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Employee or Independent Contractor? Worker Misclassification Under Heightened Scrutiny

Avoiding Liability and Penalties Amid Aggressive DOL and IRS Enforcement

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ANALYZING INDEPENDENT CONTRACTOR CLASSIFICATIONS UNDER VARIOUS STATE AND FEDERAL FRAMEWORKS

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I. INTRODUCTION

When employers ask whether they have properly classified a worker as an independent contractor, the answer is almost inevitably: it depends. The Internal Revenue Service ("IRS") uses one test to determine employment status for federal tax purposes, and the Department of Labor employs a different test for compliance with the Fair Labor Standards Act ("FLSA"). The National Labor Relations Board ("NLRB") has a third test for coverage under the National Labor Relations Act ("NLRA"). Each federal circuit has adopted its own iterations of these standards. And, every state has its own criteria for participation in its workers' compensation and unemployment programs.

Misclassifying an employee as an independent contractor can be costly. For example, the IRS and state tax authorities may hold employers liable for unpaid payroll taxes and penalties. Employers may also face liability (including personal liability) under the FLSA for unpaid overtime, and under state workers compensation and unemployment statutes for unpaid premiums. In order to properly measure the cost of doing business, employers must carefully evaluate their use of independent contractors to ensure that these classifications are appropriate, and that these workers are properly compensated.

This article examines several of the more common tests for independent contractor status that are used by federal agencies, federal courts, and the various states. This patchwork of statutes, regulations, agency interpretations, and case law can challenge employers to make the right classification decisions. There are, however, a number of strategies for employers to reduce their risk. This paper concludes with recommendations to help companies make correct classification decisions.

II. FIVE COMMON TESTS FOR INDEPENDENT CONTRACTOR STATUS

A. The Internal Revenue Service's Right to Control Test

Perhaps the best-known test for employment status is the common law "right to control" analysis employed by the IRS. In general, an employer-employee relationship exists for federal tax purposes "when an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done."[1] In 1987, the IRS issued a list of twenty factors to be considered in determining whether an employer-employee relationship exists:[2]

1. **Instructions**: Whether the employer has the right to require the worker to comply with instructions about when, where, and how he or she is to work.

2. **Training**: Whether the worker is required to work with an experienced employee, to attend meetings, or otherwise is trained to perform the services in a particular method or manner.

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[1] Treas. Reg. § 31.3401(c)-1(b). This regulation explains:

> Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.

[2] Rev. Rul. 87-41, 1987-1 C.B. 296.

3. **Integration**: Whether the worker's services are integrated into the business operations generally, in that the success or continuation of a business depends to an appreciable degree upon the performance of the services.

4. **Services rendered personally**: If the services must be rendered personally, the employer is presumably interested in the methods used to do the work as well as the results.

5. **Hiring, supervising, and paying assistants**: Whether the employer or the worker hires, supervises, and pays any assistants.

6. **Continuing relationship**: A continuing relationship between the worker and employer indicates that an employer-employee relationship exists.

7. **Set hours of work**: The establishment of set hours of work by the employer indicates control.

8. **Full time required**: When the worker must devote substantially full time to the employer's business, the worker is impliedly restricted from doing other gainful work, unlike an independent contractor who is free to work when and for whom he or she chooses.

9. **Doing work on employer's premises**: Work done away from the employer's premises indicates freedom of control, whereas work done on site indicates the employer's control over the worker.

10. **Order or sequence set**: A worker who must perform services according to established routines and schedules set by the employer is not free to follow his or her own pattern of work.

11. **Oral or written reports**: The requirement that a worker submit regular or written reports indicates control over the worker.

12. **Payment by hour, week, month**: Payment by the job or on straight commission generally indicates an independent contractor relationship, while payment by the hour, week, or month more likely points to an employer-employee relationship.

13. **Payment of business and/or traveling expenses**: Payment of business expenses generally indicates an employer-employee relationship.

14. **Furnishing of tools and materials**: An employer's furnishing of tools, materials, and other equipment indicates an employer-employee relationship.

15. **Significant investment**: If the worker invests in facilities that are not typically maintained by employees, an independent contractor relationship is indicated. Lack of investment in facilities indicates dependence on the employer.

16. **Realization of profit or loss**: A worker who can realize a profit or suffer a loss as a result of his or her services (due to significant investment or liability for expenses) is generally an independent contractor.

