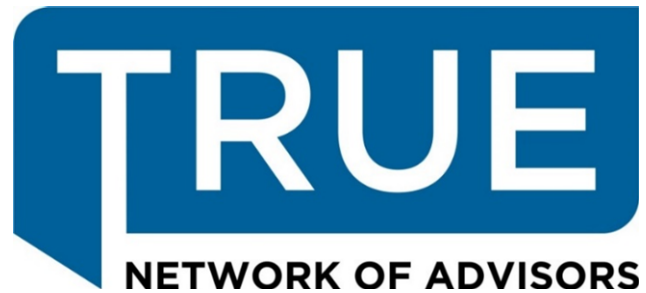


# The Developing Employment Law of Independent Contractors



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# Agenda

- ▼ **What Is An ‘Independent Contractor’?**
- ▼ **Principles of Lawful Independent Contractors**
- ▼ **Assessing Potential Liability**
- ▼ **Best Practices for Businesses Utilizing Independent Contractors**

# What Is An 'Independent Contractor'?

## ▼ A Vendor of Services to Your Business

- ▼ Most frequently another corporation:
  - ▼ IT consultant
  - ▼ Internet Service Provider
  - ▼ After hours cleaning service
  - ▼ Maintenance
  - ▼ Skilled trades: plumbers, electricians, carpenters
- ▼ Provides a service beyond the capabilities or job descriptions of your employees
- ▼ Receives a 1099
- ▼ ***Sometimes* this vendor is an individual:**
  - ▼ This is where **legal risk** arises

# What Is An 'Independent Contractor'?

## ▼ Independent Contractors Save You Money

- ▼ Independent Contractors pay their own way:
  - ▼ Employee recruitment, retention
  - ▼ Employee salaries, wages, overtime
  - ▼ Insurance and employee benefits
  - ▼ Cost of tools, special skills training, know-how
  - ▼ Taxes, fees, licenses, bonding
- ▼ They bear the risk of loss:
  - ▼ If they make a mistake, the liability is theirs
  - ▼ If they expend more time than estimated, they lose the opportunity cost

# What Is An 'Independent Contractor'?

***What Do Individual Independent Contractors Have In Common with Business Independent Contractors?***



# What Is An 'Independent Contractor'?



## Consider the Plumbing Company Vendor

- ▼ **Schedule & Availability**
- ▼ **Staffing: bring a helper?**
- ▼ **Skills, training, know-how**
- ▼ **Truck, tools, supplies**
- ▼ **Insurance, licensed, bonded**
- ▼ **Service contract/purchase order**
- ▼ **Pays its own employees wages, salaries, benefits, taxes**
- ▼ **Invoices fees and costs**

# What Is An 'Independent Contractor'?



## Consider the Problematic Individual Independent Contractor

- ▼ Works at a location during hours specified by you
- ▼ Is solely responsible for the work assigned
- ▼ Performs work similar to regular employees
- ▼ Uses your computer, hardware, office furniture, tools, supplies, etc.
- ▼ Any mistakes are on you, not the Independent Contractor
- ▼ Paid a regular fee that looks like wages/salary

# Federal Law of Independent Contractors

## ▼ US Department of Labor

- ▼ Wage and Hour Division
- ▼ Office of Federal Contract Compliance Programs
- ▼ OSHA

## ▼ Internal Revenue Service

- ▼ Anyone receiving a W-2 and a 1099 from the same entity in the same tax year: second level IRS review

## ▼ National Labor Relations Board

- ▼ February 2022, US NLRB and DOJ filed an amicus brief in federal court arguing for a change in the law such that “gig economy” workers would have a right to “organize consistent with protections provided to workers by federal law.”

## ▼ EEOC

- ▼ All workers to be protected from discrimination, harassment, and retaliation



# State Law of Independent Contractors

## ▼ State Labor Departments

- ▼ Unemployment
- ▼ Workers Comp
- ▼ State Disability Funds

## ▼ State Revenue Agencies

# Cross-Agency Cooperation

- ▶ **DOL launched a “Misclassification Initiative” to attack this problem through “enforcement, education, and outreach”**
- ▶ **DOL Entered Memorandum of Understanding (MOU) with IRS**
- ▶ **Entered MOUs with 23 states to coordinate investigations, make referrals, share data:**

Alabama, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, North Carolina, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Tennessee, Texas, Utah, West Virginia

# Principles of Lawful Independent Contractors

- ▼ Coverage as an “employee” under the Fair Labor Standards Act is broad “suffer or permit to work”
- ▼ Federal pendulum swing on the legal standard for a lawful independent contractor
  - ▼ **Economic Realities Test**
    - ▼ **Obama Era - Totality of the Circumstances:** to determine whether the employee is truly in business for him/herself or economically reliant on a single revenue source
    - ▼ **Trump Era - Two Core Factors:** (1) nature and degree of control over the work and (2) workers’ opportunity for profit or loss based on initiative/investment, plus three additional considerations: (3) amount of skill required; (4) degree of permanence of the working relationship; (5) whether the work is part of an integrated unit of production
  - ▼ **Legal Turmoil:** Trump Era rule was scheduled to take effect March 2021. Biden Administration issued rules first delaying and then withdrawing the Trump Era rule. On March 14, 2022, Judge Marcia Crone of the US District Court for the Eastern District of Texas found the Biden DOL violated the Administrative Procedure Act and reinstated the Trump Era rule

