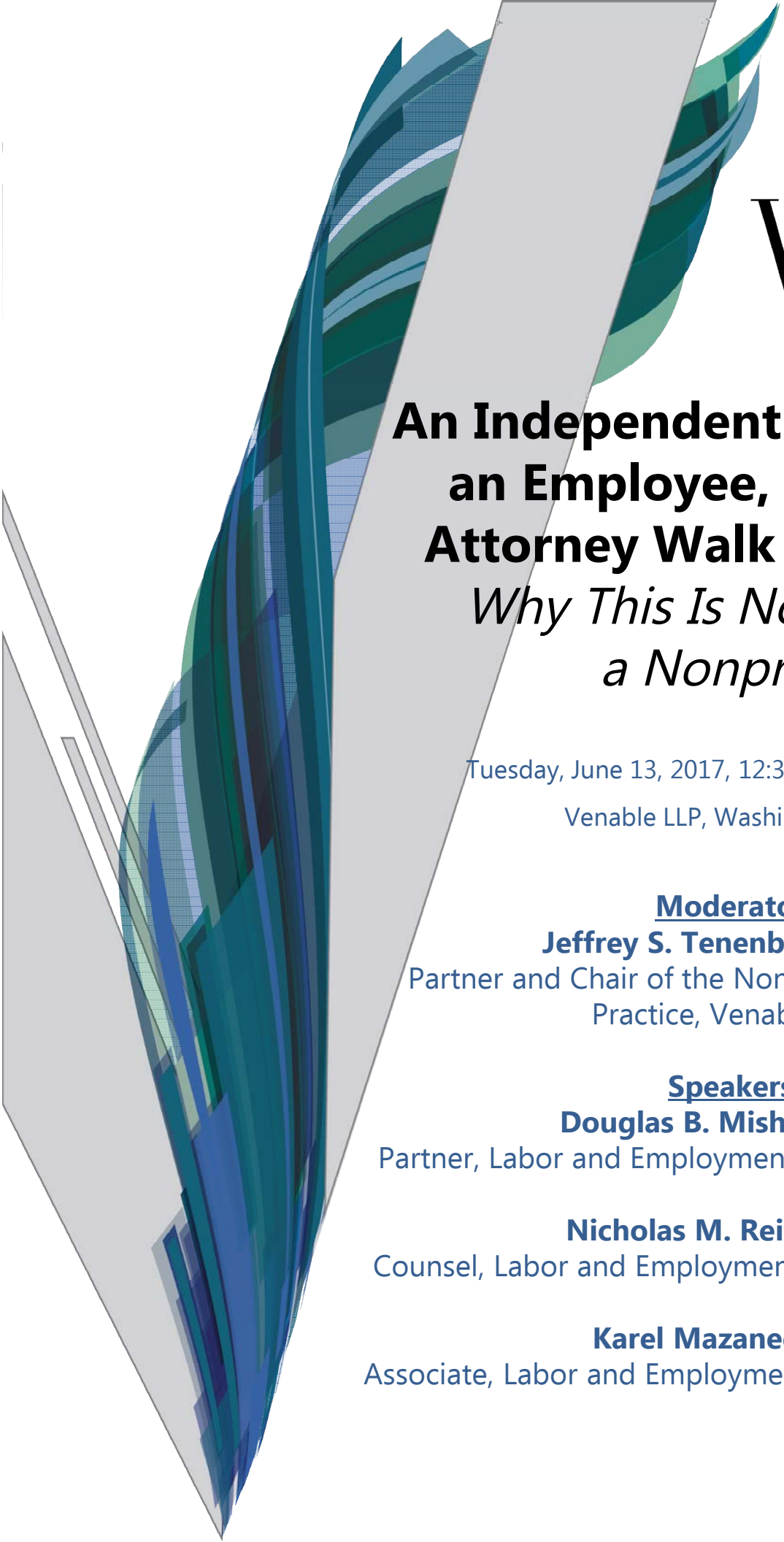


VENABLE

An Independent Contractor, an Employee, and Their Attorney Walk into a Bar: *Why This Is No Joke for a Nonprofit*

Tuesday, June 13, 2017, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq.
Partner and Chair of the Nonprofit Organizations Practice, Venable LLP

Speakers

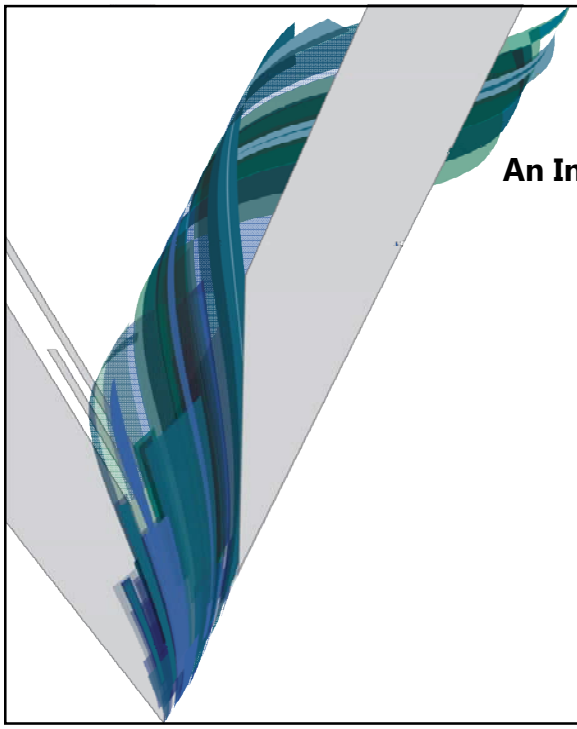
Douglas B. Mishkin, Esq.
Partner, Labor and Employment Practice, Venable LLP

Nicholas M. Reiter, Esq.
Counsel, Labor and Employment Practice, Venable LLP

Karel Mazanec, Esq.
Associate, Labor and Employment Practice, Venable LLP

© 2017 Venable LLP

Presentation



VENABLE

An Independent Contractor, an Employee, and Their Attorney Walk into a Bar:

Why This Is No Joke for a Nonprofit

Tuesday, June 13, 2017, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq.

Partner and Chair of the Nonprofit Organizations Practice, Venable LLP

Speakers

Douglas B. Mishkin, Esq.

Partner, Labor and Employment Practice, Venable LLP

Nicholas M. Reiter, Esq.

Counsel, Labor and Employment Practice, Venable LLP

Karel Mazanec, Esq.

Associate, Labor and Employment Practice, Venable LLP

© 2017 Venable LLP

CAE Credit Information

*Please note that CAE credit is available only to registered participants in the live program.

As a CAE Approved Provider educational program related to the CAE exam content outline, this program may be applied for **1.5 credits** toward your CAE application or professional development renewal requirements.

Venable LLP is a CAE Approved Provider. This program meets the requirements for fulfilling the professional development requirements to earn or maintain the Certified Association Executive credential. Every program we offer that qualifies for CAE credit will clearly identify the number of CAE credits granted for full, live participation, and we will maintain records of your participation in accordance with CAE policies. For more information about the CAE credential or Approved Provider program, please visit www.whatiscae.org.

Note: This program is not endorsed by, accredited by, or affiliated with ASAE or the CAE Program. Applicants may use any program that meets eligibility requirements in the specific time frame toward the exam application or renewal. There are no specific individual courses required as part of the applications—selection of eligible education is up to the applicant based on his/her needs.

© 2017 Venable LLP

Upcoming Venable Nonprofit Events

More events coming this fall…

© 2017 Venable LLP

VENABLE 3

Today's Program

"So what"	The consequences of getting this wrong
"What"	What distinguishes independent contractors from employees
"How to get it right"	Documenting and implementing the independent contractor relationship
"How to get it wrong"	What you can and cannot do to fix it

© 2017 Venable LLP

VENABLE 4

Why Is Misclassifying Independent Contractors No Joke for Nonprofits?

