The Contingent Workforce: Do You Know Who Your Employees Are?

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Overview

• Categories of Contingent Workers
• Contingent Worker v. Employee Analysis
• Misclassification: Issues and Areas of Potential Liability
  – Wage and Hour
  – Employment Tax
  – Employee Benefits
  – Workers’ Compensation
Overview

• Other Considerations
  – Intellectual Property Concerns
  – Discrimination/Harassment Issues
  – Tort Liability for Acts of Contractors
  – Privacy Concerns
  – Immigration Compliance

• International Issues

• Drafting Tips

• AND . . . Contingent Workforce Trivia!
Categories of Contingent Workers

• Independent Contractors
• Interns
• Temporary Employees
• Remote Workers
What is a Contingent Worker?

While definitions may vary, the term is generally employed as a catch-all phrase for workers employed through non-traditional, intentionally impermanent work arrangements, such as independent contractors, leased employees, consultants, on-call workers, part-time workers, and temporary employees.
What is a Contingent Worker, cont.:

- **Equal Employment Opportunity Commission**: Workers who are outside an employer’s “core” workforce, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long-term employment.

- **Department of Labor, Bureau of Labor Statistics**: Those who do not have an implicit or explicit contract for ongoing employment. Persons who do not expect to continue in their jobs for personal reasons such as retirement or returning to school are not considered contingent workers, provided that they would have the option of continuing in the job were it not for these reasons.
Independent Contractors

• Self-employed individuals who contract to perform a specific assignment or tasks – either for a finite time or until completion of the assignment – and are compensated on a contract or fee basis.

• If the worker is an independent contractor, the worker must:
  – Pay the full amount of FICA and Medicare taxes as a self-employment tax under the Self-Employment Contributions Act of 1954 (SECA)
  – Pay their own income taxes directly (along with the FICA/Medicare tax)
Employee:
• An individual who performs services for you who is subject to your control as to what will be done and how it will be done. (Treas. Reg. 31.3121(d)-1(c)(1))

Independent Contractor:
• One who is retained to perform certain work and who controls the manner and means by which the work is accomplished.
DOL’s Six Criteria Test for Unpaid Interns

1. The internship, even if it includes actual operation of the facilities of the company, is similar to training in an educational environment.
2. The intern experience is for the benefit of the intern.
3. The intern does not displace regular employees, but works under close supervision of the existing staff.
4. The company that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the internship.
6. The company and the intern understand that the intern is not entitled to wages for the time spent in the internship.
Temporary Employees

• The term “temporary employees” has been defined several different ways:
  – Persons who are hired, trained, and paid by a temporary help firm, which assigns the employees to work in client offices or other work places.
  – Persons hired directly by the client firm with the understanding that their jobs will last a relatively short time.
  – Workers who are employed “indefinitely.”
Remote Workers

• Is the Remote Worker actually an employee?
• If an employee, special considerations include:
  – Control of working space and tools
  – Worker’s Compensation considerations
  – Exempt / Non-exempt issues regarding recording time, overtime, meal and rest breaks
• If Remote Worker is a Contingent Worker:
  – Same analysis as above (co-employment risks)
  – Special consideration in terms of deferring to actual employer to manage time and productivity given remote status
Contingent Worker v. Employee Analysis

To evaluate employment status, courts commonly rely on one of three tests:

• The common law agency test (right-to-control test),
• The economic realities test, or
• The hybrid test.
Common Law Agency/Right to Control Test

• Involves a multifaceted analysis that examines the totality of the working relationship.

• Courts focus on “the extent of the actual supervision exercised by a putative employer over the ‘means and manner’ of the workers’ performance.”
Economic Realities Test

• Focuses on whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which he or she renders his or her services.

• Broader & more inclusive than the common law agency test.
Hybrid Test

• Seeks to combine the common law agency test with the economic realities test.

• Focuses on the hiring party’s right to control the means and manner of the worker’s performance and looks to the economic realities of the working relationship.

