

Welcome!

To Be or Not To Be *(an Employer)...*

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- The **largest business and litigation law firm** headquartered in the Research Triangle area and one of the largest in North Carolina
- Provide a **full range of legal services** to a diverse and dynamic group of **local, national and international clients**, ranging in size from **large public companies** to **emerging growth businesses**
- Dedicated to furthering clients' interests by providing **intelligent guidance, strategic counsel, solid advice** and **excellent results**



Definitions

- Employee
- Independent contractor
- Staffing firm
- Contingent worker
- Co-employment

Different Ways Workers are Engaged

- Directly as an employee
- Directly as an independent contractor
- Through another entity as an independent contractor or employee

Employee or Contractor: Who Cares?

- Workers
- Employers
- Federal and state government agencies
- Labor unions
- Lawyers (especially the plaintiffs' bar)
- The press
- The people

Why You Should Care

- All it takes to spark a full-blown, multi-agency classification investigation:
 - One unemployment claim by a contractor
 - One random / drive-by OSHA inspection
 - One complaint to state / federal DOL
- Liabilities can be huge in both independent contractor and co-employment situations

Potential Liabilities

- Liability for:
 - Penalties for failure to withhold income taxes
 - FICA/FUTA taxes
 - Employee benefits
 - Back wages (minimum wage / overtime)
 - Interest
 - Violations of Title VII/ADA
 - Violations of NLRA / unfair labor practices

Potential Liabilities

(Cont'd)

- Immigration / I-9 issues
- FMLA violations (including job restoration)
- OSHA violations (including injunctive relief and civil / criminal penalties)
- Worker's comp liability
- Liquidated damages / attorneys' fees
- Potential criminal penalties (in some states)

To Be or Not to Be an Employer?

- Analysis is fact-specific and intensive
- The ultimate, bottom-line questions:
 - Does the employer control the manner and means of the performance of the work?
 - Does the worker depend on the employer, as a matter of economic reality?

To Be or Not to Be an Employer?

- IRS 20-Factor Test
 - Required to follow instructions?
 - Amount of training for the job?
 - Level of integration into employer's business?
 - Services rendered personally?
 - Does employer hire / fire / pay assistants?
 - Is relationship continuing / long-term?
 - Set hours of work?

To Be or Not to Be an Employer?

- IRS 20-Factor Test (cont'd)
 - Full-time work required?
 - Work on employer's premises?
 - Does employer set order / sequence of work?
 - Regular oral / written reports required?
 - Payment by hour / week / month vs. project?
 - Reimbursement for business / travel expenses?
 - Furnish tools / equipment / materials?

To Be or Not to Be an Employer?

- IRS 20-Factor Test (cont'd)
 - Significant investment?
 - Opportunity for profit / loss?
 - Can / does worker work for other clients?
 - Services available to general public?
 - Can employer discharge the worker?
 - Can worker terminate relationship?

To Be or Not to Be an Employer?

- IRS Three-Prong Test
 - Behavioral Control
 - Type of instructions given
 - When / where to do work
 - What equipment / tools to use
 - Which workers to hire to assist
 - Where to purchase supplies / services
 - What work must be done by specified individuals
 - What order / sequence to follow
 - Degree of instruction
 - Evaluations
 - Training

To Be or Not to Be an Employer?

- IRS Three-Prong Test (cont'd)
 - Financial Control
 - Significant investment
 - Unreimbursed expenses
 - Opportunity for profit / loss
 - Services available to market
 - Method of payment

To Be or Not to Be an Employer?

- IRS Three-Prong Test (cont'd)
 - Type of Relationship
 - Written agreements
 - Employee benefits
 - Permanency of relationship
 - Services as key activity of business

To Be or Not to Be an Employer?

- Economic Realities Test
 - FLSA, FMLA, ADEA, Title VII
 - Factors:
 - Is the work an integral part of employer's business?
 - Does the worker's managerial skill affect opportunity for profit and loss?
 - Relative investments of worker and employer
 - Worker's skill and initiative
 - Permanency of worker's relationship with employer
 - Employer control of employment relationship

To Be or Not to Be an Employer?

