Chapter Eleven

JOINT EMPLOYMENT, INDEPENDENT CONTRACTORS AND STAFFING ISSUES

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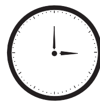

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Chapter Eleven

JOINT EMPLOYMENT, INDEPENDENT CONTRACTORS AND STAFFING ISSUES

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I. TYPES OF ALTERNATIVE WORKFORCE ARRANGEMENTS

An employer who decides to retain the services of a company to supply all or part of its workforce should be aware of the variety of arrangements available. The types of alternative workforce arrangements generally fall into six categories:

A. Temporary Help. The American Staffing Association (ASA) defines "temporary help" as a situation in which, "a staffing firm hires its own employees and assigns them to support or supplement a customer's workforce in situations involving employee absences, temporary skill shortages, seasonal workloads, and special projects." *See* http://www.americanstaffing.net/jobseekers/definitions.cfm.

B. Long-Term and Contract Staffing. In this situation, an alternative workforce provider (also referred to in the Chapter as "service provider") supplies employees to work on long-term, indefinite assignments. Employees are recruited, screened, and assigned by the service provider. While the length of the placement impacts the client's exposure to joint employment liability, the presence, or lack thereof, of an on-site supervisor/employee of the service provider plays a more significant role in the evaluation of liability exposure.

Contract staffing is often used for duties such as security, maintenance, and cleaning. As recent headlines suggest, although these workers are employed by separate companies, it behooves the contracting company to ensure the client (or worksite) employer is abiding by the multitude of employment laws (i.e. wage/hour and immigration laws).

C. Payrolling. Payrolling typically involves a situation in which the client of the alternative workforce provider recruits workers but asks the alternative workforce provider to hire and assign them to perform services. Payrolling is also used to describe a situation in which workers currently employed by the alternative workforce provider's client are placed on the service provider's payroll. The alternative workforce provider performs such services as recording the hours worked, processing the payroll for employees and monitoring the coverage of workers' compensation, as well as various administrative and human resource functions. This situation is different from Professional Employer Organization (PEO) arrangements in that workers are on temporary assignments and make up a small proportion of the customer's workforce. While this service provides for control, selection, and often the supervision of the employee, it also exposes the client of the service provider to a significant risk of joint employer liability, especially if the underlying work is controlled and supervised by the client.

D. Outsourcing/Managed Services. In this situation, an alternative workforce provider assumes full responsibility for operating a specific client function on an on-going basis. Thus, the service provider's responsibilities in this situation may include a broad range of human resource functions, as well as responsibility for a particular client function (for example, the mailroom). Since the service provider generally is responsible for management of the employees at the client's site, exposure to joint liability is typically at a minimum for the client under this arrangement.

E. Employee Leasing/Professional Employer Organization. Typical employee leasing services involve a PEO co-employing of all or a majority of a client worksite employer's employees. The PEO assumes responsibility for all human resource functions pertaining to the leased employees,

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as well as paying wages and taxes and assuming responsibility and liability for compliance with certain state and federal laws. The relationship between the client and PEO usually is based upon a contract. The contract usually allocates which employer functions are retained by the client, which are shared with the PEO and which the PEO assumes. The contract typically identifies the PEO's responsibilities (for example, unemployment administration, payment of wages, remittance of payroll taxes, benefits administration, leave administration and other HR functions) and those of the client company (for example, day-to-day supervision relating to the company's core business). While courts will consider the language of the contract in determining issues relating to the PEO relationship, that language is not controlling if it does not reflect the realities of the employment situation.

Generally, the PEO is established as the employer of record for wage reporting, contractually assumes liability for payroll taxes and tax filing, and provides workers' compensation insurance as well as other types of benefits for employees, such as 401(K) plans and health insurance. However, employees of the PEO who perform services for its client company as "leased employees" or "assigned workers" can be required to be treated, for purposes of many of the client company's employee benefit plans, as actual employees of the client company. 26 U.S.C. §414(n). *See* Section IV.J., below, for additional discussion of the effects of the client company's benefits on "leased employees." There can also be some unfavorable results for the client company, especially if those "leased employees" end up receiving benefits that were never intended to be provided to them. Many states, including North Carolina, South Carolina, Florida, and Texas, have laws that specifically require the PEO to be licensed. Further, such states establish the responsibilities of alternative workforce providers or PEOs as co-employers. In determining liability under federal laws, however, courts may still look at the economic realities of the workplace.

F. Temporary-To-Full-Time. Most alternative workforce providers provide "temporary-to-full-time" services, also referred to as "temp-to-perm." This service allows the customer to utilize the expertise of the alternative workforce provider in the area of recruitment, screening, and testing to hire the most qualified candidates without incurring the commitment of time and expense associated with recruiting functions. The service provider will place an employee with its client as a "temporary employee" for a given time period. If both the temporary employee and the client are satisfied with each other after the expiration of this predetermined period, the client may hire the temporary employee as a regular, full-time employee.

II. IDENTIFYING THE EMPLOYER

The various alternative workforce arrangements mentioned above have different liability implications for the client. Identifying who is the employer is the threshold issue in determining liability. The issue becomes whether the alternative workforce provider, the client employer, or both, are the employer. In an attempt to answer this question, two approaches have developed in the case law. The first approach is that one or the other is "the sole" employer. Under this approach, either the alternative workforce provider or the client employer is held to be the employer. The second approach is that both the alternative workforce provider and the client employer are held to be joint or co-employers, and both are legally responsible for some or all of the employment decisions.

Determining which party, the alternative workforce provider or the client employer, is the "legal" employer depends upon the nature of the relationship and the circumstances involved. While courts and administrative agencies have developed slightly different tests depending on the statute at issue, the essential factors of the relationship that generally must be considered include:

A. The Contractual Basis of the Relationship. In most alternative workforce arrangements, the parties enter into a contract, and the contract specifies which party is the "legal" employer of the employees subject to the agreement. However, the existence of a contract is not conclusive in determining the nature of the relationship.

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B. Direction and Control of the Employees. In general, an employer has the right of direction and control over what work shall be performed and how it shall be done. The existence of this "right of control" is an essential element of the employment relationship. *See, e.g.*, *Morrison v. Magic Carpet Aviation,* 383 F.3d 1253 (11th Cir. 2004) (analyzing the employment relationship in a Family and Medical Leave Act (FMLA) claim); *Cardinale v. Southern Homes of Polk County, Inc.*, 310 F. App'x 311 (11th Cir. Fla. 2009) (affirming summary judgment against plaintiff in FMLA case because employer had fewer than 50 employees; allegation of common ownership was not sufficient to show the defendants were an integrated employer for FMLA purposes where the plaintiff did not present any evidence of the other three factors set forth in the FMLA regulations); *Taylor v. Kay Lease Service, Inc.*, 761 F.2d 1107, 1110 (5th Cir. 1985). The hiring procedures used also determine the nature of the employment relationship. For example, an employer that retains the authority to make the final hiring determination is functioning as a "legal" employer. If, however, an alternative workforce provider hires the individual and retains the right to refer this individual to other employer clients, it is likely that the alternative workforce provider would be held to be the "legal" employer. The power to discharge and reprimand is also considered as evidence of direction and control of the employees.

C. Administration of Employee Compensation. The mere fact that an employer or alternative workforce provider pays workers for their services is not conclusive proof that an employment relationship exists. *See, e.g.*, *Wadley v. Aspillaga,* 163 F. Supp. 2d 1 (D.D.C. 2001) (considering the following factors in determining whether there is a master/servant relationship: (1) the selection and engagement of the servant; (2) payment of wages; (3) the power to discharge; (4) the power to control the servant's conduct; and (5) whether the work is part of the regular business of the employer), *aff'd on other grounds,* 82 F. App'x 227 (D.C. Cir. 2003).

D. Services Rendered by the Employee. The alternative workforce provider may be held to be the "legal" employer even though the entity acts as an agent and does not directly receive the benefit of the services of the employee.

The particular circumstances and the extent of the alternative workforce provider's involvement in the establishment of the working conditions, policy administration, and similar issues will largely determine whether an employee/employer relationship exists between the service provider and the employee.

- The following checklist helps define the status of a particular member of the alternative workforce:
- Which entity will instruct the worker about when, where, and how she or he is to work?
- To which entity, if any, will the worker be required to submit reports on the status of his or her work?
- Which entity, if any, will train the worker with regard to the assigned tasks?
- Which entity will have the right to discipline, discharge or reassign the worker?
- Which entity will determine the hours during which the worker is required to provide his or her services?
- Which entity will test and assess the worker's qualifications and degree of skill?
- Which entity will be responsible for paying the worker?
- Which entity, if any, will provide the worker with welfare benefits such as paid vacation, sick leave, or insurance benefits?
- Which entity, if any, will provide the worker with liability insurance if needed?
- Under the terms of the agreement, which entity will be responsible for filing and paying federal employment taxes for the worker?
- Has the worker ever been employed by the company before?

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- Does the relationship with the worker contemplate an indefinite rendering of services?
- Will the worker be prohibited from performing services for other entities or persons while working for the company?
- Has the alternative workforce provider responsible for the worker been in existence for fewer than three years?
- Is the alternative workforce provider related to the company in any manner?
- Does the worker have any type of equity interest in the company?
- Which entity will track, account for, and provide a recording mechanism for time worked?