17. **Working for more than one firm at a time**: If a worker performs services for multiple employers at the same time, this indicates that the worker is an independent contractor.

18. **Making service available to general public**: The fact that a worker regularly makes his or her services available to the general public indicates an independent contractor relationship.

19. **Right to discharge**: The right to discharge a worker indicates an employer-employee relationship.

20. **Right to terminate**: The worker's right to quit at any time without liability indicates an employer-employer relationship.[3]

More recently, the IRS has identified three categories of evidence that may be relevant: behavioral control (illustrating a right to direct or control how the task is performed), financial control (illustrating a right to direct or control how the business aspects of the job are handled), and the relationship of the parties (how the parties perceive their relationship).[4] Behavioral control includes instructions on when and where to work, what tools to use, where to purchase supplies or services, whether and which assistants may be utilized, whether prior approval is needed before taking action, and what routines, patterns, order, or sequence to follow.[5] The

[3] *Id.*

[4] Department of the Treasury, Internal Revenue Service, *Independent Contractor or Employee*? Training Materials, Course 3320-102 (10-96), at 2-7.

[5] *Id.* at 2-9-10.

more detailed the instructions, the more likely that an employer-employee relationship exists. Financial control factors include whether the worker has made a significant investment in the business, whether expenses are reimbursed, the opportunity for profit or loss, the method of payment, and whether the services are available to others.[6] Factors relevant to the relationship of the parties include their intent as expressed in a written contract, whether a W-2 form is filed, whether the worker is incorporated, the receipt of employee benefits, the manner in which the relationship may be terminated, and the expected duration of the relationship.[7]

Notwithstanding the above, the Internal Revenue Code specifies that direct sellers and licensed real estate agents are treated for all tax purposes as non-employees, provided that substantially all payments for their services as direct sellers or real estate agents are directly related to sales or other output, rather than to the number of hours worked, and their services are performed under a written contract providing that they will not be treated as employees for federal tax purposes.[8]

An employer who fails to withhold and pay employee income and social security ("FICA") taxes because of a misclassification error must pay a civil penalty equal to 1.5 percent of the employee's taxable wages and 20 percent of the employee's FICA tax not withheld.[9] And, any person who willfully fails to collect, account for, and pay over income and FICA tax faces

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[6] *Id.* at 2-16-20.

[7] *Id.* at 2-22-28.

[8] 26 U.S.C. § 3508.

[9] 26 U.S.C. § 3509.

criminal prosecution with penalties of an additional $10,000 per violation and up to five years in prison.[10]

Section 530 of the Revenue Act of 1978 creates a "safe harbor" permitting an employer to treat a worker as an independent contractor for employment tax purposes, regardless of the worker's actual status under the common law test, if certain requirements are met.[11] In order to qualify for section 530 relief, an employer must have:

(1) consistently treated the workers (and similarly situated workers) as independent contractors;

(2) complied with Form 1099 reporting requirements with respect to the tax years at issue; and

(3) had a reasonable basis for treating the workers as independent contractors.[12]

There are four categories of authority that may be relied upon as a "reasonable basis":

(1) federal judicial precedent or administrative rulings including published revenue rulings, and technical advice memoranda or private letter rulings *issued to that employer*;

(2) prior audits of the taxpayer;

(3) long-standing (at least 10 years) industry custom or practice in a significant segment (25%) of the industry; and

(4) other reasonable bases such as reliance on advice provided by an accountant or attorney when the treatment of the workers as independent contractors began.[13]

B. <u>The Economic Realities Test</u>

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[10] 26 U.S.C. § 7202.

[11] National Association of Tax Reporting and Professional Management, "*Section 530: Its History and Application in Light of the Federal Definition of the Employer-Employee Relationship for Federal Tax Purposes*," (February 2009), at 6.

[12] *Id.*

[13] *Id.* at 7-9.

A number of courts have employed the "economic realities" test when determining whether workers are employees covered by federal statutes such as the FLSA. For example, in *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2nd Cir. 1988), the Second Circuit Court of Appeals adopted the reasoning of the United States Supreme Court in *United States v. Silk*, 331 U.S. 704 (1947) and listed the following "economic realities" factors:

(1) the degree of control exercised by the employer over the workers;

(2) the workers' opportunity for profit or loss and their investment in the business;

(3) the degree of skill and independent initiative required to perform the work;

(4) the permanence or duration of the working relationship; and

(5) the extent to which the work is an integral part of the employer's business.