- Civil penalties and damages:
  - Overtime wages
  - Workers' compensation penalties
  - Unemployment insurance violations
  - Payroll tax penalties
  - Benefit plan violations
  - I-9 violations
- Class action lawsuits
- Government audits
- Anti-discrimination lawsuits

© 2017 Venable LLP

VENABLE

Common Misclassification Problems for Nonprofits

- Over-reliance upon representations within independent contractor agreements
- Misconceptions about short-term employees
- Overlap between independent contractors and employees' responsibilities
- Joint employer relationships
- Permitting the individual to classify the relationship
- Providing equipment and job training
- Mandatory work hours
- Non-competition promises

© 2017 Venable LLP

VENABLE

Independent Contractor or Employee?

Four Examples from Recent Cases

© 2017 Venable LLP

VENABLE

Independent Contractor or Employee?

Example 1: Exotic Dancers

- Dancers sued strip clubs for overtime
- Clubs: Dancers are independent contractors, not employees

© 2017 Venable LLP

VENABLE

Independent Contractor or Employee?

Example 1: Exotic Dancers (con't)

- Dancers signed leasing agreement as "independent contractors"
- Clubs did not pay dancers' compensation, benefits, etc.
  - Dancers paid entirely by customer tips/fees (set by clubs)
  - Actually had to pay club "tip-in" fee
- Clubs set dancers' schedules (days/shifts)
  - Dancers could work for other clubs if it did not interfere with schedule
- Clubs controlled advertising, hours, music, lighting, food/beverages sold
- Clubs regulated dancers' appearance/apparel, behavior, ability to enter/leave clubs, visits from family/friends

© 2017 Venable LLP

Independent Contractor or Employee?

Example 1: Exotic Dancers (con't)

Employees

- Misclassified as independent contractors
- *McFeeley v. Jackson Street Entertainment*, 825 F.3d 235 (4th Cir. 2016)

© 2017 Venable LLP

Independent Contractor or Employee?

Example 2: Yoga Instructors

- Non-staff yoga instructors terminated and applied for unemployment
- Studio: Instructors were independent contractors, not employees

© 2017 Venable LLP

Independent Contractor or Employee?

Example 2: Yoga Instructors (con't)

- Studio set fees and charged customers directly
- Instructors chose to be paid hourly or percentage of fees
  - Paid only if minimum number of students attended class
- Studio set hours and licensing requirements, regulated/provided space for classes
  - Instructors signed up to teach different classes at different times
  - Not required to attend staff meetings or training
- Instructors could work/advertise for other studios

© 2017 Venable LLP

Independent Contractor or Employee?

Example 2: Yoga Instructors

Independent Contractors

- Classified correctly
- *In the Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d 1013 (N.Y. 2016)

© 2017 Venable LLP

Independent Contractor or Employee?

Example 3: Orchestra Musicians

- Musicians wanted to unionize
- Orchestra challenged union's petition for certification: Musicians were independent contractors

© 2017 Venable LLP

Independent Contractor or Employee?

Example 3: Orchestra Musicians (con't)

- Highly skilled
- Signed up for 1-4 programs that orchestra offered each year
- Signed agreement as "independent contractors"
- Paid for each rehearsal/concert
  - Additional pay for every 15 minutes at rehearsal/concert over 2.5 hours
  - Did not withhold taxes
- Free to work for other orchestras, teach music, decline performances
- Orchestra required compliance with strict guidelines: Dress code, posture, conversations on stage, warm-up, performance

© 2017 Venable LLP

Independent Contractor or Employee?

Example 3: Orchestra Musicians

Employees

- Misclassified as independent contractors
- *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563(D.C. Cir. 2016)

© 2017 Venable LLP

Independent Contractor or Employee?

Example 4: Freelance Blogger

- Blogger for magazine website applied for unemployment after contract expired
- Magazine contested unemployment: Independent contractor, not employee

© 2017 Venable LLP

Independent Contractor or Employee?

Example 4: Freelance Blogger (con't)

- Well-known, established writer
- Signed year-long contract
  - Magazine paid him a monthly salary (no benefits) and issued an IRS Form 1099
- Worked from home, using own laptop, and set own hours
- Not required to post on particular topic and right to refuse story
  - Sometimes prohibited from writing about certain topics/stories
  - Magazine did not edit stories prior to posting
  - Magazine could remove posts
- No repercussions if did not post story every day
- Blogged for magazine's competitor and wrote 8 books during contract

© 2017 Venable LLP

Independent Contractor or Employee?

Example 4: Freelance Blogger

Independent Contractor

- Classified correctly
- *In the Matter of Mitchell*, 145 A.D.3d 1404 (N.Y. App. Div. 2016)

© 2017 Venable LLP

IRS: Old 20-Factor Test

1. Instructions
2. Training
3. Integration into the business
4. Services rendered personally
5. Hiring, supervising, and paying assistants
6. Continuing relationship
7. Set hours of work
8. Full-time required
9. Doing work on employer's premises
10. Order or sequence set
11. Oral or written reports
12. Payment by hour, week, or month
13. Payment of business or travel expenses
14. Furnishing significant tools and materials
15. Significant investment
16. Realization of profit or loss
17. Working for more than one entity
18. Making services available to general public
19. Right to discharge
20. Right to terminate

© 2017 Venable LLP

Common Law or "Economic Realities" Test

- Behavioral Control:
  - How, when, or where to do the work?
  - What tools or equipment?
  - What personnel to use?
  - Training — particularly procedures and methods

© 2017 Venable LLP

Common Law or "Economic Realities" Test

- Financial Control
  - Compensation
    - Per hour/day/week/month?
    - Per project?
    - Benefits?
  - Expenses reimbursed?
  - Investment in equipment/materials
  - Opportunity for profit or loss?

© 2017 Venable LLP

Common Law or "Economic Realities" Test

- Relationship of Parties
  - Exclusivity of arrangement
  - Permanence of relationship
  - Written agreements
  - "Integral part" of business?
    - Skill required for the work

© 2017 Venable LLP

Varying State Tests

- States are not bound by IRS test
- Maryland: Employment status is presumed
  - Test for independent contractor status:
    - Worker "free from the employing unit's control or direction"
    - Service provided is "outside the usual course of business of the employer"
    - Worker "customarily engaged in an independently established business"

© 2017 Venable LLP

Dos and Don'ts of Drafting Independent Contractor Agreements

- Good Drafting Practices:
  - Contract with an entity instead of an individual
  - Describe the scope of the services performed
  - Acknowledge no direction or control over independent contractor
  - Require regular invoices from the independent contractor
  - Include indemnification provisions
  - Require the independent contractor to obtain insurance
  - Set forth the length of engagement and conditions of automatic renewal, if any
  - Agree to non-exclusivity (subject to conflicts of interest)
  - Protect ownership of inventions and confidential information
  - Describe expense reimbursement requirements
  - Express mutual intent not to create employment relationship

© 2017 Venable LLP

Dos and Don'ts of Drafting Independent Contractor Agreements

- Bad Drafting Practices:
  - Too many requirements about the manner in which work is performed
    - E.g., location, work hours, equipment, reporting procedures
  - Vague descriptions of services
  - Requiring non-competition after the end of the engagement
  - Inadequate notice of termination of the engagement
  - Hourly compensation for the independent contractor
  - Contracting directly with the individual

© 2017 Venable LLP

Shall We Dance? *McFeely v. Jackson Street Entertainment,* 825 F. 3d 235 (4th Cir. 2016)

- Signed leasing agreement as "independent contractors"
- Clubs didn't pay dancers compensation or benefits
  - Dancers paid entirely by customer tips/fees (set by club)
  - Actually had to pay club "tip-in" fee
- Clubs set dancers' schedules (days/shifts)
  - Dancers could work for other clubs if it didn't interfere with schedule
- Clubs controlled advertising, hours, music, lighting, food/beverages
- Clubs regulated dancers' appearance/apparel, behavior, ability to enter/leave clubs, visits from family/friends

© 2017 Venable LLP

Shall We Dance? *McFeely v. Jackson Street Entertainment,* 825 F. 3d 235 (4th Cir. 2016)

- Dancers sue for wages and overtime, claiming they're employees
- Clubs counterclaim for breach of contract, etc.

