

# Focus on Nonprofit Employee Misclassification: Are Your Workers “Employees,” “Volunteers” or “Contractors”?

Tuesday, June 16, 2015, 2:00 – 3:30 pm ET

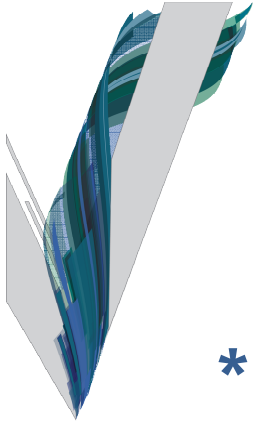
Webinar

## **Speakers**

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

Ronald Taylor, Esq., Partner, Venable LLP

Lillian Reynolds, Esq., Associate, Venable LLP

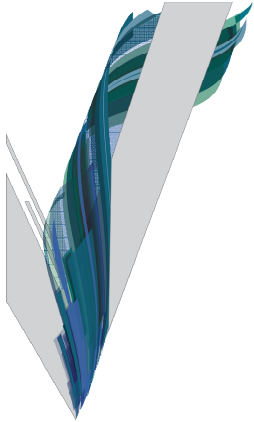


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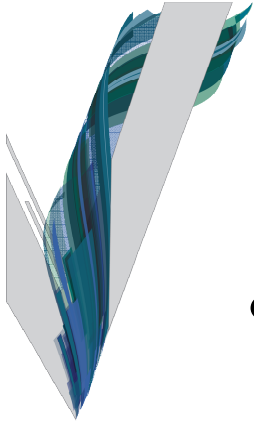
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# Agenda

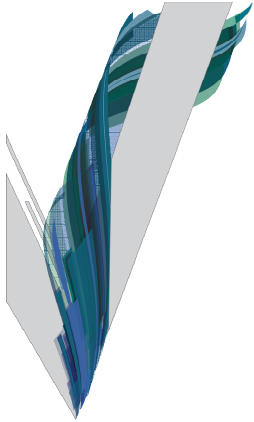
- What's in a Name: "Employee" vs. "Independent Contractor"
  - Federal rule
  - Varying state law interpretations
  - What about volunteers and interns?
- Avenues of Enforcement
  - Government
  - Employees and the plaintiffs' bar
- Consequences of Misclassification
- Identifying and Solving Problems



# Employee vs. Independent Contractor

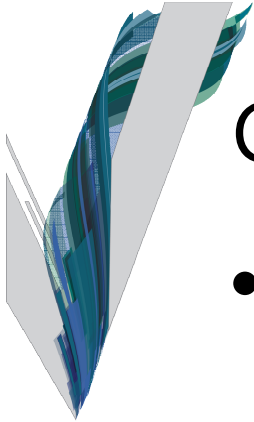
- Varying definitions between common, federal and state laws
- Common theme – ***control***
  - Behavioral
  - Financial





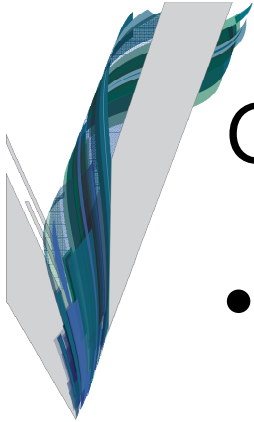
# IRS: Old 20-Factor Test

- (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



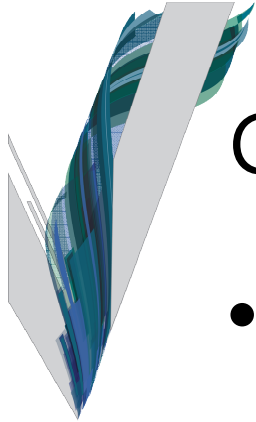
# Common Law or “Economic Realities” Test

- 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



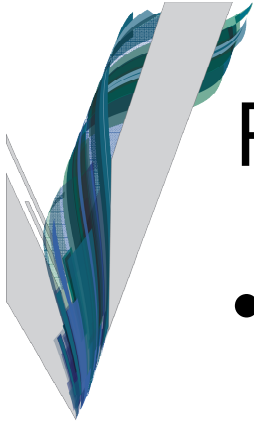
## Common Law or “Economic Realities” Test

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



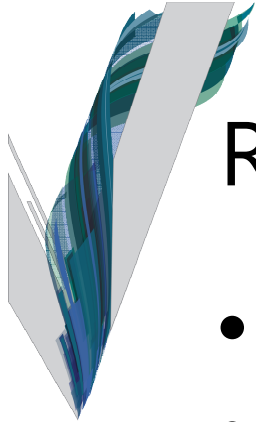
## Common Law or “Economic Realities” Test