III. JOINT EMPLOYMENT

The phrase "joint employer liability" describes the analysis and assessment of whether the alternative workforce provider, the alternative workforce provider's client, or both can be held liable for employment decisions affecting an employee who is supplied and/or managed by the alternative workforce provider. Potential and actual joint employers should, however, recognize that, given the ever increasing costs of litigation, the critical preliminary questions may be: (A) can the client of an alternative workforce provider be sued as a joint employer; and, if so, (B) at what stage of the litigation, if any, can the client be dismissed from the lawsuit?

The joint employer theory was recognized by the U.S. Supreme Court in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). As restated in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982), the joint employer test is defined as:

> Where two or more employers exert significant control over the same employees – where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment – they constitute "joint employers" within the meaning of the National Labor Relations Act (NLRA).

Id. Factors involved in applying this joint employer test include: hiring, firing, and discipline; promotions and demotions; compensation; establishing working conditions; and daily supervision and direction. If the alternative workforce provider and its client share responsibility for determining these factors, a joint employment relationship exists. All of the facts and the circumstances surrounding the relationship are analyzed when administrative agencies and courts make determinations as to whether a joint employment relationship exists. While both the client and the service provider may not ultimately be held liable merely because they are held to be "joint employers," in the majority of situations, both may be proper parties to the lawsuit. Then it simply becomes a question of whether one or both of the entities are held responsible by the judge or jury for the unlawful employment decision at issue. *See, e.g., Johnson v. Labor Force*, 2011 WL 6302890 (E.D. Pa. Dec. 15, 2011) (relying on test for joint employment set forth in *Browning-Ferris* and denying summary judgment in § 1981 case because, based on the facts presented, a jury could infer that the client and alternative workforce provider were joint employers).

IV. JOINT EMPLOYER LIABILITY UNDER VARIOUS STATUTES

A. NLRA.

1. The "Joint Employer" Concept. Whether an alternative workforce provider's employees, working side-by-side with its client's employees, may be included in the client's collective bargaining unit or potential unit is somewhat undefined. In August 2015 the National Labor Relations Board (NLRB or Board) issued its long-awaited decision in *Browning-Ferris Industries (BFI)*, 362 NLRB No. 186, substantially changing and expanding the standard for finding a joint-employer relationship under the NLRA. The previous test had been whether two entities share the ability to directly and immediately control or determine essential terms and conditions of em-

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ployment such as hiring, discipline, termination, suspension and direction. Citing the significant expansion in the diversity of workplace arrangements in today's economy and that the Board's joint-employer jurisprudence is increasingly out of step with changing economic circumstances, the NLRB's three Democratic members created a new standard over the vigorous dissent of the two Republican members. The majority said that under common-law principles the right to control is probative of an employment relationship – regardless of whether that right is exercised. Under the new standard a joint-employer relationship will be found if the alleged joint-employers possess, exercise or simply retain the right, directly or indirectly, to control essential terms and conditions of employment, even if that control is not exercised. In *BFI* the Teamsters union sought to organize employees of Leadpoint Business Services, a company providing recycling services at a BFI plant in California. Citing the existing Board standard, the Regional Director of the NLRB rejected the union's arguments that BFI was the joint employer of approximately 240 workers provided by Leadpoint under a labor services agreement and directed an election with Leadpoint as the only employer. The union appealed this decision to the NLRB, which promulgated the new standard. Applying that standard the NLRB ruled that BFI is an employer under common-law principles and that it shares or codetermines matters governing the essential terms and conditions of employment for Leadpoint's employees. The NLRB relied on the following factors in reaching that conclusion: hiring, firing, discipline, suspension, direction of work, hours and wages. While the *BFI* case involved a subcontractor, not an alternative workforce provider, the Board likely will apply the new standard to different types of business relationships that may trigger the joint employment question.

2. Petitions for Election and Bargaining Unit Issues. Joint employment issues arise when a client of an alternative workforce provider becomes involved in a union representation election. The Board has returned to its long-standing precedent that combined units of solely and jointly employed employees are multi-employer bargaining units and are statutorily permissible only with the consent of the parties. *See H.S. Care LLC, d/b/a/ Oakwood Care Center*, 343 N.L.R.B. 659 (2004). This decision overrules the Board's 2000 decision in *M.B. Sturgis*, 331 N.L.R.B. 1298 (2000), which held that bargaining units of solely and jointly employed employees are permissible under the NLRA. In overruling the prior decision, the Board held "the *Sturgis* Board's reinterpretation of the concept of an 'employer unit' severed that term from its statutory moorings." The Board further noted this "loss of direction" gave rise to such "anomalous decisions" as *Gourmet Award Foods*, 336 N.L.R.B. 872 (2001), which applied a collective bargaining agreement between an employer and its employees to employees supplied by an alternative workforce provider.

In *Oakwood Care Center*, the Board returned to the precedent set in *Greenhoot, Inc.*, 205 N.L.R.B. 250 (1973), and *Lee Hospital*, 300 N.L.R.B. 947 (1990), and held that the NLRA does not authorize the Board to direct elections in units encompassing the employees of more than one employer absent the consent of the multiple employers. According to *Oakwood Care Center*, by ignoring the bright line between employers and multi-employer bargaining units, *Sturgis* departed from the directives of the NLRA and decades of Board precedent. The Board further stated, "[w]e find that the new approach adopted in *Sturgis*, however well intentioned, was misguided both as a matter of statutory interpretation and sound national labor policy."

In *Bergman Brothers Staffing, Inc.,* Case 05-RC-105509 (R.D. June 20, 2013), an NLRB regional director certified an election among six workers employed by an alternative workforce provider assigned to a client on a short-term project. The Board Regional Director (RD) held that the employees were not temporary workers but instead were permanent employees of the alternative workforce provider. Additionally, the RD held that *Oakwood Care Center* does not apply, stating "Were I to conclude that *Oakwood* requires any petition to name both joint employers, the employees herein would effectively be denied any opportunity to exercise their statutory rights."

3. Liability for Unfair Labor Practices. In *Capitol EMI Music, Inc.*, 311 N.L.R.B. 997 (1993), *enf'd*, 23 F.3d 399 (4th Cir. 1994) (4th Cir. May 20, 1994), the NLRB dismissed an unfair labor

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practice charge against an alternative workforce provider based solely on the joint employment relationship between the service provider and its client. Although the NLRB agreed with the Administrative Law Judge that a joint employment relationship existed between the two entities, the Board refused to hold the service provider liable for the unlawful acts of its client simply because they were joint employers. The Board held that the alternative workforce provider could not be held liable for the unfair labor practices committed by the client unless it: (a) knew or should have known that the client acted against the employee for unlawful reasons; and (b) acquiesced in the unlawful action by failing to protest it or exercise any contractual right it might have to resist the unlawful practice. *But see Aim Royal Insulation, Inc.,* 358 NLRB No. 91 (July 30, 2012) (finding that the client and agency that supplied the client with temporary and temporary-to-permanent employees were liable as joint employers for unfair labor practices in refusing to hire union supporters, noting that "there must be evidence that one employer 'meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the other employer's employees' … The Board has found joint-employer relationships where an employer 'participated meaningfully in the exercise of control over matters governing the terms and conditions of employment' of an employment agency's employees.").

B. Workers' Compensation. Liability in the area of workers' compensation varies from state to state. However, the applicable analysis usually is similar. Whether the client or the alternative workforce provider is a "special employer" of the injured worker generally is the main question.

For a client to be a "special employer," three prerequisites usually must be met: (1) a special contract of hire with the client must exist; (2) the work performed must essentially be that of the client; and (3) the client must have the right to control the details of the work performed. The fact that the worker's wages come from the alternative workforce provider rather than the client is not a controlling factor in determining whether the client is a special employer.

The National Association of Insurance Commissioners (NAIC) and the National Council on Compensation Insurance (NCCI) have adopted model regulations to deal with the issue of employers transferring their employees to alternative workforce providers' payrolls to avoid high experience modifications. The NCCI rules have been adopted in a number of states. Under the model regulations, "employee leasing" is defined broadly to include any arrangement whereby one business leases workers to another business. The model regulations relating to voluntary coverage differ significantly from those applicable to assigned risk pools. Coverage in the voluntary market is essentially left to the determination of the insurance carrier. In the assigned risk pool, however, alternative workforce providers must secure coverage on a "multiple coordinated policies" basis, which means that a separate policy must be written for each client of the alternative workforce provider, with the service provider acting as the central managing entity for billing and other administrative purposes. According to the Commission, this ensures payment of the proper amount of premium relating to the contingent workers.

With respect to providing insurance coverage for workplace injuries, some states have held the client directly liable to the alternative workforce provider's employees for the payment of workers' compensation benefits, even when the alternative workforce provider has expressly agreed to provide the coverage. *See, e.g., Virginia Polytechnic Institute and State University v. Faye*, 371 S.E.2d 34 (Va. App. 1988). In such states, the client should require the alternative workforce provider to have a provision in its workers' compensation policy that requires the alternative workforce provider's carrier to provide benefits directly to the client and prevents it from seeking reimbursement from the client's carrier. *See also Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473 (Tex. 2005) (client of an alternative workforce provider could not assert the workers' compensation exclusive remedy defense in a lawsuit filed by an employee of the alternative workforce provider unless the client company could show that it was explicitly covered by a workers' compensation insurance policy; Texas state law does not permit an alternative workforce provider to obtain coverage for a client simply by obtaining coverage for itself – there must be explicit coverage for the client).