© 2017 Venable LLP

Shall We Dance? *McFeely v. Jackson Street Entertainment,* 825 F. 3d 235 (4th Cir. 2016)

- Trial court — Summary judgment for plaintiffs
- Appeals court — Affirmed: "…[T]he degree of control the clubs exercised here over all aspects of the individual dancers' work and of the clubs' operation argues in favor of an employment relationship."
- How could employer have "fixed" this? What control would clubs have been willing to give up?

© 2017 Venable LLP

Shall We Dance? *McFeely v. Jackson Street Entertainment,* 825 F. 3d 235 (4th Cir. 2016)

- Three morals to this story:
  1. "But they agreed to be independent contractors"
  2. Guess who filed an amicus brief in support of plaintiffs?
  3. Different dancers, different dances, different results

© 2017 Venable LLP

Yoga Anyone? *In the Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d 1013 (N.Y. 2016)

- Studio had "non-staff" instructors it called independent contractors
- Studio set fees and charged customers directly
- Instructors chose: Hourly or % of fees
- Studio set hours, licensing requirements, class space
  - Instructors signed up for different classes/different times
  - Not required to attend staff meetings or training
- Instructors could work/advertise for other studios

© 2017 Venable LLP

Yoga Anyone? *In the Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d 1013 (N.Y. 2016)

- *"How many rulings does it take to decide this issue?"*
- **Commission of Labor:** Employees
- **Admin Law Judge:** Contractors
- **Unemployment Insurance Appeal Board:** Employees
- **Appellate Division:** Employees
- **Court of Appeals:** Contractors

© 2017 Venable LLP

Yoga Anyone? *In the Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d 1013 (N.Y. 2016)

- **Court of Appeals: Majority**
  - Board's determination "unsupported by substantial evidence"
  - Non-staff paid only if certain number of students attend
  - No restrictions on where non-staff can teach
  - Non-staff free to tell students where else they're teaching

© 2017 Venable LLP

Yoga Anyone? *In the Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d 1013 (N.Y. 2016)

- **Court of Appeals: Dissent**
  - Lots of evidence that non-staff were employees
  - "[T]he majority has examined the evidence before the Board and concluded that the evidence weighs more heavily in favor of a conclusion that the non-staff instructors are independent contractors. *It is the role of the Board, however, and not this Court, to weigh the factual evidence and arrive at a conclusion….If the evidence reasonably supports the Board's choice, we may not interpose our judgment to reach a contrary conclusion."*

© 2017 Venable LLP

The Sound of Music? *Lancaster Symphony Orchestra v. NLRB,* 822 F.3d 563 (D.C. Cir. 2016)

- Musicians to NLRB: We're employees, we want a union
- Orchestra: They're contractors
- Undisputed facts:
  - Series of programs, each has four concerts
  - Orchestra sends packets to invite musicians
  - Paid by rehearsal or concert
  - No withholding
  - Agreement calls them contractors
  - Detailed rehearsal and performance etiquette

© 2017 Venable LLP

The Sound of Music? *Lancaster Symphony Orchestra v. NLRB,* 822 F.3d 563 (D.C. Cir. 2016)

- **Regional Director of NLRB:** Contractors
- **NLRB:** Employees
  - Orchestra has substantial "control" over musicians
  - Musician's work is part of orchestra's regular business
- Board conducts election, union wins, orchestra seeks review
- **D.C. Circuit:**
  - 10 factors
  - Some favor "employee," some "contractor"

© 2017 Venable LLP

The Sound of Music? *Lancaster Symphony Orchestra v. NLRB,* 822 F.3d 563 (D.C. Cir. 2016)

- **D.C. Circuit:**
  - "Extent of control"
    - Conductor calls the shots
  - "Because the circumstances of this case thus present a choice between 'two fairly conflicting views,' we must defer to the Board's conclusion that the Orchestra's musicians are employees."
  - Not like *Lerohl v. Friends of Minnesota Sinfonia*
    - Two musicians sue under ADA and Title VII: We're employees
    - Court: Not everyone who follows a conductor or leader is employee
    - *Lerohl* court decided issue for itself
    - We just defer to Board

© 2017 Venable LLP

The Sound of Music? *Lancaster Symphony Orchestra v. NLRB,* 822 F.3d 563 (D.C. Cir. 2016)

- How could employer have "fixed" this? What control would orchestra be willing to cede?

© 2017 Venable LLP

Subscription Cancelled—*In the Matter of Mitchell*, 145 A.D.3d 1404 (N.Y. App. Div. 2016)

- Mitchell blogged for *The Nation* magazine
- Contract calls him "freelance" writer, paid $46,800
- He publishes eight books for other entities while under contract
- When contract not renewed, he files for unemployment

© 2017 Venable LLP

Subscription Cancelled—*In the Matter of Mitchell*, 145 A.D.3d 1404 (N.Y. App. Div. 2016)

- **U.S. Department of Labor:** Employee
- **Admin Law Judge:** Employee
- **Unemployment Insurance Appeal Board:** Employee
- **Appellate Division:**
  - "We find that the Board's decision here is not supported by substantial evidence in the record…"
    - No control; wrote for others; not permitted to work in *Nation*'s office; he chose content; general lack of supervision

© 2017 Venable LLP

Morals of the Stories

1. All of this applies to all of you
2. Playing field is tilted against your usual desire to classify workers as contractors
3. Documenting contractor relationship is necessary but far from sufficient
4. What would an outside observer observe?

© 2017 Venable LLP

VENABLE

Questions?

Jeffrey S. Tenenbaum, Esq.
Partner and Chair of the Nonprofit Organizations Practice, Venable LLP
jstenenbaum@Venable.com
202.344.8138

Douglas B. Mishkin, Esq.
Partner, Labor and Employment Practice, Venable LLP
dbmishkin@Venable.com
202.344.4491

Nicholas M. Reiter, Esq.
Counsel, Labor and Employment Practice, Venable LLP
nmreiter@Venable.com
212.370.6296

Karel Mazanec, Esq.
Associate, Labor and Employment Practice, Venable LLP
kmazanec@Venable.com
202.344.4320

To view an index of Venable's articles and presentations or upcoming programs on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.

To view recordings of Venable's nonprofit programs on our YouTube channel, see www.YouTube.com/VenableNonprofits or www.Venable.com/nonprofits/recordings.

To view Venable's Government Grants Resource Library, see www.grantslibrary.com.

Follow @NonprofitLaw on Twitter for timely posts with nonprofit legal articles, alerts, upcoming and recorded speaking presentations, and relevant nonprofit news and commentary.

