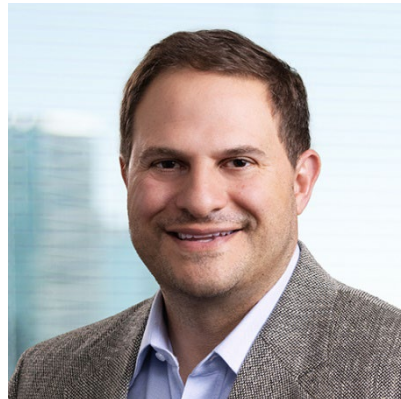




As the DOL/State Wage and Hour Law World Turns



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Where Does the Current law Stand and Its Impact of Employers?

INDEPENDENT CONTRACTORS

Overview

- The Department of Labor's recent rule on independent contractors has introduced new criteria for determining worker classification, which has generated some confusion among employers and workers alike.
- This presentation will clarify the key aspects of the rule, focusing on how it impacts the classification process and what it means for businesses and independent contractors.
- At the same time, some states have more stringent rules on independent contractors.
- Today's Mission: Explore the rule in detail to clear up any uncertainties and discuss practical guidance on navigating this evolving landscape.

What is an Independent Contractor?

An independent contractor:

- Is a worker who contracts as an individuals or entity to perform services for a company.
- Does not regularly work for any single company.
- Is **not** an employee.
- Charges fees for service.

What is an Independent Contractor? (cont'd)

An independent contractor typically:

- Is engaged only for the term required to perform a specified service or task.
- Retains control over the method and manner of work.
- Retains economic independence.
- Is responsible for paying taxes.
- Is not protected by most laws designed to protect employees.

Independent Contractor vs. Employee

An employee:

- ✓ Is paid wages and company-sponsored benefits.
- ✓ Is employed for a continuous period of time and performs whatever tasks the company requires.
- ✓ Generally pays taxes through the amounts the employer is obligated to withhold from wages.
- ✓ Is economically dependent on the employer.
- ✓ Is protected by applicable employment laws.

Benefits of an Independent Contractor

Because independent contractors are not "employees," companies that use them can avoid certain obligations and expenses, including:

- Tax and insurance obligations.
- Employment law compliance.
- Employee benefits.
- Immigration law compliance.

Tax and Insurance Obligations

By engaging independent contractors, companies can generally avoid tax payments, withholdings, and insurance obligations required on behalf of employees, including:

- Federal, state, and local income taxes.
- Social Security and Medicare taxes.
- Federal unemployment insurance taxes.
- State unemployment insurance taxes.
- Workers' compensation insurance.

Employment Law Compliance (US)

- Fair Labor Standards Act (FLSA).
- Title VII of the Civil Rights Act (Title VII).
- Equal Pay Act (EPA).
- Age Discrimination in Employment (ADEA).
- Americans with Disabilities (ADA).
- Genetic Information Nondiscrimination Act (GINA).
- Uniformed Services Employment Reemployment Rights Act (USERRA).
- Occupational Safety and Health Act (OSH Act).
- Worker Adjustment Retraining Notification Act (WARN).
- Family and Medical Leave Act (FMLA).
- Employee Retirement Income Security Act (ERISA).
- National Labor Relations Act (NLRA).

Employee Benefits (US)

Companies often provide benefits to their employees that are not available to independent contractors including, for example:

- Health insurance, including cafeteria plans.
- Retirement or pension plans.
- Stock options.
- Paid vacations.
- Sick days.
- Life insurance.
- Disability insurance.
- Fringe benefits, such as tuition reimbursement.

Government/Labor Prefer Employee Classification

- Taxes Not Withheld.
- No Unemployment Insurance Paid
- No Workplace Protections Laws/Unions.
- Immigration Status not Checked.
- No Health/Medical Benefits

Consequences of Misclassification (US)

The penalties for misclassification can be serious. If a company misclassifies an employee as an independent contractor, it must ensure compliance going forward and may be liable for:

- Back wages and overtime pay.
- Employee benefits, including stock options, retirement benefits, and health plan coverage (or the value of those benefits).
- Disability payments and workers' compensation.
- Tax and insurance obligations.
- Liquidated damages.
- Civil monetary penalties.

Employment Law Compliance (US)

Improperly classifying a worker as an independent contractor could lead to claims for:

- Unpaid overtime compensation and reimbursement of work-related expenses.
- Reasonable accommodation and return to work benefits under the ADA and its state equivalents.
- Leaves of absence under the FMLA and its state equivalents.
- Plant closure and mass layoff notice and penalties under WARN and its state equivalents.
- Discrimination under Title VII, ADEA, and other federal, state, and local anti-discrimination laws.