• More inclusive than the traditional common law agency requirements.
Independent Contractor Tests: Common Factors

• Right to control
• Right to terminate at-will
• Length of relationship
• Distinct occupation or business
• Level of skill required
• Method of payment
• Opportunity for profit or loss
• Provision of tools, equipment and place of work
• Whether work is an integral part of the company’s regular business
• Parties’ intent
Independent Contractor Tests: POTENTIAL RED FLAGS

- The business can terminate the worker at will.
- The business monitors the worker’s performance.
- The worker must follow the business’s policies and rules.
- The business provides training to the worker.
- The business provides tools for and/or place of work.
- Relationship is permanent or indefinite.
- The worker is paid on an hourly/salary basis.
- The business has employees who do the same type of work.
- The worker does not exercise business skills, judgment or initiative.
Enforcement

• Department of Labor (DOL) and state equivalents
• Internal Revenue Service (IRS) and state equivalents
• State agencies administering unemployment insurance
DOL Misclassification Memo

• DOL guidance issued in July 2015 aimed at curtailing misclassification of workers.
• DOL says most workers qualify as “employees” under the Fair Labor Standards Act’s expansive definitions.
Recent Case Developments

• Delivery Drivers
  – Alexander v. FedEx Ground Package System, Inc. (9th Cir. 2014); Slayman v. FedEx Ground Package System, Inc. (9th Cir. 2014)
  – Dynamex Operations West, Inc. v. Superior Court (Case No. S222732, Cal. Supreme Court, pending)

• Sharing Economy
  – Uber and Lyft cases
  – Homejoy

• Unpaid Intern Cases
  – Glatt, et al. v. Fox Searchlight Pictures, et al. (2d Cir. 2015)
Misclassification Risks

- State and Federal Wage and Hour Laws
- Employment Tax Issues
- Potential Liability for Employee Benefits
- Workers’ Compensation Concerns
Wage and Hour Issues

• Overtime liability
• Meal and rest break liability
• Compounded penalties
  – Wage statements
  – Failure to pay wages when due
• Joint & several liability for agency workers
Employment Tax Exposure

• Standard taxes apply plus penalties for late payment
• Federal and state income tax withholding liability
• Trigger for interagency audits (IRS, DOL, SSA & State agencies)
Employee Benefits and Affordable Care Act Exposure

- **Vizcaino v. Microsoft** – Potential Defined Benefit and Defined Benefit Plan eligibility on a retroactive basis.
  - Can create Plan operation violations
- **Affordable Care Act excise penalties** for failure to offer minimum affordable coverage.
  - The BIG penalty ($2,000 per all employees) if minimum affordable coverage not offered to 95% of workforce
  - Contractors and agency workers are included to determine threshold.
Workers’ Compensation Insurance

- Retroactive premium liability
- Failure to provide coverage penalties
- Potential exposure for uninsured losses
Liability Imposed by Statute on Businesses Using Contractors

• Example: California AB 1897 creates “share[d]” liability between client employers and labor contractors for payment of wages and worker’s compensation coverage.
Protecting Your Intellectual Property

• Confidentiality agreements are a must
• Limit contingent worker exposure to Trade Secrets
• Contractually determine ownership of any Intellectual Property
Other Areas of Potential Liability

- Harassment and discrimination claims
- Tort liability to third parties
- Privacy considerations
- Immigration compliance
International Considerations

• Common factors – similar to IRS factors – are considered in determining employment status in other countries.

• Different countries have unique requirements governing contingent workers that companies must comply with to protect against potential liabilities.

• Issue often arises when a disgruntled former contractor challenges his or her employment status.
Drafting Tips

• Indemnity provisions
• I-9 compliance
• Insurance
• Intellectual property
• Identification of the relationship
• Information security
• Federal contractor status
• Background checks
Key Takeaways

• Review policies for compliance in U.S. and applicable foreign jurisdictions
• Audit contingent workforce population to ensure proper classification
• Audit independent contractors
• If in doubt, err on the side of classifying the worker as an employee
You Decide

What if your business has:

1. An individual who is identified as an independent contractor but has been working for your company for 2.5 years full time, with no other clients?

2. The same individual from example above, but now it turns out he is on the payroll of a temporary agency?

3. An individual who is identified as an independent contractor and has been with your company for 1 year and has 3 other clients. Your company represents 70-75% of her income, and she maintains an office in your facility and works closely with company employees, including a company employee supervisor who has responsibility for the overall project?