- North Carolina's common law control test
 - Four factors:
 - Method of payment
 - Furnishing of equipment
 - Direct evidence of exercise of control
 - Right to fire

To Be or Not to Be an Employer?

- NC OSH Factors
 - Is there a contract?
 - Who does worker consider to be employer?
 - Who furnishes equipment / tools?
 - Is worker trained?
 - Does employer get to “approve” worker?
 - Are benefits provided?
 - Is worker a sole owner, and is business incorporated?

To Be or Not to Be an Employer?

- NC OSH Factors (cont'd)
 - Does worker have to report on activities?
 - Does worker select means / manner / order of work?
 - Is worker paid in intervals? Expenses reimbursed? Commissions?
 - Does worker control schedule / hours?
 - Does worker work for number of firms?

To Be or Not to Be an Employer?

- Hybrid Tests
 - Example: Fourth Circuit uses hybrid test which incorporates elements of “economic realities” and “right to control” tests
 - Control is the most important factor

What Is Being Done?

- US DOL Wage & Hour Division Misclassification Initiative
 - Targets: hospitality, construction, agriculture, janitorial, residential care facilities
 - Various states have signed MOUs with Wage & Hour Division (and in some cases, EBSA, OSHA, OFCCP) to share information and coordinate enforcement, including:
 - CA, CO, CT, HI, IL, IA, LA, MD, MA, MN, MO, MT, UT, WA

What Is Being Done?

- US DOL / IRS Memorandum of Understanding (2011)
 - DOL agreed to:
 - Report to IRS information discovered in audits that may raise tax misclassification issues
 - Share DOL training materials and “opportunities” with IRS
 - IRS agreed to:
 - Evaluate DOL referrals for employment tax audits, and conduct audits in its discretion
 - Share DOL referrals with state and local tax authorities
 - Provide DOL with potential evidence of criminal violations of laws enforced by DOL

What Is Being Done?

- US DOL grant of \$10.2 million to unemployment agencies in 19 states for misclassification detection / enforcement

What Is Being Done?

- Widespread increase in state-level enforcement and legislation aimed at stopping misclassification; in 2014:
 - Legislation introduced in 23 states
 - Laws enacted in 15 states and D.C.
- Common themes in legislation:
 - “Employment” defined
 - Workers’ compensation coverage and unemployment insurance required

What Is Being Done?

(Con't)

- Increased scrutiny by regulators
- Reporting requirements for payments to non-employees
- Higher penalties / fines
- Notifications to workers regarding classifications and how to challenge theirs
- No retaliation

What is Being Done?

- Pending North Carolina legislation
 - Senate Bill 694 (“Employee Misclassification Reform”)
 - Establishes an Employee Classification Division within the Office of State Budget and Management
 - Specifies eight factors for determining whether an individual is an independent contractor
 - Civil penalties for misclassification
 - House Bill 482 (“Employee Fair Classification Act”)
 - Senate Bill 576 (“Fair Competition & Employee Classification Act”)

Illustrative Cases

- *FedEx Ground* litigation
- *O'Connor v. Uber Techs, Inc.* (N.D. Cal.)
- *Hexemer v. General Electric Company et al* (N.D.N.Y.)

Minimizing Misclassification Risks: Structuring the IC Relationship

- Clearly communicate contractor's role to contractor
- Engage through a business entity, if possible
- Focus on end results; do not control the details of how a contractor performs the work
- Avoid routine supervision by company supervisors/forepersons, and submission of reports (unless required for safety or regulatory requirements)
- Do not use contractors for routine work or integral business functions

Minimizing Misclassification Risks: Structuring the IC Relationship

- Base pay on project/performance vs. actual time worked
- Let contractors handle selecting, hiring, training, supervising, disciplining, paying its employees (if any)
- Require contractor to supply own tools, equipment and materials, to the extent feasible
- Require contractor to pay own expenses; avoid reimbursement
- Do not include contractors in employee meetings or company functions