Tax and Insurance Obligations Generally

The tax and insurance liabilities for misclassification are significant and can include:

- Years of unpaid income tax withholdings.
- Social Security and Medicare contributions.
- Workers' compensation and unemployment insurance premiums, including federal unemployment taxes.
- Interest and penalties/fines

US Tests for Independent Contractor Status

- There is no single test to determine independent contractor status for all purposes.
- The various tests include:
 - The Economic Realities Test.
 - The Control Test.
 - Common law and other federal law tests.
 - State law tests.
- **Familiarize yourself with the different federal and state tests that may apply.**

New DOL Rule

- Effective March 11, 2024
- 6-factor Economic Realities Test
- Totality of Circumstances
 1. Opportunity for profit or loss depending on managerial skill
 2. Investments by the worker and the employer
 3. Permanence of the work relationship
 4. Nature and degree of control
 5. Whether the work performed is integral to the employer's business
 6. Skill and initiative

New DOL Rule (continued)

- The economic realities analysis is nothing new
- But the enforcement focus by DOL is something to be concerned about
 - Emphasis on integral part of the business (akin to “B” prong in tough ABC test states (CA,NJ,IL,MA,ME)
 - Control from customer requirements or to comply with government regulations/laws can be considered control by the Company
 - “Relative investment” may create insurmountable hurdle

The Control Test: The IRS Standard

- Used to determine whether a worker is an employee for federal tax purposes.
- Analyzes three aspects of the worker's control or independence:
 - Behavioral control.
 - Financial control.
 - The type of relationship.

The Common Law Darden Test

- Commonly used in the context of Title VII, the ADA, the ADEA, the ACA, and ERISA.
- The test considers the following factors:
 - Skill required.
 - Source of supplies and tools.
 - Location of the work.
 - Duration of the relationship between the parties.
 - Hiring party's right to assign additional projects to the hired party.
 - Extent of the hired party's discretion over when and how long to work.
 - Method of payment.
 - Hired party's role in hiring and paying assistants.
 - Regular business of the hiring party and whether the work performed is part of that business.
 - Hiring party's status as "in business."

The Common Law 20-Factor Test

- Previously used by the IRS, this test is commonly used by state agencies making independent contractor determinations.
- The 20 factors are:
 - Instructions.
 - Training.
 - Integration with the company's operations.
 - Services rendered personally.
 - Hiring, supervising, and paying helpers.
 - Continuing relationship.
 - Set hours of work.
 - Full time or exclusive work.

The Common Law 20-Factor Test (cont'd)

- Location where services are performed.
- Specifying the order or sequence of work.
- Oral or written reports.
- Payments.
- Business or travel expenses.
- Tools and materials.
- Investment.
- Profit and loss.
- Number of companies with whom the independent contractor works.
- Advertises services to the general public.
- Right to fire.
- Right to quit.

NLRB Activity & IC Status

- On June 13, 2023, the NLRB overruled its prior decision and returned to the common law multi-factor test.
- ICs are not able to organize for a union under the NLRA.
 - Making it more difficult to classify workers as ICs increases eligible targets for unions.



State Law Tests (ABC Test)

- State independent contractor tests can impose a more narrow definition than the federal equivalent.
- The most common state test is the ABC Test.
- The ABC Test presumes an employment relationship unless the company shows that:
 - (A) The worker has been and will continue to be free from control or direction over the performance of his work.
 - (B) The work is either outside of the usual course of business for the company requesting the work or performed outside of any of that company's places of business.
 - (C) The worker is customarily engaged in an independently established trade, occupation, profession, or business.

Florida Cont'd

If four of these criteria are not met, an individual may still be presumed to be an independent contractor and not an employee based on all the facts and circumstances with regard to satisfying any of the following conditions:

- The individual performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work;
- The individual incurs the principal expenses related to the service or work that they perform or agree to perform;
- The individual is responsible for the satisfactory completion of the work or services that they perform or agree to perform;
- The individual receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis;
- The individual may realize a profit or suffer a loss in connection with performing work or services;
- The individual has continuing or recurring business liabilities or obligations; or
- The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

An individual claiming to be an independent contractor has the burden of proving that they are an independent contractor for purposes of exemption from workers' compensation coverage.

Florida – Workers Compensation

An independent contractor working or performing services in the construction industry is considered to be an employee for workers' compensation coverage purposes. An individual who is not engaged in the construction industry may be considered an employee unless at least four of the following criteria are met:

- The individual maintains a separate business with their own work facility, truck, equipment, materials, or similar accommodations;
- The individual holds or has applied for a federal employer identification number, unless they are a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;
- The individual receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual;
- The individual holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to service rendered or work performed for compensation;
- The individual performs work or is able to perform work for any entity in addition to or besides the employer at their own election without the necessity of completing an employment application or process; or
- The individual receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless the contractual agreement expressly states that an employment relationship exists.

