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A T T O R N E Y S A T L A W

Solutions at Work®

LIABILITY AND MAINTENANCE ISSUES FOR PROPERTY MANAGERS AND BROKER/OWNERS

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Roadmap

- Review of Past IC and Other FLSA Issues
- The New 2015 DOL Guidance Under the FLSA
- DOL Enforcement
- FLSA Lawsuits
- Target Occupations and Industries
- Risks of Improper Classification
- How to Increase the Chances of a Successful IC Relationship



Reality!

- **US Labor Department sues Syracuse based property management companies for willfully underpaying dozens of workers**
- **Date of Action:** February 26, 2015
- **Type of Action:** Fair Labor Standards Act Lawsuit
- **Allegations:** An investigation by the Albany District Office of the U.S. Department of Labor's Wage and Hour Division found that the defendants violated the overtime, minimum wage, recordkeeping and anti-retaliation requirements of the Fair Labor Standards Act. The violations affected employees who traveled to foreclosed properties to mow lawns, winterize homes, change locks and do light construction work.
- **Quote:** "These employees, many of whom traveled long distances and worked more than 60 hours each week, kept their end of the bargain by doing their jobs. Their employer, by underpaying them and cheating them of their hard-earned wages, did not," said Jay Rosenblum, the Wage and Hour Division's district director in Albany.

Recent Court Cases and Administrative Decisions

Misclassified Maintenance Worker Figures to Clean Up: Judge Holds He Was Not an Independent Contractor

- A building maintenance worker, after losing his job, filed a lawsuit claiming that he worked 66 hours per week and that the property management company failed to pay him overtime
- The Court granted summary judgment to the “employee,” finding that he was improperly classified as an independent contractor.

DOL to Center for American Progress

- “We are back in the business of enforcement, putting more cops on the beat and giving them more resources to protect working families.”
 - Increase from 730 investigators in 2007 to more than 1,000 in 2015, with budget calling for hundreds more to be added
 - Recovered more than \$1 billion in back wages since 2009
- “We create ripple effects, as a single investigation can resonate throughout that sector, influencing employer behavior and reforming a race-to-the-bottom culture.”

Minimum Wage



Fight for \$15

- Federal Contractor Minimum Wage Increase: \$10.10
- State Minimum Wage Increase:
 - Alaska: \$9.75 (January 2016)
 - Arkansas: \$8.50 (January 2017)
 - Nebraska: \$9.00 (January 2016)
 - South Dakota: \$8.50 (January 2015)
 - San Francisco, CA: \$15.00 (July 2018)
 - Oakland, CA: \$12.25 (March 2015)



A Brief History

- The FLSA was enacted in 1938
- The law specifically delegates the authority to define the “white collar” exemptions to the United States Department of Labor
- The DOL revised definitions of the “white collar” exemptions in 1940, 1949, 1958, 1963, 1970, 1975, and 2004
- In March 2014, the President directed DOL to again “modernize and streamline” its regulations governing “white collar” exemptions

Why Now?

- “To ensure that the FLSA’s intended overtime protections are fully implemented”
 - Encourage employers to hire more employees rather than pay overtime premiums
 - Provide more income to middle class employees, resulting in economic growth
 - Increase payroll tax contributions to Social Security and Medicare
- “To simplify the identification of nonexempt employees . . . making [it] easier for employers and workers to understand.”

The Basics

- An increase in the salary basis of \$455 per week (or \$23,660 annually) for “white collar” exempt employees
 - Proposed salary level would be 40% of earnings for full-time salaried workers
 - This is projected to be \$970 per week (\$50,440 annually) in 2016
 - Annual (and automatic) updates in salary level to maintain 40% threshold
- An increase in the salary basis of \$100,000 annually for “highly compensated” employees
 - Proposed salary level would be 90% of earnings for full-time salaried workers
 - This is projected to be \$122,148 annually in 2016
 - Annual (and automatic) updates in salary level to maintain 90% threshold

There Could Be More?

