

# The Contingent Workforce - Are They Contractors, Temps, Leased Or Your Employees?

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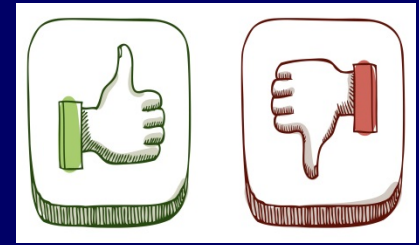
**BROOKS & SMITH, LLP**

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# Definitions

- **Employee:** A worker who is subject to the control of the employer. The employer defines what work shall be done and how.
- **Contingent Worker:** A worker engaged to perform services free from the direction and control of the employer, except for the result of the work. This worker is sometimes referred to as an independent contractor.
- **Co-employment:** An employment relationship where two organizations exert some control over an individual's work or working conditions, resulting in both organizations having actual or potential legal obligations and duties with respect to that individual.

# Pros & Cons Of A Contingent Workforce



## PROS

- Reduces management of “non-core”
- Reduces HR burden of vendor’s employee (no direct support, but obligation to investigate claims remains)
- Lowers cost of benefit administration, training and development and other ‘employee-specific’ costs
- Greater flexibility to staff up or down (no “lay off” issues)
- Reduces overhead costs for vendor work performed offsite

## CONS

- Less supervision of work
- Reduces management of “non-core”
- Reliance on vendor to select, develop and retain talent
- Increases resources required for contract administration and vendor management
- Loss of workers’ comp immunity to suit
- Potential for increased risks to confidential data
- Onsite contractors still incur overhead costs
- Loss of continuity; ramp up-ramp down costs

# How Big Is This Issue?

10 million contingent workers  
7% of total employment



# Federal Statistics Relied Upon By IRS And DOL



- Up to 15% of employers misclassify workers
- 3.4 million workers are contractors, when they should be employees
- Revenue loss to U.S. Treasury is \$1.6 billion, annually:
  - Income tax
  - Social Security
  - Medicare
  - Unemployment Insurance Trust Fund

# What Is The DOL Doing?



- WHD, OFCCCP, OSHA & Office of the Solicitor hire new investigators to investigate misclassification
- Budgets include millions of dollars for the hiring of new personnel within WHD to investigate misclassification
- Budgets include millions of dollars available to states to enhance their mechanisms for conducting misclassification audits

# If We Just Close Our Eyes, Will This Go Away?

- Federal/State Budget Deficits
  - Increased tax payments
- Increased compensation-based private claims
  - Unpaid Wages or Overtime (FLSA)
  - Past Benefits (Health and Welfare, Pension and 401(k))
  - Monetary Relief under various State and Federal Laws, including Title VII, FMLA, ADA & NLRA
- Focus of Plaintiffs' Attorneys
  - Significant damages that are easy to prove
  - Significant attorneys' fees

# Now That I Have Your Attention...



Today, we will be covering:

- Determination of independent contractor:
  - Understand and recognize the factors that differentiate between “contractors” and “employees”
  - Review the various laws that are impacted by improper classification of workers
  - Review the consequences of misclassification
- Joint/co-employment issues
- National Labor Relations Act
- Practical takeaways



# Tests To Determine Proper Classification

- Common Law “Right to Control” Test
- IRS Category Test (replaced IRS “20-Factor” Test)
- FLSA “Economic Realities” Test

**Independent Contractor**



**Or Employee**

# “Right to Control”

- Hiring party’s control over details of the work
- Worker’s occupation and skill
- Relevance of work to company’s business
- Worker’s investment, materials and tools
- Location of work
- Duration of the relationship
- Control of work hours
- Method of payment
- Right to hire assistants
- Taxes, employee benefits
- Parties’ intentions

# “20-Factor”

- Instructions
- Training integration
- Services rendered personally
- Hiring, supervising, paying assistants
- Continuing relationship
- Set hours of work
- Full-time required
- Working on business premises
- Order or sequence set
- Oral or written reports
- Payment of business/traveling expenses
- Furnishing tools and materials
- Significant investment
- Realization of profit or loss
- Working for more than one business at a time
- Making services available to the general public
- Company’s right to discharge
- Worker’s right to terminate



# Current IRS Category Test

- **Behavioral Control:** Amount of control of where, when and how the job is done
- **Financial Control:** Worker's pay, business expenses and facility investment
- **Type of Relationship of the Parties:** Written agreements, benefits, length of relationship