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



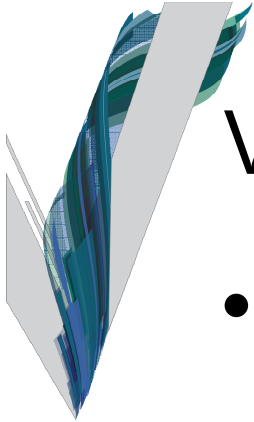
## Recap

- “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



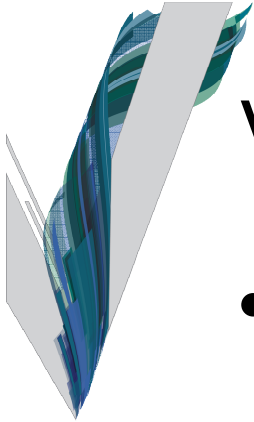
## Recap

- **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

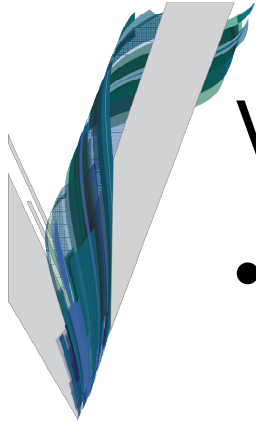
- States **are not** bound by IRS definition and may have a more restrictive test
- For example, in Maryland employment status is **presumed**
  - Person is “**free** from the employing unit’s control or direction”
  - Service being provided is “**outside the usual course of business** of the employer”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



# Volunteers

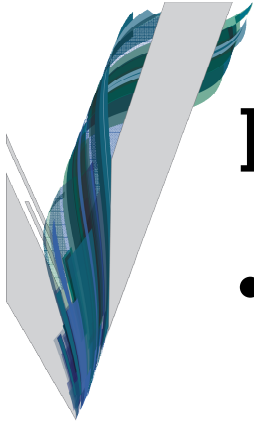
- Volunteers and interns, like independent contractors, are **not employees**
- Volunteers permitted for religious, charitable or similar **nonprofit** organizations or public sector
- May not normally volunteer in for-profit private sector





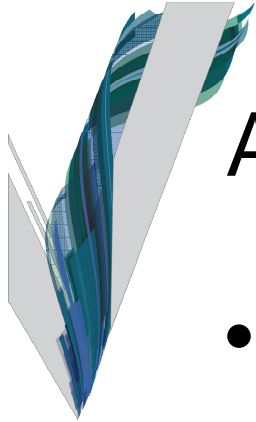
# Volunteers

- 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
  - BUT, some state laws may vary – *e.g.*, Maryland



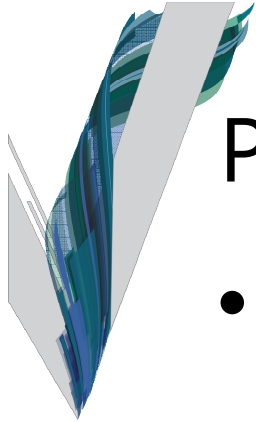
# Interns

- U.S. Department of Labor (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 “nonprofit **charitable** organizations”
  - Not the case under some state unemployment laws



## Avenues of Enforcement

- Current focus of government authorities
- Employees
- Plaintiffs' bar



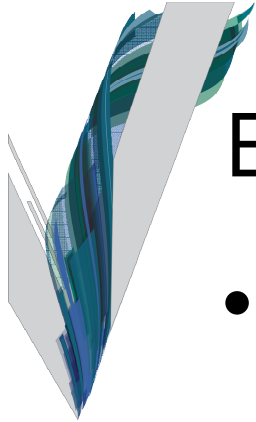
# Priority of Federal Government

- Increasing scrutiny of government regulators
  - DOL Wage & Hour Division's 2016 budget request up 21% year over year
    - \$14M earmarked for employee misclassification
- IRS and DOL entered into memorandum of understanding to coordinate on misclassifying employees as independent contractors



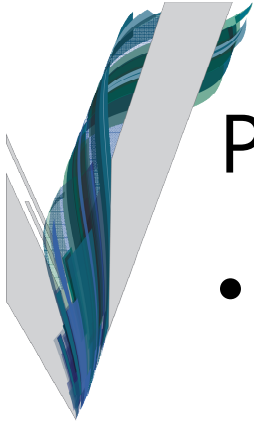
## State Enforcement

- D.C., Maryland, Connecticut, New York, Virginia 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



