - 7 day logs

Distinct Contractor Orientation Process



- Avoid:
 - I-9
 - Federal or State withholding forms
 - EEO Self-identification forms
 - Company handbook
 - Other company policies



Safety Compliance Programs



- Contractor/Owner-operator specific training
- Insurance requirements
- FMCSA training
 - Hazmat
 - Hours of Service
 - ELD compliance
 - Clearinghouse
 - Roadside inspections
- Safety-focused training
- Operating a business training
- Vehicle maintenance training
- Avoid training: EEOC, Workplace harassment, Whistleblower protection

Other Considerations



- Cautious with incentives:
 - Safe-driving awards
 - Recognition programs
- Cautious when transferring employee drivers to owner-operators:
 - Qualify them under contractor process
 - All new documentation
 - FMCSA requirements
 - Different period of service



- Regularly review set up, system, & processes to stay in compliance with changing law
- Keep employees, recruiters updated on law

Thank you!

Questions?

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