

A LITTLER PRESENTATION

The Risks and Rise of Contingent Workers

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Littler[®]



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Agenda

- What is the Contingent Workforce?
- The Rise of the Contingent Workforce
- The Risks
- Mitigating Risk

What Is the Contingent Workforce?



- It's not a formal legal term. It covers workers who are not the traditional, directly-employed, full-time personnel of “using” organizations.
- The “using” organization is your organization.
- Contingent workers include **temporary employees**, vendor employees, leased employees, payrolled employees, **independent contractors**, and consultants.
- The term may sometimes include part-time or seasonal employees directly employed by the using organization, but they will not be included in what we will discuss today.

- Professional Services – Businesses or External Firms that provide professional expert advice, counsel, or representation.
- They often provide services which fulfill a specialized need.
- There are other types of contingent workers that are employed by you (e.g. on-demand employees), but those are beyond the scope of this training.
- Independent Contractors/Freelancers (“Contractors”) – Contractors can be a company or an individual worker that has specialized skills, training or experience and performs a service for the Company, typically for a set period of time, on a project basis.

Independent Contractors

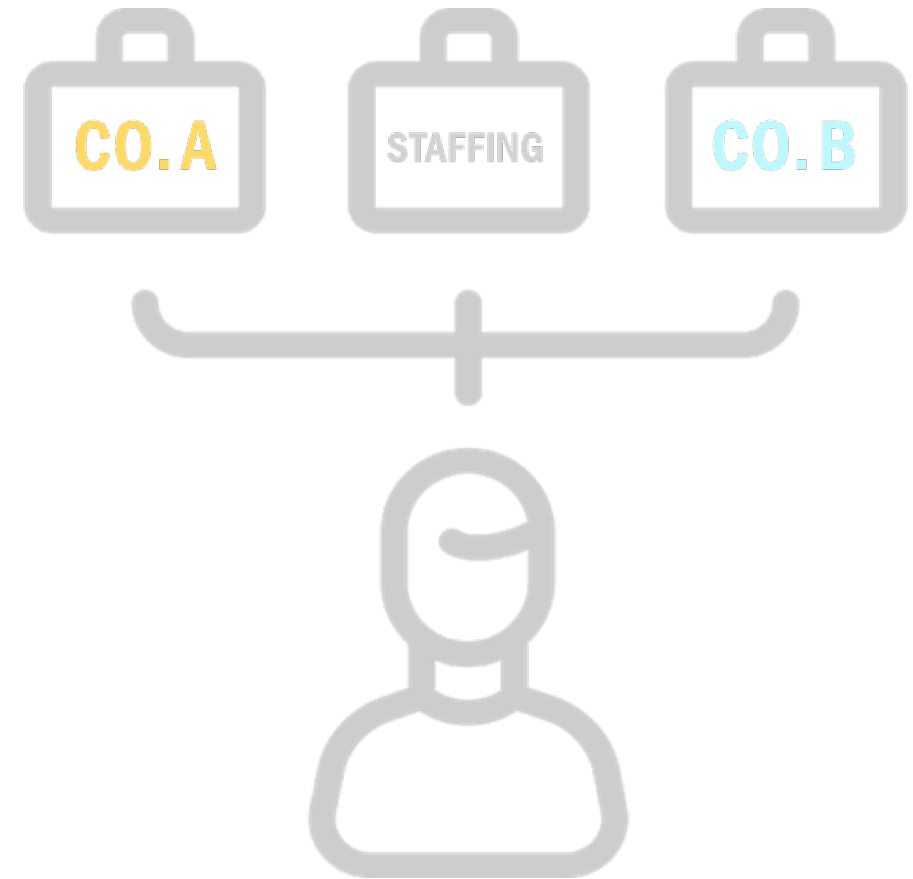
- Independent contractors are separate businesses and not your employees.
- They essentially employ themselves and/or others and usually promise results. The agencies that provide you with workers are your contractors. Their employees are vendor employees, not your employees and should be treated differently.

Most Workers Are Employees

- FLSA defines “employ” as “to suffer or permit to work”
- “Broadest definition of employment under the law because it covers work that the employer directs or allows to take place”
- Employees that are employed by a third party may work with you but are not your employees, but you can be liable for employment costs if you are considered a co-employer.

