

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

- 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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