



Cause I'm Free – Freelancing!
What Employers Need to Know About
Independent Contractors
Part 1

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Overview

- Introduction to key areas in which the classification of workers is relevant
- Common misconceptions about classifying workers as independent contractors
- The Big Picture: What common themes exist across various laws and statutes
- The Little Picture: The different tests that apply for classifying workers and the consequences of misclassifying a worker
- Discussion of hypothetical
- Conclusion and Q+A



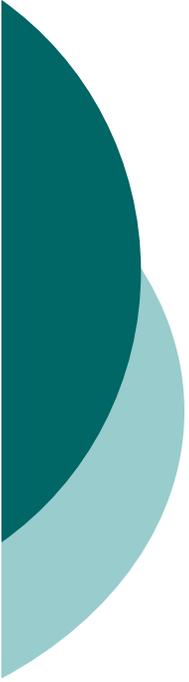
Key Contexts in Which the Employee Versus Contractor Distinction Arises

- Workers Compensation
- Unemployment Compensation
- Fair Labor Standards Act (FLSA) – Wage & Hour
- Employee Retirement Income Security Act (ERISA) – Employee Benefits
- Tort and Contract Liability
- Federal Taxes
- Family and Medical Leave Act (FMLA)
- National Labor Relations Act (NLRA)
- Anti-Discrimination Laws
 - Title VII, ADEA, ADA



Myths About Independent Contractors

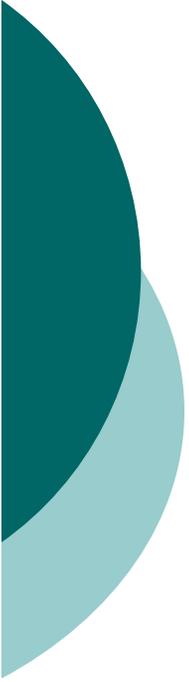
- The distinction between independent contractors and employees only applies in certain industries
- Workers can request or negotiate whether they are classified as independent contractors or employees
- An employer can control whether a worker is classified as an independent contractor by having the worker sign an independent contractor agreement or issuing him or her a 1099 form
- It is possible to distinguish between independent contractors and employees based on their schedules and the number of hours that they work
- All temporary workers are independent contractors

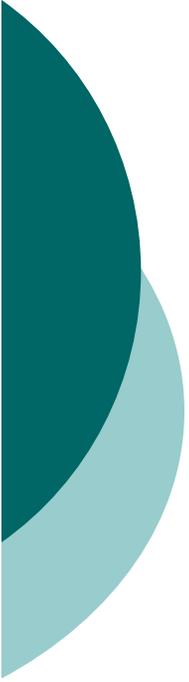


The Big Picture: Common Factors and Themes

- Control factor
- Worker's independence – financial and otherwise
- Employer's core business

The Little Picture

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- Control performance
 - Workplace rules & policies
 - Direct supervision
 - Discipline
 - Ownership of vehicle, equipment or tools
 - Supplies
 - Degree of skill required
 - Training/Instruction
 - Uniforms
 - Restrictive covenants
 - Can worker solicit new business
 - Can worker work for others
 - Rights to inventions & work product



The Little Picture (Cont.)

- Bargaining power
- Control of pricing
- Method of payment – salary, hourly or project
- Work hours/schedule
- Length of employment
- Reimbursement of expenses
- Employee leave & other benefits
- Written contract
- Is work key part of company business
- Integration into company
- Reporting requirements
- Supervisor duties

The Little Picture (Cont.)

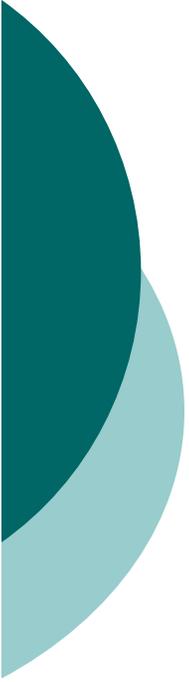
- Worker's investment
- Worker's ability to control profits/losses
- Worker's availability to the public
- Worker's ability to hire her own staff
- Worker's business structure
- Company's right to unilateral discharge
- Worker's right to unilaterally quit
- W-2 or 1099

Unemployment Compensation: Rules

- Tests vary by state
- Common Tests
 - Right to control
 - Nature of the work/course of business
 - Common law definition/agency factors

Unemployment Compensation: Local Rules

- Maryland
 - An individual performing services for an employer is presumed to be a covered employee unless the individual
 - The worker is free from direction and control
 - Is customarily engaged in an independent business or occupation of the same nature as the work
 - Work is outside employer's usual course of business or performed outside employer's place of business
- DC
 - Statute states that, for the purposes of unemployment compensation, the common-law rule applies to determine to classify workers
 - Emphasis on control
- Virginia
 - Statute states that for the purposes of unemployment compensation, the IRS twenty factor test applies