- The DOL is considering whether nondiscretionary bonuses may satisfy a portion of the salary level threshold
- The DOL is considering revisions to the “duties” tests
 - A 50% requirement for performing exempt work
 - Additional examples illustrating how the exemptions apply to particular occupations
- “There’s no mischief here.”

How Do You Respond?

- Review all exempt employees with a salary of less than \$50,440
- Evaluate whether other non-“white collar” exemptions are available
- Prepare to modify the pay of those employees who will no longer be exempt

The Alternatives

- Do not “suffer or permit” employees with salaries of less than \$50,440 to work more than 40 hours in a workweek
 - Hire part-time employees to satisfy overtime needs
 - But beware of “off-the-clock” litigation
- Increase employee salaries to \$50,440 or more
 - But beware of need for future increases and verify that employees still satisfy duties requirements
- Convert employees with salaries of less than \$50,440 to hourly plus overtime
 - Weekly salary divided by 40 or some other number?

Review of Past IC Issues

- IRS
 - estimated loss of \$3 Billion to \$5 Billion each year due to misclassification
- State Income Tax Agencies
- State Unemployment Tax Agencies
- Department of Labor
 - works in tandem with IRS
- Congress and State Legislatures
- Unions
 - potential dues-paying members
- Collective/Class Action Lawyers



1987

- IRS Revenue Ruling 87-41 provides a twenty-factor test
 - Training
 - Integration
 - Personal Rendering of Services
 - Continuing Relationship
 - Hiring of Assistants
 - Set Hours of Work
 - Full-Time Required
 - Order or Sequence Set
 - Method of Payment



Benefits of ICs

- Savings on labor costs
 - unemployment, workers' comp, taxes, benefits, etc.
- No concerns over wage & hour law compliance
- Avoid liability for most employment discrimination laws
- Avoid issues under OSHA and immigration laws

Many workers prefer the freedom of being classified as independent contractors as well as possible financial incentives

Independent Contractors

- Misclassification of workers as “independent contractors” costs the government billions of dollars
- Efforts are under way by state and federal legislators to enact new laws to crack down on employers who misclassify workers as contractors
- The Wage-Hour Division is focusing on misclassification issues and plans new initiatives to address this issue
- IRS promised 6,000 random audits over a 3 year period

Independent Contractor Relationship

- Requires more than just an agreement; agreement can easily be set aside as invalid
- Is a fact-based test looking at many circumstances



Key Factor

In the past, IC misclassification battles usually boiled down to one determinative factor:

CONTROL

How much control does the business have over the worker?

Little control = IC classification might be OK

A lot of control = IC classification is likely problematic

So What Rules Should I Follow?

Difficult to provide blanket recommendations, because different tests are applied in different situations:

- IRS & State tax departments
- Department of Labor
- NLRB
- Unemployment claims
- Workers' compensation claims
- State and federal courts



Independent Contractors

- The United States Department of Labor looks to the following facts:
 - The degree to which the individual's work is controlled by the business
 - The individual's investment in facilities in equipment and facilities
 - The individual's opportunities for profit or loss
 - The amount of initiative, judgment or foresight the individual uses in open-market competition
 - The permanency of the work relationship
 - The extent to which the individual's work is an integral part of the organization's business or activities

Federal Law Standard

- The first group of facts are “behavioral” and looks at the extent of control
 - Types of instruction given (e.g. where and where to do the work, what tools to use, what workers to hire, where to purchase supplies, what order or sequence to use when performing the work)
 - The degree of detail of instruction
 - Is there an evaluation system utilized for the worker’s performance?
 - Does the employer have to provide training to the worker?

Federal Law Standard

- The second group of facts are “financial” and examine whether the business aspects of the worker’s job are controlled by the worker?
 - Investment in the equipment the worker uses
 - Are expenses reimbursed?
 - Opportunity for profit or loss on project?
 - Are the worker’s services available to the market?
 - Is the worker paid a flat fee, or more like an employee (hourly, salary commission?)
 - Are you issuing a 1099 to worker and/or corp.?