Employer Status

- Many contingent employee issues call for an answer to the question, “Who is this person’s employer?”
- The answer could be: no one, the using organization, a staffing organization, a vendor or combinations of two or more of these potential employers.
- With contingent employees, there may be two employers for some purposes. This is called “co-employment” or “joint employment.”



- Employers have duties to the workers and to government agencies.

- When you are deemed to be a co-employer, you are equally responsible for all employer duties.

- Whether a company is a co-employer is determined by a number of factors.

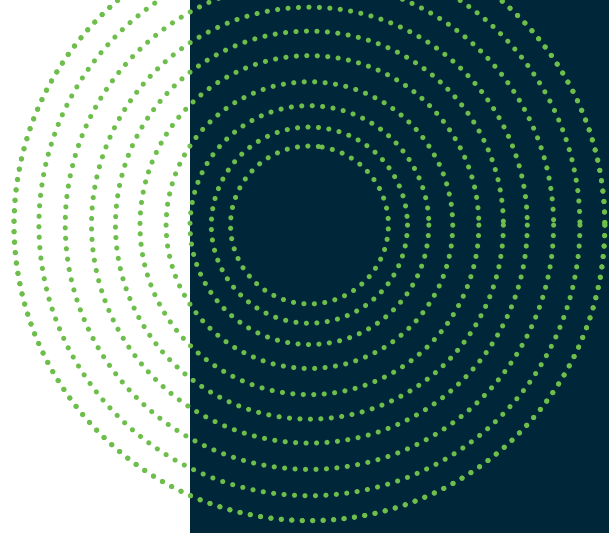
- You should avoid taking on the duties of a co-employer.

- You can't "commit co-employment" or be sued for co-employment.

- Co-employment never travels alone.
It is always attached to some other employment law issue.

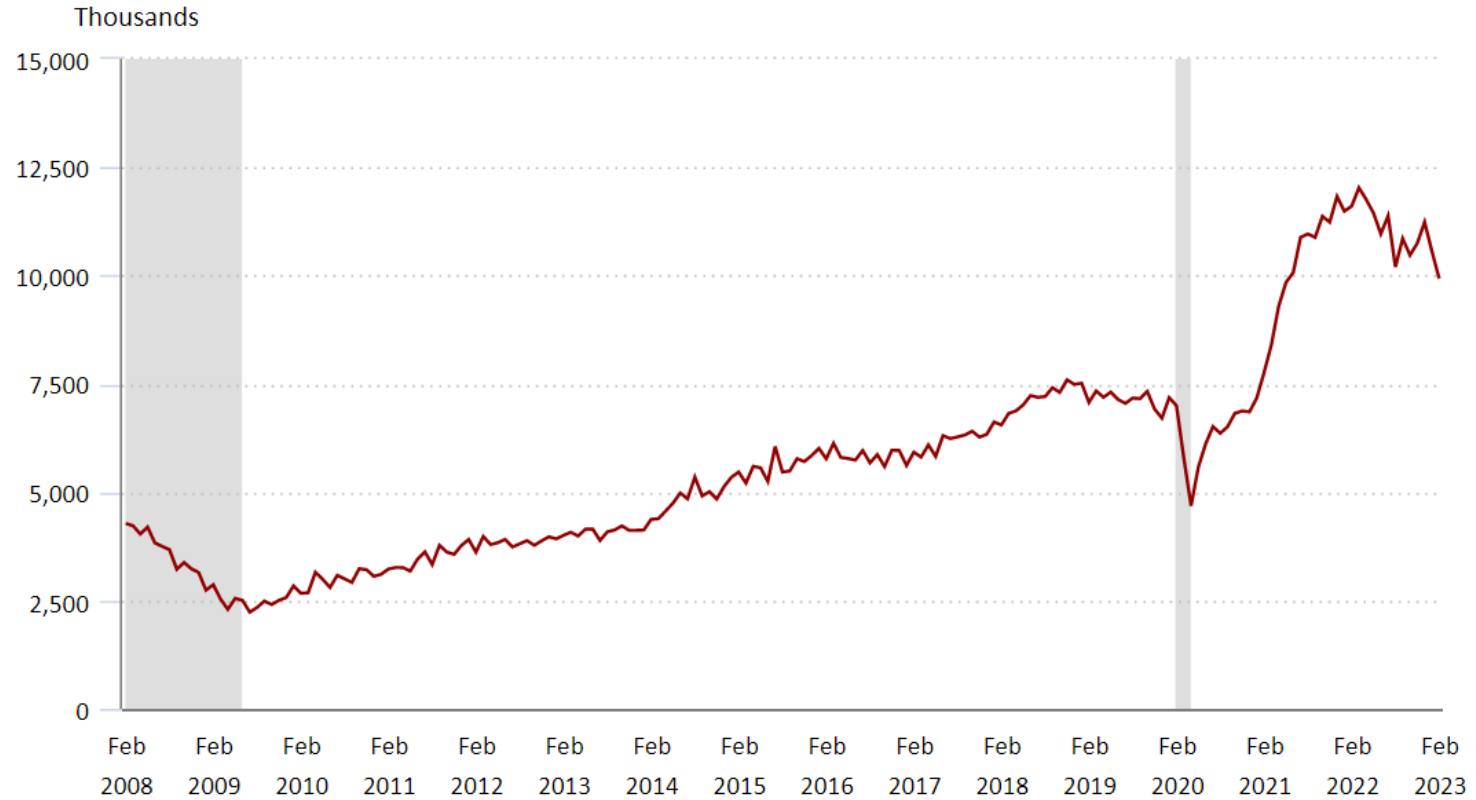
- A lawyer's definition might be that co-employment is a theory used by government agencies and plaintiff's lawyers to bring additional defendants into employment disputes.

