Legal Implications of Independent Contractor Status

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I. Introduction

Independent contractor status has become a politicized issue. It is yet another issue on which the two predominant political parties in this country have different views. Democrats tend to be skeptical of independent contractor status. Republicans tend to support an individual's right to work as an independent contractor. The developments concerning independent contractor status discussed below reflect this political divide.

II. The Biden Administration is skeptical of independent contractor status

The Biden Administration has expressed skepticism concerning independent-contractor status and promised to aggressively pursue instances of worker misclassification. For example, the Biden/Harris Campaign Website[1] asserted the following:

- As president, Biden will put a stop to employers intentionally misclassifying their employees as independent contractors.
- He will enact legislation that makes worker misclassification a substantive violation of law under all federal labor, employment, and tax laws with additional penalties beyond those imposed for other violations.
- And, he will build on efforts by the Obama-Biden Administration to drive an aggressive, all-hands-on-deck enforcement effort that will dramatically reduce worker misclassification.
- Biden will fund a dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate a large anti-misclassification effort.
- As president, Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws.

III. The Biden Administration has followed through on its campaign promise to scrutinize independent contractor status more aggressively

The Biden Administration has followed through on its promise to aggressively pursue instances of worker misclassification and to pursue an expansion of the applicable tests for defining covered employees.

A. For example, the U.S. Department of Labor ("DOL") issued Field Assistance Bulletin 2021-2 (Apr. 9, 2021), which announced an expansion of authority

[1] See https://joebiden.com/empowerworkers/.

for the recovery of "liquidated damages," i.e., double damages, from employers determined to have violated the FLSA. This means that a company investigated by DOL that is determined to have misclassified individuals as independent contractors, and failed to pay the individuals in accordance with FLSA's overtime and minimum-wage requirements, would more likely be required to pay "liquidated damages," i.e., twice the amount of the unpaid "back wages."

B. The DOL's special focus on worker misclassification was reaffirmed recently by DOL Solicitor Seema Nanda, who announced at a CLE class on January 25th that worker misclassification remains a high priority at DOL.

C. The Biden Administration has publicly endorsed the *Protecting the Right to Organize Act of 2021*, H.R. 842 and S. 420, (the "PRO Act"), which would adopt an "ABC" test for determining independent-contractor status for purposes of the National Labor Relations Act.[2] Under the "ABC" test, as proposed in the PRO Act, an individual performing any service shall be considered an employee … and not an independent contractor, unless—

> (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
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> (B) the service is performed outside the usual course of the business of the employer; and
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> (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed

D. In a *Report to the President by the White House Task Force on Worker Organizing and Empowerment* (Feb. 7, 2022),[3] one of the recommendations of the Task Force (which is Chaired by Vice President Kamala Harris) is to instruct DOL to continue to prioritize action to prevent and remedy the misclassification of workers as independent contractors, through (1) rigorous enforcement, (2) partnerships with other relevant federal and state agencies, such as the Internal Revenue Service and the Department of Transportation, (3) guidance, rules and/or education for employers and

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[2] E.g., in President Biden's 2022 State of the Union Address, he stated "Look, let's pass the PRO Act. When a majority of workers want to form a union, they shouldn't be able to be stopped." 2022 State of the Union Address | The White House.

[3] Microsoft Word - Worker Organizing Task Force Report_FINALPRINT.docx (whitehouse.gov).

workers, as needed, and (4) robust outreach to workers, employers, unions, and worker advocates.

In support of this recommendation, the Report asserts that:

> misclassification of employees as independent contractors deprives workers of their rights under federal labor laws because independent contractors are not covered by most of those laws. In particular, the practice of misclassification undermines workers' organizing rights because employers that misclassify workers as independent contractors typically do not consider them to be employees under the National Labor Relations Act.[4]

E. Three days following the issuance of the *Report to the President by the White House Task Force on Worker Organizing and Empowerment*, Jennifer Abruzzo, General Counsel to the National Labor Relations Board ("NLRB"), released Memorandum GC 22-03 to all NLRB Regional Directors and certain others, offering her endorsement of the Report noting that "I fully embrace the recommendations contained within its February 7, 2022 report, which will help to restore some economic stability and correct imbalances of power and voice for many workers throughout this country through internal process improvements and robust inter-agency coordination." Ms. Abruzzo also states in the Memorandum that she is "proceeding with efforts to establish partnerships with IRS, DOJ's Antitrust Division, and FTC to address unfair methods of competition that undermine workers' rights. This includes coordination in order to: reduce the incidence of misclassification of employees and ensure that employers properly pay their employees and their employment taxes…."