Colorado - Penalties

For every misclassified independent contractor, a business may be fined up to \$5,000 for the first offense and up to \$25,000 for subsequent offenses if the misclassification was willful. After a second offense, the employer may also be prohibited from contracting with, or receiving any funds for the performance of contracts from, the state for up to two years. This may be in addition to any withholding taxes, unemployment taxes, penalties, or interest that the state may be due.

New Jersey – Workers Comp/Penalties

- **Workers' compensation: In determining whether an individual is covered as an employee, the state will inquire whether the job should be expected to carry its own accident burden.** For example, someone working in the employer's plant and using the employer's equipment would be more likely to expect the employer to take the responsibility for accidents and would have a greater chance of being considered an employee. On the other hand, a person engaged in repairing the employer's building and using their own ladders and scaffolds should probably be prepared to take on this responsibility himself or herself, and they are likely to be classified accordingly.

New Jersey Continued.

- In the construction industry, employers who knowingly misclassify their employees are guilty of a crime of the second degree if the contract amount is to \$75,000 or above and guilty of a crime of the third degree if the contract amount exceeds \$2,500, but is less than \$75,000; and guilty of a crime of the fourth degree if the contract amount is for \$2,500 or less. In addition, the violator may be liable to the employees in any amount by which the employees were underpaid
- in connection with the misclassification and will be placed on a list of employers who are prohibited from working on public works projects for a period of 3 years. The Labor Commissioner may also order the immediate suspension of a contractor's registration. Violators are also subject to administrative penalties of \$2,500 for a first violation and up to a maximum of \$5,000 for each subsequent violation, may be imposed.

Local Authorities Creating Own Regulations and Enforcing State Laws,

- Garuda Labs, Inc. et al v. City and County of Denver, Colorado et al – City of Denver investigating gig hospitality companies.
- Instawork and Advantage Workforce Services, LLC
- Think Uber of hospitality/workers obtain shifts from platform
- City of Denver found the gig workers were employees assessed over \$1 Million Dollars in wage and paid leave violations.
- Arguing pre-emption and lack of jurisdiction.
- Case is still pending.

Conduct Audits

- **The tenure of the relationship.** Project Based? Termination Date?
- **The duties being performed.** Are the duties being performed by the contractor are integral to the mission of the business? Are they doing similar things as employees?
- **The contractor's skills.** Are skills unique and not integral to mission of business.

Best Practices

To ensure that the independent contractor classification requirements are satisfied:

- Use an independent contractor agreement to establish the terms of the working relationship.
- Avoid using former employees as independent contractors.
- Avoid having independent contractors do the same work as employees.
- Avoid using independent contractors to perform work that is integral to the business.
- Require independent contractors to have corporate entity, complete a Form W-9, Request for Taxpayer Identification Number and Certification.
- Keep independent contractor files with vendor files, not employee files.

Best Practices (cont'd)

- Pay contractors by the project or by an agreed-on flat fee at regular intervals, not by the hour, week, or month.
- Avoid Non-Compete Agreements.
- Do not reimburse independent contractors for business expenses.
- Avoid handbooks and other workplace policies.
- Do not provide contractors with employee-type benefits like paid vacation, paid holidays, sick leave, and retirement benefits.
- Do not schedule hours or days of work for contractors or their employees.
- Avoid requiring uniforms, grooming standards, and similar workplace requirements typically imposed on employees.
- Issue separate guidelines for independent contractors, vendors, and other third parties instead of providing them with a copy of the employee handbook.

Best Practices (cont'd)

- Do not invite contractors to employee-only events or meetings.
- Do not provide contractors with company business cards.
- Do not give independent contractors job titles.
- Deal with performance problems as contract modification or breach issues, not as disciplinary issues. Do not conduct performance evaluations for independent contractors. Do not involve Human Resources in the business relationship with independent contractors.
- Determine if the company's competitors classify similar workers as employees instead of independent contractors.
- Regularly audit the company's independent contractor arrangements and template agreements.
- Do not control the details of how the independent contractor performs the work. Focus on the end result rather than the details.

Lower the Risks/Consequences

- Avoid close calls in states such as CA, MA, IL, MD, NJ, WA.
- Avoid contractors in union heavy industries.
- Pay overtime for hours worked over 40.
- Use staffing/labor companies and have them indemnify over potential employment claims.
- Business to business arrangement via a consulting agreement.