- But if you don't have basic employment law issues, you won't have co-employment law issues.



The Rise

Total Nonfarm Job Openings

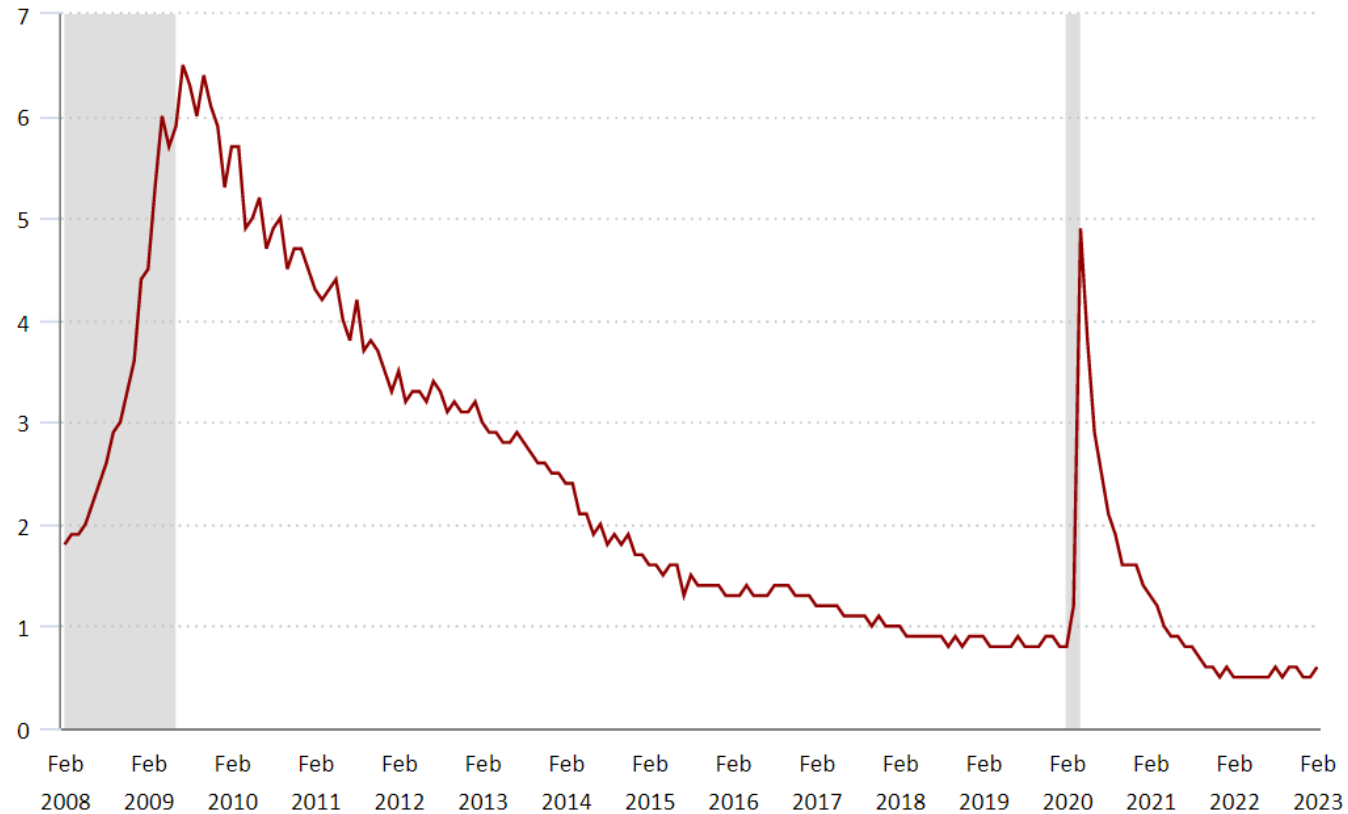


Hover over chart to view data.

Note: Shaded area represents recession, as determined by the National Bureau of Economic Research.

Source: U.S. Bureau of Labor Statistics.

Unemployed Persons Per Job Opening



Hover over chart to view data.

Note: Shaded area represents recession, as determined by the National Bureau of Economic Research.

Source: U.S. Bureau of Labor Statistics.

Ghosting

A 2022 Survey found that “A startling 84% of respondents indicated that they had ghosted an employer or potential employer at least once” during the survey’s 18-month time frame.

- **37%** indicated they had ghosted an employer
- **25%** had ghosted a potential employer
- **21%** had ghosted both an employer and a potential employer

Further, **62%** of respondents said they have been ghosted by an employer or potential employer.