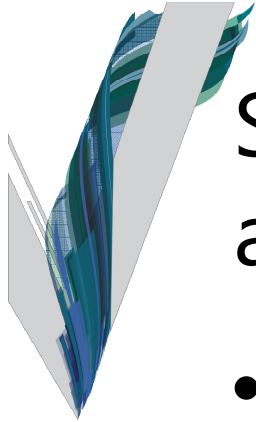
# Employees

- IRS Form 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

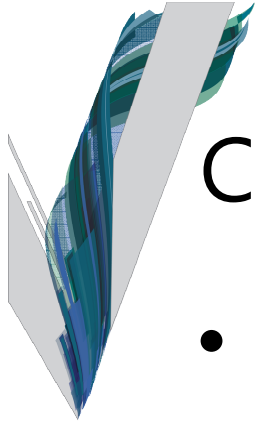
- *Fox Entertainment Group, Inc.*
  - Interns on *Black Swan* and *500 Days of Summer*
  - Unpaid workers performed low-level tasks that immediately benefited the employer
  - Any benefits to the intern were the same as those to a regular employee
- *Hearst Corp.*
  - Interns for *Harper's Bazaar*, *Cosmo*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



# So Is Your Worker an “Employee” or an “Independent Contractor”?

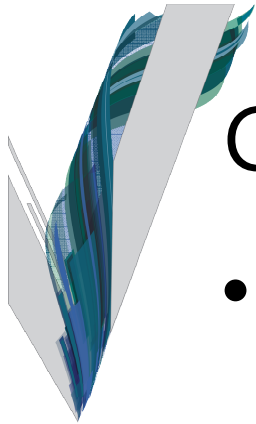
- And why do you care?
- Wrong answer may result in significant adverse financial consequences
- Answer implicates several areas of law—federal and state wage-hour law, federal and state tax law, benefits, and related laws and regulations





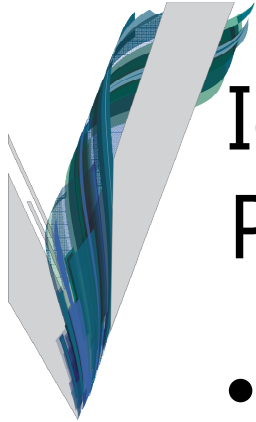
# Consequences of Misclassification

- Overtime and back pay under the federal Fair Labor Standards Act (FLSA)
  - Liquidated damages, attorneys' fees
  - Potential for collective or class actions
- Benefit eligibility
  - Health and retirement benefits
- Back taxes
  - Social Security
  - Medicare
  - Unemployment Insurance Trust



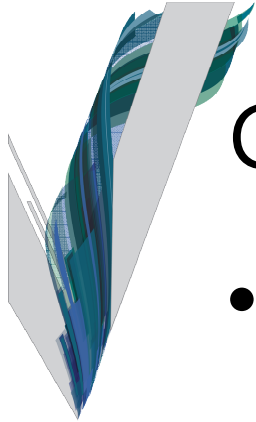
# Consequences of Misclassification

- Smaller employers may unwittingly become subject to additional laws because of increase in workforce
  - Title VII of the federal Civil Rights Act, and federal Americans with Disabilities Act (ADA) – 15 employees
  - Federal Family and Medical Leave Act (FMLA), EO 11246 – 50 employees
  - Affordable Care Act (ACA) – different obligations based on number of employees (*e.g.*, fewer than 25 or more than 50 FTE employees)



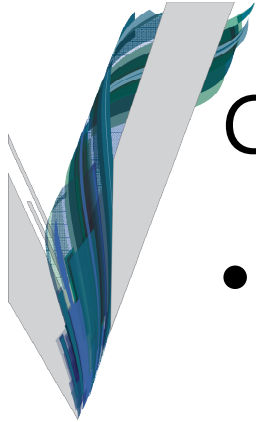
# Identification and Solution of Common Problems

- Internal education
- Policies
- Self-audit
- Strong independent contractor agreements



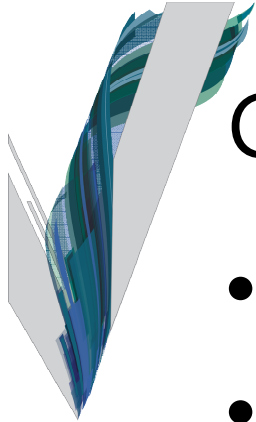
## Common Problems

- 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 as “independent contractors” performing the same work
- Current employees working in a second capacity
- Exempt vs. nonexempt employees under the FLSA
- “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 IRS Form 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

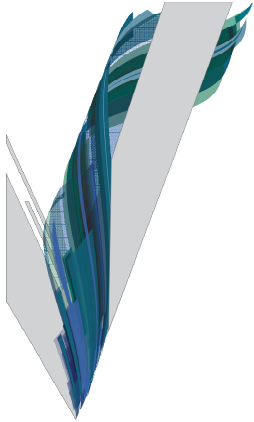
- “Must-haves”:
  - **Written agreement** signed by both parties
  - Clearly defined **scope of work**
  - Worker decides **how** the work is to be performed
  - Require **invoicing** and, if practicable, fixed-fee-type payments
  - Clearly defined and, if practicable, limited **termination rights**
  - 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 or her services
  - Compensation should not resemble a salary
  - Termination only for nonperformance/breach of contract
  - Avoid circumstances where contractor position is identical to those of W-2 employees





# Questions?

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