

INDEPENDENT CONTRACTOR

VS.

EMPLOYEE

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PROPOSED INDEPENDENT CONTRACTOR LEGISLATION

- Employee Misclassification Prevention Act

April 2010

- The Fair Playing Field Act of 2010

September 2010

- 2010 IRS Audit Program of 6000 employers in 3 years



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PROPOSED ACTION ...

- 2011 Budget for 100 IRS agents
- Ohio H.B. 523 Definition of Employee
 - Independent Contractor Law



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STRINGENT STATE LAWS

- Illinois, Indiana, New Hampshire, New Jersey, Minnesota, Rhode Island, Washington, Massachusetts, Delaware, Maryland, Colorado



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PROPOSED LAWS

- Ohio
- Pennsylvania
- New York
- Wisconsin



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A NEW ERA OF COMPLIANCE

- Monies Needed

- State unemployment and workers' comp. funds



- Monies Lost

- \$7 billion/10 years



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A NEW ERA ...

- 30% of companies misclassify
 - 3.4 million workers
 - 92,500 in Ohio costing \$363 million



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RIGHT OF CONTROL TEST

- What and how done
 - Means and methods
- VS.
- Result

30% cost savings for employer misclassification
including FLSA overtime



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MOST FREQUENTLY MISCLASSIFIED

- Truck drivers
- Construction workers
- Home health aides
- High tech engineers
- Sales persons



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Implications of Misclassification

- Tax Concern
 - Federal income tax withholding
 - State income tax withholding (if any)
 - FICA (federal social security tax)
 - FUTA (federal unemployment tax)
 - State disability insurance (if any)
 - State unemployment insurance
 - Treasury (IRS) Form 1099-MISC v. Form W-2
 - Treasury (IRS) Form W-9 v. Form W-4





Implications ...

- Non-Tax Concerns
 - INS Form I-9 and the independent contractor issue
 - Workers' compensation
 - Liability for acts of employees
 - Liability for acts of independent contractors
 - Danger in using IC's to create copyrightable works





Implications ...

- Financial Exposure
 - Income tax not withheld or paid over
 - FICA tax not withheld or paid over
 - State payroll taxes
 - Interest assessment
 - Penalty assessment
 - Workers' compensation claims
 - Nondischargeability in bankruptcy
 - Problems with the corporate veil or shield
 - Who is liable for an assessment



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IRS' Employment Tax National Research Project

- February 2010
- Specialized 3 year audit program
- Independent contractors
 - Fringe benefits
 - Payroll taxes
 - Expense reimbursements



IRS' Employment Tax National Research Project ...

- Tax gap estimate
 - \$200 billion – payroll and self-employment taxes
- Program goals
 - Gather statistics for computing gap
 - Identify areas of greatest non-compliance





Factors of “Independent-ness”

1. Degree of control
2. Right to discharge
3. Right to delegate work
4. Right to hire and fire assistants
5. Payment by the hour
6. Furnishing of training
7. Skill
8. Duration of relationship
9. Control over hours of work
10. Independent trade





Factors ...

11. Furnishing of tools
12. Place of work
13. Profit and loss
14. Intent of the parties
15. Principal in business
16. Sequence of work
17. Reports required
18. Same work as others classified as employees
19. Integration; and
20. Industry custom



Have You Hired an Independent Contractor?

- Do you need to instruct the person about when, where, and how to work?
- Do you need to train the worker to do the job?
- Is the worker integrated into your normal business operation?
- Are the services rendered personally by the worker or can he delegate the work?
- Are you responsible for the worker's assistants or subordinates?





Have You Hired ...

- Is there a continuing relationship with this worker?
- Do you set the worker's hours?
- Do you restrict the workers' freedom as to when and for whom he will work?
- Is the worker required to perform his tasks on your premises?
- Do you control the order or sequence of the task to be completed?



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Have You Hired ...

- Do you have a high level of supervision over the person?
- Do you pay by time instead of by the job?
- Do you pay the person's travel and other expenses?
- Do you furnish his or her tools and materials?
- Do you invest in the facilities that are used in performing the services?



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Have You Hired ...

- Do you restrict the profit or loss the person can earn from his services?
- Does the person perform similar services for more than one business at a time?
- Does the person make his services available to the public?
- Do you have the right to fire the person even if he meets your contract specifications?
- Can the person quit the job without any liability?



Checklist for Determination of Independent Contractor Status

	Yes	No
1. Have the parties signed an independent contractor agreement?	_____	_____
2. Does the contract state that the company has no right to control the work performed?	_____	_____
3. Has the company prepared a letter upon the completion of the work stating that the contractual terms were complied with?	_____	_____
4. Does the contract state that the independent contractor cannot be fired so long as he meets his contractual obligations?	_____	_____
5. Does the contract state that the independent contractor has a right to hire and fire assistants?	_____	_____
6. Does the contract state that the independent contractor will treat assistants as his own employees and will comply with all tax requirements?	_____	_____
7. Does the contract provide that the independent contractor is solely responsible for providing the labor to achieve the intended result?	_____	_____





Checklist

	Yes	No
8. Is the independent contractor paid by the job, rather than by the hour?	_____	_____
9. Is the company ensuring that no type of training is provided by the company for inexperienced workers?	_____	_____
10. Is the independent contractor viewed as a skilled worker?	_____	_____
11. Is the independent contractor hired for a specified time period?	_____	_____
12. Does the contract set out a completion date or some other termination date of its relationship with the independent contractor?	_____	_____
13. Does the independent contractor set his own hours of work?	_____	_____
14. Is the independent contractor free to work for any number of persons or firms simultaneously?	_____	_____
15. Does the independent contractor advertise and project himself to the public as an independent contractor in business for himself? Does he have business cards? Does he advertise on the side of his truck or van? Does he advertise in the yellow pages?	_____	_____



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Checklist ...