4. A college-age child of a company employee who has been “interning” with the company for 8 weeks over summer?
So, what if?

The IT department at UnaWareCo is working on a proprietary and confidential design of a business software product. The project is to last about 12 months from design to ‘go live.’ Different technical expertise is required along the way. Staffing advertises for the talent hoping to hire someone and transition them to permanent employment at the end of the project if all works out.

Pat, an IT consultant, applies. The IT Director offers Pat the job at $80,000 plus an incentive bonus, but Pat wants to continue her consulting activity and doesn’t want to be tied down. She asks to be paid as an independent contractor at $50/hr billed semimonthly up to 8 hours a day with a $20,000 completion bonus payable if the project is completed on time. The IT Director agrees, tells Pat to start the following Monday, and arranges for Pat to have a workstation, a phone, an access badge, and an IT system password.

RED FLAGS?
Pat & Mickey . . .

Eight months into the project, Pat’s design work is finished on time but the project is behind schedule by about two months and over budget (Pat had to rework a lot of other designer applications but did not bill extra hours). Most of the programming and testing can be finished by lower paid programmers; some are already on staff.

The IT Director tells Pat that he no longer needs her expertise on system design but is willing to pay Pat $35/hr to work as an IT Help Line team leader while the regular supervisor is on leave. Pat tries it for a week but develops a crush on one team member, Mickey. The Director unexpectedly sees Mickey rubbing Pat’s neck after the team had moved several heavy computers. He hears Pat ask if Mickey will come to Pat’s apartment.

Sensing a conflict of interest, the Director tells Pat he has decided to have another team member lead the group, that there is no additional work, and for Pat to send him a final bill.
Your worst nightmare!

After a couple of weeks of unsuccessful searching for a new gig, Pat files a clam for unemployment benefits. Her back hurts a lot worse. Her doctor says she has a bulging disc and needs medical treatment.

Pat has no insurance. At the doctor’s suggestion, Pat applies for workers compensation benefits. ICE sends a letter initiating an I-9 compliance audit. The Company has no I-9 record for Pat, but learns that Pat may be a Canadian citizen not authorized to work in the U.S.

Mickey and Pat have since broken up and Mickey has filed a sexual harassment complaint. The president calls down to say she just learned the firm’s patent application for the new software product was declined due to an earlier filed patent application filed by Pat.

What are your potential exposure issues?
Ten DO’s and DON’Ts

- **DO** screen potential workers and relationships for strong indicia of independent contractor status.
- **DON’T** compensate on a salary, weekly or monthly rate. Project-based rates are preferable.
- **DON’T** provide the worker with tools, equipment, supplies, office space, full access to your computer systems, your employee handbook or training.
- **DON’T** contract for services already being performed by Company employees.
- **DON’T** require the contractor to work established hours, attend employee meetings or events, or provide reports usually prepared by employees. **DO** focus on the final result. **DO** allow the worker to subcontract work.
Ten DO’s and DON’Ts

• **DON’T** exercise control over the who, how, where and when aspects of the work.

• **DO** manage the relationship with an eye toward compliance with other laws.

• **DON’T** retain contractors long term.

• **DON’T** use terminology or documentation associated with employment. **DO** have a written contract term expressly disavowing any employment relationship and any right to control, and including an appropriate indemnity provision.

• **DO** protect against the pitfalls of inadvertent misclassification.
Additional Materials Provided

- Comparative Chart of Common Independent Contractor Tests
- DO’s and DON’Ts to Avoid Misclassification
- Information regarding Penalties for Misclassification
- Additional DOL Publications (Fact Sheet #13 [Independent Contractors], Fact Sheet #71 [Interns], PowerPoint presentation, Blog Post)
Additional Materials Provided

- IRS Publications (15-A [Employer’s Supplemental Tax Guide], 1779 [Independent Contractor or Employee?], MOU between IRS and DOL)
- Employment Law Commentary Articles (Contingent Workforce, Dealing with Worker Classification Tax Audits)
- Sample Agreements
- U.S. Government Accountability Office Survey Regarding the Contingent Workforce
Questions?