The top reasons for ghosting related to these expectations included:

- Salary levels below expectations (29%)
- Other, more attractive job offers (28%)
- Inaccurate descriptions of job roles (27%)
- Companies with bad reputations and online reviews (26%)
- Dislike of perceived workplace culture (22%)



The Risks

EEOC Enforcement Focus On Contingent Workers

- Strategic Enforcement Plan lists area of emphasis:
 - “temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.”
- Sample settlements in past 4 years:
 - \$2.6m staffing agency (sex discrim.)
 - \$675k staffing agency & client (sex harassment & retaliation)
 - \$550k staffing agency (race, sex, age, disability discrim. – client preference defense failed)
 - \$350k tech staffing agency & client (sex harassment & retaliation)
 - \$225k tech company & 3P recruiter (disability discrim.)

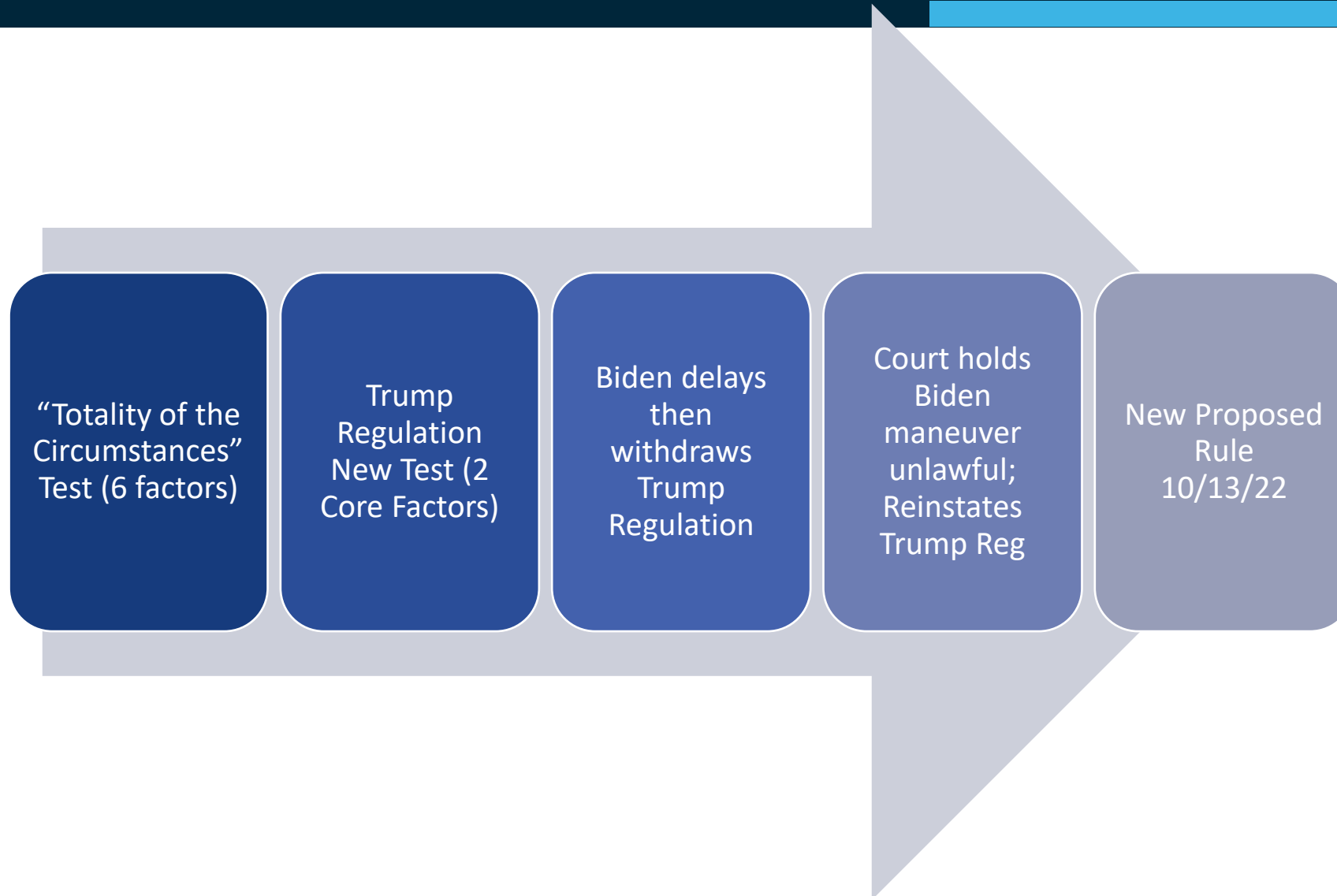
EEOC Enforcement Focus On Contingent Workers

