DETERMINING EMPLOYEMNT RELATIONSHIPS UNDER FEDERAL AND STATE LAW: WHY SHOULD EMPLOYERS WORRY?

Calvasina, Gerald E.
Southern Utah University

Calvasina, Richard V.
University of West Florida

Calvasina, Eugene J.
Southern University

ABSTRACT
Proper determination of an employment relationship has become a perennial problem for employers, employees, and the United States government. The extent of the problem, according to a recent United States Government Accountability Office (GAO) report while "unknown", it is estimated that it "could be a significant problem with adverse consequences" (GAO, 2009). The nature of the problem from the perspective of the United States is the extent to which misclassification of an employee results in unpaid taxes. Employers are not required to match an independent contractor's Social Security and Medicare tax payments. For employers, while "misclassification itself is not a violation of law, it is often associated with labor and tax law violations" which may result in significant financial penalties and litigation expenses (GAO, 2009). For employees, misclassification may result in not being paid properly and limiting their eligibility for unemployment compensation and workers' compensation benefits. In recent years, a pronounced rise in these types of complaints to federal and state regulators frequently led to adverse employment consequences for employees who complained and ultimately to litigation. In addition to gaining the attention of federal legislators and agencies, in recent years, a number of state legislatures have enacted legislation attempting to deal with the proper determination of the employment relationship. The purpose of this study is to examine the nature of the problems, recent initiatives at the federal and state levels of government, and identify suggestions for employers to mitigate the problems associated with the proper determination of an employment relationship.

INTRODUCTION
Proper determination of an employment relationship has become a perennial problem for employers, employees, and the United States government. The extent of this problem, according to a recent United

States Government Accountability Office (GAO) report while "unknown", it is estimated to "be a significant problem with adverse consequences" (GAO, 2009). The GAO report that will be referenced extensively in this study was generated at the request of four influential committee chairs in the U. S. Congress. The committee chairs that requested the report were the Chair of the Senate Committee on Health, Education, Labor, and Pensions, Edward M. Kennedy, the Chair of the Subcommittee on Financial Services and General Government Committee on Appropriations, Senator Richard J. Durbin, the Chairman of the House of Representatives Subcommittee on Health, Employment, Labor, and Pensions Rob Andrews, and the Chairwoman of the House Subcommittee on Workforce Protections Committee on Education and Labor Lynn Woolsey. In its analysis of the problem the GAO focused on the improper classification of a worker as being an independent contractor instead of being an employee (GAO, 2009). Additionally, the GAO characterized the nature of the problem with respect to its impact on the US Government, employers, and employees.

From the perspective of the United States, an important effect is the extent to which misclassification of an employee results in unpaid taxes. Employers are not required to match an independent contractor's Social Security and Medicare tax payments. For employers, while "misclassification itself is not a violation of law, it is often associated with labor and tax law violations" which may result in significant financial penalties and litigation expenses (GAO, 2009). For employees, misclassification may result in not being paid properly, limiting their eligibility for unemployment compensation and workers' compensation benefits and making them ineligible for "numerous rights and privileges provided to employees by federal workforce protection laws"(GAO, 2009). In recent years, a pronounced rise in these types of complaints to federal and state regulators frequently led to adverse employment consequences for employees who complained and ultimately to litigation. In addition to gaining the attention of federal regulators and legislators, in recent years, a number of state legislatures have enacted legislation attempting to deal with the proper determination of the employment relationship. The purpose of this study is to examine the nature of the problems, recent initiatives at the federal and state levels of government, and to identify suggestions for employers to mitigate the problems associated with the proper determination of an employment relationship.