Federal Law Standard

- The third group of facts are look at the “type of relationship” intended by the parties?
 - Is there a written agreement manifesting the parties’ intent of an independent contractor relationship?
 - Are fringe benefits such as vacation, sick leave, medical benefits, insurance, pension pay, etc.) provided to the worker in a traditional/non-traditional fashion?
 - Is the relationship permanent and are there restrictions on where else the worker can provide services?
 - Are the services provided a key activity of the business?

The New 2015 DOL Guidance Under the FLSA

July 15, 2015

SUBJECT: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors

- Misclassification
- Worker Complaints
- "Combatting" Misclassification
- FLSA defines "employ" broadly
- Most workers are employees under the FLSA
- All factors must be considered (none determinative)

The New 2015 DOL Guidance Under the FLSA

- The “suffer or permit” concept has broad applicability and is critical to determining whether a worker is an employee
- Rejects the common law control test
- Broadest test ever in terms of defining who is an employee
- Look at whether the individual is “dependent” on the entity
 - Integral part of business
 - Profit or loss
 - Investments, special skills, permanency, control

The New 2015 DOL Guidance Under the FLSA

- The ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself.
- If the worker is economically dependent on the employer, then the worker is an employee.
- If the worker is in business for him or herself (i.e., economically independent from the employer), then the worker is an independent contractor.



The New 2015 DOL Guidance Under the FLSA

- Integral Part of the “Employer’s” Business:
- Workers are more likely to be ‘employees’ under the FLSA if they perform the primary work of the employer
- A true independent contractor’s work, on the other hand, is unlikely to be integral to the employer’s business
- Work performed by cake decorators is obviously integral to the business of selling cakes which are custom decorated
- Construction example: carpenters vs. software developers

The New 2015 DOL Guidance Under the FLSA

- Integral Part of the “Employer’s” Business:
- It does not take much of a record to demonstrate that picking pickles is a necessary and integral part of the pickle business
- Work can be integral to a business even if the work is just one component of the business and/or is performed by hundreds or thousands of other workers
- Work can be integral to an employer’s business even if it is performed away from the employer’s premises, at the worker’s home, or on the premises of the employer’s customers.

The New 2015 DOL Guidance Under the FLSA

- Managerial skills impacting profit or loss by the individual
- A worker in business for him or herself faces the possibility to not only make a profit, but also to experience a loss.
- The worker's managerial skill will often affect opportunity for profit or loss beyond the current job, such as by leading to additional business from other parties or by reducing the opportunity for future work.
- For example, a worker's decisions to hire others, purchase materials and equipment, advertise, rent space, and manage time tables may reflect managerial skills that will affect his or her opportunity for profit or loss beyond a current job.

The New 2015 DOL Guidance Under the FLSA

- Individual's investment as compared to the "Employer's" investment
- If the worker's investment is relatively minor, that suggests that the worker and the employer are not on similar footings and that the worker may be economically dependent on the employer
- Rig welders' investments in equipped trucks costing between \$35,000 and \$40,000 did not indicate that the rig welders were independent contractors when compared to the employer's investment in its business

The New 2015 DOL Guidance Under the FLSA

Special skill and initiative example:

- A highly skilled carpenter provides carpentry services for a construction firm; however, such skills are not exercised in an independent manner. For example, the carpenter does not make any independent judgments at the job site beyond the work that he is doing for that job; he does not determine the sequence of work, order additional materials, or think about bidding the next job, but rather is told what work to perform where. *In this scenario, the carpenter, although highly-skilled technically, is not demonstrating the skill and initiative of an independent contractor (such as managerial and business skills). He is simply providing his skilled labor.*

The New 2015 DOL Guidance Under the FLSA

Special skill and initiative example:

- In contrast, a highly skilled carpenter who provides a specialized service for a variety of area construction companies, for example, custom, handcrafted cabinets that are made-to-order, may be demonstrating the *skill and initiative of an independent contractor* if the carpenter markets his services, determines when to order materials and the quantity of materials to order, and determines which orders to fill.