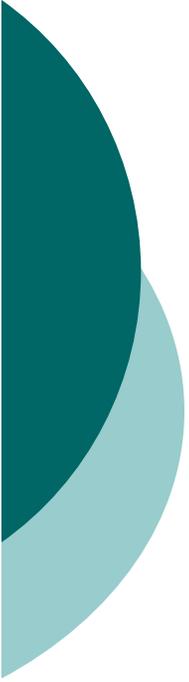


Unemployment Compensation: Consequences of Misclassification

- Employers who improperly classify a worker as an independent contractor may be subject to
 - Liability for outstanding contribution and reimbursement payments (plus interest)
 - Civil fines
 - Administrative fines
 - Civil liability
- Misclassification Fraud Act
 - “Knowing” failure to properly classify
 - Provides for inter-agency cooperation

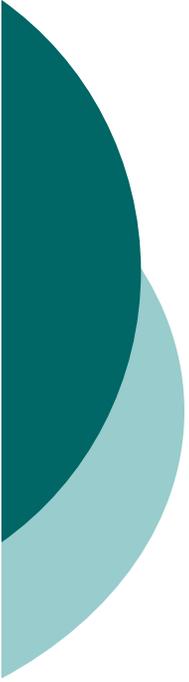
Worker's Compensation: Rules

- Tests vary by state
- Tests include
 - Right to control
 - Nature of the work
 - Common law definition/agency factors
 - Economic reality



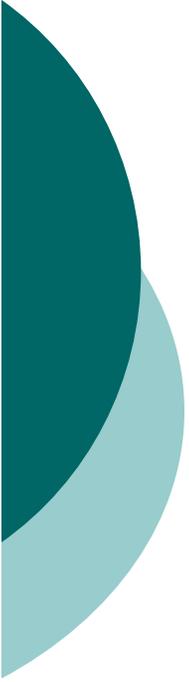
Worker's Compensation: Local Rules

- Maryland
 - An individual performing services for an employer is presumed to be a covered employee unless the individual
 - Maintains a separate business
 - Represents to the public that he or she provides the service and provides the service to the public
 - Has covered employees
- DC
 - Focus on whether worker is hired to do work in which the company specializes (nature of the work)– 2 part inquiry
 - Part 1 – Nature and character of worker's work or business
 - Part 2 – Relationship between worker's work and the employer's business
- Virginia
 - Focus on the right to control the means, methods and outcome



Worker's Compensation: Consequences of Misclassification

- Employers who improperly classify a worker as an independent contractor may be subject to
 - Worker's compensation claims
 - Breach of contract from WC carrier
 - Civil tort liability
 - Fines
 - Criminal actions



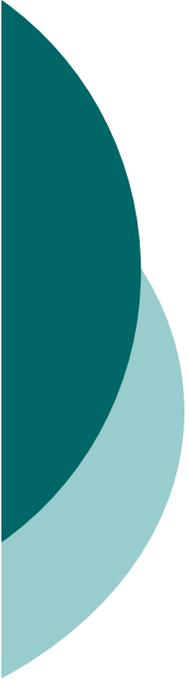
FLSA: Rule

- When classifying a worker for FLSA purposes the focus must be the **economic reality**
 - The Supreme Court has identified the relevant factors to this inquiry to include:
 - Whether the worker's service is an integral part of the business
 - The permanency of the relationship
 - The worker's investment in facilities and equipment
 - The nature and degree of control
 - The worker's opportunities for profit and loss
 - The initiative, judgment and foresight required for the worker's success
 - The degree of independent business organization and operation



FLSA: Consequences of Misclassification

- Generally, an employer who misclassifies an employee as an independent contractor will be liable for:
 - Unpaid minimum wages
 - Unpaid overtime
 - Liquidated damages (2x amount owed)
- Subject to DOL enforcement or private lawsuit
- Individual liability for officers/managers!

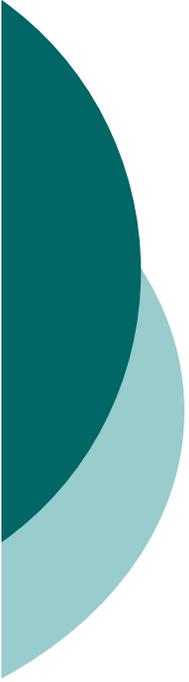


ERISA: Rule

- The ERISA statute and regulations do not offer clear guidance on classifying workers
- The Supreme Court has held that the traditional **common law test of agency** applies to classifying workers for the purposes of ERISA
 - “[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”

ERISA: Consequences of Misclassification

- Plan disqualification
- Liability for retroactive coverage and past benefits
- Reclassification causing plan to fail non-discrimination testing



Tort Liability

- Regardless of label, employer may be subject liability for acts of “IC”
- Does an agency relationship exist?
- Is there a basis to impute liability?
- Is the “IC” really an employee?
- Ensure the company has appropriate insurance coverage!