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In many states, PEOs are statutorily recognized as an employer for the purposes of that state's workers' compensation statutes. The significance of this recognition is that a PEO enjoys the "exclusive remedy" protection under such state workers' compensation laws, meaning that it cannot be sued for a co-employee's work-related injuries – only workers' compensation remedies apply.

C. Consolidated Omnibus Budget Reconciliation Act (COBRA). Clients and alternative workforce providers may agree on allocation of reporting and other responsibilities under COBRA if that allocation is spelled out in the staffing contract, and may even agree to hold each other harmless if there should be a failure. However, regardless of any agreement, the legal responsibility remains with the plan administrator of the plan under which the employees are covered. For instance, if the employees remain employees of the client, and participate in the client's group health plan, even if the alternative workforce provider agrees to assume the obligations to them under COBRA, it is acting on behalf of the client (or the administrator of the client's plan) and the responsibility for omissions or mistakes lies with the client. If the client is able to seek indemnification from the alternative workforce provider, that is a matter between them, but the client will remain responsible to the employees, the Internal Revenue Service (IRS), etc. for penalties. In addition, the "leased employee" rules of the Internal Revenue Code (IRC), discussed in J., below, apply for purposes of COBRA, and treat a leased employee as the employee of the recipient organization, even though he or she may actually be the employee of the alternative workforce providers. 26 U.S.C. §414(n)(3).

D. Immigration. Who employs a nonimmigrant alien between an alternative workforce provider and its client? Using the example of an H-1B visa, in general, an "employer" must file a petition for an H-1B nonimmigrant. For the purposes of the H-1B classification an employer is defined at 8 CFR 214.2(h)(4)(ii) as a person, firm, corporation, contractor, or organization in the United States which: (1) engages a person to work within the United States; (2) has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire[,] supervise, or otherwise control the work of any such employee; and (3) has an IRS tax identification number. So, a PEO can file an H-1B petition for an alien as long as the PEO meets the definition of an employer.

Additionally, does the PEO, its client, or both have the responsibility of obtaining the information required under the Immigration Reform and Control Act (IRCA) in a PEO relationship? Do new I-9 Forms have to be obtained in this situation? Who will handle future I-9's? These issues should all be addressed in the PEO contract.

The completion of I-9s is addressed by the United States Citizenship and Immigration Services (USCIS) in guidance entitled "Handbook for Employers – Instructions for Completing the Form I-9" (M-274)[1]. The following Q&A (#43 at page 37) reflects the position of the Department of Human Services (DHS) regarding PEOs:

> Q. I use a professional employer organization (PEO) that "co-employs" my employees. Am I responsible for Form I-9 compliance for these employees or is the PEO?
>
> A. "Co-employment" arrangements can take many forms. As an employer, you must comply with Form I-9 requirements. If the arrangement into which you have entered is one where an employer-employee relationship also exists between the PEO and the employee (e.g., the employee performs labor or services for the PEO), the PEO would be considered an employer for Form I-9 purposes and: a) the PEO may rely upon the previously completed Form I-9 at the time of initial hire for each employee continuing employment as a co-employee of you and the PEO, or b) the PEO may choose to complete new Forms I-9 at the time of co-employment.

1 The handbook is available at http://www.uscis.gov/files/nativedocuments/m-274_3apr09.pdf.

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E. Occupational Safety and Health Administration (OSHA). OSHA's Rule regarding Occupational Injury and Illness Recording and Reporting Requirements, 29 C.F.R. § 1904.31 (Covered Employees), states that a company that obtains employees from a temporary help service must record injuries and illnesses of these employees, even if they are not on the company's payroll, if the company supervises these employees on a day-by-day basis. However, the temporary help agency or other company from whom the employee was leased is not required to record injuries or illnesses of employees if the user company (which supervises the employees on a day-by-day basis) is recording these injuries or illnesses. 29 C.F.R. § 1904.31(4).

A report released by the National Employment Law Project and the National Staffing Workers Alliance indicates that temporary workers are employed in some of the most dangerous jobs in the economy, but often do not receive sufficient training and may be less likely to report injuries for fear of retaliation. *See Perfect Storm of Health, Safety Risks Face Temporary Workers, Report Says, 44 O.S.H. Rep. (BNA) 847 (Sep. 11, 2014). In light of these safety concerns, OSHA and the National Institute for Occupational Safety and Health (NIOSH) have released Recommended Practices for alternative workforce providers and host employers to better protect temporary workers from hazards on the job. The Recommended Practices are available at:* https://www.osha.gov/Publications/OSHA3735.pdf. The guidance makes a number of recommendations including:

- The host employer and alternative workforce provider should jointly evaluate the host employer's worksite for hazards and identify necessary training and protections for each worker. For alternative workforce providers that do not have dedicated safety and health professionals on staff, the guidance recommends utilizing safety and health consultation services provided by their workers' compensation insurance providers. Additionally, small- and medium-sized businesses may request assistance from OSHA's free on-site consultation service.
- The alternative workforce provider and host employer should assign occupational safety and health responsibilities and define the scope of work in the contract.
- The guidance recommends that both the host employer and the alternative workforce provider track and, where possible, investigate the cause of workplace injuries. However, the guidance states that for statistical purposes, OSHA requires OSHA injury and illness logs be kept by the employer who provides day-to-day supervision – that is, the employer who controls the means and manner of the temporary employees' work.
- The guidance notes that both the host employer and alternative workforce provider are responsible for the training of temporary workers. Service providers should provide training applicable to different occupational settings, and host employers should provide specific training tailored to the particular hazards at their workplaces. The guidance states that host employers should provide temporary workers with safety training that is identical or equivalent to that provided to the host employers' own employees performing the same or similar work.

In the PEO context, OSHA uses a controlling employer definition. A controlling employer has general supervisory authority over the worksite, including the power to correct any safety and health violations. In this, control can take the form of contractual duty or by practice. Most PEOs state in their agreement that they reserve a "right to direct and control." Further, a PEO contract usually contains a provision for the PEO's right to terminate services if the client is noncompliant with safety recommendations. *See* OSHA Directive Number:CPL 2-0.124.

F. The Fair Labor Standards Act (FLSA). When a joint employer relationship exists, each employer is individually and jointly responsible for compliance. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the FLSA depends upon all the facts in the particular case. 29 C.F.R. § 791.2. If all the relevant facts establish that two or more employers are acting entirely independently of each

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other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. *Id.* If, however, the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. *Id.* In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act, including the overtime provisions, with respect to the entire employment for the particular workweek. *Id.* In discharging the joint obligation, each employer may take credit for minimum wage and overtime payments made to the employee by the other joint employer(s). *Id.*

In *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012), the Eleventh Circuit held that DHL Express was not a joint employer with Sky Land Express for the purposes of an FLSA claim made by delivery drivers employed by Sky Land Express. The court held that an assessment of the economic realities did not reveal an employment relationship between DHL Express and the drivers. In the Eleventh Circuit, courts analyze numerous factors to determine whether an employment relationship exists, including: (1) the nature and degree of the employer's control over the employees; (2) the employer's supervision of the employees' work; (3) the employer's right to hire, fire, or modify employment conditions; (4) the employer's power to set employee pay; (5) the employer's role in preparing payroll; 6) the employer's ownership of the employees' work facilities; (7) whether the employees performed a specialty job integral to the employer's business; and (8) the relative investment in equipment and facilities by the purported joint employers. Ultimately, courts determine whether an employment relationship exists on a case-by-case basis by looking at the "totality of the circumstances." After examining all of the factors, the court held that DHL was not a joint employer of the drivers. The Eleventh Circuit noted DHL did not pre-determine how the drivers accomplished their ultimate duty – delivering the packages. Thus, even though DHL determined when the drivers could start their workday and sometimes added unplanned routes to the drivers' schedules, the court found DHL did not exert sufficient control over the drivers to qualify as their employer. The court also found DHL did not subject the drivers to employer-like supervision through its use of scanners because DHL did not monitor the scanners in real time. Moreover, aside from requiring that all couriers pass a basic background check, the court found DHL exerted no influence over Sky Land's hiring process. Importantly, DHL did not set drivers' hours or pay rates, and did not prepare their payroll. Furthermore, the court noted the drivers spent the majority of their day in their vehicles, which Sky Land owned, and which Sky Land could use to make deliveries for other companies. Lastly, because both Sky Land and DHL made significant investments in facilities and equipment, this factor did not influence its decision. In light of the totality of the circumstances, the court determined DHL was not a joint employer of the drivers.

Additionally, in *Orozco v. Plackis* 757 F.3d 445 (5th Cir. 2014), the court overturned a jury verdict in favor of the franchisee's employee, who claimed the franchisor was his joint employer. The employee claimed that the franchisor: (1) made regular visits to the franchisee's restaurant; (2) regularly discussed customer comments and complaints with the franchisee owners and provided input for improvement; (3) had the authority to select and hire the franchisee's managers; and (4) selected and set up the franchisee's time keeping systems and trained the managers on how to use them. The employee also claimed that employees trained by the franchisor needed no training to work for the franchisee and that the franchisor and franchisee at times shared services of the same employee. In overturning the jury verdict in favor of the employee, the Fifth Circuit applied the "economic reality test" and found that the allegations of control were either untrue or that they did not support a finding that the franchisor actually exerted control over the franchisee's operations. For example, although the franchisor: gave nonbinding advice to the franchisee regarding how to operate more profitably, including how to schedule employees; suggested changes to the menu; suggested which vendors to use; and provided advertising advice, the franchisee at all times maintained control over

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these and other operations of the franchise. Additionally, the fact that the franchisee hired employees from the franchisor because they would have already been trained by the franchisor did not show that the franchisor directed where employees work.