Courts in other circuits have also used the "economic realities" test in the FLSA context. *See, e.g., Martin v. Selker Brothers, Inc*., 949 F.2d 1286 (3rd Cir. 1991) (gas station operators held to be employees under economic realities test); *Schultz v. Capital International Security, Inc*., 466 F.3d 298 (4th Cir. 2006) (security agents held to be employees under economic realities test); *Thibault v. BellSouth Telecommunications, Inc*., 612 F.3d 843 (5th Cir. 2010) (splicer held to be independent contractor under economic realities test); *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) (migrant pickle harvesters held to be employees under economic reality test); *Baker v. Flint Engineering & Construction Co.*, 137 F.3d 1436 (10th Cir. 1998) (rig welders held to be employees under the economic realities test).

C. The Common Law Agency Test

The NLRB and the courts use the ten-part "common law agency" test to determine whether a worker is an employee subject to the NLRA. This test includes the following factors:

(1) The extent of control which . . . the [employer] may exercise over the details of the work;

(2) Whether or not the [individual] is engaged in a distinct occupation or business;

(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(4) The skill required in the particular occupation;

(5) Whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work;

(6) The length of time for which the person is employed;

(7) The method of payment, whether by the time or by the job;

(8) Whether or not the work is a part of the regular business of the employer;

(9) Whether or not the parties believe they are creating the relation of [employer and employee]; and

(10) Whether the principal is or is not in the business.

NLRB v. CSS Healthcare Services, Inc., 190 L.R.R.M. 2745 (11th Cir. 2011) (citing Restatement (Second) of Agency § 220 (1958)). *See also FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (applying common law agency test to determine whether worker properly classified as employee or independent contractor). Other courts have applied the common law agency test to claims asserted under Title VII, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA"). *See, e.g., Salamon v. Our Lady of Victory Hosp*., 514 F.3d 217 (2nd Cir. 2008) (Title VII); *Speen v. Crown Clothing Corp*., 102 F.3d 625 (1st Cir. 1996) (ADEA); *Attis v. Solow Realty Dev. Co*., 522 F. Supp. 2d 623 (S.D.N.Y. 2007) (ADA).

D. <u>Tests Used Under State Workers Compensation Laws</u>

The criteria used to determine employment status (and coverage) under state workers compensation laws vary substantially. The following standards are commonly used, although no state uses all of them and the language employed by each state may differ:

(1) The right to control the means and the method by which the work is done;

(2) The right to terminate the relationship without liability;

(3) The existence of a contract between the worker and the hiring entity and the terms of that contract;

(4) The method of payment, whether by time, job, piece, or other unit of measurement;

(5) Control over the hours of work;

(6) The furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;

(7) Whether the worker is engaged in a distinct occupation or business;

(8) The skill required in a particular occupation;

(9) Whether the worker's business or occupation is typically of an independent nature;

(10) Whether the worker hires others;

(11) Whether the worker carries his or her own workers' compensation policy;

(12) Whether the worker pays taxes as a business and has a Federal Employer Identification Number;

(13) Whether the worker maintains a separate office and incurs business-related expenses;

(14) The number of different hiring entities for whom the worker performs services;

(15) Whether the worker can realize a profit or suffer a loss;

(16) Whether the work is an integral part of the regular business of the hiring entity;

(17) Whether the worker can refuse to perform tasks without penalty;

(18) Whether the worker holds a state license for the type of work performed;

(19) The length of time for which the person is hired.[14]

State regulatory schemes may be "bright line" systems which require that a specific and binding set of criteria be proven to gain independent contractor status; "weight of evidence" systems where a number of criteria are considered and balanced to determine whether a particular party is an independent contractor; or a hybrid between the two.[15] Most states also have specific carve outs for particular industries or professions such as landscape contractors (Oregon), loggers (Maine), ministers, day care workers, and other charitable employment (Hawaii), and volunteers at ski resorts (Colorado).[16]

E. The ABC Test for Unemployment Compensation Coverage

The majority of states use some version of the "ABC" test to determine whether an individual is an employee or an independent contractor for the purpose of determining eligibility for unemployment benefits.[17] Under this test, a worker is classified as an employee unless *each* of the following three criteria ("A, B, and C") are satisfied:

(A) The worker is free from control or direction in the performance of the work under the contract of service and in fact;

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[14] NAIC/IAIABC Joint Working Group of the Workers' Compensation (C) Task Force, "*An Overview of Workers' Compensation Independent Contractor Regulatory Approaches*," (Oct. 24, 2008), at 7-8.