NATURE OF THE PROBLEM

Employers utilize independent contractors for a variety of reasons. The most widely hailed reason for their use is the cost savings associated with their use on a variety of fronts. For example, one estimate is that "businesses can save as much as 30 percent of payroll – avoiding unemployment insurance and workers' compensation payments, as well as the employer's share of payroll withholding" (Gram, 2010). At a 2007 hearing of the House Education and Labor Committee on the use of independent contractors, witnesses were quoted as reporting that "employee misclassification is rampant", "implying that some employers intentionally label certain workers as independent contractors to save money on pay and benefits (SHRM, 2007). For employers, a reoccurring theme in practitioner publications with respect to the determination of the employment relationship is the complexity of and the variety of federal and state laws and regulations related to the determination of independent contractor status. Employers claim that the primary rational for the use of independent contractors is "to augment their regular workforce" providing them with trained, non-employee workers with specialized skills who can provide needed services on a short-term or long-term basis" (Shea, 2005). This type of flexibility is believed to be critical for companies to help manage costs and "stay flexible in an increasingly tough and competitive economy" Gram, 2010). The GAO report, citing Bureau of Labor Statistics estimates, noted that "approximately 10.3 million workers, or 7.4 percent of the employed workforce, were classified as independent contractors in the united States in 2005" GAO, 2009).

Table 1
Key Laws and Regulations Impacting the Determination of Employment Relationship

Fair Labor Standards Act (FLSA)
The National Labor Relations Act (NLRA)
Internal Revenue Service (IRS) Regulations
A wide variety of state laws and regulations

In addition to the complexity of the laws and regulations involved in making the actual determination of employment status, there is an even larger body of law related to the impact of proper determination of the employment relationship. In Table 2, statutes under which employers commonly incur obligations depending on a worker's status as an employee or an independent contractor, and some potential liabilities for misclassification are presented.

Table 2
Statutes Impacting Determination of Employment Status

Statute	Test Used to Determine Status	Potential Liability for Mischaracterization
Federal Tax Law	IRS Control Test	Unpaid taxes, penalties and interest.
FLSA	Economic Reality Test	Unpaid overtime or minimum Wages; liquidated damages, fines, and criminal sanctions.
Federal Anti-discrimination (Title VII, ADEA, ADA,EPA)	Generally, economic reality; Sometimes both combined with IRS control test.	Back pay, front pay, equitable relief, and attorney's fees.
Employment discrimination (federal contractors)	Common law/IRS control test, economic reality test.	Office of Federal Contract Compliance Program can bar company from obtaining federal contracts.
NLRA	Common law/IRS Control test.	Reinstatement, back pay, new bargaining unit election and expenses, cease and desist orders; other equitable relief.
Immigration status: I-9 Forms	Common law/IRS control test	Civil and criminal penalties.
Worker Adjustment and Retraining Notification Act ("WARN")	Common law/IRS control test	Fines for failure to give proper notice to employees and to local government.
Employee Retirement Income Security Act ("ERISA"): employee pension and welfare benefits under the law		Liability for benefits not received, equitable relief, attorney's fees and costs.

Source: McDermott, (1999/2006).

Employer struggles with the determination of employment status have been a problem for a number of years in a variety of industries. From high-tech to construction employers of all types and sizes have encountered problems with this issue. High profile cases at Microsoft and Time Warner have attracted the most attention to this issue. The Vizcainio v. Microsoft case, which began after an IRS audit in 1986, eventually settled for an estimated $97 million in 2000 (Virgin, 2000). More recently, high profile firms like FedEx Ground, Comcast and Target have been sued for misclassification issues and attracted additional attention to this issue (Gram, 2010). At the state level, from California to Florida and points in between, a variety of firms have seen litigation initiated by state attorney generals and grand juries alleging violation of state independent contractor laws (Gram, 2010). In 2009, Excell Cleaning and Building Services and M.O Restaurant Cleaning found themselves on the losing end of a $13.6 million judgment after being sued by the California attorney general for misclassifying employees. The action was characterized as "a wake-up call to every employer in this state" by Labor Commissioner Angela Bradstreet (San Jose Mercury News, 2010).