Some plaintiffs have survived motions to dismiss by claiming the franchisor exercised sufficient control over the franchisee's employees that they should be considered joint employers. *See, e.g., Olvera v. Bareburger Group LLC*, 73 F. Supp. 3d 201 (S.D.N.Y. 2014) (allegations sufficient to survive motion to dismiss included that the franchisor: (1) guided franchisees on "how to hire and train employees"; (2) set and enforced requirements for the operation of franchises; (3) monitored employee performance; (4) specified the methods and procedures used by employees to prepare customer orders; (5) exercised control, directly or indirectly, over the work of employees; (6) required franchises to "employ recordkeeping" of operations, including "systems for tracking hours and wages and for retaining payroll records"; and (7) exercised control over their franchisees' timekeeping and payroll practices).

In Olvera, the court noted that these allegations of franchisor control were sufficiently specific to avoid dismissal of the lawsuit on the issue of joint employment. The court further held that these facts would meet both the formal control test and the functional control test, both of which are viable methods of establishing joint employment in the Second Circuit Court of Appeals.

The formal control test, which has been widely used in many jurisdictions, consists of whether the franchisor: (1) has the power to hire and fire; (2) supervises and controls work schedules or conditions of employment; (3) sets the rate and method of payment; and (4) maintains employment records. The functional control test is more expansive and consists of: (1) whether the franchisor's premises and equipment were used by the plaintiffs; (2) the extent to which the plaintiffs performed a discrete line-job that was integral to the alleged employers' processes of production; (3) the degree to which the alleged employers or their agents supervised the plaintiffs' work; and (4) whether the plaintiffs worked exclusively or predominantly for the alleged employers. Not all of the factors must exist to create joint employment, and other factors not listed by either test may be relevant. All factors and circumstances are to be viewed in light of the economic realities of the relationship.

G. Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). Title VII and the ADA apply to any employer who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). An employer under Title VII is "a person engaged in an industry affecting commerce who has fifteen or more employees." *Id.* at § 2000e(b) The ADEA applies to any employer who has 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b). Before analyzing whether an alternative workforce provider has liability as a joint employer under federal anti-discrimination laws, a determination must be made regarding whether the alternative workforce provider is an employer. Numerous courts addressing this issue under Title VII have held that when viewed in the "functional sense" and when applying a "right to control" test and considering the "economic realities" of the situation, different employee leasing companies are not "employers" within the statutory meaning. *See, e.g.*, *Astrowsky v. First Portland Mortgage Corp.*, 887 F. Supp. 332, 337 (D. Me. 1995) (citations omitted); *Williams v. Caruso*, 966 F. Supp. 287, 296 (D. Del. 1997) (employment agency is not a Title VII employer and not subject to suit because it did not control plaintiff's day-to-day activities); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1244-45 (11th Cir. 1998) (focusing on the degree of control an entity has over the adverse employment decision on which the Title VII suit is based.).

1. Aggregation of Agency and Client Employees to Meet Statutory Coverage Threshold. In *Burdett v. Abrasive Engineering & Technology, Inc.*, 989 F. Supp. 1107 (D. Kan. 1997), the court held that under the joint employer theory, only the alternative workforce provider's employees over whom the client exercised control could be considered the client's employees. Thus, since the client exercised control over only six of the alternative workforce provider's employees during the weeks in which it used employees of the alternative workforce provider, the court counted only those employees, and determined that the client did not meet Title VII's statutory threshold

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with respect to one of the years during which the plaintiff claimed discrimination. In this case the alternative workforce provider supplied temporary workers. The analysis might be different if the relationship had been that of PEO and client.

2. Distinction between Aggregation of Single Integrated Employers and Joint Employers. In *Arculeo v. On-Site Sales & Mktg.*, 425 F.3d 193 (2d Cir. 2005), the Second Circuit discussed the distinction between aggregating employees under the "single integrated employer" theory versus the "joint employer" theory. Citing an earlier Second Circuit decision, the court explained that a "single employer" situation exists "'where two nominally separate entities are actually part of a single integrated enterprise. … '" (citations omitted). In this situation, examples of which include a parent and wholly-owned subsidiary corporation or separate corporations under common ownership and management, "the nominally distinct entities can be deemed to constitute a single enterprise." *Id.* at 198.

The court then explained that in a "joint employer" relationship, "there is no single integrated enterprise." *Id.* A determination that employers are "joint" assumes they are separate legal entities but handle "certain aspects of their employer-employee relationship jointly." *Id.* (citing *Clinton's Ditch Cooperative Co. v. NLRB*, 778 F.2d 132 (2d Cir. 1985)). "Where this doctrine is operative, an employee, formally employed by one entity, who has been assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity, may impose liability for violations of employment law on the constructive employer, on the theory that this other entity is the employee's joint employer." *Id.*

The court then explained that aggregation of employees under the joint employer doctrine functions differently from aggregation of employees under the single employer doctrine. In the single employer context, the court draws the conclusion that, although nominally and technically distinct, several entities are properly seen as a single integrated entity. Accordingly, "all the employees of the constituent entities are employees of the overarching integrated entity, and all of those employees may be aggregated to determine whether it employs 15 employees." *Id.* at 199. However, where an employee is employed jointly by two different employers, "it does not follow that all the employees of both employers are part of an integrated entity encompassing both." *Id.* In this situation, the court held that the employees of one employer may be added to those employees of the other employer "who are jointly employed by the first, but such joint undertaking does not furnish logical justification for adding together all the employees of both employers, unless the circumstances justify the conclusion that all the employees of one are jointly employed by the other." *Id.* The court also noted that the EEOC's Compliance Manual (discussed below) does not endorse "simply adding together all the employees of entities found to be joint employers, as may be appropriate where aggregation occurs under the single employer theory. It rather requires a detailed analysis of the number of employees attributable to each employer, either because they are formally employed or jointly employed by that employer." *Id.* at 200.

3. Equal Employment Opportunity Commission (EEOC) Guidance. According to the EEOC enforcement guidance, in determining whether a worker "has an employment relationship" with the alternative workforce provider or the client, the EEOC first looks at whether the worker should be considered an employee or an independent contractor. The agency has developed a list of factors to consider in determining whether the worker should be considered an employee or independent contractor. *See EEOC Issues Guidance on Application of EEO Laws to Contingent Workers*, available at http://www.eeoc.gov/press/12-8-97.html; *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, http://www.eeoc.gov/policy/docs/conting.html. If the worker should be considered an employee, the EEOC then addresses whether the worker is an employee of the alternative workforce provider, the client or both.

One or both of the businesses will be considered the employer if they have the right to control the worker's employment. If either entity qualifies as the worker's employer and that entity has the

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statutorily required number of employees, that entity can be held liable for unlawful discriminatory conduct against the employee. The guidance provides that if both the alternative workforce provider and the client have the right to control the worker's employment and each has the statutorily required minimum number of employees, they are covered as "joint employers."

The guidance notes that the alternative workforce provider generally will be found to have a relationship with the worker because that company usually hires the worker, determines when and where the worker will report to work, pays the worker's wages, etc. However, the guidance notes that if the client puts its employees on the alternative workforce provider's payroll solely to transfer the responsibility of administering wages and insurance benefits, the alternative workforce provider would not be considered the employer of these workers if it does not have the right to exercise any control over them.

4. EEOC Guidance on ADA Liability in the Contingent Worker Context. The EEOC has issued guidance on how the ADA and the Rehabilitation Act of 1973 apply to contingent workers. According to the EEOC:

> A staffing firm or its client may not ask disability-related questions or require medical examinations until after an offer of employment with a particular client has been made. A staffing firm's placement of someone on its roster for future consideration for assignments is not an offer of employment.
>
> While a staffing firm is generally responsible for providing reasonable accommodations for job applicants, the staffing firm and the client will often both be responsible for providing accommodations needed on the job.

http://www.eeoc.gov/policy/docs/qanda-contingent.html. Neither alternative workforce providers nor their clients may discriminate against their employees or applicants on the basis of disability. The ADA also makes it clear that both the alternative workforce provider and the client can be held liable for requesting and filling job orders in a way that discriminates against an applicant's disability. An employer is exposed to the same level of liability by requesting nondisabled employees from an alternative workforce provider as it is when using such criterion for the selection of its own employees.

5. Case Law Addressing Joint Employment. In *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith*, 611 F. Supp. 344 (S.D.N.Y. 1984), *aff'd*, 770 F.2d 157 (2d Cir. 1985), the court adopted the joint employer test to determine whether the alternative workforce provider, the client, or both could be properly sued under Title VII. The court also held that even if the client and the alternative workforce provider were joint employers, either entity could be held liable for its involvement in or influence of the discriminatory decision.