- Charges regularly name joint employers as respondents.
 - “If CP is an independent contractor, dismiss the charge for lack of jurisdiction. If CP is an employee, determine who qualifies as his or her employer. It is possible that both the staffing firm and its client qualify as joint employers.”
- Darden Test (1992): Multi-factor test, heavily emphasizing right to control when, where, and how the work is performed.

New DOL Guidance



Regulatory Tests



Proposed Rule

Opportunity for Profit
or Loss

Investment

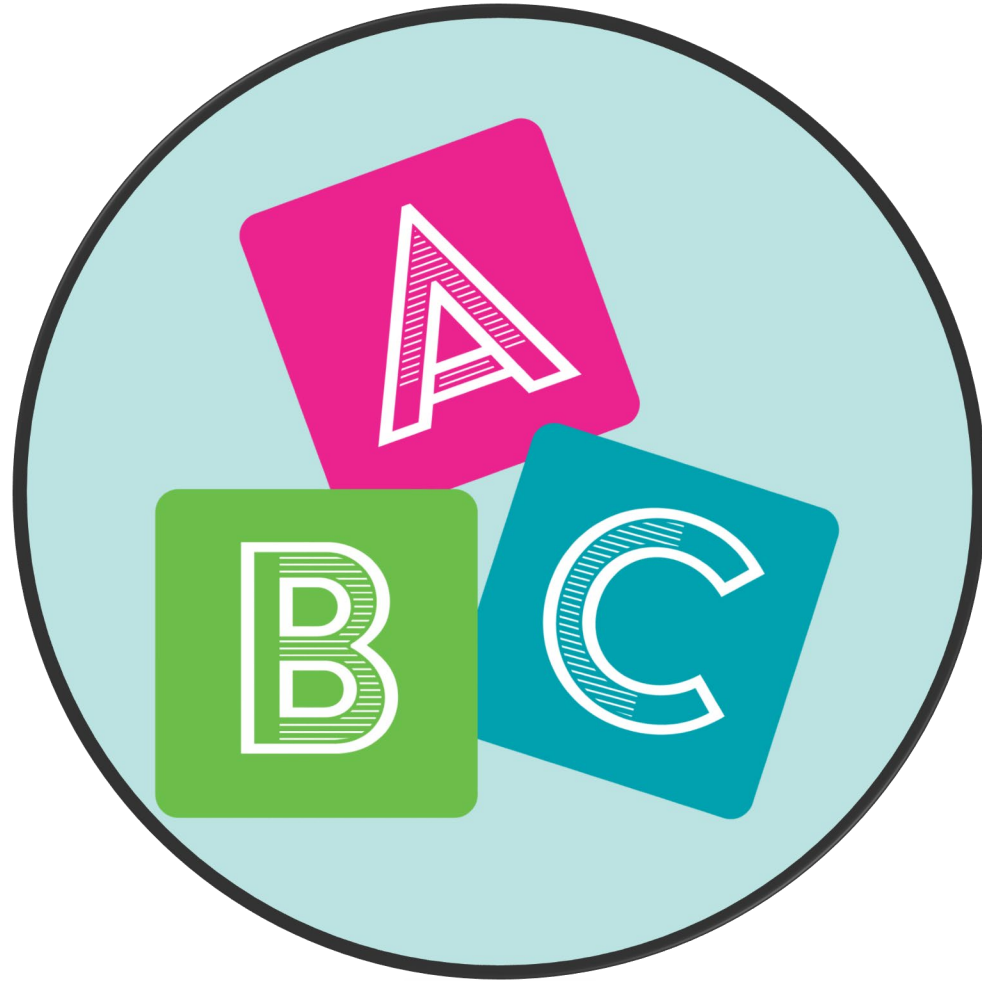
Permanence

Control

Integral to Business

Skill and Initiative

Rise of The ABC Test



ABC Test States* 2023

- Alaska (Unemployment)
- California**
- Colorado (A&C parts only)
- Connecticut
- Delaware
- Georgia (Unemployment, using A&C)
- Hawaii (Unemployment)
- Idaho (Unemployment, using A&C)
- Illinois
- Indiana** (Unemployment)
- Louisiana (Unemployment)
- Maryland** (Unemployment)
- Massachusetts**
- Montana (A&C parts only)
- Nebraska
- Nevada (Unemployment)
- New Hampshire (Unemployment)
- New Jersey
- New Mexico (Unemployment)
- Pennsylvania (Unemployment, using A&C)
- South Dakota (A&C)
- Utah (Unemployment, using A&C)
- Vermont
- Washington
- Wyoming (Unemployment using A&C & If the individual may substitute another to perform their services)

What about NC?

- **IC Test**

- NCDOL considers the following factors “significant:”
 - The extent to which the services rendered are an integral part of the principal's business.
 - The permanency of the relationship.
 - The amount of the alleged contractor's investment in facilities and equipment.
 - The nature and degree of control by the principal.
 - The alleged contractor's opportunities for profit and loss.
 - The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
 - The degree of independent business organization and operation.

NC Continued

- Other NC agencies follow the common law “control test.” See *McCown v. Hines*, 537 S.E.2d 242, 244 (N.C. Ct. App. 2000); *State ex rel. Emp't Sec. Comm'n v. Huckabee*, 461 S.E.2d 787, 788 (N.C. Ct. App. 1995).