For the federal government, the nature of the problem is primarily associated with revenue collection and the perceived rampant violation of independent contractor regulations by employers. One reported estimate of the payroll tax and self-employment tax gap is "more than $200 billion annually (Fuller & Holmes, 2010). According to the GAO report, the last time the IRS published a comprehensive estimate of the revenue impact of misclassification was for tax year 1984. In that report, the IRS estimated that nationally about 15 percent of employers misclassified a total of 3.4 million employees as independent contractors, resulting in an estimated revenue loss of $1.6 billion (in 1984 dollars) (GAO, 2009). The GAO estimated that nearly 60 percent of the revenue loss was "attributable to the misclassified individuals failing to report and pay income taxes on compensation they received as misclassified independent contractors" with the remaining associated with unpaid Social Security, Medicare, and unemployment taxes by employers (GAO, 2009). A 2000 Department of Labor (DOL) study cited in the GAO report estimated a potential $200 million annual loss in unemployment taxes across all states as a result of only 1 percent of all employees being misclassified (GAO, 2009). State audits of the number of misclassified employees have also shown a steady increase since 2000, with the total number of employees misclassified increasing from 106,239 in 2000 to 151,039 in 2007 (GAO, 2009).

CURRENT FEDERAL INITIATIVES

There are four federal initiatives that employers should be following related to the proper classification of employees as independent contractors. In Congress, two pieces of legislation have been introduced that most employer advocates believe would further complicate the process of properly determining the employment status of individuals and increase the penalties associated with misclassification. At the administrative level of government, the IRS and the DOL are both involved in efforts to reign in employers who misclassify employees. In September of 2010, The Fair Playing Field Act of 2010 (H.R. 6128 and S. 3786) was introduced and would "end the moratorium on Internal Revenue Service guidance addressing worker classification" (Smith, 2010). The Employee Misclassification Prevention Act (H.R. 5107 and S. 3254) was introduced in April of 2010 and "focuses on wage and hour issues associated with worker misclassification" (Smith, 2010).

Table 3 Key Provisions of the Employee Misclassification Prevention Act

- Requiring that employers keep records reflecting the correct status of each worker as an employee or nonemployee and stating expressly that employers violate the FLSA when they misclassify workers.
- Increasing penalties on employers who misclassify their employees and are found to have violated employees' overtime or minimum wage rights. Civil penalties would be imposed, up to $1,100 per employee for first-time violators, and up to $5,000 per employee for repeat or willful violators.
- Allowing double liquidated damages for employers that fail to accurately classify an individual as

an employee and violate the minimum wage or maximum hour provisions of FLSA.
- Requiring employers to notify workers in writing of their classification as an employee or nonemployee.
- Creating an official Department of Labor (DOL) "employee rights web site," explaining that employees may have additional or greater rights under state or local laws and how employees may obtain additional information about their rights under state or local laws (the web site may provide a link to permit individuals to file complaints online with the Wage and Hour Division).
- Providing protections to workers who are discriminated against because they have sought to be accurately classified.
- Mandating that states report quarterly to the DOL the results of state auditing and investigative procedures with respect to identifying employers that may have excluded employees from unemployment compensation coverage.
- Directing states to strengthen their own penalties for worker misclassification.
- Permitting the Wage and Hour Division, other administrations of DOL, and the Internal Revenue Service to refer incidents of misclassification to one another.
- Directing the DOL to perform targeted audits focusing on employers in industries that frequently misclassify employees.

Source: (Lewis, 2010).

According to sponsors of the Fair Playing Field Act, the legislation would close "the so-called loophole" created by Section 530 of the Revenue Act of 1978 (Reibstein, Petkun, & Rudolph, 2010, A). Section 530 "currently affords businesses a safe harbor to treat workers as independent contractors for employment tax purposes if the company has had a reasonable basis for such treatment and has consistently treated such employees as independent contractors by reporting their compensation on form 1099s" (Reibstein, Petkun, & Rudolph, 2010, A). This "so-called loophole" enabled FedEx to escape $319 million in a back tax assessment related to litigation involving the classification of its Ground Division Drivers as independent contractors (Reibstein, Petkun, & Rudolph, 2010, A). Other major requirements associated with the Fair Playing Field Act are contained in Table 4.