Other courts have concluded that both the alternative workforce provider and employer can be liable under Title VII when both exercise control over the employee; however, this is a fact-specific inquiry, and the result varies depending on the facts of the specific case. *See*, *e.g.*, *Butler v. Drive Automotive Indus.,* 793 F.3d 404, 409 (4th Cir. 2015) ("Courts have formulated at least three tests that could be used in the joint employment context: the economic realities test, the control test, and the hybrid test. All three tests aim to determine, in a highly fact-specific way, whether an entity exercises control over an employee to the extent that it should be liable under Title VII."); *Atchley v. Nordam Group, Inc*., 180 F.3d 1143 (10th Cir. 1999) (affirming jury verdict in favor of Title VII plaintiff; even though contract stated that company supplying employees to work on a specific project was the "employer," the court, when considering the "right to control the means and manner of the worker's performance," determined that the client was the employer); *Blagg v. Technology Group, Inc.*, 303 F. Supp. 2d 1181 (D. Colo. 2004) (holding that the client, who had the right to control all key aspects of the consultants' work, including hiring, work assignments, work hours, work environment, and termination, was the employer, not the company who supplied the consultants); *Kellam v. Snelling Personnel Services*, 866 F. Supp. 812 (D. Del. 1994) (relying on the "right to control" test and holding that the alternative workforce provider was not

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an employer within the meaning of Title VII; factors significant to the determination included the client's day-to-day supervision of the plaintiffs and its determination of the plaintiffs' rates of pay and hours of work), *aff'd without opinion*, 65 F.3d 162 (3d Cir. 1995). *See also Byorick v. CAS, Inc.,* 2015 WL 4113727 (Dist. Co. July 8, 2015) ("a joint employer is liable under Title VII based on its co-employer's discriminatory conduct where it participated in the discrimination, or where it knew or reasonably should have known of the discrimination but failed to take prompt corrective measures within its control") (citing cases).

With regard to harassment in the joint employer context, the courts have concluded that when the alternative workforce provider has little control over the client's site, the alternative workforce provider must take only whatever action is reasonable and within its control. In *Riesgo v. Heidelberg Harris, Inc.*, 36 F. Supp. 2d 53 (D.N.H. 1997), the court concluded, in part, that because the alternative workforce provider reported the complaint to the client, called to determine if corrective action had been taken, asked the plaintiff if he wanted to continue working with the client, and placed the plaintiff with another client after the client discharged him, the alternative workforce provider could not be held liable for the harassment.

H. FMLA. The FMLA entitles eligible employees to take a total of 12 weeks of leave during a 12-month period due to the employee's or a family member's serious health condition, the birth, adoption, or placement of a child for adoption or foster care, or any qualifying exigency arising out of the fact that the employee's spouse, child, parent or next of kin is a military member on covered active duty or has been notified of an impending call to active duty status. It also entitles eligible employees to take a total of 26 weeks of leave to care for a covered service member with a "serious injury or illness" if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember. 29 U.S.C. § 2612(a); 29 CFR 825.112.

The FMLA applies to private-sector employers who employ 50 or more employees in 20 or more calendar work weeks in the current or preceding calendar year, and who are engaged in commerce or in any industry or activity affecting commerce, including joint employers and successors of covered employers, and all public agencies, including state, local, and federal employers, and local education agencies.

Which entity, the client or the alternative workforce provider, is responsible for granting leave and for granting reinstatement after leave is the key question in the FMLA context. FMLA eligibility, which may be unlikely in the typical "temporary employment" situation, becomes increasingly likely as the relationship progresses toward long-term staffing and outsourcing arrangements. This is so because the FMLA requires employees to have worked at least 12 months and 1250 hours for the employer.

1. Department of Labor (DOL) Regulations Regarding Joint Employment Under the FMLA. The DOL has issued regulations addressing joint employment, which state that a joint employment relationship will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer. *See* 29 C.F.R. § 825.106. The regulations specifically address how the joint employment rules apply to PEOs. *See* § 825.106(b)(2).

According to the regulations, the determination of whether a PEO is a joint employer depends on the economic realities of the situation, and must be based on all the facts and circumstances. PEOs that contract with client employers merely to perform administrative functions – including payroll, benefits, regulatory paperwork, and updating employment policies – are not joint employers with their clients. *See, e.g., Adams v. Valega's Prof. Home Cleaning, Inc.,* 2012 WL 5386028 at *12 (N.D. Ohio Nov. 2, 2012) (holding that a company that provides human resources services, without supervisory or other control over employees, is not considered a joint employer under 29 C.F.R. § 825.106) (citations omitted).

If, however, in a particular fact situation a PEO has the right to hire, fire, assign, or direct and control the employees, or if the PEO benefits from the work that the employees perform, that

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PEO might be a joint employer with the client employer, depending upon all the facts and circumstances.

In joint employment relationships, only the "primary" employer is responsible for giving required FMLA notices to employees, providing FMLA leave, and maintaining health benefits required by the FMLA. The DOL regulations state that the factors considered in determining which is the "primary" employer include whether the entity has: authority/responsibility to hire and fire; assign/place the employee; make payroll, and provide employment benefits. *See* 29 C.F.R. § 826.106(c). For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer. *Id.* Where a PEO is a joint employer, the client employer most commonly would be the primary employer. *Id.*

The regulations provide that employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. 29 C.F.R. § 825.106(d). For example, an employer who jointly employs 15 workers from an alternative workforce provider and 40 permanent workers is covered by the FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. *See* 29 C.F.R. § 825.111(a)(3).) *Id.* The regulations further provide that an employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer. *Id.* According to the regulations, in those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

The regulations provide that job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary placement agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its jointly employed employees, regardless of whether the secondary employer is covered by the FMLA. 29 C.F.R. § 825.106(e) (citing § 825.220(a)). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under the FMLA. *Id.* A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce. *Id.*

2. Case Law Addressing FMLA Liability in Contingent Workforce Situations. In a recent FMLA case applying the DOL's joint employer regulations, the Fifth Circuit affirmed dismissal of a former temporary employee's FMLA interference claim. *See Cuellar v. Keppel Amfels, L.L.C.,* 731 F.3d 342, 347 (5th Cir. 2013). The plaintiff was employed by Perma-Temp, an alternative workforce provider, and was assigned to Keppel Amfels. The court determined that Perma-Temp was the plaintiff's primary employer, while Keppel Amfels was her secondary employer as set out in the DOL regulations. The plaintiff claimed Keppel Amfels interfered with her FMLA rights by "convincing" Perma–Temp not to seek her reinstatement after her maternity leave ended, and retaliated against her based on her exercise of FMLA rights. The Fifth Circuit rejected these claims, holding that the "regulations permit, even expect, a secondary employer to rely on a primary employer to provide FMLA leave: a temporary employee's relationship with a secondary employer *may end and never be restored* without any violation of the FMLA." *Id.* at 347 (emphasis in original). The court explained that "the 'primary responsibility' for job restoration falls on the primary employer; a secondary employer need only accept an employee returning from FMLA leave if it 'continues to utilize an employee from the temporary placement agency, *and the agency chooses to place the employee with the secondary employer.*'" *Id.* (citations omitted,

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emphasis in original). Thus, the court held that Keppel Amfels, the secondary employer, acted within its rights to replace the plaintiff temporarily and had no obligation to reinstate her without a request from Perma-Temp, the primary employer.

In *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004), the Ninth Circuit affirmed dismissal of a FMLA lawsuit against Air France, holding that Air France was not a "joint employer" of the various employees who provide contracted services to Air France. Accordingly, Air France did not employ 50 or more employees within a 75 mile radius of where the plaintiff, Moreau, worked; therefore, it did not have to provide Moreau with leave under the FMLA or California's Family Rights Act (CFRA). *See also Mahoney v. Nokia*, 444 F. Supp. 2d 1246 (M.D. Fla. 2006), *aff'd*, 236 F. App'x 574 (11th Cir. 2007) (holding that a worker provided to a corporation by an alternative workforce provider was employed by the service provider, not the client corporation for FMLA leave purposes; based on its examination of the contract between the employee and alternative workforce provider, the court determined that the alternative workforce provider was the employee's employer.) *But see Mackey v. Unity Health Systems*, 2004 WL 1056066 (W.D.N.Y. May 10, 2004) (Based on the DOL's regulation stating that joint employment will ordinarily be found when a temporary or leasing agency supplies employees to a second employer, the court held that an alternative workforce provider and a health care facility were joint employers with regard to an employee who claimed he was improperly denied FMLA leave. However, the court dismissed the FMLA claim because the employee was unable to return to work at the end of FMLA leave. The court permitted the plaintiff to proceed with his race discrimination and retaliation claims.).

3. Aggregation of Employees to Determine FMLA Coverage. At least one court interpreting the DOL's regulation has held that the employees of the PEO and client must be aggregated in determining employer and employee eligibility under the FMLA. In *Russell v. Bronson Heating & Cooling*, 345 F. Supp. 2d 761 (E.D. Mich. 2004), the court relied on the DOL regulations in part in determining that the PEO and client employer were joint employers with regard to the plaintiff's FMLA claim. The court distinguished the PEO relationship, which was involved in the case before it, from cases analyzing the relationship between a client and an alternative workforce provider supplying temporary employees. However, in *Adams v. Valega's Professional Home Cleaning, Inc.,* 2012 WL 5386028 (N.D. Ohio Nov. 2, 2012), the court distinguished *Russell,* noting that the employer in *Russell* "admitted his understanding of the [personnel services] agreement was that [Company A] employees became [Company B] employees and were leased back to Company A." *Id.* at 15 The court found no such agreement with respect to Adams. The court further noted that *Russell* did not "involve combining the approximately 488 employees of over 150 clients into one massive 'joint employer' relationship." *Id. See also Cruz-Lovo v. Ryder System, Inc.*, 298 F. Supp. 2d 1248 (S.D. Fla. 2003) (payroll processing company and its client were not joint employers because the payroll processing company did not exercise sufficient control over the plaintiff's employment and the client had fewer than 50 employees, thus it was not covered by the FMLA).