The New 2015 DOL Guidance Under the FLSA

- Is the relationship permanent or indefinite?
- Even if the working relationship lasts weeks or months instead of years, there is likely some permanence or indefiniteness to it as compared to an independent contractor, who typically works one project for an employer and does not necessarily work continuously or repeatedly for an employer.
- The reason for the lack of permanence or indefiniteness should be carefully reviewed to determine if the reason is indicative of the worker's running an independent business.
- A worker's lack of a permanent or indefinite relationship with an employer is indicative of independent contractor status if it results from the worker's own independent business initiative.
- Editor example: one publisher vs. many publishers

The New 2015 DOL Guidance Under the FLSA

- “Employer’s” Control
- The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business.
- The economic reality inquiry requires us to examine the nature and degree of the alleged employer’s control, not why the alleged employer exercised such control.
 - Business needs cannot immunize employers from the FLSA’s requirements.
 - If the nature of a business requires a company to exert control over workers to the extent that [the employer] has allegedly done, then that company must hire employees, not independent contractors.

The New 2015 DOL Guidance Under the FLSA

Conclusion

- In sum, most workers are employees under the FLSA's broad definitions.
- Factors should not be analyzed mechanically or in a vacuum, and no single factor, including control, should be over-emphasized.
- Each factor should be considered in light of the ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee).

The New 2015 DOL Guidance Under the FLSA

Conclusion

- The factors should be used as guides to answer that ultimate question of economic dependence.
- The correct classification of workers as employees or independent contractors has critical implications for the legal protections that workers receive, particularly when misclassification occurs in industries employing low wage workers.



DOL Enforcement

The U.S. [Department of Labor](#) has put employers on notice that there will be a renewed emphasis on enforcement and important changes to key policies in 2015. These include:

- (1) increased audits and prosecutions of federal and state minimum wage and overtime law violations;
- (2) intensified scrutiny of the classification of workers as independent contractors; and
- (3) an overhaul of the Fair Labor Standard Act's overtime exemption for white collar employees.

