



# Are your Workers Employees or Independent Contractors?

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# Center for Business and International Negotiation

- <http://www.clayton.edu/business/Research-Centers/Center-for-Business-and-International-Negotiation>
- **VISION:** The Center for Business and International Negotiation introduces students and business people to strategies for resolving conflict to support and promote conflict resolution locally, nationally, and globally.
- **GOALS:** To offer and support students experiential learning opportunities, faculty research; and community and international training
- Conflict Resolution Skills for Not-for-Profits, on June 5, 2015, 9:00 am-12:00 noon, [https://claytonstate.qualtrics.com/SE/?SID=SV\\_1TSKtYSrex6mBKd](https://claytonstate.qualtrics.com/SE/?SID=SV_1TSKtYSrex6mBKd)

# Human Resource Leadership

- [MBA program will add a concentration in Human Resource Leadership.](#)
- For more information, please contact Dr. Ali Dadpay, Assistant Dean and MBA Director.

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# Why does it matter if a worker is an employee or an independent contractor?

- Employer payroll deductions
  - Employer responsible for FICA, RRTA, FUTA and IRS withholdings for employees
  - Independent contractors pay these taxes themselves
- Benefits
  - Employee benefits protected
  - Independent contractor provides his or her own benefits
- Discrimination and affirmative action
  - Antidiscrimination statutes only protect employees
  - National Labor Relations Act only protects employees



# Why does it matter if a worker is an employee or an independent contractor?

- Cost reductions
  - Employees generally more expensive
  - Employees can generally quit at-will
  - Employers incur liability with employees but not independent contractors



# Employers must issue the correct Tax Forms

- EMPLOYEE
- W-2
- INDEPENDENT CONTRACTOR
- 1099-MISC



# Result of failure to appropriately categorize workers

- IRS assesses harsh penalties for failure to pay FICA and FUTA
- Employer may be liable under National Labor Relations Act
- Employer may be liable under Fair Labor Standards Act
- Employer may be liable for unpaid benefits





# WHY IS THIS SO DIFFICULT TO CLASSIFY WORKERS?

- Facts and circumstances test
- No bright line test
- Different agencies use different tests: courts and governments do not always agree



# How do you tell if a worker is an employee? A Variety of Criteria

- The Economic Realities Test
  - Used in FLSA cases regarding overtime, wage cases
  - Used in FMLA cases
  - Used in Title VII of Civil Rights Act , ADEA, ADA (or a hybrid test)
- The Right to Control Test / Similar to the Common Law Test
  - Used by some courts and some states
  - Used in IRS cases regarding withholding, payment of taxes
  - Used with Federal Insurance Contribution Act (SS and Medicare)
  - Federal Unemployment Tax Act (Unemployment Compensation)
  - ERISA (Employee Retirement Income Security Act)
  - NLRA
  - Immigration Reform and Control Act



# DOL's Misclassification Initiative

- DOL has entered into Memoranda of Understanding (MOU) with the IRS, and some state agencies.
- Will exchange information in an effort to reduce the amount of employee misclassification.



# How do you determine if a worker is an employee?

- Common-law agency test
  - Who has the right to control the manner in which the work is performed?
- IRS test
  - 20 factors to determine whether someone is an employee or an independent contractor
  - Derived from results of court judgments



# IRS 20 FACTOR ANALYSIS

1. Instructions
2. Training
3. Integration
4. Services rendered personally.
5. Hiring, supervising, and paying assistants.
6. Continuing relationships
7. Set hours of work
8. Full time required
9. Doing work on the employee's premises
10. Order or sequenced set.



# IRS 20 FACTOR ANALYSIS

11. Oral or written reports
12. Furnishing tools and materials
13. Payment by hour, week, or month.
14. Payment of business or traveling expenses
15. Significant investment
16. Realization of profit or loss
17. Working for more than one firm at a time
18. Making services available to the general public.
19. Right to discharge
20. Right to terminate



- If you are not certain for tax purposes if a worker is an employee, you (or the worker) can file Form SS-8 with the IRS, and the agency will officially determine the worker's status.
- The determination takes at least six months.