I. The Surface Transportation Assistance Act (STAA). In *Western Truck Manpower, Inc. v. Department of Labor,* 12 F.3d 151 (9th Cir. 1993), the court ruled that an employer who leased truck drivers to another company was liable under the STAA for firing a driver who refused to drive the other firm's truck with an unsafe load. The court declined to rule on the issue of whether there was a "knowing participation" requirement under STAA that would require the Secretary of Labor to prove that a joint employer was aware of the other employer's violation of the Act before the joint employer could be found liable for violating it.

The driver worked for Western Truck Manpower, Inc., which leased drivers to Ryerson Steel. After a load of sheet metal and steel products fell off his truck, the driver refused to continue to drive the truck because of its alleged unsafe condition and returned to Ryerson's yard. After Ryerson informed Western of the driver's action, Western's personnel informed the driver that the load was safe and issued him a warning for failure to complete a job assignment. Two weeks later, Ryerson informed Western that it would no longer accept the driver as an employee. Western then informed the driver that he was being removed as a driver at Ryerson's facility for "just cause." Western re-

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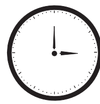

moved the driver from duty, took back all of its keys and credit cards, and paid all money due to him. The driver filed a complaint under STAA, which prohibits an employer from discriminating against an employee who refuses to operate a vehicle the employee reasonably or in good faith believes is unsafe. The Secretary of Labor ruled that Ryerson and Western were joint employers of the driver and that Western had violated STAA.

The Secretary concluded that the driver was engaged in protected activity when he refused to deliver the load that he believed was unsafe. The Secretary also concluded that Western had discriminated against the driver by failing to conduct an independent investigation of the incident. The Secretary also found that Western's general manager suggested disciplinary action to Ryerson and that Western then fired the driver. The Secretary ordered back pay to the driver and Western appealed. In affirming the Secretary's ruling, the court found that the Secretary's factual determinations were supported by substantial evidence. The court relied in part on the Secretary's conclusion that Western failed to take legal action to enforce an agreement between it and Ryerson, which required Ryerson not to take or cause any action, directly or indirectly, without Western's consent, that would cause a variance in the requirements contained in the collective bargaining agreement between Western and its drivers. The Secretary ruled that by not enforcing this agreement, Western allowed Ryerson to continue its retaliatory action against the driver. The court found that these findings supported the Secretary's conclusion that Western knowingly participated in the adverse action against the driver, thereby violating the STAA.

J. IRC. Generally, for the purposes of the IRC, including the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA), an entity is considered an employer of a worker if the entity has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. The entity is not required actually to direct the work; it is sufficient if the entity has the right to do so. Other factors considered include the right to discharge and furnishing tools and a place to work. Generally, if the worker is subject to another's control with regard to the result to be accomplished but not the means and method for accomplishing it, he or she would not be considered an employee. *See* 26 C.F.R. § 31.3401(c)-1(b); 26 C.F.R. § 31.3121(d)-1(c)(2); 26 C.F.R. § 31.3306(i)-1(b). *See also IRS Publication 15 (2014) (Circular E), Employer's Tax Guide,* available at: http://www.irs.gov/publications/p15/index.html, *Publication 15-A, Employer's Supplemental Tax Guide,* available at: http://www.irs.gov/pub/irs-pdf/p15a.pdf, and *Publication 15-B, Employer's Tax Guide to Fringe Benefits* available at http://www.irs.gov/pub/irs-pdf/p15b.pdf. Additionally, even if the parties to a contract agree that the relationship between a company and its workers is something other than employer/employee, if the relationship of employer/employee actually exists, the designation in the contract is irrelevant.

The IRS determination of employment relationship is significant because many employers enter into PEO or other types of alternative workforce relationships to have another company take control of payroll, taxes, benefits, etc. Regardless of, and notwithstanding, the treatment of such an arrangement for the other purposes discussed above, the treatment for purposes of the IRC, and the application of its rules, will be determined under the IRC.

On March 31, 2014, final regulations were issued under § 3504 of the Code, dealing with employment tax liability where a designated payor (such as a PEO) performs the acts required of an employer on behalf of a client under a service agreement. Under the regulation, the payor becomes subject, in its own right, to all requirements – including penalties – that apply to the employer, and becomes liable for employment taxes on wages paid by the payor to the client's employees. There are limited circumstances where the regulation does not apply, such as where the payor is hired to prepare employment tax returns under the client's Employment Identification Number (EIN), or where the payor is a "common paymaster" under the FICA rules, but generally the payor and the employer will both be liable for the penalties in the event of a failure.

The IRC also prescribes rules under which certain nonemployees are treated as employees for

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purposes of an employer's employee benefit plans. For example, if certain requirements are met, nonemployees who perform services for a recipient organization under an agreement between the recipient organization and "any other person" (referred to in the Code as the "leasing organization") can be considered "leased employees." This occurs once they perform services "of a type historically performed by employees" in the business field of the recipient organization, under the control of the recipient, on a substantially full-time basis for at least a year. 26 U.S.C. 414(n)(2). At that point, they are required to be treated as if they were employees of the organization receiving their services for purposes of that organization's employee benefit plans. So, unlike the general rule, nonemployees who qualify as "leased employees" under the IRC can – and in some cases must – be provided with employee benefits when they are not in fact employees.

V. INDEPENDENT CONTRACTORS

The analysis of whether an individual is an employee versus an independent contractor is important in determining the necessity for wage withholding and other taxation issues, exposure to discrimination liability, application of employee benefit rules, application of state workers' compensation laws, and exposure to state unemployment liability. Generally, if a worker is not an employee then the company does not have to pay Social Security and Medicare taxes (FICA), pay into workers' compensation and unemployment compensation funds, withhold income taxes and FICA taxes, pay minimum wage or overtime, or provide certain leave that is required by law for employees.

Because classifying a worker as an independent contractor substantially reduces the employer's legal tax and wage obligations, the DOL and the IRS have become increasingly focused on whether workers are properly classified as independent contractors. In September 2011, former Secretary of Labor Hilda L. Solis announced the signing of a Memorandum of Understanding (MOU) between the DOL and the IRS. Under this agreement, the agencies are working together and sharing information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws. Additionally, labor commissioners and other agency leaders representing a number of states have signed MOUs with the Wage and Hour Division, and in some cases, with the Employee Benefits Security Administration (EBSA), OSHA, the Office of Federal Contract Compliance Programs (OFCCP), and the Office of the Solicitor, as well as with the IRS. According to the DOL, in 2014 the DOL's budget included $14 million for worker misclassification enforcement. On September 15, 2014, the DOL announced that it had awarded $10.2 million in grants to 19 states to help states enhance misclassification detection abilities and enforcement efforts. *See DOL Awards $10.2 Million in Grants to Help with Misclassification Detection in States,* 60 Const. Lab. Rep. (BNA) 769 (Sep. 18, 2014).

The IRS has also increased its enforcement efforts by hiring new employment tax auditors with a three-year long focus on employment tax audits. Therefore, while independent contractor classification affects many different laws, there is an increased federal focus on proper employment tax withholding and properly paying minimum wage and overtime. However, the test to make the independent contractor determination varies depending on the body of law providing the framework. This Chapter will review the common law test which is similar to the master/servant analysis and then the specific tests used by the DOL and the IRS.

A. Independent Contractor vs. Employee. Determining which members of the workforce are employees and which are independent contractors can be critical in terms of liability under various laws.

The best candidates for independent contractor status are workers who have specialized skills and can perform their jobs without close supervision. These individuals include computer programmers, writers, artists, engineers, attorneys, outside directors, consultants, commissioned salespersons, drivers, and temporary workers engaged for a specific job. A recent decision from the Minnesota Court of Appeals provides some direction for employers in determining whether workers are properly classified as employees or independent contractors. *See St. Croix Sensory, Inc. v. Department*

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of Employment and Economic Development, 785 N.W.2d 796 (Minn. Ct. App. 2010). While the court analyzed this issue under Minnesota law, the factors are generally the same in most states and under federal law; thus, the decision provides valuable guidance on the issue of independent contractor versus employee. In this case, the Minnesota Court of Appeals reversed the Minnesota Department of Employment and Economic Development's determination that St. Croix Sensory's "assessors" were employees rather than independent contractors. St. Croix Sensory is a sensory laboratory that specializes in odor testing of materials, products and air for private industry and governmental entities. The company hires assessors who perform independent odor evaluations and record their observations so that St. Croix Sensory can relay the test results to its customers. The assessors sign up for whichever tests they want to participate in, thereby setting their own schedules. They do the testing in whatever manner they choose, receive a lump sum for each assessment session rather than hourly pay, and are free to read the paper, play cards, knit, or just visit with the other assessors for about 50 minutes per hour during an assessment session. Nevertheless, the State ruled that the assessors were employees, and subsequently declined to reconsider its determination, leading to St. Croix Sensory's appeal. In reversing the State's determination, the Court of Appeals examined several factors and emphasized several points. First, the Court disagreed with the State's primary finding, that St. Croix Sensory exercises so much "control" over the assessors' work that they are employees. The Court held that St. Croix's requiring the assessors to follow certain instructions "does not negate the assessors' overall right to control the method and manner of performance." The Court further explained that while St. Croix Sensory might retain control over the "end product," the assessors control the manner in which they perform those evaluations. Thus, the most important factor – control – dictated the conclusion that the assessors were independent contractors. The Court also emphasized the fact that St. Croix Sensory cannot discharge an assessor in mid-assessment without incurring liability, which again dictates that they are independent contractors. The evidence showed that if St. Croix Sensory discharges an assessor (which it never has actually done), it would pay the assessor for the entire assessment session. The State had argued that such a liability is "very limited," but as the Court noted, the rules speak to liability, period, not to a certain minimum amount of liability.