Federal Taxes: Rule

- When classifying a worker for federal tax purposes the focus must be on **the degree of control and independence** that that worker has
 - Relevant facts fall into three categories:
 - Behavioral – Does company control or have right to control what the worker does and how the worker does his or her job?
 - Financial – Are the business aspects of the worker’s job (inc. how the worker is paid, reimbursements, providing of tools and supplies) controlled by the payor?
 - Type of Relationship – Are there written contracts or employee type benefits? Will the relationship continue and is the work performed a key aspect of the business?



Federal Taxes: Consequences of Misclassification

- Generally, an employer who misclassifies an employee as an independent contractor will be liable for
 - Withholding taxes
 - Employee social security taxes
- Employer may be relieved of liability for employment taxes if the IRS determines the employer had a reasonable basis for not treating the worker as an employee
- Voluntary Classification Settlement Program

FMLA: Rule

- FMLA statute adopts the FLSA definition of “employee”
- Courts have therefore applied the same **economic realities test** to determine who is an employee for the purposes of the FMLA



FMLA: Consequences of Misclassification

- If a worker is misclassified as an independent contractor and does not receive FMLA leave that they should have been eligible for, the employer is likely to be treated as having interfered with the individual's FMLA rights
- An employer who interferes with an employee's FMLA rights may be liable for
 - Compensation and benefits lost by reason of the violation
 - Other actual monetary losses sustained as a direct result of the violation
 - Appropriate equitable or other relief, including reinstatement, promotion, or any other relief tailored to the harm suffered
- DOL enforcement and private law suits



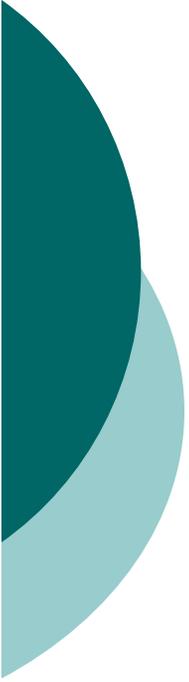
NLRA: Rule

- When classifying a worker for the purposes of the NLRA, the courts and the National Labor Relations Board apply the **common-law agency test**
 - Relevant factors to this inquiry include:
 - The right to control the manner and performance of the job
 - The occupation and regular business of the worker and the employer
 - The allocation of losses and gains
 - Who supplies tools and place of work
 - The skills required to perform the job
 - Whether the parties believe that they have created an employment relationship
 - The method of payment (by time or by job)
 - The duration of the work assignment



NLRA: Consequences of Misclassification

- An employer who misclassifies and treats a worker as an independent contractor may be liable for violating that worker's rights under the NLRA - in both union and non-union companies
- NLRB and unions are raising the profile of the misclassification issue
- NLRA trend may be to consider "economic dependence" more heavily
 - Contracts of adhesion
 - Does worker control pricing



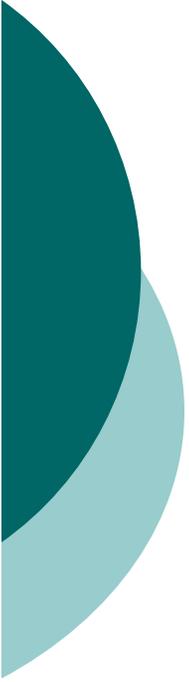
Anti-Discrimination Laws: Rules

○ ADA

- In applying the common law to classify a worker under the ADA the Supreme Court has given particular focus to the element of control
 - **Key facts considered by the Court-** Hiring and firing, supervision, who the worker reports to, influence of the worker on the organization, intent of the parties, allocation of profits losses and liabilities

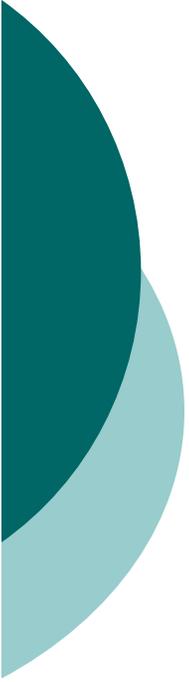
○ Title VII and ADEA

- Courts have varied as to whether they apply the common law, hybrid test or economic realities test



Anti-Discrimination Laws: Consequences of Misclassification

- An employer who misclassifies and treats a worker as an independent contractor may be liable for any discrimination against the worker



Conclusions & Q+A

We hope this has been helpful to your approach to
classifying employees

If there are any questions we would be happy to
address them now

Thank you

Please join us for Part 2 of the series on
Tuesday December 11th at 1pm

Visit our webpage for registration details



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