© 2017 Venable LLP

VENABLE

Speaker Biographies

VENABLE® LLP

our people

Jeffrey S. Tenenbaum

Partner

Washington, DC Office

T 202.344.8138 F 202.344.8300

jstenenbaum@Venable.com

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal*'s Top Washington Lawyers Award. He was only a handful of "Leading Lawyers" in the Not-for-Profit category in the prestigious *Legal 500* rankings for the last six years (2012-17). Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-17 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014-17 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

AREAS OF PRACTICE

Tax and Wealth Planning

Antitrust

Political Law

Tax Controversies and Litigation

Tax Policy

Tax-Exempt Organizations

Regulatory

INDUSTRIES

Nonprofit Organizations

GOVERNMENT EXPERIENCE

Legislative Aide, United States House of Representatives

BAR ADMISSIONS

District of Columbia

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Board of *The NonProfit Times*, on the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and on the American Society of Association Executives' Public Policy Committee. He previously served as Chairman and as a member of the ASAE *Association Law & Policy* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

MEMBERSHIPS

American Society of Association Executives

REPRESENTATIVE CLIENTS

AARP
Academy of Television Arts & Sciences
Air Conditioning Contractors of America
Air Force Association
Airlines for America
American Academy of Physician Assistants
American Alliance of Museums
American Association for Marriage and Family Therapy
American Association for the Advancement of Science
American Bar Association
American Cancer Society
American College of Cardiology
American College of Radiology
American Council of Education
American Institute of Architects
American Nurses Association
American Red Cross
American Society for Microbiology
American Society of Anesthesiologists
American Society of Association Executives
American Thyroid Association
America's Health Insurance Plans
Anti-Defamation League
Association for Healthcare Philanthropy
Association for Talent Development
Association of Clinical Research Professionals
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Auto Care Association
Better Business Bureau Institute for Marketplace Trust
Biotechnology Innovation Organization
Brookings Institution
Carbon War Room
Career Education Colleges and Universities
Catholic Relief Services
CFA Institute
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Cystic Fibrosis Foundation
Democratic Attorneys General Association
Dempsey Centers for Quality Cancer Care
Design-Build Institute of America
Entertainment Industry Foundation
Entertainment Software Association
Erin Brockovich Foundation
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Good360
Goodwill Industries International
Graduate Management Admission Council
Homeownership Preservation Foundation
Hugh Jackman Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
InsideNGO
Institute of Management Accountants
International Association of Fire Chiefs
International Rescue Committee

International Sleep Products Association
Investment Company Institute
Jazz at Lincoln Center
LeadingAge
The Leukemia & Lymphoma Society
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
National Air Traffic Controllers Association
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of College Auxiliary Services
National Association of County and City Health Officials
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Coffee Association
National Council of Architectural Registration Boards
National Council of La Raza
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
New Venture Fund
NTCA - The Rural Broadband Association
Nuclear Energy Institute
Pact
Patient-Centered Outcomes Research Institute
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Romance Writers of America
Telecommunications Industry Association
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United States Tennis Association
Volunteers of America
Water Environment Federation
Water For People
WestEd
Whitman-Walker Health

HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-17

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-17

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-17

Served as member of the selection panel for the *CEO Update* Association Leadership Awards, 2014-16

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 1,000 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 850 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine, The Chronicle of Philanthropy, The NonProfit Times, Politico, Bloomberg Business, Bloomberg BNA, EO Tax Journal,* and other periodicals. He also has been interviewed on nonprofit legal topics on Washington, DC CBS-TV affiliate, the Washington, DC Fox-TV affiliate's morning new program, Voice of America Business Radio, Nonprofit Spark Radio, The Inner Loop Radio, and Through the Noise podcasts.

VENABLE® LLP

our people

Douglas B. Mishkin

Partner

Washington, DC Office

T 202.344.4491 F 202.344.8300

dbmishkin@Venable.com

Doug Mishkin is a partner in Venable's Labor and Employment Group with over 30 years of experience litigating on behalf of businesses and nonprofits. He focuses on litigating about and counseling on theft of trade secrets and breach of noncompetes, with significant experience as well in discrimination, harassment, wage and hour, and employment contract disputes. Mr. Mishkin is a trained mediator, and both represents clients and has served as a mediator.

An experienced trial attorney, Mr. Mishkin has represented clients in state and federal courts across the country. He frequently handles matters in proceedings initiated by the Equal Employment Opportunity Commission and human rights agencies.

Prior to joining Venable, Mr. Mishkin co-chaired the employment law practice at an international law firm for over 15 years. In 1992, he served on President Bill Clinton's transition team for the Equal Employment Opportunity Commission. He has been interviewed on National Public Radio's "All Things Considered" and the CBS "Early Show."

AREAS OF PRACTICE

Labor and Employment

Litigation

Employee Mobility and Trade Secrets

Global Labor and Employment Capabilities

INDUSTRIES

Nonprofit Organizations

Government Contractors

Education

Art Law

BAR ADMISSIONS

District of Columbia

Maryland

Virginia

COURT ADMISSIONS

U.S. Supreme Court

U.S. Court of Appeals for the D.C. Circuit

U.S. Court of Appeals for the Fourth Circuit

U.S. District Court for the District of Columbia

U.S. District Court for the Eastern

HONORS

Super Lawyers "Super Lawyer," Washington, DC, Employment Litigation (2013, 2014, 2016)

Super Lawyers Business Edition "Super Lawyer," Washington, DC, Employment Litigation (2013)

"Top Rated Lawyer," DC & Baltimore's Top Rated Lawyers, *National Law Journal* (2013)

Martindale-Hubbard AV® Preeminent™ Rating

"Top Lawyer" in the field of Employment Law - Defense, *Washingtonian Magazine* (2015)

"Best Lawyers," *Washingtonian Magazine* (December 2011)

"Top Employment Lawyer," *Washingtonian Magazine* (2009)

Washington, DC Super Lawyers, *Super Lawyers* magazine (2007, 2011, 2015)

Winner, The Burton Award for Legal Achievement (2005)

ACTIVITIES

From 2001 to 2004, Mr. Mishkin served as a faculty member for Georgetown University Law Center's GULC/NITA Intensive Session in Trial Advocacy Skills and in 2002 for the school's GULC/NITA Depositions Seminar. He has also participated in various Georgetown University Law Center CLE programs on employment litigation.

Mr. Mishkin is the co-editor of *Trade Secrets and Transitions*, a blog providing legal news and analysis on the issues regarding employee mobility and trade secrets. In

District of Virginia

U.S. District Court for the District of Maryland

EDUCATION

J.D., George Washington University Law School, 1980

A.B., Brown University, 1977

JUDICIAL CLERKSHIPS

Honorable Peter H. Wolf, District of Columbia Superior Court, 1980 - 1981

MEMBERSHIPS

Chair, Legalink, a worldwide network of law firms (2009-2011)

Member, Ethics Committee of George Washington University Hospital and Adjunct Professor of Health Care Sciences, George Washington University School of Medicine (1986-present)

Workplace Flexibility 2010 Legal Working Group and Member, National Advisory Commission

Director and Secretary, National Courts and Sciences Institute

2015, he authored a series of posts on metadata and what employers must know about using metadata – both defensively and offensively in litigation.