B. General Test for Independent Contractor. No single test is used under all of the various laws to determine whether a worker is an independent contractor or an employee. Traditionally, the degree of control over the manner and detail of the work retained by the worker as compared to the employer has been of primary importance to the independent contractor determination. While degree of control remains an important part of the independent contractor determination, the tests used by the DOL and IRS increasingly focus on the economic realities of the relationship.

Generally, the more control the worker retains over the manner in which she or he achieves the desired result, the more likely it is that she or he will be considered an independent contractor. Similarly, the more the employer is interested only in the result achieved as compared to how it is achieved, the more likely it is that the worker will be considered an independent contractor. Conversely, the more the employer attempts to regulate the manner in which the work is performed, the less likely it is that the worker will be found to be an independent contractor. The analysis is fact specific. Nevertheless, there are some basic questions that can be asked in an effort to measure the degree of control asserted in a given situation, including:

- Is the worker free to perform similar work for others?
- Is the worker paid on a per job basis, instead of a salary or hourly basis like other employees?
- Can the worker set his or her own work hours and routines?
- Does the worker provide his or her own tools and supplies?
- Does the worker pay his or her own job-related expenses?
- Can the worker hire others to perform some or all of the job?
- Is the worker excluded from benefit programs that cover employees?

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- Does the worker have an occupational license?
- Does the worker advertise his or her services?
- Is there a written agreement between the parties setting forth the terms of the relationship? If so, to what extent does it define the control to be exercised by the employer over the worker?
- Is the worker free to accept or reject the work without any adverse consequences?
- Where does the worker perform the work?
- Does the worker have a financial investment in his or her business?
- Is the work performed by the worker an occupation distinct from the work performed by employees of the employer?
- What is the length of time for which the worker will work?
- Is the work a part of the regular business of the employer?
- Do the parties believe they are creating an employment relationship?

In *Murray v. Principal Financial Group*, 613 F.3d 943 (9th Cir. 2010), the Ninth Circuit held that a "career agent" who sells the financial products and services of a group of financial services companies was an independent contractor and, accordingly, could not sue the companies for sex discrimination under Title VII because that statute only covers employees. In reaching this decision, the Court noted that it and "virtually every other Circuit to consider similar issues, have held that insurance agents are independent contractors and not employees for purposes of various federal employment statutes." *Id.* at 944.

The Ninth Circuit also clarified the test to be used in determining whether a worker will be considered an employee or an independent contractor. Relying on the U.S. Supreme Court's 1992 decision in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), the court held, "when determining whether an individual is an independent contractor or an employee for purposes of Title VII, a court should evaluate 'the hiring party's right to control the manner and means by which the product is accomplished.'" *Id.* at 945. The factors relevant to this inquiry are:

- the skill required;
- the source of the instrumentalities and tools;
- the location of the work;
- the duration of the relationship between the parties;
- whether the hiring party has the right to assign additional projects to the hired party;
- the extent of the hired party's discretion over when and how long to work;
- the method of payment;
- the hired party's role in hiring and paying assistants;
- whether the work is part of the regular business of the hiring party;
- whether the hiring party is in business;
- the provision of employee benefits; and
- the tax treatment of the hired party.

Id. at 946. The court held that several of these factors favored a finding that the agent, Murray, was an independent contractor, including that she was free to operate her business as she saw fit, without day-to-day intrusions; she decided when and where to work and maintained her own office; and she scheduled her own time off and was not entitled to vacation or sick days. Additionally, Murray was paid on a commission basis only, reported herself as self-employed to the IRS, and, in some circumstances, sold products other than those offered by Principal. Although the Court

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acknowledged that there were some factors in the relationship between Murray and Principal that supported the argument that Murray was an employee, these factors were not sufficient to overcome the strong indications that Murray was an independent contractor. *See also Jones v. A.W. Holdings LLC*, 484 F. App'x 44 (7th Cir. June 20, 2012) (unpublished decision) (holding that plaintiff was an independent contractor in light of the degree of flexibility she retained over her schedule, conducting client visits and recommending treatments, all of which suggested a significant degree of independence and lack of control; additionally, the plaintiff obtained specialized education and professional clinical training long before affiliating with the company, held an additional job with a different company, was paid with nonemployee compensation on an IRS Form 1099, and the language of her independent contractor agreement specifically stated that she was not an employee; affirming summary judgment on plaintiff's Title VII claims).

C. IRS Test for Independent Contractor. An employer could be subject to penalties, back taxes and interest if it is determined that an independent contractor was actually an employee and should have been treated as one. There is no statute of limitations if employment tax returns are false or are not filed.

If an employer fails to withhold income tax from an employee's compensation (e.g., because the employee was incorrectly classified as an independent contractor), the employer is itself liable for payment of the tax that should have been withheld from the employee. In addition, the IRS can assess a 100 percent penalty against the individual(s) who are responsible for the failure to withhold and/or to deposit withheld taxes. If and when the employee pays the tax, then the employer's tax liability is extinguished, but not necessarily the responsible individuals' liability for the 100 percent penalty. However, the IRS will generally employ the 100 percent penalty only as a method of collecting the tax due; once the tax has been satisfied, the penalty will *generally* not be assessed. Of course, an employer is always responsible for its share of FICA, and FUTA, taxes that should have been paid with respect to an employee. The employer can also be responsible for payment of the employee's share of FICA taxes if it fails to withhold, as well as interest and penalties.

Right to control is the primary factor in determining whether a worker is an independent contractor or an employee for purposes of federal income tax withholding, FICA, or federal unemployment tax. The IRS' rule is that an individual is an independent contractor if the "employer" has the right to control or direct *only the result of the work and not what will be done and how it will be done. See Independent Contractor Defined, at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Defined, and that in determining whether an individual is an employee or independent contractor, all evidence of control and independence must be considered. *See Independent Contractor vs. Employee, at:* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee. To determine if a worker is a company employee or an independent contractor, the IRS had historically applied the so-called "20 factor test," but has recently simplified this test by consolidating the 20 factors into 11 main tests, organized into three categories: behavioral control, financial control, and the type of relationship between the parties. *See IRS Pub. 15-A, Employer's Supplemental Tax Guide*, available at http://www.irs.gov/pub/irs-pdf/p15a.pdf. The IRS publication explains the three categories:

1. Behavioral Control. Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:

a. Instructions that the business gives to the worker. Generally, an employee is subject to the employer's instructions regarding when, where, and how to work. The IRS provides the following examples of types of instructions regarding how to do the work:

- When and where to do the work.
- What tools or equipment to use.
- What workers to hire or to assist with the work.
- Where to purchase supplies and services.

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- What work must be performed by a specified individual.
- What order or sequence to follow.

Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. IRS Pub. 15-A (2014), p. 7. The key consideration is whether the business has retained the right to control the details of a workers' performance or, instead, has given up that right. *Id.*

b. Training that the business gives the worker. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods. IRS Pub. 15-A (2014), p. 7.

2. Financial Control. Facts that show whether the business has the right to control the financial aspects of a worker's job include:

a. The extent to which the worker bears the cost of business expenses. Independent contractors are more likely to have unreimbursed business expenses than are employees. IRS Pub. 15-A (2014), p. 7.

b. The extent of the worker's investment. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status. *Id.*

c. The extent to which the worker makes his or her services available to the relevant market. An independent contractor is generally free to seek out business opportunities. *Id.*

d. How the business pays the worker. An employee is generally paid a regular wage amount for an hourly, weekly or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. *Id.* An independent contractor is usually paid a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly. *Id.*

e. The extent to which the worker can realize a profit or loss. An independent contractor can make a profit or suffer a loss. *Id.*

3. Type of Relationship. Facts that show the parties' type of relationship include:

a. Written contracts describing the relationship the parties intended to create. IRS Pub. 15-A (2014), p. 7.

b. Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation or sick pay. *Id.*

c. The permanency of the relationship. If a worker is engaged with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship. *Id.*

d. The extent to which the workers' services are a key aspect of the regular business of the company. If a worker provides services that are a key aspect of the company's regular business activity, it is likely that the company will have the right to direct and control the worker's activities. *Id.*

Any worker (or the firm for which he or she works) can request a determination of his or her status from the IRS by filing Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. The IRS will obtain from both parties detailed questionnaires regarding the worker and the control factors, and will make its decision on the basis of the information it receives. (If one of the parties – the firm, for example – fails to provide the requested information, then the determination will be made on the basis of what the IRS does receive.)

Having compensation reported on Form 1099 rather than form W-2 does not mean that the contractor is free of the hiring employer's control, and does not even mean that he or she is a contractor. If

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the worker participates in any benefit program in which employees participate or takes advantage of fringe benefits – particularly those that are supposed to be limited to employees – the identity as an independent contractor could be nullified (or, in some cases, the validity of the benefit plan could be adversely affected). Even purchasing discount tickets from the employer's employee services arm can jeopardize the independent contractor status.