Table 4 Key Provisions of the Fair Playing Field Act

- eliminate the reduced penalty provisions of the Tax Code for failure to withhold income taxes and the employee's share of FICA taxes in cases in which the business did not have a reasonable basis for treating a worker as an independent contractor
- require businesses who use independent contractors "on a regular and ongoing basis" to provide them with a written statement informing them of their federal tax obligations, notifying them of the employment law protections that do not apply to them, and telling them how they can seek a determination of their status from the IRS, and
- exclude certain skilled workers (engineers, designers, drafters, computer programmers, systems analysts, and the like), who were *not* eligible for the safe-harbor protection of Section 530, from the prohibition on retroactive tax assessments.

Source: (Reibstein, Petkun, & Rudolph, 2010, A).

U.S. Secretary of Labor Hilda Solis made it very clear in announcing her agency's agenda for fiscal year 2011 that much of the additional funding received by the DOL would be directed at worker protection programs including employees misclassified as independent contractors (Kaplan, 2010). In her announcement, Solis noted that "when employees are misclassified as independent contractors, they are deprived of benefits and protections to which they are legally entitled…[they] do not receive overtime and are ineligible to receive unemployment benefits" (Kaplan, 2010). For fiscal year 2011, the DOL's

budget includes $25 million for a "Misclassification Initiative" that will target misclassification. The initiative will also include 100 additional enforcement personnel and competitive grants to boost states' incentives and capacity to address the problem (Kaplan, 2010). In addition to devoting more resources to address misclassification, the Wage and Hour Division (WHD) of the DOL posted a Notice of Proposed Rule Making (NPRM) related to this issue. The proposed rule would require covered employers to notify workers of their rights under the FLSA, and to provide information regarding hours worked and wage computation. In addition, any employers that seek to exclude workers from the FLSA's coverage will be required to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to WHD enforcement personnel who might request it (DOL, 2010, A). In addition to additional resources and rules, the DOL's Wage and Hour Division will be a key partner in a joint Department of Treasury-Department of Labor initiatives to detect and deter the misclassification of employees as independent contractors and to strengthen and coordinate federal and state efforts to enforce labor law violations arising from misclassification (DOL 2010, B). In WHD's strategic plan, the agency presented its customer-service strategy to secure "sustained compliance" with wage and hour regulations. An important component of this strategy is the "We Can Help" campaign designed to expand public awareness and outreach to workers. The campaign will target individuals working in construction, janitorial work, hotel/motel services, food services, and home health care (DOL 2010, B). WHD also intends to increase the involvement of workers and community organizations to help identify and report alleged workplace violations (DOL, 2010, B).

In November of 2009, the Internal Revenue Service (IRS) announced that it would initiate its first Employment Tax National Research Project in 25 years (IRS, 2009). The IRS announced two major goals associated with the project:

Table 5: Main goals for Employment Tax National Research Project

- To secure statistically valid information for computing the Employment Tax Gap, and
- To determine compliance characteristics so IRS can focus on the most noncompliant employment tax areas.

Source: (IRS, 2009).

The focus of the project is to study payroll taxes, fringe benefits, independent contractors, expense reimbursements and other related payroll issues (Fuller & Holmes, 2010). The IRS announced that it will randomly select 2,000 taxpayers each year for the next three years for what they have described "will be comprehensive in scope" (IRS, 2009). Another related purpose of this project is to provide the IRS with additional information regarding the "employment tax gap", the difference between the amounts that taxpayers should pay, and the amounts that they actually pay. The gap was estimated to be $290 billion for the year 2001 with much of the gap due to under-reporting of income (Going Concern, 2010). A part of this gap is believed to be associated with employees misclassified as independent contractors.

