

AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR?

HOW TO DECIDE AND HOW TO HANDLE PAST MISCLASSIFICATIONS



Carol Merchant...

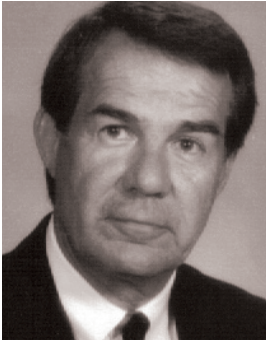
"The issue is complicated by the fact that each law has its own test of independent contractor status."

One of the biggest issues that employers face is determining whether a worker should be classified as an employee or can be paid as an independent contractor. Among the ramifications are whether there is an obligation to withhold payroll taxes, pay workers compensation and unemployment insurance and company benefits, and comply with numerous employment laws that are based on employee status. In general, an employee is someone whom the employer controls not merely as to the work to be done, but as to the method, manner, and means of doing it. The common law "right to control" test is what most commonly determines employee status, whether or not the employer chooses to exercise the right of control. The issue is complicated by the fact that each law has its own test of independent contractor status. Perhaps the most well know and popular test, however, is the so-called "20-factor test" released by the IRS in 1987.

Determining the level of control you have over your workers is the key to resolving the issue of whether your workers are employees, for whom you have payroll tax obligations, or independent contractors, for whom you do not. When IRS auditors analyze this issue, they work through a list of 20 different factors before concluding whether a sufficient level of control is present to create an employer-employee relationship. You should go through this same exercise before you try to claim that someone who does work for you is an independent contractor and not your employee.

1. **Instructions.** Workers who must comply with your instructions as to when, where, and how they work are more likely to be employees than independent contractors.
2. **Training.** The more training your workers receive from you, the more likely it is that they are employees. The underlying concept here is that independent contractors are supposed to know how to do their work and, thus, shouldn't require training from the purchasers of their services.
3. **Integration.** The more important that your workers' services are to your business's success or continuation, the more likely it is that they are employees.
4. **Services rendered personally.** Workers who must personally perform the services for which you are paying are more likely employees. In contrast, independent contractors usually have the right to substitute other people's services for their own in fulfilling their contracts.
5. **Hiring assistants.** Workers who are not in charge of hiring, supervising, and paying their own assistants are more likely employees.
6. **Continuing relationship.** Workers who perform work for you for significant periods of time or at recurring intervals are more likely employees.
7. **Set hours of work.** Workers for whom you establish set hours of work are more likely employees. In contrast, independent contractors generally can set their own work hours.
8. **Full time required.** Workers whom you require to work or be available full time are likely to be employees. In contrast, independent contractors generally can work whenever and for whomever they choose.
9. **Work done on premises.** Workers who work at your premises or at a place you designate are more likely employees. In contrast, independent contractors usually have their own place of business where they can do their work for you.
10. **Order or sequence set.** Workers for whom you set the order or sequence in which they perform their services are more likely employees.
11. **Reports.** Workers whom you require to submit regular reports are more likely employees.

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NLRB DROPS CASE AGAINST BOEING

The National Labor Relations Board announced on Friday, December 9, 2011, that it is dropping its case against Boeing, in which the Board had accused Boeing of NLRA violations by opening production on its Boeing 787 in North Charleston, South Carolina. Acting General Counsel, Lafe Solomon, said the Board has decided to end the case after the IAM had asked the Board to withdraw it.

As a result of recent contract renewal negotiations, 74 percent of its 31,000 Boeing workers in Washington State had voted to ratify a four-year contract extension that includes substantial raises, unusual job security provisions and a commitment by Boeing to expand aircraft production in Washington State.

Ronald G. Daves....

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The Board had filed the case against Boeing last April claiming that Boeing’s decision to build the \$750 million plant in South Carolina constituted illegal retaliation against the IAM union members in Washington for having engaged in their federally protected right to strike. The machinists’ union has engaged in five strikes against Boeing since 1977, including a 58-day strike in 2008 that cost the company \$1.8 billion.

The NLRB had asked an administrative law judge in Washington to order the company to move its South Carolina production line to Washington State. Presumably, Boeing will continue 787 production in South Carolina.

Other NLRB Initiatives

Consistent with the prediction of increased pro-labor rulings, the NLRB recently issued 3 rulings that will be of great value to organized labor. All 3 decisions overruled cases decided when Republicans constituted a majority of the Board. Two of the decisions delay how soon unions can be challenged as bargaining representative, after a new union is recognized, or when new owners take over a company.