Correction of a misclassification does not have to be expensive. If an individual is misclassified as an independent contractor, but is treated "correctly" as if he were a contractor (i.e., Form 1099 filed, etc.), the employer's liability for the misclassification could be (A) 1.5 percent of the individual's "wages" for failure to withhold income taxes, plus (B) 20 percent of the otherwise-applicable employee FICA tax (i.e., 3.06 percent of wages up to the wage base), plus (C) the regular amount of employer FICA tax. 26 U.S.C. § 3509(a). If the employer neglected to comply with the Form 1099 reporting requirement (other than willfully), the percentages in (A) and (B) of the preceding sentence are doubled. 26 U.S.C. § 3509(b).

In connection with its enforcement program, the IRS in 2011 issued Announcement 2011-64, (which can be found at: http://www.irs.gov/pub/irs-drop/a-11-64.pdf), announcing a "Voluntary Classification Settlement Program" (VCSP), which allows employers to correct worker classification errors voluntarily and to pay significantly reduced penalties, without having to go through either an employment tax examination or complicated administrative procedures. There were originally a number of conditions that had to be met for an employer to be eligible for relief under the VCSP, but if an employer were eligible, it could resolve outstanding misclassification tax issues at a substantially reduced cost, i.e., a fraction of the amount determined under § 3509, described above, with no interest or penalties. In addition, in exchange for the employer's agreement to prospectively reclassify the affected employees, the IRS would agree not to audit the employer's classifications for prior years. It should be noted that the VCSP covers only the IRS; it has no application to either the DOL or state agencies. But in the right case it could be a useful tool.

In late 2012, in Announcements 2012-45 and 2012-46, the IRS temporarily extended eligibility to participate in a slightly modified version of the program (the "Modified VCSP") to employers who had not filed all required Forms 1099, as is required for the VCSP. In addition, the prohibition against participation by employers that are under audit and the requirement that employers agree to extend the limitations period for future assessments were also eliminated under the Modified VCSP. However, employers who file court challenges against classifications resulting from an IRS or DOL audit remained ineligible to participate. For those who are eligible, applications for the modified temporary program could only be filed through June 30, 2013, and the penalties under the modified program, though still reduced, are not as low as those under the "original" VCSP.

Since the lapse of the Modified VCSP, the original program can still be utilized, by filing Form 8952 at least 60 days before the date as of which the correction is proposed to be made effective. The current terms of the VCSP are summarized at: http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Voluntary-Classification-Settlement-Program. Among those terms, the IRS states that no information is provided to the DOL, or to state labor agencies, as a result of filing a VCSP application, though many employers remain hesitant to do so.

One additional factor that applies for purposes of IRS determinations is so-called "Section 530 relief," named for § 530 of the Revenue Act of 1978 – not the IRC. That section created a safe harbor providing complete prospective and retroactive relief to an employer for misclassifications, provided that (1) its classification of similarly situated individuals since 1977 is consistent; (2) it satisfies all reporting requirements consistent with its classifications; and (3) it had a "reasonable basis" for its classification of the individuals in question (i.e. prior IRS audit, established practice of a significant segment of the industry, judicial precedent, IRS ruling or specific legal or accounting advice). *See* http://www.irs.gov/pub/irs-pdf/p1976.pdf.

D. Wage/Hour Test for Independent Contractor. The definition of "employee" under the FLSA is broader than under the common law concept and includes "suffering or permitting" one to work. The

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express wording of the FLSA indicates that the wage and hour provisions apply only to "employees." The FLSA defines an employee as any individual employed by an employer. Because federal courts traditionally define "employee" broadly for purposes of FLSA coverage, the majority of reported decisions find that the workers are "employees." If an employer knows or has reason to know that work is being performed, the work time may be compensable under the FLSA even if it has not been authorized or requested, and even if the employee "volunteered" to work for free. 29 U.S.C. §§ 203(e) and 203(g); 29 C.F.R. § 785.6, 785.7, 785.11.

Individuals are often treated as "independent contractors," "subcontractors," "contract workers," or "consultants," but under the law are considered "employees" eligible to receive the minimum wage and overtime pay and as to whom there are record-keeping obligations under the FLSA. *See Usery v. Pilgrim Equipment Company, Inc.*, 527 F.2d 1308 (5th Cir. 1976). Employees cannot waive the FLSA's requirements. A contract designating an individual as an "independent contractor" is not determinative of the true nature of the individual's status. *Mitchell v. John R. Cowley & Bro., Inc.,* 292 F.2d 105 (5th Cir. 1961); 29 C.F.R. § 778.316. *See also Naik v. 7-Eleven Inc.,* 2014 WL 3844792 (D.N.J. Aug. 5, 2014) (despite entering into franchise agreements designating them as "franchisees" or "independent contractors" the plaintiffs claimed the economic realities of the workplace showed they were actually employees for FLSA purposes; finding allegations sufficient to survive motion to dismiss when analyzed in light of the economic realities and the six-factor test enunciated by the Third Circuit in *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir.1991). Some of the factors set out in *Martin* are included in the DOL's Fact Sheet, discussed below.).

In July 2015 the DOL issued an interpretation in furtherance of its Misclassification Initiative, which concludes that "most workers are employees under the FLSA's broad definitions." *See* Administrator's Interpretation 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors. The Interpretation does not change the "economic realities" test courts currently apply in determining whether a worker is an independent contractor. It does, however, emphasize that each factor of the economic realities test must be applied consistently with the broad definition of "employ" found in the FLSA. Depending on the court, the economic realities test generally includes the following factors:

1. the extent to which the work performed is an integral part of the employer's business;
2. the worker's opportunity for profit or loss depending on his or her managerial skill;
3. the extent of the relative investments of the employer and the worker;
4. whether the work performed requires special skills and initiative;
5. the permanency of the relationship; and
6. the degree of control exercised or retained by the employer.

While the Interpretation did not change the factors most courts consider in determining the economic realities of a work relationship, the Interpretation did provide some important takeaways regarding each factor:

The DOL specifically noted that work performed away from the employer's premises, whether in the worker's home or at the employer's customer, can still be integral to the employer's business.

- If a worker is truly in business for him or herself, and, therefore, an independent contractor, the worker should be at some risk of loss due to the managerial decisions he or she makes. Merely being able to work more hours is not a managerial skill that affects the worker's opportunity for profit or loss.
- In evaluating the relative investments of the employer and worker, courts should consider whether the worker has made investments in his or her business to further its ability to expand, reduce its cost structure or extend its business plan. Courts should also consider how that in-

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vestment compares to the employer's investment, not just to the work performed by the worker but to the employer's overall investment in the project.

- Merely having specialized skills does not mean that the worker is an independent contractor. There is a difference between providing skilled labor and demonstrating the skill and initiative of an independent contractor. The Interpretation states, in probably its most telling sentence: "Only carpenters, construction workers, electricians, and other workers who operate as independent businesses, as opposed to being economically dependent on their employer, are independent contractors."
- Courts should also consider whether the lack of permanence or indefiniteness in the worker's relationship with the employer is the result of operational characteristics of the business (i.e., whether the work is typically transient or seasonal) or the result of the worker's own independent business initiative.
- Control exerted due to the nature of the business, regulatory requirements and/or customer satisfaction are indicative of an employee/employer relationship. The issue is how much control is exercised by the employer, not why the employer is exerting it.

While no single factor is determinative, the DOL emphasized that the "control factor" should not be given undue weight. Ultimately, according to the DOL, the "factors should be considered in totality to determine whether a worker is economically dependent on the employer, and thus an employee." If the worker is in business for him or herself, and not economically dependent on the employer, then he or she is an independent contractor.

E. Uniformed Services Employment and Reemployment Rights Act (USERRA) and Independent Contractor Issues. USERRA provides employees serving in the uniformed services with protection from discrimination and retaliation in the workplace based on their military service. USERRA also provides service members with reinstatement rights after their military service and other benefits while they are serving. The DOL has issued regulations interpreting USERRA.

Several aspects of the regulations implicate contingent workforce issues. For instance, the regulations note that USERRA does not apply to independent contractors and identify a six-factor test for determining independent contractor status. The factors to be considered include:

1. The extent of the employer's right to control the manner in which the work is to be performed;
2. The opportunity for profit or loss that depends upon the individual's managerial skill;
3. Any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers;
4. Whether the service the individual performs requires a special skill;
5. The degree of permanence of the individual's working relationship; and
6. Whether the service the individual performs is an integral part of the employer's business.

20 C.F.R. § 1002.44.

In addition to addressing independent contractor status, the regulations also clarify that USERRA applies to hiring halls and successor employers and covers employees serving in part-time and probationary positions. Additionally, the regulations establish that an employer under USERRA "includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities." Thus, as with other employment statutes, whether a company utilizing an alternative workforce provider is considered an employer under USERRA also depends on the degree of delegation.

F. Independent Contractors: State Laws. Employers should file informational returns for their independent contractors (such as 1099's) and comply with state laws regarding workers' compensation and unemployment compensation. Employers should check the law of the state(s) in which they are located

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to ensure compliance. *See Hartford Underwriters Ins. Co. v. Kansas Dep't of Human Resources*, 32 P.3d 1146 (Kan. 2001) (The Kansas Supreme Court rejected a disabled individual's argument that the individuals who performed home health care services paid for by his insurance company were independent contractors and found him to be the employer of the home health care workers because he interviewed and selected the candidates, prepared a job description, and supervised their work.); *JKH Enterprises, Inc. v. Department of Industrial Relations,* 142 Cal. App. 4th 1046 (Cal. App. 6th Dist. 2006) (drivers who performed delivery services on behalf of company were found to be its employees; stop work order and penalty assessed to company for failure to procure workers' compensation insurance for the benefit of the drivers).

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