Focus on Misclassification: Are Your Association’s Workers “Employees,” “Volunteers,” or “Contractors?”

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July 18, 2013
2:00-3:30 PM ET
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
    • 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
• 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

- Maryland, Connecticut, New York, Pennsylvania, California are just some of the states enacting or considering 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
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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