STATE INITIATIVES

In recent years, an increasing number of states have initiated legislation to address the misclassification of employees as independent contractors and the resulting tax revenue losses. At least eighteen states have either enacted new laws or strengthened laws on the books with respect to employee misclassification (See Table 6).

Table 6: State Independent Contractor Laws and Selected Bills

- *CO: Misclassification of Employees as Independent Contractors Law for Purposes of the Colorado Employment Security Act (enacted 6/09)*
- *CT: Act Concerning Employee Misclassification (eff. 7/1/08)*
- *CT: Act Implementing the Recommendations of the Joint Enforcement Commission on Employee*

Misclassification (enacted May 5, 2010)
- *DE: Workplace Fraud Act (enacted 7/31/09)*
- *IL: Employee Classification Act (eff.1/1/08)*
- *IL: Wage Payment and Classification Act (amended 7/14/06)*
- *IN: Independent Contractor Information Sharing Law (eff. 7/1/09)*
- *MA: Independent Contractor Misclassification Law (enacted 1990, as amended 1992, 1993, 1998, 2004)*
- *MD: Workplace Fraud Act of 2009 (enacted May 7, 2009)*
- *ME: Act to Ensure that Construction Workers are Protected by Workers' Compensation (eff. 1/1/10)*
- *MN: Independent Contractor Law (eff. 7/1/08)*
- *NE: Employee Classification Act (enacted Apr. 13, 2010)*
- *NH: Act Relative to the Definition of Employee (eff. 1/1/08)*
- *NJ: Construction Industry Independent Contractor Act (enacted 7/13/07)*
- *NY: Construction Industry Fair Play Act (S 5847C) (A 8237A) (enacted 8/27/10)*
- *PA: Construction Workplace Misclassification Act (H 400) (enacted 10/13/10)*
- *UT: Independent Contractor Database Act (2008)*
- *UT: Amendments to Workers Compensation Laws Regarding Independent Contractor Misclassification (2008)*
- *VT: Act Related to Misclassification of Employees to Lower Premiums for Workers' Compensation and Unemployment Compensation (eff. 7/1/10)*
- *WA: Determination of Independent Contractor Status Law (enacted 3/20/08)*
- *WI: Worker Classification Compliance Law (eff. 1/1/11)*

Selected Bills

- *KS: Kansas's Misclassification of Employees Act (SB 229, HB 2281)*
- *KY: Kentucky's Misclassification of Employees in the Construction Industry (HB 392)*
- *MN: Minnesota's Act Relating to Providing Standard Definition of Independent Contractor (H.F. No. 1794)*
- *OH: Uniform Definition of Employee Act (H.B. No. 523)*
- *RI: Rhode Island's Public Works Law – Private Right of Action for Misclassification (2010 – S. 2375)*

Bills Passed But Vetoed

CA: California's Independent Contractor Advisor Law (SB 1583)

Source: Reibstein, Richard J., Petkun, Lisa B., & Rudolph, Andrew J. (2010, B).

In addition to the enactment of new laws regarding the use of independent contractors, a number of states have initiated investigations into specific industries and litigation regarding the misclassification of employees as independent contractors. The rationale for the interest at the state level in this issue is the same as the federal governments. In a 2007 study on the cost of worker misclassification in New York state, the researchers reported that the average annual underreported wages subject to unemployment insurance taxes during 2002-2005 amounted to 4,283,663,771.79 (Donahue, Lamare, & Kotler, 2007). The average annual unemployment insurance tax underreported in audited industries was $175,674,161.45 for the same period (Donahue, Lamare, & Kotler, 2007). The study also noted studies in other states where the estimated total tax loss due to misclassification was estimated to be as high as $7 billion in California and a study in Massachusetts estimated losses of $12.6 to $35 million to the state's unemployment insurance system (Donahue, Lamare, & Kotler, 2007). The Massachusetts study also