Hypothetical 1

Jan is a graphic designer for Image, Inc., a graphic design company. Jan has excellent credentials and has been a valued Image employee for several years. Upon returning from maternity leave, Jan told her manager that she's decided to stay home with her new baby and two other young children instead of working full time. However, Jan said she would like to work a few hours a week to keep her skills sharp and to earn a small income. Jan's manager believes a few hours a week is better than losing Jan altogether and agrees to hire her as an independent contractor. The manager asks Jan to sign an agreement acknowledging in writing that she is an independent contractor and asks her to set up a business entity, as required by Image's vendor guidelines. Jan establishes an LLC, signs the agreement, and begins working 10 hours per week as a contractor for Image. Both Jan and her manager are happy with the arrangement.

Is Jan properly classified as an independent contractor under the FLSA?

Answer to Hypothetical 1

Probably not.

- The hypothetical does not tell us some important facts, such as whether Jan provides design services for clients other than Image, whether she is paid hourly or on some other basis, and which party (Jan or Image) determined her rate of pay.
- However, the fact that Jan now does the same work as a contractor for Image that she once did as its employee seriously undermines her classification as an independent contractor. Employees and independent contractors are generally not interchangeable. In addition, Jan's work as a graphic designer is integral to Image's business, which the DOL considers indicative of her economic dependence on Image and indicative of an employment relationship.

Hypothetical 2

Jane is a certified personal trainer with several years of experience. She teaches individual and group sessions at three different gyms, including Bolt. Bolt is part of a large chain of gyms and a consistent client experience is part of its business model. For that reason, Bolt asks Jane to wear a Bolt nametag and Bolt activewear when she is teaching. Bolt schedules the sessions, handles registration, collects session fees from Bolt members, and pays Jane a flat fee for each session. Jane must commit to at least ten session hours each week and at least four hours every Saturday for consultations scheduled by Bolt. Jane enjoys the flexibility and variety of working at different facilities, but she prefers the arrangement with Bolt because, unlike the other gyms, she is not responsible for administrative tasks such as scheduling and collecting money. Also, Bolt has the best equipment of the three and does not require her to pay rent for the studio space.

Hypothetical 2 (cont'd)

Recently though, Bolt canceled several of her sessions because of low registration numbers. Jane was able to replace some of the lost income by scheduling extra sessions at another gym, but when she complained to a fellow trainer, he said Bolt should pay her for the time, even if the sessions were canceled, because she is a Bolt employee.

Is Jane's fellow trainer correct?

Answer to Hypothetical 2

Probably.

- Many of the facts in this hypothetical are indicative of an employment relationship. For example, Bolt exercises a significant degree of control over Jane's work, including scheduling sessions and consultations, registering participants, and collecting payment. Bolt requires a minimum number of hours from Jane, which must coincide with Bolt's session schedule, and requires Jane to wear its branded clothing and nametag. Jane personally performs the work for Bolt and does so at Bolt's location.

Answer to Hypothetical 2 (cont'd)

- Jane is paid a flat fee for each session, regardless of the number of participants, and is paid nothing if Bolt decides to cancel a session Jane is scheduled to teach. Also, Jane's investment is minimal compared to Bolt. Bolt provides the studio space and equipment, and covers costs such as advertising and overhead.
- Finally, Jane's work as a personal trainer may be considered "integral" to Bolt's physical fitness business.

Hypothetical 3

- Technicians install and repaired cable internet and digital phone service for a contractor. The technicians were classified as independent contractors. Technicians were required to report to the Contractor facility by 7:00 am every morning. Routinely communicated with dispatch and logged in and out of their phone. The technicians returned requirement and submit work orders which included billing codes that determined their pay. The technicians were assigned routes and had no ability to decline assignments. Technicians were also required to attend quality control meetings and classes on new equipment.

Hypothetical 3 Answer - Scantland v. Jeffry Knight, Inc.

- 11th Circuit found that they were employees. Overturned MDL Court.
- Company controlled what jobs technicians did, how much they were paid, how many hours they worked, how many days they worked, their daily work schedule, whether they could work for others, whether they could earn additional income from customers, and closely monitored the quality of their work. Technicians could not bid for jobs or negotiate the prices for jobs.

Hypothetical 4

- Brian a licensed unarmed security guard works for a security services company. Clients pay the security services company and the security guards negotiate with security services company in pay based on the contract. The security services company then provides the licensed security guards (Brian). Brian is classified as an independent contractor. The client assigns the security guards tasks. Security guard company sets the schedule with input from security guards. Brian sues for overtime.

Was he misclassified?

Hypothetical 4 - Answer - Walsh v. Freeman Sec. Servs.

- Yes, a federal court ordered a Winter Haven security services company to pay \$117,880 in back wages and liquidated damages to 76 employee.
- Control - They signed non-competes, wore uniforms, subject to wages set by company.
- Not high degree of skill, customer demand favors additional work, not skill set.
- Providing integral services to business. Could not provide security without the guards.



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