	Yes	No
16. Does the independent contractor furnish his own tools?	_____	_____
17. Does the independent contractor perform his job off company premises?	_____	_____
18. Does the independent contractor negotiate the payment for his services with the company?	_____	_____
19. Does the contract provide that the customer will pay the independent contractor directly, rather than pay the company who then pays the independent contractor?	_____	_____
20. Does the company consistently refer to the worker as an independent contractor in letters, memoranda, invoices, check stubs, and other correspondence between the parties?	_____	_____
21. Does the company refrain from instructing the independent contractor as to the sequence in which the work is to be performed?	_____	_____
22. Does the company refrain from requiring the independent contractor to submit regular oral or written reports?	_____	_____





Checklist ...

	Yes	No
23. Does the company refrain from sending supervisors or inspectors to the field on a regular basis to check on the work progress?	_____	_____
24. Does the company refrain from requesting that the independent contractor do the same type of work as its regular employees?	_____	_____
25. Does the company refrain from engaging an independent contractor to do something that is part of the day-to-day operations of the company?	_____	_____
26. Is there evidence that the company's competitors are treating similar workers as independent contractors?	_____	_____





Strategies for Business Owners

- Business should have the person sign a written agreement attesting to the fact that he/she is an independent contractor
- Person should actually bill the business for the services rendered
- Person should be required to have their own workers' compensation coverage
- As much independence as possible should be given in areas such as hours worked, where the job is to be performed, etc.
- Person should provide his/her own tools, supplies, training, transportation, etc.





Employee Leasing

- The arrangement
 - Leaseback of your own employees





Pros - Leasing

- Time savings
- Employee benefits paid by others
- Improved benefits
- Available manpower
- Wage administration
- Reduced record keeping





Cons

- Cost
- Co-employer liability
 - Discrimination
 - Wage-hour
- General liability insurance exclusions
- Workers' compensation – questionable immunity





TIPS FOR CONTRACTORS

- Let the subs contract with other companies
- Set job specifications, but don't tell contractors how to do their job
- State what day workers are needed, but don't specify work hours
- Require contractors to submit written bid for each project and end-of-job invoice based on that bid





TIPS ...

- Require them to carry own tools
- Require them to carry own insurance
- Require them to sign lien waiver every time they pick up a check
- Require them to sign W-9 each year
- Require them to sign subcontractor agreement each year, which refers to compensation as draw payments
- Provide 1099 at end of year





OHIO'S PROPOSED INDEPENDENT CONTRACTOR LAW H.B. 523

- Changes definition of “employee” uniformly
- Prohibits misclassification
- Requires agencies to share misclassification information
- Make contractor liable for misclassification of subcontractors



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OHIO'S PROPOSED LAW ...

- State agency debarment
4 years
- Civil and criminal penalties
\$1,500 per violation
- Poster requirement



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OHIO'S PROPOSED INDEPENDENT CONTRACTOR STATUS FOR CONSTRUCTION

An employer and the Director of Commerce must consider a sole proprietorship or partnership that performs Construction Services as an employer to be legitimate sole proprietorship/partnership if the employer demonstrates all of the following:



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CONSTRUCTION ...

- Performs free from the direction or control over the means and manner
- Not subject to cancellation/destruction upon severance of the relationship with the employer



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CONSTRUCTION ...

- Substantial investment of capital beyond ordinary tools and equipment and a personal vehicle
- Owns the capital goods, gains the profit and bears the losses
- Makes construction services available to the general public on continuing basis





CONSTRUCTION ...

- Reported a profit or loss or earnings from self-employment on sole proprietorship or partnership's federal income tax schedule
- Performs construction services for the employer under the name of a sole proprietorship or partnership





CONSTRUCTION ...

- Obtains the appropriate license or permit
- Furnishes the tools and equipment
- Hires its own employees without obtaining approval, pays without direct reimbursement and reports employees' income to IRS





CONSTRUCTION ...

- Does not represent individual as an employee of the employer
- Performs similar construction services for others





OHIO'S PROPOSED INDEPENDENT CONTRACTOR STATUS

- Free from control in connection with performance
- Customarily engaged in the business
- Separate business entity
- Incurs the main expenses and has continuing or recurring business liabilities related to the services



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PROPOSED STATUS ...

- Liable for breach of contract for failure to complete service
- Agreement describing the services, the payment the individual will receive, and the time frame for completion
- Service performed by individual outside of usual course of business of the employer





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