

# Welcome!

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## 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

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

# Different Ways Workers are Engaged

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

# Employee or Contractor: Who Cares?

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

# Why You Should Care

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- 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

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- 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

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(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?

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- 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?

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- 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?

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- 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?

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- 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?

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- 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?

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- 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?

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- 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?

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- 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?

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- 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?

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- 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?

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- 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?

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- 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?

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- 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?

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

# What Is Being Done?

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- 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?

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(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?

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- 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

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- *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

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- 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

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- 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

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- 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

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- 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

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

# Minimizing Risks: Staffing Arrangements

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- 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

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- 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

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- 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

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- 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

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- 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

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

# Addressing Common Issues

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- 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

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

# Addressing Common Issues

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- 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

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- 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

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

# Overseas Contractors

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- 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

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- 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