[15] *Id*. at 8.

[16] *Id*. at 19.

[17] U.S. Dept. of Labor, Employment and Training Administration, *Comparison of State Unemployment Laws*, (Jan. 1, 2011), at 1-5.

(B) The service is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed; and

(C) The individual is customarily engaged in an independent trade, occupation, profession, or business.[18]

Most states follow the exclusions set forth in the Federal Unemployment Tax Act ("FUTA"). Other positions commonly excluded from coverage under state unemployment statutes include: insurance and real estate agents on commission, casual labor not in the course of the employer's business, part-time service for non-profit organizations exempt from federal income tax, service for relatives, and "work study" by students for an educational institution.[19]

III. TEN QUESTIONS TO HELP COMPANIES MAKE THE RIGHT CLASSIFICATION DECISIONS.

As noted above, there is no single test that can determine whether a worker is properly classified as an independent contractor. There are, however, recurring themes that run through all of the tests such as the parties' intent as documented by written agreements and the submission of consistent tax documents to the IRS and state tax authorities; the level of control that the employer asserts over the means and method of performing the work; whether the worker and the work are integrated into the employer's core business; and the level of the worker's dependence on a particular employer for his or her livelihood. These broad principles lead to specific questions that employers can ask to determine whether they are at risk of a misclassification claim:

A. Have All Contractors Signed Written Independent Contractor Agreements, and Do They Receive a Form 1099?

[18] *Id.*

[19] *Id.* at 1-9-10.

While not controlling, the existence of a written independent contractor agreement is evidence of the parties' intent. Likewise, the absence of such an agreement will likely be construed against such a finding. Every contractor paid $600 or more in a year must receive a Form 1099. While it seems obvious that a Form W-2 is the death knell to a claim of independent contractor status, providing no form at all is almost equally bad.

B. Are the Contractor's Duties Integrated with Core Business Operations, or Does He or She Perform Non-essential Business Activities?

The more peripheral the contractor's tasks, the most likely that an independent contractor classification will be upheld. Conversely, if the contractor is performing key business functions, he or she is likely to be re-classified as an employee.

C. Must the contractor's services be performed personally?

As the IRS noted in 1987, an employer who requires that services be performed personally is presumably interested in the methods used to do the work as well as the results, giving rise to the presumption that an employment relationship exists.

D. Must the contractor's services be performed on-site, or during specific hours?

An employer who regulates the place and time that services are performed is exerting control over the means and manner of performance, not just the outcome. This is a hallmark of an employment relationship.

E. Does the contractor perform full-time services to only one company, or work for other companies also?

Although not dispositive, the fact that a contractor has numerous clients and does not work for any one client on a full-time basis, indicates a lack of dependence on any single employer.

F. Does the contractor receive employee benefits such as insurance coverage or paid time off?

The receipt of employee benefits strongly indicates an employment relationship.

G. Does the contractor do the same job as or work side by side with company employees?

Workers who perform the same tasks should be classified in the same manner. If some are treated as employees, they all should be. Similarly, an employer whose "contractors" work side by side with employees is at risk, and should carefully evaluate the reasons for the differing treatment of these workers.

H. Does the contractor have a supervisor who directs his or her work, or does the contractor supervise company employees?

The right to supervise and control indicates an employment relationship. Contractors typically do not require supervision, nor are they asked to supervise employees.

I. Is there a non-compete agreement that would prevent the contractor from providing services to other employers?

Confidentiality, customer solicitation, and employee recruitment provisions are acceptable, although they should not be utilized indiscriminately. A non-compete provision, however, is inconsistent with the freedom that contractors typically enjoy to work when, where, and for whom they choose.

J. Is the contractor expected to attend company meetings or periodic or ongoing training as to procedures and methods to be used?

Contractors should not require training, particularly as to procedures and methods to be used. The focus should be on the end result, not the means used to attain it. Likewise, it should

not be necessary for contractors to attend company meetings in order to effectively perform their assigned tasks.

IV. CONCLUSION

It is not always easy to determine whether a worker is properly classified as an independent contractor. There are a myriad of varying guidelines promulgated by courts and government agencies, and it is entirely possible for a worker to be an independent contractor for some purposes (such as federal taxation) but an employee for others (such as state unemployment benefits). Careful employers (and their attorneys) must determine which tests apply in their jurisdiction, and analyze the relationship between contractor and employer under each one.