PUBLICATIONS

- May 4, 2017, "Mining for Metadata:" Will You Strike Gold or Strike Out?, *Trade Secrets & Transitions*
- March 28, 2017, Labor and employment under President Trump, news in non-competes, and more in this issue of *Labor & Employment Law Update*
- December 15, 2016, The DOL Under Trump: The State of the FLSA "White Collar" Exemptions, Labor & Employment News Alert
- December 2, 2016, Breaking News on DOL Overtime Regulations: DOL Files Notice of Appeal, Labor & Employment News Alert
- December 1, 2016, Potential FTC agenda under Trump, courts get serious about fake advertising, and more in this issue of Advertising Law News & Analysis
- June 2016, New FLSA regulations, a summer vacation tip for employers, and more in this issue of Labor & Employment Law Update
- June 20, 2016, Investigating Employee Misconduct in the Nonprofit Workplace
- May 17, 2016, Compensable Time? What Employers Need to Know Regarding Their Non-Exempt Employees, Labor & Employment News Alert
- May 17, 2016, Compensable Time? What Nonprofits Need to Know Regarding Their Non-Exempt Employees
- March 2016, Election-Year Tips for Nonprofits: Employee Participation in the Political Process
- March 14, 2016, A government contractor wins $20 million and sanctions in a trade secret case: What it means for you, *Westlaw Journal Government Contract*
- March 9, 2016, Election Year Tips for Employers, Labor & Employment News Alert
- March 2016, U.S. Department of Labor proposes sweeping changes to FLSA overtime exemption criteria: The implications for nonprofit employers
- February 25, 2016, The looming deadline for BPA content warnings, the trade secrets sanctions game, and more in this issue of Advertising Law News & Analysis, Advertising Alert
- February 25, 2016, Zika and Your Workplace Part Two: You and Your Pregnant Employees, Labor & Employment News Alert
- February 25, 2016, Zika Virus: What It Does—and Does Not—Mean for Nonprofit Employers and their Pregnant Employees
- February 2016, Zika Virus: What It Does – and Does Not – Mean for U.S. Employers, Labor & Employment News Alert
- February 5, 2016, The EEOC Proposes to Require Pay Data on EEO-1s: What Does This Mean for Nonprofit Employers?
- February 4, 2016, EEOC Tackles Retaliation in Draft Update to Enforcement Guidance: How Nonprofit Employers Can Avoid Potential Pitfalls
- February 2016, EEOC Tackles Retaliation in Draft Update to Enforcement Guidance, Labor & Employment News Alert
- February 2015, The EEOC Proposes to Require Pay Data on EEO-1s, Labor & Employment News Alert
- December 10, 2015, Advertising Law News & Analysis - December 10, 2015, Advertising Alert
- December 2015, New Year/New Requirement for Employers: DC's Employer Transit Benefit Ordinance to Take Effect January 1, 2016, Labor & Employment News Alert
- December 3, 2015, Advertising Law News & Analysis - December 3, 2015, Advertising Alert
- October 29, 2015, Advertising Law News & Analysis - October 29, 2015, Advertising Alert
- October 28, 2015, For Advertising Employers, NLRA Giveth And FTC Taketh Away, *Law360*

- October 22, 2015, Advertising Law News & Analysis - October 22, 2015, Advertising Alert
- September 24, 2015, Advertising Law News & Analysis - September 24, 2015, Advertising Alert
- September 14, 2015, Ding-Dong! The DC DOES Zip Code Project Is Dead, Labor & Employment News Alert
- August 20, 2015, Advertising Law News & Analysis - August 20, 2015, Advertising Alert
- July 23, 2015, Don't Let Your Integration Clause Bite You: How Employers Sometimes Unintentionally Cancel Restrictive Covenants, *Trade Secrets & Transitions Blog*
- July 17, 2015, Does a Termination Without Cause Mean Termination Without a Non-competition Agreement?, *Trade Secrets & Transitions Blog*
- July 2, 2015, U.S. Department of Labor Proposes Sweeping Changes to FLSA Overtime Exemption Criteria: The Implications for Nonprofit Employers
- June 18, 2015, Advertising Law News & Analysis - September 24, 2015, Advertising Alert
- June 15, 2015, Hijabs, the U.S. Supreme Court, Diversity Discomforts, and the Workplace: How Nonprofit Employers Should Use Their Heads to Minimize Liability Risk
- June 15, 2015, Hijabs, the Supreme Court, Diversity Discomforts, and the Workplace: How Employers Should Use Their Heads to Minimize Liability, Labor & Employment News Alert
- June 8, 2015, GINA and the Case of the "Devious Defecator": Broad Prohibition Impacts Nonprofit Employers
- June 4, 2015, GINA and the Case of the "Devious Defecator", Labor & Employment News Alert
- May 6, 2015, Employment Law Update: DC, Maryland, and Virginia
- May 1, 2015, Update from DC Department of Employment Services on DC Wage Theft Act
- April 30, 2015, Report on Last Night's DOES "Business Stakeholders Meeting" on DC Wage Theft Act, Labor & Employment News Alert
- April 17, 2015, Knock Knock Knockin' on Nonprofits' Doors: DC's "Zip Code Project" to Search Your Office
- April 16, 2015, Advertising Law News & Analysis - April 16, 2015, Advertising Alert
- April 15, 2015, Knock Knock Knockin' On Employers' Doors: DC's "Zip Code Project" to Search Your Office, Labor & Employment News Alert
- April 6, 2015, DC Nonprofits Now Must Reasonably Accommodate Pregnant Workers
- April 6, 2015, DC Employers Must Now Reasonably Accommodate Pregnant Employees, Labor & Employment News Alert
- March 27, 2015, What Hillary Clinton's Use of BYOD Teaches Us about the Protection of Nonprofits' Trade Secrets
- March 26, 2015, What HRC's Use of BYOD at DoS Means for PYTS – Protecting Your Trade Secrets, Labor & Employment News Alert
- March 2015, Business News Digest - March 2015, Business News Digest
- March 3, 2015, DC Nonprofits Subject to New Notice Requirement and Bigger Penalties under New Wage Theft Prevention Act
- March 3, 2015, DC Employers Subject to New Notice Requirement and Bigger Penalties under New Wage Theft Prevention Act, Labor & Employment News Alert
- March 3, 2015, Additional Changes to the D.C. Wage Theft Prevention Act, Labor & Employment News Alert
- December 11, 2014, LGBT, Religion, and Diversity in the Nonprofit Workplace
- Fall 2014, Jurisdictions Cuffing Asks About Arrests

- November 6, 2014, Advertising Law News & Analysis - November 6, 2014, Advertising Alert
- November 2014, Department of the Army Found to Have Discriminated Against Transgender Employee, Labor & Employment News Alert
- September 15, 2014, DC's New "Ban-the-Box" Law: Nonprofits May No Longer Question Applicants about Arrests
- September, 2014, DC's New "Ban-the-Box" Law: Employers May Not Question Applicants About Arrests, Labor & Employment News Alert
- July 29, 2014, Government Contractors Now Prohibited From LGBT Discrimination, Client Alerts

SPEAKING ENGAGEMENTS

- June 13, 2017, An Independent Contractor, an Employee, and Their Attorney Walk into a Bar: Why This Is No Joke for a Nonprofit
- November 28, 2016, "DOL Overtime Regulations Blocked: What Now?," a Venable Webinar
- June 21, 2016, Investigating Employee Misconduct in the Nonprofit Workplace
- May 19, 2016, "What Employers Must Know About Protecting Critical Company Information" at the Frederick County Society for Human Resources Management (FCSHRM) 2016 Annual Conference
- April 12, 2016, "Social Media Wins and Fails: Pitfalls to Avoid in Your Next Social Media Campaign" at the New York Advertising Law Symposium
- April 6, 2016, "Zika and the Workplace: What Employers Can and Cannot Do" webinar hosted by Bloomberg BNA
- March 15, 2016, "The $20 Million Trade Secret: What Employers Must Know About Protecting Critical Company Information" for the Clear Law Institute
- January 13, 2016, "Volunteering for Trouble? Classifying, Managing and Disciplining Volunteers," a Lorman Education Services Webinar
- July 15, 2015, Mental Health Issues in the Nonprofit Workplace: Questions Raised by the Germanwings Air Disaster
- May 6, 2015, Employment Law Update: DC, Maryland, and Virginia
- December 11, 2014, LGBT, Religion, and Diversity in the Nonprofit Workplace
- December 9, 2014, Legal Quick Hit: "LGBT, Religion, and Diversity in the Nonprofit Workplace: What Every In-House Counsel Needs to Know" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- December 1, 2014, "Ebola and Beyond: Managing Your Workplace, Insuring against Risk, and Addressing Misconceptions about This and the Next Public Health Crisis," a Venable Luncheon and Webinar
- September 3, 2014, "What President Obama’s Executive Order On LGBT Means For Government Contractors" for the Professional Services Council

VENABLE® LLP

our people

Nicholas M. Reiter

Counsel

New York, NY Office

T 212.370.6296 F 212.307.5598

nmreiter@Venable.com

Nicholas Reiter focuses his practice on labor and employment matters and commercial litigation. He regularly advises and litigates on behalf of clients in the restaurant, hospitality, construction, healthcare, education, and financial services sectors.