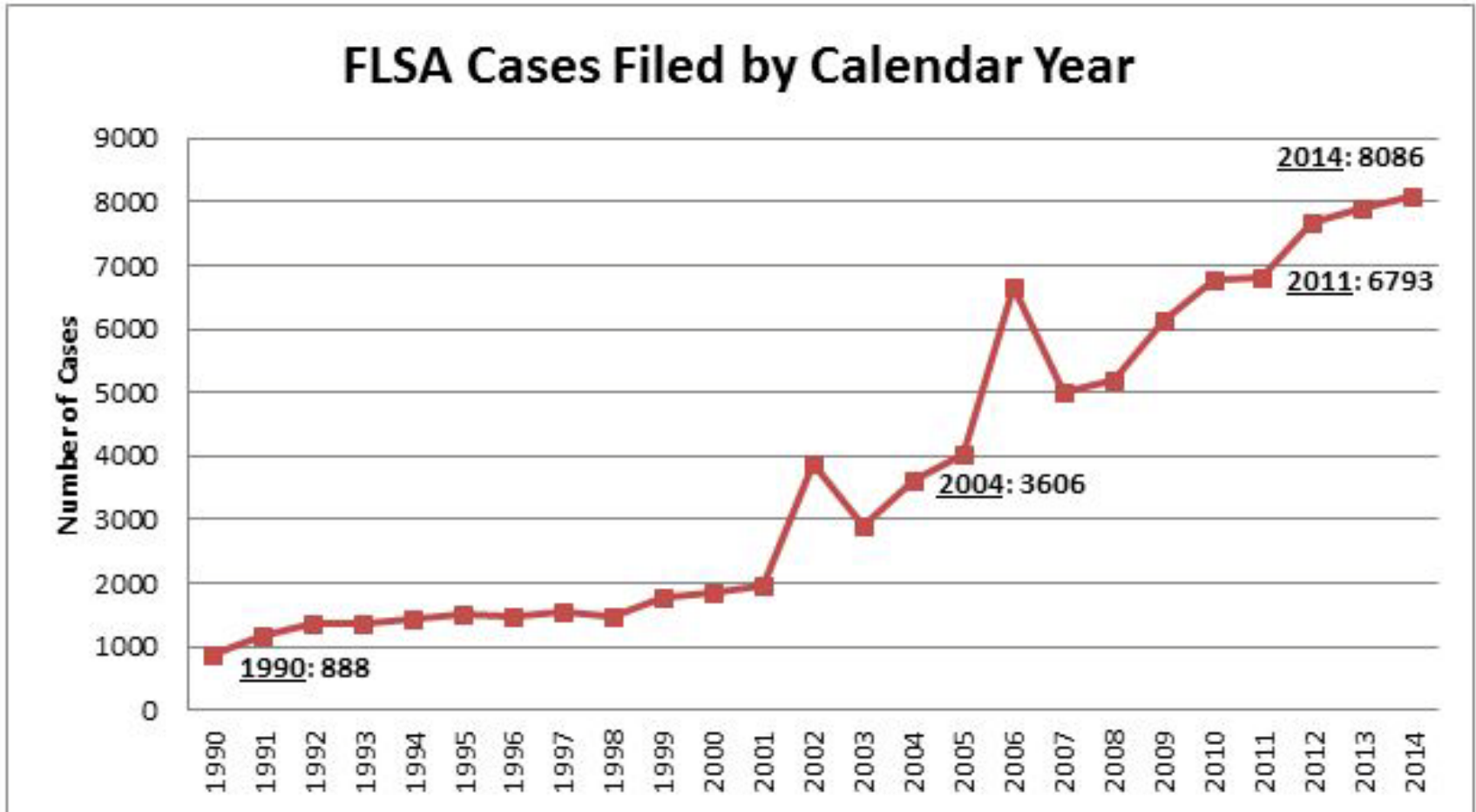
DOL

- “We are back in the business of enforcement, putting more cops on the beat and giving them more resources to protect working families.”
 - Increase from 730 investigators in 2007 to more than 1,000 in 2015, with budget calling for hundreds more to be added
 - Recovered more than \$1 billion in back wages since 2009
- “We create ripple effects, as a single investigation can resonate throughout that sector, influencing employer behavior and reforming a race-to-the-bottom culture.”

FLSA Lawsuits

- Tens Of Thousands Of FLSA Lawsuits Filed In Last Decade
- No Slowdown In 2014, 2015 The Same
- Both Individual Claims And "Collective Actions"
- Hundreds Of Millions In Judgments And Settlements
- Count On It: This Will Continue

FLSA LITIGATION



Bonnetts v. Arctic Express (Ohio)

Over the road driver hired as a contractor. Leased truck from Arctic and was responsible for all expenses. Signed independent contractor agreement stating that contractor made all decisions relating to route selection, repairs and maintenance, hiring helpers, license plate fees, vehicle insurance and operating credentials.

Result: Summary judgment motion denied because of disputes as to degree of control asserted over contractor in performance of duties.

Lesson: Despite efforts to establish legitimate relationship, day-to-day interactions can jeopardize the nature of the relationship.