Do you have a reasonable basis for not treating a worker as an employee?

If so, you may not have to pay employment taxes

- You reasonably relied on a court case about Federal taxes or a ruling issued to you by the IRS; or
- Your business was audited by the IRS at a time when you treated similar workers as independent contractors and the IRS did not reclassify those workers as employees. You may not rely on an audit commenced after December 31, 1996, unless such audit included an examination for employment tax purposes of whether the individual involved (or any other individual holding a substantially similar position) should be treated as your employee; or





## See Publication 1976 Section 530 Employment Tax Relief Requirements

- You treated the workers as independent contractors because you knew that was how a significant segment of your industry treated similar workers; or
- You relied on some other reasonable basis. For example, you relied on the advice of a business lawyer or accountant who knew the facts about your business.



# Voluntary Classification Settlement Program

- New program that allows employers to reclassify workers as employees for future tax periods.
- May receive partial relief from federal employment taxes.
- Employer must meet eligibility requirements
  - Must be classifying as IC
  - Must have consistently done so for 3 years
  - Not currently undergoing an audit by IRS, DOL, or state agency
  - If IRS previously audited, employer has complied with the results of that audit and is not currently contesting the classification in court.



# Independent Contractors

DOL uses the “economic realities” test. (An employment relationship exists if an individual is economically dependent on a business for continued employment.)

- (1) the extent to which the worker's services are an integral part of the employer's business (examples: Does the worker play an integral role in the business by performing the primary type of work that the employer performs for his customers or clients? Does the worker perform a discrete job that is one part of the business' overall process of production? Does the worker supervise any of the company's employees?);
- (2) the permanency of the relationship (example: How long has the worker worked for the same company?);



# Economic Realities Test continued

- (3) the amount of the worker's investment in facilities and equipment (examples: Is the worker reimbursed for any purchases or materials, supplies, etc.? Does the worker use his or her own tools or equipment?);
  
- 4) the nature and degree of control by the principal (examples: Who decides what hours will be worked? Who is responsible for quality control? Does the worker work for any other company(s)? Who sets the pay rate?);



# Economic Realities Test continued

- (5) the worker's opportunities for profit and loss (examples: Did the worker make any investments such as insurance or bonding? Can the worker earn a profit by performing the job more efficiently or exercising managerial skill or suffer a loss of capital investment?); and
- (6) the level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of an independent enterprise (examples: Does the worker perform routine tasks requiring little training? Does the worker advertise independently? Does the worker have a separate business site?).



# DOL Fact Sheet

- Am I an employee?

[http://www.dol.gov/whd/regs/compliance/w  
hdfs13.pdf](http://www.dol.gov/whd/regs/compliance/w<br/>hdfs13.pdf)



# Summarizing the tests: Control of behavior, control of financials, type of relationship

- Behavior: When and where is the work done? What tools are used? Who hires assistants, and purchases supplies? Who performs which work, sequence? Is training provided?
- Financial: Does the worker have unreimbursed expenses? How much has the worker invested? Are services made available to others? How is the worker paid? Does worker participate in profit or loss?
- Relationship: Is something put into writing? Are benefits provided? Is the relationship long-term? Are the services performed a key aspect of the company's business?



- What would you include in an independent contractor agreement?





# Independent Contractor Agreement

- Declaring someone to be an independent contractor does not make it so.
- The firm must give up the right of control over the worker.
- The firm should not have ICs doing work that is central to the firm's business or the same work as employees perform.
- The firm should closely review long term IC agreements and not assign new projects without renewing agreements.



# Independent Contractor Agreement

- A good IC Agreement should:
  - Require that the IC supply his own tools, materials & equipment, and pay his own assistants and business expenses.
  - Document the firm's payment of a flat fee, rather than hourly or weekly payment.
  - Provide no benefits, not even time off.
  - Make it clear that the IC is free to offer his services to others.
  - State that the Contractor may not act as agent for, or on behalf of, the Company, or to represent the Company, or bind the Company in any manner.
  - State that the Contractor will not be entitled to worker's compensation, retirement, insurance or other benefits afforded to employees of the Company.