- Joint Employer Test
 - 6 factor test - *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 130 (4th Cir. 2017)
 - Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
 - Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;

NC Continued

- The degree of permanency and duration of the relationship between the putative joint employers;
 - Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
 - Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
 - Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.
- **North Carolina Employee Fair Classification Act**

Special Risk Issues



Special Issues

Sexual Harassment

- Clients are responsible for the actions of their direct employees – no blaming the victim.
- Policies and procedures must be in effect.
- A non-hostile environment must be provided.

Special Issues Disabilities

- EEOC guidance says that staffing firms and their clients share responsibilities for compliance. This is often also true for vendors.
- Reasonable accommodation is a shared duty.
- Educating supervisors is critical to avoiding violations.

Special Issues Safety

- Vendors are responsible for sending employees to safe workplaces.
- Vendors should have primary responsibility for work site safety and record keeping.
- Immediate safety issues trump the tradition of vendors counseling their own employees.

Mitigating Risk



Mitigating Risk

- Contingent Worker Business Review or Audit
- Eliminate high risk engagements
- Contingent Worker Policy and Best Practices



Contingent Worker Policies

- Types of Contingent Workers
- Approval Process
- Term Limits and Extensions
- Reduce “reserved control” in agreements
- Choose vendors carefully (solvency/competency)
- Avoid contracting for “same work”/side-by-side arrangements (staff augmentation)
- Terminating Engagements
- Waiting Period, Re-engagement
- Guidelines (onboarding, security, training, tools and equipment)
- Manager do’s and don’ts – reducing actual control on the ground