In the first case, *UGL-UNICCO Serv. Co.*, 357 NLRB No. 76 (8/26/11), the Board ruled 3-1 to restore a “successor bar” doctrine requiring employers to recognize incumbent unions for a “reasonable period” after a business transition without challenging the majority status of the union. The prior NLRB precedent had ruled that an incumbent union in a successorship situation enjoys only a rebuttable presumption of majority status, and thus the majority status could be quickly challenged where there was proof of loss of majority. However, the new ruling says that the successor bar better achieves the Act’s policy of preserving industrial peace by promoting stability in collective-bargaining relationships. This type fact pattern arises when an entity purchases the assets of another entity having a collective bargaining relationship with the union. The issue comes up when the union wants to negotiate an agreement with a new entity, and the question is whether the new entity has to recognize the collective bargaining relationship or not, particularly when employees indicate during the same time period that they do not want union representation.

In a second case, *Lamons Gasket Co.*, 357 NLRB No. 72 (8/26/11), the Board similarly overruled precedent and ruled that a representation election petition is barred for a reasonable period of time following voluntary recognition of a union designated by a majority of employees. The fact patterns giving rise to this issue occur when an employer voluntarily recognizes a union through a “card-check” or some similar voluntary recognition, and employees find out about the voluntary recognition and take steps to show that a majority of employees do not want the union.

The third case may end up being the most important of the three, *Specialty Healthcare Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (8/26/11). This case narrows the “appropriate voting unit” where a union seeks an election among a smaller group of employees. In the ruling, the 3-1 majority notes that the Act requires only that an election be conducted in appropriate unit, and that once the NLRB determines that employees in a proposed voting unit share a community of interest, the petitioned-for unit would not be rendered inappropriate unless the party seeking a larger unit “demonstrates the employees in a larger unit share an overwhelming community of interest with those in the petitioned-for unit.” Dissenting member Hayes warns that the majority has adopted a bargaining unit test that “obviously encourages unions to engage in incremental organizing in the smallest units possible.” Employers fear that unions will seek elections in “gerrymandered” smaller voting units in favor of the union, and use the success in those smaller units to organize larger units. Some commentators refer to unions now being able to form “micro-unions” in small parts of a company.

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RETALIATION NOW THE MOST COMMON EEOC CHARGE



Kelly Campbell.....

“Employees mistakenly believe that any subsequent discipline automatically qualifies as retaliation for filing the charge or for complaining about discrimination.”

For the first time in history, retaliation charges filed with the EEOC have surpassed race as the most frequently filed EEOC charge. Some suggest that the economy has something to do with this situation, as employees sometimes file a discrimination charge or complaint thinking they will thereby insulate themselves from future disciplinary action. Employees mistakenly believe that any subsequent discipline automatically qualifies as retaliation for filing the charge or for complaining about discrimination. Sloppy employer procedures and documentation add to the situation, particularly if employees are thereafter disciplined regarding infractions for which they had previously received no disciplinary action. Further, some supervisors still make negative comments to employees who have filed a charge or complained of discrimination, which some lawyers refer to as a “smoking gun” of showing discrimination or retaliation. Almost every federal and state employment law has some sort of retaliation provision, and employees and their attorneys are increasingly sophisticated about bringing such claims.

To avoid retaliation claims, employers must evaluate carefully any disciplinary or other adverse employment actions taken against an employee after the complaint or charge of discrimination is filed. Employers must separate the investigation of the complaint or charge of discrimination from the investigation of the subsequent disciplinary action. The situation is particularly dangerous if the disciplinary action decision is influenced by the same person who was previously the subject of the complaint or charge of discriminatory conduct. In such situations, it is strongly recommended that a higher authority within the company do a separate and independent review, in an attempt to avoid an allegation that the decision has been tainted or prejudiced by the accused supervisor’s input into the decision making process.

KNOW YOUR ATTORNEY CATHERINE E. SHUCK

CATHERINE E. SHUCK is a Senior Associate with the Knoxville, Tennessee office of the Firm, which she joined in September 2009. Her practice involves general civil defense litigation and handling special assignments.



Cathy received her B.A. from Northwestern University and her J.D. from Boalt Hall at the University of California, Berkeley where she was a member of the Order of the Coif. While at Boalt Hall she was the Senior Articles Editor

for the Berkeley Journal of Employment and Labor Law. Her Comment written for the journal, *That’s It, I Quit: Constructive Discharge After Ellerth*, was cited by the United States Supreme Court in 2004. Following law school she served as a law clerk to Justice E. Riley Anderson of the Tennessee Supreme Court and to Judge William A. Fletcher of the United States Court of Appeals for the Ninth Circuit. Prior to attending law school, Cathy worked for several years in the human resources field. Cathy has been admitted to practice in the United States District Courts for the Eastern and Middle Districts of Tennessee as well as the U.S. Court of Appeals, Sixth Circuit. Cathy is the author of the article, *Bargaining Power: Understanding the Rights of Public Sector Workers in Tennessee*, published in the Tennessee Bar Journal, May 2011, Vol. 47, No. 5. She is an Adjunct Professor at the University of Tennessee College of Law and is a member of the Knoxville and Tennessee Bar Associations and the East Tennessee Lawyers Association for Women.