# CASES: DOL v. Skokie Maids

- Skokie Maids provided cleaning services to homes and businesses.
- Maids were classified as independent contractors.
- Company assigned clients, set working hours, and issued detailed cleaning instructions
- Maids did not pay their own bond insurance, or provide cleaning supplies or equipment.
- Company trained new maids, most maids had no other employment, and seemed to be financially dependent on company.
- Maids were required to sign non-compete agreements.
- Determined to be employees, and the violations were found to be willful.



# CASES: Gayle, et al, v. Harry's Nurses Registry, Inc.

- Plaintiffs, a class of nurses, sued to recover unpaid overtime under the Fair Labor Standards Act (FLSA). Court applied “economic reality” test.
- Harry's policies:
  - prohibited a nurse from contracting independently with placements, although its nurses may be listed with other agencies;
  - prohibited a nurse from subcontracting a shift to another nurse;
  - prohibited a nurse from taking a partial shift, although a nurse could decline a whole shift; and prohibited a nurse who was unilaterally terminated from collecting anything but unpaid wages as damages.



# Gayle, et al, v. Harry's Nurses Registry, Inc.

- Furthermore, the hourly rate paid was not negotiated but was fixed by Harry's.
- Indications of professional control present included:
  - the work of Harry's nursing director and nursing supervisors, who monitored the nurses' daily phone calls reporting to shifts, collected documents and conducted on-site training four to five hours each month, communicated with doctors to ensure that their prescribed care was being carried out, and handled emergencies;
  - the ability of a nursing supervisor to require a nurse to attend continuing education to maintain their licenses;
  - an in-service manual that nurses had to certify having read and understood;



# Gayle, et al, v. Harry's Nurses Registry, Inc.

- training by Harry's covering HIV confidentiality, ventilators, oxygen, and other medical subjects;
- and a requirement that each shift include a comprehensive assessment of the patient in the form “progress notes,” which nurses had to submit to get paid.
- Another critical factor was that the nurses had no opportunity for profit or loss whatsoever; they earned only an hourly wage for their labor.
- The nurses had no business cards, advertisements, or incorporated vehicle for contracting with Harry's, and they were paid promptly regardless of whether the insurance carrier paid Harry's promptly.



# Gayle, et al, v. Harry's Nurses Registry, Inc.

- That the nurses were skilled workers in a transient workforce reflected the nature of their profession and not their success in marketing their skills independently.
- Finally, Harry's claimed that the nurses are not integral to Harry's Nurses Registry, notwithstanding that "Nurses" is—literally—Harry's middle name.



# Gayle, et al, v. Harry's Nurses Registry, Inc.

- The Court's Holding: placing nurses in positions accounts for Harry's only income; the nurses are not just an integral part but the sine qua non ( but for) of Harry's business.





# CASES: Robert Patrick Day v. Comm.

- Petitioner was a sole proprietor engaged in hauling freight with drivers he hired. He paid no federal employment tax. The petitioner supplied the trucks and maintained them. If repairs were needed, he authorized them. He required his drivers to keep in contact with him by cell phone.
- The court found that the drivers were employees because of the degree of control exercised by the petitioner.



# CASES: Anthony S. D'Acquisto v. Commissioner

- D'Acquisto claimed to be an independent contractor capable of claiming Schedule C business expense deductions.
- D'Acquisto worked as a voice actor. For radio and television commercials, his agents negotiated the terms based upon the actors' unions' fee schedule.



# Anthony S. D'Acquisto v. Commissioner

- The IRS determined that he was an employee of the various companies for which he worked.
- D'Acquisto failed to establish that he had sufficient control over the relationship at the time service was rendered, to be classified as an independent contractor.
- According to D'Acquisto's own testimony, upon acceptance of a job, the hiring company provided a script and instructed him to read it according to the company's specifications.
- D'Acquisto argued that having the right to pick and choose the jobs of his choice demonstrated he had control over this services.
- However, D'Acquisto failed to establish the details of control he had over the engagement agreement once he accepted a job.



**THANK YOU FOR  
YOUR ATTENTION!**