American Family Insurance (Ohio)

Workers retained to assist as insurance agents were provided office equipment and forced to follow regular office hours

Result:

Class action case approved (2013)

Lessons:

ICs should provide their own tools and equipment to do the job
Employees can be directed regarding working hours; ICs should not be treated the same way

Target Occupations and Industries

- Wage and Hour Division (WHD)
- **Press Releases: Employee Misclassification as Independent Contractors**
- August 13, 2015
[US Department of Labor signs agreement with Alaska Department of Labor and Workforce Development to protect workers from misclassification](#)
- August 06, 2015
[US Department of Labor signs agreement with Idaho Department of Labor to protect workers from misclassification, help responsible employers](#)
- July 15, 2015
[US Labor Department and Kentucky Labor Cabinet sign three-year agreement to protect misclassified workers](#)

Target Occupations and Industries

- Barber or hair stylist
- Tattoo artist
- Real estate agent
- Auctioneer
- Massage therapist
- Property Management
- Lifeguard
- IT professional
- Personal trainer
- Hit man or drug dealer



Any Business Can Be a Target...

Onyx Club (Atlanta): Workers provided with a “Dancer’s Packet” containing rules and policies

Result: \$1.55 million settlement (2012)

Rick’s Cabaret (NY): Workers “micromanaged” by club, told no gum or body glitter allowed

Result: \$5 million adverse ruling (2013)

Spearmint Rhino (national): Workers had to follow set schedules, and required to clock in and out

Result: \$12.9 million settlement (2013)

Columbia Artists Mgmt. (New York)

Musicians on tour were treated very much like employees, with their lodging reimbursed and subject to drug & alcohol tests

Result:

Appeals court loss, final judgment pending (2013)

Lessons:

Do not pay expenses for your ICs

Do not subject them to the same rules as your employees

Bowlin Group (Kentucky)

Cable installers classified as ICs performed same work as other company cable installers classified as employees

Result:

\$1 million settlement (2013)

Lessons:

Your ICs cannot be retained to do the same things as your employees

Your ICs should be brought on to perform specialized tasks different from your employees

kgb, Inc. (Pennsylvania)

Workers hired to quickly respond to text message research inquiries from general public

Result:

\$1.3 million settlement with Dept. of Labor (2013)

Lessons:

ICs cannot be integral part of business

If you are retaining workers to perform the work that makes your business your business, you should probably classify them as employees

Arise Virtual Solutions (California)

Workers hired to provide virtual business outsourcing were provided detailed scripts and extensive training before being allowed to make phone calls

Result:

\$1.25 million settlement (2013)

Lessons:

Avoid levying significant control over your ICs

If you feel the need to provide extensive training to your ICs before allowing them to work, you should probably hire another IC instead

S.D. Union Tribune (California)

Newspaper delivery workers were asked to sign the best independent contractor agreement money could buy

Result:

\$11 million settlement approved (2014)

Lesson:

“The contract cannot always be binding...otherwise, every employer who wanted to avoid paying employment taxes could do so by drafting an IC contract, but then treat the worker exactly as though he or she was an employee...”

James Estate (Oregon)

Bookkeeper hired to administer estate signed top-notch IC agreement after having worked as an employee for several years, and performed bookkeeping work for no other employer

Result:

Tax assessment (2013)

Lessons:

Employees who become ICs cannot do the same job

ICs should preferably perform the same type of work for other companies

Recent Court Cases and Administrative Decisions

- *FedEx Home Delivery v. NLRB* (holding fed ex drivers were independent contractors)
- Contradict that with Fed Ex Ground drivers that were awarded \$14,000,000 in damages because of misclassification
- *Smith v. TYAD, Inc.* (Montana Supreme Court holds that exotic dancers were employees even though they paid “stage fee” and “rented the dressing room”)

Recent Court Cases and Administrative Decisions

- *Allen v. Jobo's, Inc. d/b/a B.J. Roosters* (2014) (Class certification granted to group of male go-go dancers at gay nightclub in Atlanta in IC misclassification lawsuit alleging violations of the FLSA and retaliation; facts established that the club set the dancers' schedules; approved their clothing, stage name, and dance routines; and controlled other aspects of their compensations and terms and conditions of employment)