His areas of concentration include:

- Representing employers in employment litigation matters in state and federal courts such as claims of discrimination, harassment, retaliation, constructive discharge, and wage and hour violations
- Advising and counseling employers regarding their workplace practices and procedures, including employee handbooks, termination and hiring decisions, and disability accommodations
- Conducting company-wide audits of employee classifications to ensure compliance with federal and state wage and hour laws
- Evaluating non-compete clauses and other restrictive covenants
- Representing employers in connection with audits and investigations initiated by governmental agencies, including the U.S. Department of Labor, the U.S. Department of Homeland Security, and the New York State Department of Labor
- Negotiating collective bargaining agreements and representing employers in other labor union disputes
- Litigating commercial actions such as breach of contract claims, misappropriation of trade secrets, and unfair competition matters
- Representing independent schools and other educational institutions in arbitrations, mediations, and lawsuits involving employees, students, and students' families

SIGNIFICANT MATTERS

- Attained summary judgment dismissal of national origin discrimination claims and retaliatory failure to re-hire claim against large hospital employer in the U.S. District Court for the Eastern District of New York
- Successfully defended employer against breach of employment contract claim during four-day trial in the U.S. District Court for the Southern District of New York
- Defeated labor union's bid for recognition as collective bargaining representative after advising and coordinating employer's five-month anti-union campaign
- Attained summary judgment dismissal of age discrimination and retaliation claims for general contractor firm in *Dunaway v. MPCC Corp.*, 7:12-CV-7609 (S.D.N.Y. 2015). Successfully argued appeal of dismissal order before U.S. Court of Appeals for the Second Circuit, Case No. 15-2587 (2d Cir. Sep. 27, 2016).

AREAS OF PRACTICE

Labor and Employment

Litigation

Class Action Defense

Employee Mobility and Trade Secrets

Healthcare - Labor and Employment Law

Financial Services Wage Compliance

INDUSTRIES

Hospitality and Lodging

Construction

Financial Services

Nonprofit Organizations

Education

Healthcare

BAR ADMISSIONS

New York

COURT ADMISSIONS

U.S. District Court for the Eastern District of New York

U.S. District Court for the Northern District of New York

U.S. District Court for the Southern

District of New York

U.S. District Court for the Western District of New York

U.S. Court of Appeals for the Second Circuit

EDUCATION

J.D., *cum laude*, Brooklyn Law School, 2008

B.A., College of William and Mary, 2004

JUDICIAL CLERKSHIPS

Honorable David N. Hurd, U.S. District Court for the Northern District of New York

- Attained summary judgment dismissal of an employee's promissory estoppel and defamation claims against large hospital employer
- Defeated employee's appeal to the U.S. Court of Appeals for the Second Circuit seeking reinstatement of claims for alleged race discrimination, retaliation and constitutional rights violations
- Successfully argued appeal before New York State Appellate Division on behalf of *pro bono* client in a case involving child custody issues and allegations of neglect

HONORS

Named a "Rising Star" in *New York Super Lawyers*, Employment & Labor, 2014 - 2016

ACTIVITIES

Prior to joining Venable, Mr. Reiter was a law clerk for United States District Judge David N. Hurd of the Northern District of New York.

While attending law school, Mr. Reiter was Editor-in-Chief of the Journal of Law and Policy.

PUBLICATIONS

- February 21, 2017, Federal Appeals Court Teaches Important Lessons for Nonprofit Employers That Use Pre-Employment Background Checks, Nonprofit Alert
- September 2016, Minimizing risk when buying a payments company, NYC's new labor-related executive order, and more in this issue of Business News Digest
- August 30, 2016, Federal Judge Tosses Unpaid Intern Claims: Four Takeaways—and Good News—for Nonprofit Employers with Internship Programs, Nonprofit Alert
- August 10, 2016, New York City's New "Labor Peace" Executive Order: How Some Employers May be Required to Remain Neutral During Union Organization Campaigns, Labor & Employment News Alert
- June 2016, New FLSA regulations, a summer vacation tip for employers, and more in this issue of Labor & Employment Law Update
- June 10, 2016, Transgender Employees and Restrooms in the Workplace: What Every Employer Needs to Know, Labor & Employment News Alert
- August 31, 2015, Employers May Rethink Settlement Agreements In 2nd Circ., *Law360*
- August 27, 2015, What nonprofits need to know before settling federal wage and hour claims, *Association TRENDS*
- August 20, 2015, Second Circuit Gives a Thumbs-Down to Private Settlement Agreements: What Nonprofits Need to Know Before Settling Federal Wage and Hour Claims
- August 13, 2015, Employees Down But Not Out As Unpaid Intern Lawsuits Keep Coming in a Post-Glatt World: The Olsen Twins' Company Gets Sued, *Class Action Perspectives for Employers Blog*
- August 11, 2015, Issue Resolved: The Second Circuit Gives a Thumbs-Down to Private Settlements of Federal Wage and Hour Claims, Labor & Employment News Alert
- July 23, 2015, Don't Let Your Integration Clause Bite You: How Employers Sometimes Unintentionally Cancel Restrictive Covenants, *Trade Secrets & Transitions Blog*
- July 17, 2015, Does a Termination Without Cause Mean Termination Without a Non-competition Agreement?, *Trade Secrets & Transitions Blog*
- June 25, 2015, NYC bans criminal record inquiries prior to issuance of conditional job offer, *Employee Benefit News*
- June 18, 2015, New York City Bans Criminal Record Inquiries Prior to Issuance of Conditional Job Offer: What Employers Need to Know for New Hires, Labor & Employment News Alert
- June 15, 2015, Hijabs, the Supreme Court, Diversity Discomforts, and the

Workplace: How Employers Should Use Their Heads to Minimize Liability, Labor & Employment News Alert

- July 8, 2014, Five Things NY Employers Need to Know about Legal Marijuana, *Forbes*
- March 3, 2014, Complying with the Affordable Care Act: "Obamacare" Requirements that Restaurant and Foodservice Employers Can't Afford to Miss
- January 14, 2014, Employment Law Litigation Trends: How Your Nonprofit Can Avoid Common Family-Oriented Lawsuits
- December 5, 2013, Work & Family: What Nonprofit Employers Should Know about Family-Oriented Employment Laws
- November 18, 2013, 5 Steps to Head Off Workplace Bullying, *Restaurant Hospitality*
- November 2013, Takeaways from the Miami Dolphins' Locker Room: The Legal Risks of Workplace Bullying, *Daily Business Review*, Labor & Employment News Alert
- January 8, 2013, Exempt or Non-Exempt? The Ten Most Common Employee Classification Pitfalls Faced by Nonprofits
- September 20, 2012, Payroll Pitfalls: How Nonprofit Employers Can Avoid Big Problems
- June 2012, Seventh Circuit Answers Question of First Impression: Cat's Paw Theory Exposes Co-Workers to Individual Liability for Retaliation Claims under Section 1981, Labor & Employment News Alert
- February 21, 2012, How Nonprofits Can Avoid the Legal Pitfalls of Telecommuting Employees
- September 12, 2011, Telecommuting Employees: How Nonprofits Can Avoid the Legal Pitfalls
- July 25, 2011, A Nonprofit's Guide to Properly Characterizing Workers as Employees, Interns and Volunteers
- June 2011, New York Department of Labor Clarifies that Employers Have Until Next Regularly Scheduled Pay Day to Pay Out Employees' Credit Card Tips, Labor & Employment News Alert