Mitigating Risk

- Staffing Firms:
 - Standardize Contracts
 - W-2 responsibilities
 - Indemnity
 - Insurance
 - Worker Acknowledgments with arbitration agreement & class action waiver
 - Reporting & Cooperation (investigations, reasonable accommodations)



Red Flags re IC Classification

- Control manner and means of completing the work
- Control scheduling
- They work full time exclusively for you
- Duration (longer than 12 months raises a flag)
- Engaged as both an IC and EE – 1099 and W2 in same year

Red Flags re IC Classification

- Their services re part of your core business
- IC doing same work as an employee
- Training and Extensive Onboarding
- Equipment and Reimbursement (if you provide tools, equipment and reimbursement for business expenses, it raises a flag)
- No business formalities such as LLC, taxpayer ID, insurance, business license

Co-Employment Dos and Don'ts

- Make sure that your benefit plans, compensation plans, fringe benefits, and other policies and plans clearly distinguish your direct employees from contingent employees and that they exclude all workers (including contractors and vendor employees) that are not your direct employees.
- Ensure that all contingent workers are clearly identified as working for a vendor and NOT for you (lanyards, name tags, business cards)



Co-Employment Dos and Don'ts

The following are additional co-employment factors. You don't have to do all of these the "right" way, but exceptions should have good reasons).

- Do let the vendor do the recruiting, screening, selection, and assigning. Resist the temptation to become part of the hiring process.
- Nomenclature matters – never ask for a vendor employee to be terminated or disciplined. Instead simply ask for that person to be removed from your project or assignment and point out quality issues with the work to the vendor's supervisory staff.



Co-Employment Dos and Don'ts

- Don't make contingent employees report their tardiness or absences to your supervisors. Let them call the Vendor who can communicate the absence and provide substitute workers.
- Don't make vendor employees call you and work with you on disability and family leave issues. This should be handled by the Vendor and they can reach out to you.



Co-Employment Dos and Don'ts

- Don't change a contingent employee's overall work assignment (manager, location, job code, etc.) without consulting with the vendor. In addition to co-employment concerns, that creates pay/bill rate and other issues.
- Don't let supervisors create in contingent workers the impression or expectation of direct employment with you.
- Don't direct a vendor employee on when, where, why or how to complete a project or perform work. The Vendor should be given details on project completion dates and specifications and it is up the vendor to ensure their employees understand what is needed.



Co-Employment Dos and Don'ts

- Don't present your benefit plan information to contingent workers.
- Don't reimburse expenses to contingent workers. Do it through the vendor and don't do it at all for independent contractors.
- On-site presence by a vendor management employee is helpful and that person should manage any concerns with vendor employees in the call center or sales functions.



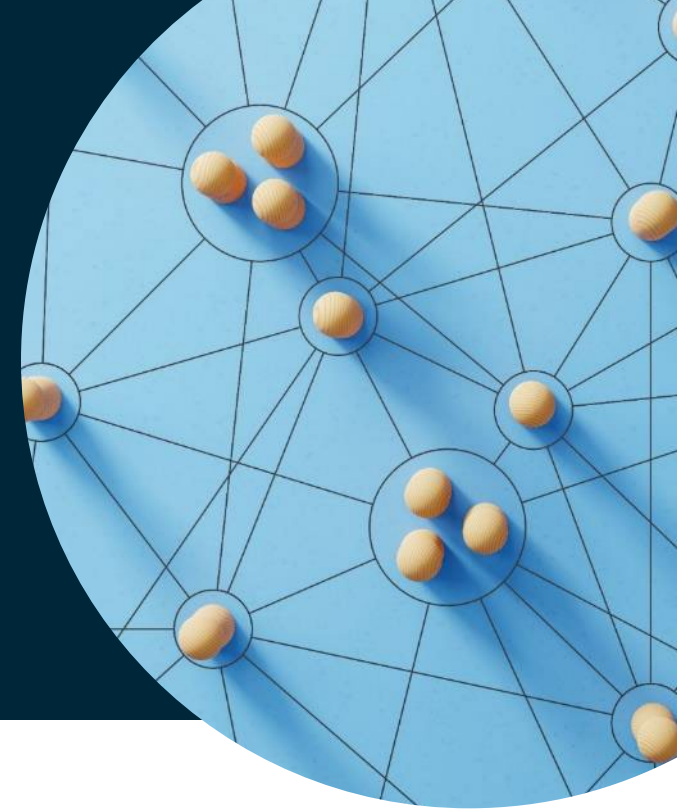


Questions?

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