estimated $91 million in lower state income tax revenue and $91 million in unpaid workers' compensation premiums (Donahue, Lamare, & Kotler, 2007). New York, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, Rhode Island, Vermont, and Washington are members of a joint task force studying the misclassification problem (HR Specialist: New York Employment Law, 2010). While Microsoft was the poster boy for the misclassification issue through the 1990s, in recent years, FedEx Corporation has been the target of lawsuits from coast to coast with respect to employee misclassification. FedEx is currently involved in class action litigation involving over 25,000 individuals in cases dealing with the misclassification of its ground and home delivery drivers in 33 states (Stand Your Ground, 2010). Table 7 contains a list of states where complaints have been taken to court.

Table 7: State Complaints involving FedEx Corporation

Alabama	Montana
Arkansas	New Hampshire
California	New Jersey (Capers)
Colorado	New Jersey (Tofaute)
Florida	New York (Johnson)
Georgia	New York (Louzau)
Illinois	Ohio
Iowa	Oregon
Indiana	Pennsylvania (Hart)
Kansas	Pennsylvania (Willis)
Kentucky	Rhode Island
Louisiana	South Carolina
Massachusetts (Perry)	Tennessee
Massachusetts (Sheehan)	Texas
Michigan	Vermont
Minnesota	Virginia West Virginia
Mississippi	West Virginia (Orig.)
Missouri	Wisconsin

Source: Stand Your Ground (2010).

The efforts to address the impact the misclassification of employees as independent contractors from all levels of government in the United States appears to have generated wide spread bipartisan support. In part, this would appear to be due to the impact on tax revenues during a period of prolonged economic stress in the US. The 2010 mid-term elections may impact the momentum of proponents for more government intervention into this issue, but since the effort is not about increasing taxes, only enforcing tax liabilities already on the books, this may be an issue that will be able to garner bipartisan support. With 31 states and the U.S. Virgin Islands currently borrowing from the Federal Unemployment Account (FUA), pressure to increase tax revenues will certainly continue (NCSL, 2010).

Table 8
States Borrowing from Federal Unemployment Account, Balances and When they began Borrowing

State	Balance as of October 18, 2010	Began Borrowing
Alabama	$ 283,001,164.19	September, 2009
Arizona	$ 152,792,292.09	March, 2010
Arkansas	$ 330,853,383.31	March, 2009
California	$ 8,628,301,634.94	January, 2009
Colorado	$ 334,706,213.50	January, 2010
Connecticut	$ 498,452,705.05	October, 2009
Delaware	$ 18,924,005.48	March, 2010
Florida	$ 1,679,537,000.00	August, 2009

Georgia	$ 416,000,000.00	December, 2009
Idaho	$ 202,401,700.22	June, 2009
Illinois	$ 2,239,582,343.13	July, 2009
Indiana	$ 1,851,208,078.31	December, 2008
Kansas	$ 88,159,421.40	March, 2010
Kentucky	$ 795,100,000.00	January, 2009
Maryland	$ 133,840,764.71	February, 2010
Massachusetts	$ 387,313,005.04	February, 2010
Michigan	$ 3,814,145,999.11	September, 2006
Minnesota	$ 544,901,876.29	July, 2010
Missouri	$ 722,116,933.16	February, 2009
Nevada	$ 555,749,588.76	October, 2009
New Jersey	$ 1,749,563,533.38	March, 2009
New York	$ 3,176,873,427.71	January, 2009
North Carolina	$ 2,354,488,228.51	February, 2009
Ohio	$ 2,314,186,799.00	January, 2009
Pennsylvania	$ 3,008,614,960.83	March, 2009
Rhode Island	$ 225,472,937.00	March, 2009
South Carolina	$ 886,662,351.97	December, 2008
Texas	$ 1,584,771,537.31	July, 2009
Vermont	$ 32,657,064.94	March, 2010
Virgin Islands	$ 16,421,793.42	August, 2009
Virginia	$ 346,876,000.00	October, 2009
Wisconsin	$ 1,424,768,541.29	February, 2009
Total	$40,798,445,281.05	

Source: (NCSL 2010 and U.S. Department of Labor, Employment and Training Administration).

