

# Focus on Misclassification: Are Your Association's Workers "Employees," "Volunteers," or "Contractors?"

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# agenda

- What's in a Name: "Employee" vs. "Independent Contractor"
  - Federal rule
  - Varying state law interpretations
  - What about volunteers and interns?
- Avenues of Enforcement
  - Government
  - Employees and the plaintiffs' bar
- Consequences of Misclassification
- Identifying and Remediating Problems

# employee vs. independent contractor

- Varying definitions between common, federal and state law
- Executive assistant vs. lawn-care company
- Common theme – ***control***
  - Behavioral
  - Financial

# 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

# common law or “economic realities” test

- Behavioral control
  - Instructions
    - **how**, when, or where to do the work?
    - what **tools** or **equipment**?
    - what **personnel** to use?
  - Training – particularly **procedures** and **methods**
  - **Evaluation** system

# common law or “economic realities” test

- Financial control
  - Compensation
    - Per hour/day/week/month?
    - **Project basis?**
  - **Expenses** – reimbursed?
  - Investment and opportunity for **profit** or **loss**?
  - **Exclusivity** of arrangement

# common law or “economic realities” test

- Relationship of the Parties
  - Provision of **benefits**
  - **Permanence** of relationship
  - Written **agreements**
  - **Key activity** of the business

# recap

- “The IRS 20-Factor Test is Dead; Long Live the IRS 20-Factor Test”
- IRS Form SS-8
  - <http://www.irs.gov/pub/irs-pdf/fss8.pdf>
    - Behavioral control
    - Economic control
    - Agreement between the parties



# recap

- **Control** is key
- **Compensation** particularly the opportunity for **profit/loss**
- Whether the services are an “**integral part**” of the business
- Clear **understanding** between the parties

# varying state tests can apply

- States **are not** bound by IRS definition and may have a more restrictive test
- E.g., in Maryland employment status is **presumed**
  - Person is “**free** from the employing unit’s control or direction”
  - Service being provided is “**outside the usual course of business** of the employer”
  - Contractor is “customarily engaged in an independently **established business**”

# volunteers

- Volunteers and interns, like independent contractors, are **not employees**
- Volunteers permitted for religious, charitable, or similar **non-profit** organizations or public sector
- May not normally volunteer in for-profit private sector

# volunteers

- Volunteers typically “serve on a **part-time basis** and **do not displace** paid workers or perform work that would otherwise be performed by employees”
- Volunteer service offered freely and without pressure or coercion
- May receive a “**nominal fee**”
  - Not tied to number of hours worked/productivity
  - No more than **20% of cost** if employer had to pay wages

# interns

- DOL “Fact Sheet 71” six prongs for unpaid internships
  - Similar to training in **educational** environment
  - For **benefit of intern**
  - Intern does not **replace** regular employees
  - No **immediate advantage** to the employer
  - No entitlement to a **job** following internship
  - Understood that no entitlement to **wages**
- Footnote indicates unpaid internships “**generally** permissible” for “non-profit **charitable** organizations”

# avenues of enforcement

- Current focus of government authorities
- Employees
- Plaintiff's bar

# priority of federal government

- Increasing scrutiny of government regulators
  - DOL W&H's 2014 budget request up 7% year over year
    - \$14M ear-marked for employee misclassification
- IRS and DOL entered into MOU to coordinate on misclassifying employees as independent contractors

# state enforcement

- D.C., Maryland, Connecticut, New York, and California are just some of the states that have enacted laws to crack down on worker misclassification
- More than 30 states have entered into agreements with DOL and/or IRS to share information related to worker misclassification
  - Tax auditors for each side bundle information and share it with their counterparts



# employees

- SS-8 Determination
  - Many IRS audits are initiated as a result of claims filed **by workers** for **benefits**, or are related to workers' personal tax issues
  - An SS-8 Determination is made by an IRS agent and although not binding on a company may lead to an IRS examination
- Significant questions regarding what effect an adverse SS-8 determination will have on the employer in a subsequent audit

# plaintiffs' bar

- *Fox Entertainment Group, Inc.*
  - Interns on Black Swan and 500 Days of Summer
  - Unpaid works performed low-level tasks that immediately benefited the employer
  - Any benefits to the intern were the same as a regular employee
- *Hearst Corp.*
  - Interns for Harpers Bazaar, Cosmo, and Marie Claire
  - Worked as much as 55 hours per week at no pay performing tasks otherwise performed by employees
  - Heading to 2d Circuit appeal

# so is your worker an “employee” or an “independent contractor”?

- And why do you care?
- Wrong answer may result in significant adverse financial consequences
- Answer implicates several areas of law – Federal and state wage-hour law, federal and state tax law, benefits, and related laws and regulations

# consequences of misclassification

- Overtime and back pay under the FLSA
  - Liquidated damages, attorney's fees
  - Potential for collective or class actions
- Benefit eligibility
  - Health and retirement benefits
- Back taxes:
  - Social Security
  - Medicare
  - Unemployment Insurance Trust

# consequences of misclassification

- Smaller employers may unwittingly become subject to additional laws due to increase in workforce
  - Title VII, ADA – 15 employees
  - FMLA, EO 11246 – 50 employees
  - ACA (Affordable Care Act) – different obligations based on number of employees (e.g., less than 25 or more than 50 FTE employees)

# identification and remediation of common problems

- Internal Education
- Policies
- Self-audit
- Strong Independent Contractor Agreements

# common problems

- Decision-makers' lack of understanding around contours of permissible independent contractor and volunteer relationship
- No internal policy or guidance around proposal and approval of arrangements

# common problems

- Retirees and other former employees who return to as “independent contractors” performing the same work
- Current employees working in a second capacity
- “Independent contractors” in management or supervisory roles
- Teleworkers misclassified as contractors



# cleaning-up

- Mechanism available for self-reporting
- Modify arrangements at year-end to avoid W-2 and 1099 reports
- If possible, modify position to provide context for change in arrangement
  - “temp to perm”
  - benefit eligibility
  - additional duties

# preparing strong independent contractor agreements

- “Must” haves:
  - **Written agreement** signed by both parties
  - Clearly defined **scope of work**
  - Worker decides **how** the work is to be performed
  - Require **invoicing** and, if practicable, fixed-fee type payments
  - Clearly defined and, if practicable, limited **termination rights**
  - Clear statement of **independent contractor status** and **ineligibility for benefits**

# preparing strong independent contractor agreements

- “Like to” haves:
  - Limited training or instruction required
  - Worker decides when and where work is to be performed or works off-site
  - Worker provides own tools, equipment, staff
  - Worker has freedom to contract with others for his services
  - Compensation should not resemble a salary
  - Termination only for non-performance/breach of contract
  - Avoid circumstances where contractor position is identical to other W-2 employees

questions?

# contact information

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