Minimizing Misclassification Risks: Structuring the IC Relationship

- Require contractor to handle taxes for itself and its employees (if any)
- Allow contractor to provide services to others
- Require the contractor to have workers' compensation coverage
- Implement policies and procedures on use of contractors
- Utilize a carefully drafted contractor agreement

Contractor Agreements

- Specifically acknowledge intention to create an independent contractor relationship
- Avoid “control” terminology; state that the contractor has control over how work is to be done
- Define the term of the relationship; include termination provisions
- Provide for payment by project, where possible

Contractor Agreements

- Carefully consider restrictive covenants
- Allocate responsibilities
 - General liability insurance, unemployment and workers' compensation insurance, employment taxes
- Include appropriate waivers

Minimizing Risks: Staffing Arrangements

- Potential liabilities exist for both client company and staffing firm as joint employers (for example, harassment, safety, workers' compensation)
- General approaches:
 - Client company should exert little or no control, or
 - Client company should accept reality, cover key issues in agreement, and include strong indemnification provisions

Staffing Arrangements: Structuring the Relationship

- Let staffing firm recruit, interview, screen, on-board, evaluate, discipline, fire
 - Avoid requesting specific workers
- Let staffing firm discipline workers or otherwise resolve problems
- Direct grievances/complaints to staffing firm (but be careful about EEO issues)
- Enforce term limits with breaks in service

Staffing Arrangements: Structuring the Relationship

- Exclude from benefit plans offered by the company
- Limit participation in meetings, training sessions, etc. unless absolutely necessary; conduct separate sessions
- Ensure staffing firm has own work rules/policies
- Refer worker to agency for questions about pay / benefits – do not negotiate rates, time off

Staffing Arrangements: Structuring the Relationship

- Prohibit workers from wearing company attire / logos
- Distinguish workers from employees in directories and on ID/access badges
- Utilize carefully drafted agreements

Drafting Staffing Agreements

- Contract with staffing company, not the worker
- Clarify nature of the relationship
 - Specifically acknowledge intention to create an independent contractor relationship
- Carefully assign responsibilities
 - Training, supervision, performance management, termination
 - Payroll, withholdings, taxes
 - General liability insurance, unemployment and workers' compensation insurance
 - Benefits

Drafting Staffing Agreements

- Require compliance with all applicable laws, including employment laws
- Include appropriate waivers
- Include strong indemnification provisions

Addressing Common Issues

- Disability accommodations
 - If joint employers, staffing agency and client company each may be obligated to provide reasonable accommodation absent undue hardship
 - Application process
 - On-the-job accommodations
 - Beneficial for agreements to specify which entity will provide reasonable accommodations or how costs will be allocated

Addressing Common Issues

- Discrimination/harassment
 - Staffing firms/clients share EEO responsibilities
 - Not our employee, not our problem . . . not correct
 - Coordinate response to complaints

Addressing Common Issues

- I-9s/Immigration compliance
 - Companies should not complete I-9s for contingent workers
 - But, cannot contract for labor if company knows that contingent worker is unauthorized

Overseas Contractors

- Tests fairly consistent (but consider controlling test in applicable jurisdiction)
- Problems
 - Foreign courts sympathetic to workers
 - Foreign countries may require employers to provide more benefits to employees, which increase ultimate penalties for misclassification

Overseas Contractors

- In addition to usual penalties, liability may include:
 - Back vacation/holiday pay
 - State-mandated benefits
 - Severance pay
 - Notice requirement penalties
 - Fines

Overseas Contractors

- Recommendations:
 - Consult with local counsel
 - Consider:
 - Hiring worker as employee (if feasible)
 - Engaging worker through local staffing firm or via secondment
 - Business to business arrangement

Next Steps

- Remember that the terms of agreements are not always controlling – how they are implemented is
- Train employees responsible for managing ICs/contingent workers
- Consider conducting a contractor classification audit
 - Beware of discoverability – involve legal counsel
 - Use to identify specific risky relationships / practices
 - Follow through with correcting identified problems
 - Make it an ongoing exercise
- Consider engaging workers through staffing agency or hiring as employees