# “Economic Realities”

- “Economic reality” rather than “technical concepts”
- The U.S. Supreme Court held that it is the total activity or situation that controls. Significant factors:
  - 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 independent contractor
  - The degree of independent business organization and operation

# Consequences of Misclassification



# Consequences of Misclassification

## FLSA Liability:

- Retroactive entitlement to overtime pay by the contractor for two to three years
- Employer likely has not kept accurate time records, leading to inability to defend claims
- Liquidated (double) damages are applied; attorney's fees can be awarded
- DOL audits and investigations can result
- Class actions can result in exorbitant costs and settlements
- Liability for overtime
- Joint and several liability
  - If team with staffing agency, must be “completely disassociated with respect to the employment of a particular employee”

# Consequences of Misclassification

## State Laws:

- Possibly the employee's share of taxes, which should have been withheld, plus penalties and interest
- State tax liability often will trigger investigation into unpaid workers' compensation and unemployment benefits. This also can result conversely when contractors apply for such benefits after termination
- Suspension or revocation of incorporation or limited liability status, commissioner can revoke "licenses" for repeat offenders and business subject to subsequent audits thereafter
- Criminal sanctions and administrative penalties and significant financial penalties that are subject to increase if found to be knowing misclassification
- Responsible for underpaid wages, overtime, benefits or taxes on behalf of misclassified workers



# Consequences of Misclassification

## ERISA Liability:

- Class actions
- Retroactive entitlement to benefits by the contractor
- Plan may fail coverage or discrimination tests, or may be deemed to violate minimum participation standards
- Plan may be liable for wrongful denial of benefits and breach of fiduciary duty claims

# Temporary Staffing: EEOC Guidance

- EEOC Enforcement Guidance: *Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms:*
  - Covers temporary employees, leased employees and project management
  - Staffing firms must hire and make job assignments in a non-discriminatory manner
  - Both staffing firms and their clients share EEO responsibilities
  - Both client and staffing company are considered employers if they have the right to control the work and have the statutory minimum number of employees

# Temporary Staffing: Potential Exposure

- Litigation
- Eligibility for benefits
- Unknown employment issues
  - Discrimination
  - Harassment
  - Immigration
  - Retaliation



# Drafting Staffing Agreements



# Drafting Staffing Agreements

- Make the agreement with the staffing company, not the worker
- Clearly designate the responsibilities and services of each party - hiring, firing, training, assigning work, making work rules, etc.
- Specify job descriptions
- Indicate situations under which employer may terminate the contract
- Delineate all confidentiality requirement
- Stipulate which party is responsible for payroll, withholding and payment of taxes
- Clarify who has primary responsibility for paying and providing workers' compensation insurance
- Indicate the extent to which employee benefits will be provided by the staffing company and the employees' level of contribution

# The National Labor Relations Act

NLRA applies only to employees. A common tactic of labor unions seeking to organize workers is to challenge the independent-contractor status of a group of workers that perform a certain function for companies in a particular industry. The unions then seek a court determination that the workers are employees entitled to the right to organize and bargain for the terms and conditions of their work.

# Immigration Laws & Contingent Workers

- Form I-9/Immigration Compliance Liability
  - You DO NOT complete a Form I-9 for persons who are contingent workers
  - However, employers cannot contract for labor of a contingent worker if the employer knows the contingent worker is an “undocumented” worker or not authorized to work in the U.S.
  - Civil Monetary Fines
    - ICE fines employers
  - Criminal Prosecution
    - ICE makes criminal arrests tied to ICE investigations; hundreds are owners, managers, supervisor or human resources individuals
    - ICE requires employers to pay millions as forfeited funds





# Practical Tips for Managing and Minimizing Risk

- Determine who are legally independent contractors:
  - Do they meet the criteria of the tests?
  - Review written agreements.
  - Examine the facts on the ground- actual job duties.
  - Train managers in how to deal properly with contractors.
  - Know the legal risks.

# Practical Tips for Managing and Minimizing Risk

- Virtually any independent contractor classification could come under scrutiny if:
  - The work is part of the company's normal business;
  - The company exerts significant control over the manner in which the work is performed, as opposed to the quality of the goods or service provided;
  - The worker cannot or does not work for other clients or customers; and/or
  - The worker cannot subcontract the work

# Practical Tips for Managing and Minimizing Risk

- Consider whether to terminate all independent contractor agreements and rehire as employees
- Consider hiring independent contractors through temporary agency or other company
- Loosen restrictions and control; allow subcontracting or work for other clients

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