Holland & Knight

ALERT

Worker Misclassification Getting More Attention

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Steven L. "Steve" Gillman

There are tax and financial advantages for businesses that hire independent contractors as opposed to employees. These businesses do not pay FICA for the contractors, withhold taxes, pay unemployment taxes or pay for worker's compensation coverage. At the same time, these workers are not eligible for minimum wage and overtime, unemployment, employer-provided health insurance and retirement plans, and other employer benefits. Also, these workers cannot join together for union representation and cannot avail themselves of the myriad protections provided employees by federal, state and local laws, including employment discrimination laws. But the consequences of misclassifying employees as independent contractors are potentially huge, including liability for taxes, interest and penalties; unpaid overtime and minimum wages; and liquidated damages and unpaid benefits.

State and federal government efforts to uncover misclassified workers continue to grow, and plaintiff class action/collective action lawyers continue to target employers who incorrectly classify workers as independent contractors. This article addresses the current state of affairs.[1]

The Controlling Legal Standard

The controlling legal standard is well known, albeit somewhat confusing due to the competing tests being applied. The Internal Revenue Service (IRS) and the courts weigh a host of factors in determining whether the worker is an independent contractor or employee.[2] The common law agency test focuses primarily on the employer's right to control the manner and means by which the work is accomplished. The economic realities test focuses on the realities of the entire relationship. A hybrid test combines the two.[3] Fundamentally, all tests overlap to a significant extent and are functionally equivalent, or virtually so. The tipping point is invariably the employer's right to control the manner and means of the worker's performance.

State Efforts

Meanwhile, the pressing need to find new revenue has caused a frenzy of activity on the state and federal level to identify employers who misclassify workers. The states have established task forces, commissions, attorney general initiatives and investigations – as well as taken other measures – to identify these employers in an effort to collect taxes and unpaid wages. A few examples on the state level make the point. A New York Joint Enforcement Task Force on employer misclassification has conducted roughly 70 sweeps and identified 35,000 misclassified workers, $407 million in unreported taxes, $13 million in unemployment taxes due, and $14 million in unpaid wages. Many states, including Illinois, have enacted measures to discourage and prevent misclassification of construction workers, an industry where violations are rampant and difficult to detect.

Recent initiatives on the state level include: a revision in Connecticut law to make each day that an employer knowingly or intentionally misclassifies an employee a separate offense, subject to civil penalties up to $1,000 per day; a new section in Wisconsin's employee classification laws requiring

employers to maintain records of all employees and their hours, wages, and deductions and offer worker's compensation coverage for employees; and an executive order issued by New Hampshire's Governor instructing state departments with authority in this area to coordinate their respective resources in order to identify and investigate cases of misclassification and to develop strategies to eliminate misclassification.

The efforts on the part of state attorneys general to pursue claims against Federal Express for misclassifying drivers are well publicized. At least 10 state attorneys general are pursuing claims, and others, like Massachusetts, have reached multimillion-dollar settlements.[4]

Federal Efforts

On the federal level, for the fiscal year 2012 budget the Obama administration has proposed to allocate $46 million to combat employer misclassification of employees as independent contractors. Fifteen million would be allotted to hire new personnel within DOL's Wage and Hour Division to investigate misclassification, and $25 million would be available to states in grants to conduct audits.

The IRS began its National Research Program in 2010 to conduct extensive employment tax examinations of 2,000 businesses each year for three years. In 2011, the National Research Program is continuing its examinations, which focus primarily on worker classification, payment of employment taxes, and treatment of employee benefit plans.

In 2010, two bills were introduced in Congress for the purpose of curtailing misclassification of employees as independent contractors:

- **The Employee Misclassification Prevention Act** (H.R. 5107, S.3254) targets abuses by establishing anti-retaliation protections for workers and incentives for whistleblowing, plus increasing the civil penalties for misclassification.
- **The Fair Playing Field Act** (H.R. 6128, S.3786) closes the "loophole" known as the Safe Harbor provision, which allows businesses to classify workers as independent contractors as long as there is a "legal basis" for the classification and the business has consistently treated such employees as independent contractors by reporting their compensation on a Form 1099. A provision of this bill would require businesses which hire independent contractors on a regular ongoing basis to provide a written statement to each contractor that informs them of the federal tax obligations of independent contractors, employment practices that do not cover independent contractors, and the right of any independent contractor to request a status determination by the IRS.