Recent Court Cases and Administrative Decisions

- *Ivy League Tutoring v. New York Commissioner of Labor* (2014) (New York Appellate Court determined that a tutoring referral company misclassified tutors as ICs where they provided in-home tutoring sessions, but were otherwise treated as employees; paid an hourly rate; and subject to non-solicitation and non-compete agreement)



Recent Court Cases and Administrative Decisions

- *Shepard v. Lowe's, Inc.* (2014) (Lowe's Home Centers agreed to settle a class action brought by its home improvement contractors who alleged they were misclassified as ICs instead of employees, with an agreement to pay them \$6.5 million dollars plus twenty-five percent more for attorney's fees)

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Risks of Improper Classification

- Minimum wage, overtime, and other unpaid wages
- Back taxes
- Unemployment audits
- Social Security contributions
- Unpaid benefits
- Employment law violations
- Workers' Compensation coverage
- Penalties and fines
- Litigation costs and attorney fees



Consequences of Misclassifying Someone as an “Independent Contractor”

- Employees can argue that they were entitled to pension plans, employer contributions to a 401(k) plan, stock options, and other benefits
- Overtime Pay
- Tax penalties



What If We Might Have Messed Up?

An employment law audit to determine whether mischaracterization exists is the first step

If problems are found, you have three basic options:

1. Do nothing and hope for the best
2. Reclassify your ICs as employees
3. Retain as ICs but restructure the working relationship to comply with the applicable tests



How to Increase the Chances of a Successful IC Relationship

Quotes:

- No new test, just demonstrates DOL's new aggressiveness
- Just silly, choice quotes from courts that ruled in favor of the workers, ignores the many decisions that reject misclassification claims
- Will have a dramatic impact on employers
- IC relationship already dead, this is just the official pronouncement by DOL
- Reads like a plaintiff's summary judgment brief
- Employers are going to be hard-pressed to show that a worker is an independent contractor in all but the most clear-cut situations

In a Perfect World...

- Your ICs should be in business on their own, with their own tax ID number (not just SSN), business license, business cards, and possibly also assistants/workers
- You pay your IC by the job and not by the hour or the week or by the mile
- Your IC submits invoices (not timecards) and is paid on a 1099 basis while remaining responsible for all taxes
- Your ICs carry their own insurance and are not provided any benefits or bonuses
- You should develop a contract spelling out relationship and respective duties

In a Perfect World...

- ICs should have the opportunity to realize either profit or loss for their work
- ICs should not have business cards from your company
- Do not treat new hires or “temps” as ICs while you try them out (consider staffing companies, but be wary of joint employment situations)
- Don't give workers option of being employee or IC; choice of the worker is not the legal standard
- ICs should pay for their own business expenses and licenses, and should have an investment in their own equipment necessary to do job

IC Agreements

- Reality matters
- Careful drafting
- Cautious approach
- Follow new developments
- Choose battles wisely
- Seek expert advice

INDEPENDENT CONTRACTOR AGREEMENT

1. **Parties.** This Independent Contractor Agreement ("Agreement") is between:

THE COMPANY	THE CONTRACTOR
Name: <input type="text"/>	Name: <input type="text"/>
Address: <input type="text"/>	Address: <input type="text"/>
City, State Zip: <input type="text"/>	City, State ZIP: <input type="text"/>
Email: <input type="text"/>	Email: <input type="text"/>
Phone: <input type="text"/>	Phone: <input type="text"/>

2. **Services.** The Contractor will perform the services described in Exhibit A to this Agreement ("Services").
3. **Payment.** The Company will pay the Contractor according to the terms in Exhibit B to this Agreement ("Payment Terms").

Questions?



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A photograph of three business professionals in a hallway. A woman in a dark suit and white shirt is smiling and looking towards two men in suits. One man is holding a smartphone. The background is a brightly lit office hallway with a window.

Thank You!

Presented by:

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