SPEAKING ENGAGEMENTS

- June 13, 2017, An Independent Contractor, an Employee, and Their Attorney Walk into a Bar: Why This Is No Joke for a Nonprofit
- June 20, 2016, "Investigating Employee Misconduct in the Nonprofit Workplace," hosted by Venable LLP
- May 6, 2016, "Avoiding HR Pitfalls" at the American Academy of Family Physicians' Annual Chapter Leader Forum (ACLF)
- March 7, 2016, "Don't Get Burned: Five Common Wage & Hour Mistakes Restaurant and Foodservice Employers Are Still Making," at the International Restaurant and Foodservice Show of New York
- March 8, 2015 - March 10, 2015, 2015 International Restaurant and Foodservice Show of New York
- February 22, 2015, "Employees, Independent Contractors, Interns and Volunteers" at Dance/NYC Symposium 2015
- July 24, 2014, "Complying with the Affordable Care Act: 'Obamacare' Requirements that Specialty Food Businesses Can't Afford to Miss" Webinar for the Specialty Food Association's webinars@work® Series
- May 14, 2014, "How New York City Employers Can Avoid Trouble under Mayor de Blasio's New Employment Laws," hosted by Venable LLP
- March 2, 2014 - March 4, 2014, International Restaurant and Foodservice Show of New York
- January 14, 2014, Legal Quick Hit: "Employment Law Litigation Trends: How Your Nonprofit Can Avoid Common Family-Oriented Lawsuits" for the Association of Corporate Counsel's Nonprofit Organizations Committee

- December 5, 2013, Work & Family: What Nonprofit Employers Should Know about Family-Oriented Employment Laws
- March 4, 2013, "The New Health Care Law Has Arrived: What Restaurants and Foodservice Employers Need To Know" at the International Restaurant & Foodservice Show of New York
- January 8, 2013, Exempt or Non-Exempt? The Ten Most Common Employee Classification Pitfalls Faced by Nonprofits
- September 20, 2012, "Payroll Pitfalls: How Nonprofit Employers Can Avoid Big Problems" for the Better Business Bureau of Metropolitan New York
- April 17, 2012, Venable Breakfast Briefing: Updates for Restaurant Industry Employers
- September 14, 2011, Telecommuting Employees: How Nonprofits Can Avoid the Legal Pitfalls

VENABLE® LLP

our people

Karel Mazanec

Associate

Washington, DC Office

T 202.344.4320 F 202.344.8300

kmazanec@Venable.com

Karel Mazanec is an associate in the Labor and Employment group in Washington, D.C. His practice focuses on representing and counseling employers across a wide variety of industries, including healthcare, education, construction, financial services, government contractors, non-profit organizations and the public sector.

Employment Litigation

Mr. Mazanec assists clients with a broad range of litigation matters, including discrimination, harassment and retaliation, wage and hour, whistleblower and employment contract disputes, under both federal and state laws. Some of his recent matters include:

- Winning an arbitration before the International Centre for Dispute Resolution that dismissed all age discrimination claims brought against a global health partnership
- Representing a construction client in D.C. superior court seeking to dismiss whistleblower and discrimination claims brought under a joint-employer theory
- Drafting an EEOC Position Statement on behalf of a government contractor client sued by a former employee claiming that the employee was unlawfully terminated because of a disability

Labor Relations

Mr. Mazanec counsels employers on a multitude of labor relations and compliance issues, and represents clients in grievance arbitrations and matters before the NLRB. His recent activities include:

- Representing a major healthcare system in a collective action grievance alleging wrongful discharge following a mass layoff of employees
- Attaining a dismissal of an Unfair Labor Practice charge alleging that the employer failed to bargain in good faith and did not furnish the union with relevant information
- Drafting the winning post-hearing brief for a large public sector client following an interest arbitration hearing

Employment Counseling

Mr. Mazanec has experience working with clients to develop personnel policies and employee handbooks, address compliance issues under federal wage and hour laws, and make hiring, termination and other personnel decisions. He has helped employers draft a variety of employment documents, including employment contracts, independent contractor agreements, confidentiality agreements, non-competition and other restrictive covenant agreements, and severance agreements. Some representative matters include:

- Counseling a name brand multinational corporation on compliance with Title III of the ADA with respect to the client's websites, kiosks and other touchscreen devices

AREAS OF PRACTICE

Labor and Employment

BAR ADMISSIONS

District of Columbia

Maryland

EDUCATION

J.D., William & Mary Marshall-Wythe School of Law, 2015

Executive Board Member, William & Mary Moot Court Team

Staff, *William & Mary Law Review*

B.A., Political Science and Psychology, University of North Carolina at Charlotte, 2010

- Advising a financial services client on its employee non-competition and non-solicitation agreements under state law
- Developing guidance on the requirements and potential impact of new OSHA regulations on the operations of a major retail client

ACTIVITIES

Mr. Mazanec graduated from the William & Mary Marshall-Wythe School of Law, where he was an Executive Board Member of the William & Mary Moot Court Team and a member of the *William & Mary Law Review*. He holds a B.A. in political science and psychology from the University of North Carolina at Charlotte.

His pro bono commitments include serving as a volunteer attorney for local immigration consultation clinics sponsored by the DMV Immigration Alliance.

PUBLICATIONS

- May 4, 2017, "Mining for Metadata:" Will You Strike Gold or Strike Out?, *Trade Secrets & Transitions*
- October 25, 2016, Not All Rounding Practices Are Created Equal: Indiana Court Certifies Class Despite Individualized Questions Concerning Hours Worked, *Labor & Employment Law Class Action Perspectives for Employers*
- February 25, 2016, Zika and Your Workplace Part Two: You and Your Pregnant Employees, *Labor & Employment News Alert*
- February 25, 2016, Zika Virus: What It Does—and Does Not—Mean for Nonprofit Employers and their Pregnant Employees
- February 2016, Zika Virus: What It Does – and Does Not – Mean for U.S. Employers, *Labor & Employment News Alert*
- December 1, 2015, Not Quite Fun in the Sun: What Happens to Accrued Vacation Leave When the Employment Relationship Ends, *Trade Secrets & Transitions*
- 2014, Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse, 56 *Wm. & Mary L. Rev.* 631 (2014)

SPEAKING ENGAGEMENTS

- June 13, 2017, "An Independent Contractor, an Employee, and Their Attorney Walk into a Bar: Why This Is No Joke for a Nonprofit"

Additional Information

VENABLE LLP

ARTICLES

June 12, 2017

U.S. DEPARTMENT OF LABOR WITHDRAWS OBAMA-ERA GUIDANCE ON INDEPENDENT CONTRACTORS AND JOINT EMPLOYERS, SIGNALING SIGNIFICANT SHIFT IN WAGE AND HOUR POLICY FOR NONPROFITS AND OTHER EMPLOYERS

AUTHORS

Laura Reathaford
Christopher R. Williams
Jeffrey S. Tenenbaum

RELATED PRACTICES

Labor and Employment

RELATED INDUSTRIES

Nonprofit Organizations

ARCHIVES

2017 2013 2009
2016 2012 2008
2015 2011 2007
2014 2010

On Wednesday, June 7, 2017, the U.S. Department of Labor (DOL) withdrew two Wage and Hour Division administrative interpretations on independent contractors and joint employment, thereby signaling a significant shift in wage and hour policy. The withdrawn Obama-era guidance had heightened the scrutiny of employers with respect to their classification of workers as employees, and had adopted expansive standards for determining joint employment with contractors and other related organizations. While the withdrawal of the guidance has little bearing on existing law, it is a strong indication that the Trump administration will attempt to reverse Obama-era policy in favor of less aggressive regulation and oversight of nonprofits and other employers.