Most likely, one or both of these bills will be reintroduced in March 2011. It is doubtful that either bill will pass in the current political climate, but there is no question that the DOL and the IRS are cracking down on businesses. Overall, there is increased collaboration between the DOL and the IRS, as well as the sharing of tax information between the IRS and most states.

Litigation

The wildcard in 2011 and future years is the plaintiff class action/collective action bar. While we continue to see, as we have for years, a steady docket of cases filed under the Fair Labor Standards Act for overtime pay based upon a worker's exempt or non-exempt status, or cases brought by non-exempt employees who claim they are performing work off the clock, a relatively modest number of cases have been filed on behalf of workers who claim they have been cheated out of being paid minimum wage or overtime by being improperly classified as independent contractors. Federal Express is currently defending a considerable number of these cases nationwide.

A huge potential liability for employers is the denial of employee benefits to a class of misclassified

workers. The seminal case is *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1995) ("*Vizcaino I*"), aff'd, 120 F.3d 1006 (9th Cir. 1997) (en banc) ("*Vizcaino II*"); 290 F.3d 1043 (9th Cir. 2002) ("*Vizcaino III*"). In *Vizcaino I*, the court held that a class of workers was entitled to participate in Microsoft's qualified Employee Stock Purchase Plan (ESPP) even though they had been told when hired that they were independent contractors and ineligible for such benefits. Microsoft had hired them as "freelancers" or "temps." The class members had even signed written agreements disclaiming any entitlement to these benefits. The court found that the class members met the definition of employee under the common law *and* the Internal Revenue Code required that the ESPP permit all common law employees to participate. The fact that the class members were "leased" from an employment agency was deemed immaterial – class members were afforded the same options to require stock as all other Microsoft employees.

Considerations for Employers

Employers must be mindful of the ramifications of misclassifying workers. Again, government agencies, departments and officials have become significantly more aware of the misclassification problem. Legislation and initiatives have been launched on the federal and state level to uncover misclassification cases and collect unpaid taxes and other monies. And we can expect to see an increase in lawsuits filed by the plaintiff class action/collective action bar as the misclassification issue continues to gain attention.

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[1] More on worker misclassification can be found in a May 21, 2008 Holland & Knight Labor, Employment and Benefits Alert by the author titled, "Independent Contractor or Employee?"

[2] These factors are covered in the traditional "20 factor test" used by the IRS. The IRS has simplified this test by consolidating the 20 factors into 11 considerations, which are organized into three main groups: behavioral control, financial control, and the type of relationship between the parties. See the Department of Treasury Internal Revenue Service Publication 15-A, "Employer's Supplemental Tax Guide" (2008) for a more complete description of the IRS test. In *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), the United States Supreme Court distilled the 20 factors into a 12-factor test. While commentators complain that the lack of a single standardized test for determining who is a contractor means that a worker could be an independent contractor under some laws, but not others, the tests are virtually indistinguishable – the degree of control exerted by the employer over the worker is typically determinative. Nevertheless, a litigant must be sure to advocate the right test under the statute in question. The class action suit, *Anfinson v. FedEx Ground Package System, Inc.*, involved 320 drivers in Washington state who sought damages for non-payment of overtime and reimbursement of uniform expenses. The state court jury ruled in favor of FedEx in finding that the drivers were properly classified as independent contractors. On appeal, the court found that the jury instructions incorrectly recited the factors underlying the common law right to control test as opposed to the economic realities test required by the state's wage and hour law and the FLSA. *Anfinson v. FedEx Ground System, Inc.*, 244 P3d 32 (Wash. App. 2010). While the court acknowledged that both tests considered the employer's right to control the worker's performance, the court presumed that the trial court's instructions were prejudicial because the factors relied upon by the two tests are not identical. Yet the court's recitation of the factors for each test showed substantial overlap.

[3] For a succinct discussion of these tests see *Murray v. Principal Financial Group*, 613 F3d 943 (9th Cir. 2010).

[4] Public officials are not unanimous on the need to devote resources to uncovering worker misclassification. In Maine, Governor Paul LePage (R) has issued an executive order abolishing a two-year-old task force set up to study employee misclassification. LePage, who has stressed the need to free business from excess regulation, called the task force an extra layer of bureaucracy.

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