# Principles of Lawful Independent Contractors

- ▼ Trump Era Independent Contractor Rule
- ▼ **Economic Realities Test**
  - ▼ **Two Core Factors:**
    - ▼ (1) nature and degree of control over the work; and
    - ▼ (2) workers' opportunity for profit or loss based on initiative/investment,
    - ▼ plus three additional considerations: (3) amount of skill required; (4) degree of permanence of the working relationship; (5) whether the work is part of an integrated unit of production
- ▼ **But Will the Courts Buy It?**

# Principles of Lawful Independent Contractors

## ▼ **IRS 20-Factor Test for Lawful Independent Contractor Status:**

- ▼ Level of Instruction
- ▼ Amount of Training
- ▼ Degree of Business Integration
- ▼ Extent of Personal Services
- ▼ Control of Assistants
- ▼ Continuity of Relationship
- ▼ Flexibility of Schedule
- ▼ Demands for Full Time Work
- ▼ Need for On-site Service
- ▼ Sequence of Work
- ▼ Requirements for Reports
- ▼ Method of Payment
- ▼ Payment of Business or Travel Expenses
- ▼ Provision of Tools and Materials
- ▼ Investment in Facilities
- ▼ Realization of Profit or Loss
- ▼ Work for Multiple Companies
- ▼ Availability to Public
- ▼ Control Over Discharge
- ▼ Right of Termination

# Principles of Lawful Independent Contractors

- ▼ **Recent Significant State Law Developments**
  - ▼ Current legal standards often seem inapplicable to “gig economy” or “third category” workers
  - ▼ State Legislatures Have Stepped In:
    - ▼ **California Prop 22** (passed November 2020) classified rideshare drivers as independent contractors, carving them out of state labor protections
    - ▼ **Washington State Engrossed Substitute House Bill 2076:**
      - ▼ Preserves independent contractor status for rideshare drivers while guaranteeing certain minimum per-trip payments, paid sick leave, and workers’ comp

# Assessing Potential Liability

## ▼ Getting Caught:

- ▼ Independent contractor **files for unemployment** upon conclusion of project
- ▼ Independent contractor has an **on-the-job injury**
- ▼ Independent contractor believes FLSA misclassification caused loss of wages, overtime and **makes an agency complaint or files a lawsuit**

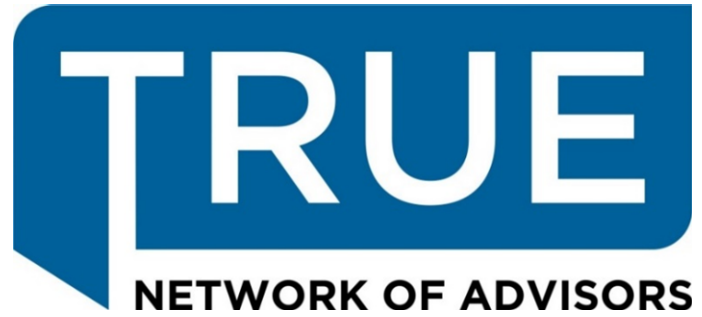
## ▼ Potential liability:

- ▼ A **single unemployment claim** by a misclassified independent contractor can prompt a **company-wide audit for misclassification**, leading to a back-tax assessment for unpaid state unemployment taxes
  - ▼ Due to **cross-agency cooperation**, this can lead to a state revenue department audit, a federal DOL (FLSA) audit, and an IRS audit for back wages and back tax
- ▼ On the job **injuries can lead to penalties and fines** associated with not carrying workers' comp on the independent contractor in addition to OSHA penalties/fines
- ▼ Misclassification that leads to an FLSA (or comparable state law) wage claim can result in an **exponential expense associated with litigation** (where you pay the plaintiffs' attorneys' fees)

# Best Practices

- ▼ Have a **gatekeeper** for any current, new independent contractors
- ▼ Have a **good contract that tracks the principles** of compliance
- ▼ Start by complying with the **Traditional 20-Factor IRS Test**, in addition to **ABC Test**
- ▼ Other factors for limiting risk:
  - ▼ Require that any independent contractor have a **corporation or LLC**
  - ▼ Require independent contractors to have **a business license**
  - ▼ Avoid using **non-compete agreements** in independent contractor agreements (confidentiality, some non-solicitations okay)
  - ▼ Do not employ someone in the **same tax year** you engage them as an independent contractor
  - ▼ Do not offer **employee benefits** to independent contractors





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