“NLRB DROPS CASE”

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NLRB: Illegal Workers Not Entitled to Back Pay

The NLRB has ruled that it lacks authority to award back pay to undocumented workers, even when the employer knew of the workers’ illegal status. In a 2002 U.S. Supreme Court ruling, *Hoffman Plastic Compound v. NLRB*, the Court said the Board could not award back-pay to an illegal worker who violated the immigration laws by presenting false work documents to get hired. The current NLRB ruling in *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47 (8/9/11), addresses the same issue in the context of an situation in which the employer, not the employee, violated the immigration laws. That is, the employees were not asked for immigration documents when they were hired. There were some questions whether the *Hoffman* principle applied since the employer violated the law by not verifying the employees’ work authorization status. The employer contended that *Hoffman* barred the back-pay award because the employees were working in the U.S. illegally. The NLRB agreed, and stated that *Hoffman* “is categorically worded: back-pay cannot be awarded to undocumented aliens. It suggests no distinction based on the identity of the IRCA violator.”

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12. **Payment method.** Workers whom you pay by the hour, week, or month are more likely employees. In contrast, independent contractors are usually paid by the job.
13. **Expenses.** Workers whose business and travel expenses you pay are more likely employees. In contrast, independent contractors are usually expected to cover their own overhead expenses.
14. **Tools and materials.** Workers whose tools, materials, and other equipment you furnish are more likely employees.
15. **Investment.** The greater your workers' investment in the facilities and equipment they use in performing their services, the more likely it is that they're independent contractors.
16. **Profit or loss.** The greater the risk that your workers can either make a profit or suffer a loss in rendering their services, the more likely it is that they are independent contractors.
17. **Works for more than one person at a time.** The more businesses for which your workers perform services at the same time, the more likely it is that they are independent contractors.
18. **Services available to general public.** Workers who hold their services out to the general public (for example, through business cards, advertisements, and other promotional items) are more likely independent contractors.
19. **Right to fire.** Workers whom you can fire at any time are more likely employees. In contrast, your right to terminate an independent contractor is generally limited by specific contractual terms.
20. **Right to quit.** Workers who can quit at any time without incurring any liability to you are more likely employees. In contrast, independent contractors generally can't walk away in the middle of a project without running the risk of being held financially accountable for their failure to complete the project.

A starting point is whether or not there is a written agreement. If there is no written agreement with the “contractor,” employee status is likely to be found. However, the actual practice under the written contract is also important.

Employers save about 30% by using independent contractors rather than employees, due to lack of payroll taxes and benefits. Further, independent contractors are not subject to the discrimination and other employment laws, and some consider them better workers. Nevertheless, those employers that use independent contractors on a large scale basis, such as UPS, are constantly facing legal challenges pertaining to their use. The proper classification often depends on various factors including an employer's level of control over a worker, but there is no clear formula in determining the classification issue. The twenty factors just discussed are points that should be considered. Among other things, government or private litigation can seek back payments of all payroll taxes, penalties, and interest as well as minimum wages or overtime that may be owed.

So, what can you do to protect yourself against such litigation if you believe that you have misclassified employees as independent contractors? There is a new IRS initiative called the Voluntary Worker Classification Settlement Program which was established to encourage businesses to re-classify their independent contractors as employees, without having to worry about a big penalty. Employers who go into the program will owe 10% of the tax liability that would have been due on the employees' compensation for the past year, without interest or penalties. This amount usually is about 1% of wages paid to re-classified workers over the past year.

To be eligible, a company must consistently have treated the workers as independent contractors; must have filed required Form 1099 for the past three (3) years; and must not be under a worker-classification audit by federal or state agencies. The program is open to companies of any size, and was introduced by the IRS on September 21, 2011. The initiative is part of a broader effort to address the misclassification issue. A few days earlier, officials from the Labor Department, IRS, and seven states announced an agreement to work together to combat the practice. Further, the Obama Administration has asked Congress to change the current provisions of the law on the classification issue. The government is concerned that misclassification results in unpaid federal taxes, plus unpaid assessment for state workers' compensation and unemployment insurance programs.

Using the factors outlined above, employers need to carefully examine all workers who are being paid as independent contractors to ensure that they are properly classified. If an employer feels they have made errors in such classifications, they might want to consider contacting the IRS to determine if they are eligible to participate in the Voluntary Worker Classification Settlement Program to protect themselves against future government or private litigation.



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More information to come!

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