The Administrative Interpretations

In 2015, the DOL's Wage and Hour Division (WHD) issued Administrative Interpretation No. 2015-01. Authored by WHD Administrator David Weil, the guidance stated that most workers are employees—rather than independent contractors—under the federal Fair Labor Standards Act (FLSA) definition of "employment." The guidance effectively created a presumption that workers are employees under the FLSA, underscoring the importance and level of scrutiny placed on employers to verify that they were correctly classifying workers.

The next year, the WHD published Administrative Interpretation No. 2016-01, addressing joint employment under the FLSA and the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The guidance, also authored by Administrator Weil, offered new standards for determining when organizations are joint employers with contractors and other related organizations under the FLSA and MSPA. Administrator Weil called for an expansive definition of joint employment—suggesting, for instance, that organizations that share clients may be joint employers, and that an employer may be a joint employer with a contractor if the contractor's employee(s) repeatedly perform(s) work for the employer.

Immediate Impact

Withdrawing the guidance has little, if any, impact on existing law, and does not change the liability that nonprofits and other employers may face as a joint employer with a contractor or as a result of misclassifying workers. Indeed, the DOL emphasized in its announcement that the removal "does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Protection Act, as reflected in the Department's long-standing regulations and case law."

The withdrawal of the WHD administrative interpretations does not directly affect the risks associated with misclassifying nonprofit workers. The misclassification of workers still exposes nonprofits and other employers to significant liability risks, including back wages, overtime, Social Security and Medicare taxes, workers' compensation, and unemployment insurance, among other risks. Nonprofit employers should continue to ensure that their workers are properly classified as employees or independent contractors under the appropriate standards, particularly the FLSA and Internal Revenue Service tests.

Similarly, nonprofits and other employers may still be liable as joint employers under the FLSA or MPSA. With or without the WHD administrative interpretation, joint employer determinations are unpredictable because the law is not clear. The National Labor Relations Board's ***Browning-Ferris*** decision is still under appeal at the D.C. Circuit. In *Browning-Ferris*, the Board found that an organization can be liable for its contractor as a joint employer even if the organization exerts no control over the contractor's workers. Despite the withdrawal of the WHD guidance, employers that have such

relationships with contractors should continue to analyze their status under the relevant standards and ensure compliance with the DOL-enforced laws.

Signal for the Future

The withdrawal of the administrative interpretations is significant because the Trump administration is sending a message about its intention to take a less aggressive approach to the enforcement of this aspect of the wage and hour laws than the Obama administration took. The withdrawal is likely only the first of a number of steps that could be taken by the administration to move away from Obama-era wage and hour policy and eventually enact more pro-employer regulations.

Despite the symbolic significance of withdrawing the administrative interpretations, it is unlikely that there will be substantive change to wage and hour regulations and law in the near future. In his confirmation hearing, U.S. Secretary of Labor Alexander Acosta expressed his intention to direct agencies to issue opinion letters as regulatory guidance instead of administrative interpretations; however, the further issuance of opinion letters—or any new guidance—will probably remain at a standstill until President Trump appoints an administrator of the DOL's Wage and Hour Division.

U.S. Wage and Hour Division
(Revised May 2014)

Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the Fair Labor Standards Act (FLSA).

Determining Whether an Employment Relationship Exists: Is a Worker an Employee or Independent Contractor?

In order for the FLSA's minimum wage and overtime provisions to apply to a worker, the worker must be an "employee" of the employer, meaning that an employment relationship must exist between the worker and the employer. The FLSA defines "employ" as including to "suffer or permit to work", representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Applying the FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves.

A number of "economic realities" factors are helpful guides in resolving whether a worker is truly in business for himself or herself, or like most, is economically dependent on an employer who can require (or allow) employees to work *and* who can prevent employees from working. The Supreme Court has indicated that there is no single rule or test for determining whether an individual is an employee or independent contractor for purposes of the FLSA. The Court has held that the totality of the working relationship is determinative, meaning that all facts relevant to the relationship between the worker and the employer must be considered.

While the factors considered can vary, and while no one set of factors is exclusive, the following factors are generally considered when determining whether an employment relationship exists under the FLSA *(i.e.*, whether a worker is an employee, as opposed to an independent contractor):

1) The extent to which the work performed is an integral part of the employer's business. If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.

2) Whether the worker's managerial skills affect his or her opportunity for profit and loss. Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.

3) The relative investments in facilities and equipment by the worker *and* the employer. The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing risk of loss, this factor indicates that the worker may be an independent contractor.

4) The worker's skill and initiative. Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

5) The permanency of the worker's relationship with the employer. Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of a permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.

6) The nature and degree of control by the employer. Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.

There are certain factors which are immaterial in determining the existence of an employment relationship. For example, the fact that the worker has signed an agreement stating that he or she is an independent contractor is not controlling because the reality of the working relationship – and not the label given to the relationship in an agreement – is determinative. Likewise, the fact that the worker has incorporated a business and/or is licensed by a State/local government agency has little bearing on determining the existence of an employment relationship. Additionally, the Supreme Court has held that employee status is not determined by the time or mode of pay.

Requirements Under the FLSA

When an employer-employee relationship exists, and the employee is engaged in work that is subject to the FLSA, the employee must be paid at least the Federal minimum wage of $7.25 per hour, effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The FLSA also has youth employment provisions which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

GET THE FACTS ON

MISCLASSIFICATION

UNDER THE FAIR LABOR STANDARDS ACT

Employee or Independent Contractor?

The Fair Labor Standards Act (FLSA) provides minimum wage and overtime pay protections to nearly all workers in the U.S. Some employers incorrectly treat workers who are employees under this federal law as independent contractors. We call that "misclassification." If you are misclassified as an independent contractor, your employer may try to deny you benefits and protections to which you are legally entitled.

Please refer to **Fact Sheet 13** for more information on the factors used to determine whether you're an employee or an independent contractor.

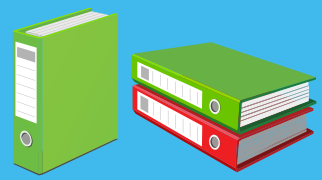
WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

1-866-4US-WAGE
dol.gov/whd

Receiving a 1099 does not make you an independent contractor under the FLSA.

Even if you are an independent contractor under another law (for example, tax law or state law), you may still be an employee under the FLSA.

Signing an independent contractor agreement does not make you an independent contractor under the FLSA.



Having an employee identification number (EIN) or paperwork stating that you are performing services as a Limited Liability Company (LLC) or other business entity does not make you an independent contractor under the FLSA.

Employers may not misclassify an employee for any reason, even if the employee agrees.

You are not an independent contractor under the FLSA merely because you work offsite or from home with some flexibility over work hours.

Whether you are paid by cash or by check, on the books or off, you may still be an employee under the FLSA.

"Common industry practice" is not an excuse to misclassify you under the FLSA.