Future projections from the DOL are that as many as 40 unemployment insurance jurisdictions could have to borrow approximately $93 billion in federal loans for state trust funds by FY 2013 (DOL 2010, C). The DOL also estimates that because of the high volume of state loans and increased Extended Benefits payments, that additional borrowing from the general fund will be necessary. These advances must be repaid with interest, and neither of the accounts is projected to return to a net positive balance by 2015 (DOL 2010, C).

SUGGESTIONS FOR EMPLOYERS

While federal and state agencies have "historically" not cooperated with respect to this issue, given the current and projected economic conditions and the announced joint efforts coming from the DOL, the IRS, Congress, and state governments, a new day is about to dawn for employers (Keeley, Kuenn, & Reid, 2010). Those employers who are intent on "gaming the system" or following the philosophy that ignorance is bliss, may be in for a very unpleasant awakening (Smith, 2010). The literature continues to be consistent with respect to the rules associated with the determination as to who is and who is not an independent contractor. There will continue to be multiple tests employed by multiple federal and state agencies and courts. These rules will continue to be complex in nature and there is nothing being reported that indicates there are any initiatives to simplify the process. What is clear is that both federal and state governments are intent on collecting more of the estimated billions of dollars in lost revenue associated with the misclassification of employees as independent contractors. Federal and state regulators have made it clear that the construction industry will be a prime target in addition to janitorial, hospitality related, and home health care service employers (DOL 2010, C).

Given the current economic and political environment, employers should at a minimum make sure they know the basic rules associated with the proper classification of their employees. DOL Fact Sheet #13:

Employment Relationship Under the Fair Labor Standards Act (FLSA) is a good place to start (DOL 2010, D).

Table 9
Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA).

An employment relationship under the FLSA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act. In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.
The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:
1) The extent to which the services rendered are an integral part of the principal's business.

2) The permanency of the relationship.

3) The amount of the alleged contractor's investment in facilities and equipment.

4) The nature and degree of control by the principal.

5) The alleged contractor's opportunities for profit and loss.

6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

7) The degree of independent business organization and operation.
There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

Source: DOL, 2010, D).

Keeping in mind, that there are other rules and tests, Fact Sheet #13 should be a basic starting point given its impact on compliance with Federal minimum wage and overtime requirements. According to former acting WHD administrator Alex Passantino, while there are different tests, "ultimately whether someone should be classified as an independent contractor or employee usually boils down to the following:

Who controls the details of the work.
The extent to which the worker's business is entrepreneurial.
How the individual's work relates to the core of the company's business.
Who provides tools for the work.
The length of the contractual relationship.
How much independent skill the work requires.
Whether the work is by piece or job.
Whether the worker is paid by the hour or salary.
The intent of the parties in the work relationship.
Whether the work typically is performed in the industry by an independent contractor" (Smith, 2010).

Proactive steps that employers can take to facilitate proper classification of employees as independent contractors include developing formal policies and checklist to make sure all details regarding management of independent contractors are being handled properly (Bliss & Thornton, 2009). The use of written independent contractor agreements prepared by competent attorneys is also recommended (Bliss & Thornton, 2009). Regular review and audits of how the organization is actually making use of independent contractor relationships is also recommended (Willett, 2010). Self-audits in particular have been recommended to head off problems before a government agency knocks at the employer's door (Schleifer, 2006).

Given the current and projected state of the US economy, what has already happened at the state and federal level, and what may come from Congress, employers have plenty to be worried about. Stepped up enforcement, more litigation, bigger penalties, and higher cost of doing business are all possible. Knowledge of current rules, proactive human resource management practices, and efforts to prepare for what may be coming are critical for employers to address what lies ahead.

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