IV. Overview of the different types of legal risks associated with independent-contractor status

Any company that does business with independent contractors is exposed to a risk that the independent contractors will be determined to have been misclassified. This risk has multiple dimensions. The following are examples of federal and state laws that generally impose specified duties on a company with respect to its employees but not independent contractors.

A. Federal Law Examples

i. Federal employment taxes

[4] Id. at p. 30.

ii. Affordable Care Act's employer mandate

iii. Employee Retirement Security Act of 1974 – employee benefit plans

iv. National Labor Relations Act

v. Fair Labor Standards Act

vi. Nondiscrimination laws, e.g., Title VII, ADEA, ADA

B. State Law Examples

i. State unemployment

ii. Workers' compensation

V. Different tests apply to determine an individual's status for purposes of different laws

The determination of whether an individual is properly classified as an independent contractor will depend on the specific context. This is because different statutes define covered employees differently.

The predominant test for determining an individual's status, as an employee or independent contractor, for purposes of federal statutes is the common-law test.[5] Examples of the different types of tests that apply for purposes of different laws are provided below.

A. Federal Law Examples

Federal Employment Taxes

The primary test for determining an individual's status, as an employee or independent contractor, for purposes of federal employment taxes is what is commonly known as the common law test. According to the Internal Revenue Manual ("IRM"):

> Generally, an employer-employee relationship exists under the common law when the person for whom the services are performed has the right to direct and control the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details

[5] Russell Hollrah & Patrick Hollrah, *The Time Has Come for Congress to Finish Its Work on Harmonizing the Definition of "Employee,"* 26 J.L. & POL'Y 439 (2018) ("The Time Has Come").

> and means by which that result is accomplished. In other words, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.[6]

In determining whether a worker is an employee or independent contractor under the common law rules, the IRS has developed a list of twenty factors. The factors are to be used not as an objective scoring device, but rather as an analytical aid in determining whether the engaging entity retains the requisite right to control the worker with respect to the means and methods of performance. The IRS has distilled its 20-factor test into the following three categories:

1) *Behavioral control* relates to facts that show whether the business has a right to direct or control how the worker performs the specific tasks for which he or she is engaged, including instructions and training.

2) *Financial control* relates to facts that show whether the business has a right to direct and control the financial and business aspects of the worker's activities, including the extent to which the worker has a significant investment, unreimbursed business expenses, or may realize a profit or loss, and the extent to which the worker makes his or her services available to the relevant market.

3) *Relationship of the parties* relates to facts that show how the parties perceive their relationship. These facts may include the intent of the parties in establishing the relationship, written contracts, the permanency of the relationship, and the extent to which services performed by the worker are a key aspect of the regular business of the company.[7]

Section 530 of the Revenue Act of 1978

An important safe harbor that is available to taxpayers for purposes of federal employment taxes is section 530 of the Revenue Act of 1978 ("Section 530"). This safe harbor provision protects a company's classification of individuals as independent contractors for purposes of federal employment taxes, provided that the company satisfies the following three conditions:

(1) since 1978 the company (and any predecessor) has consistently treated the workers (and similarly situated workers) as independent contractors;

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[6] See I.R.M. 5.1.24.3.1.3.
[7] See I.R.M. 5.1.24.3.1.4.

(2) for the tax year at issue the company has complied with the Form 1099 reporting requirements with respect to the compensation paid the workers; and

(3) the company had a *reasonable basis* for treating the workers as independent contractors.

A taxpayer will be treated as having a *reasonable basis* for not treating a worker as an employee if the treatment was in reasonable reliance on one of three safe harbors:

A. Judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer.[8]

B. A past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual.[9]

C. A long-standing recognized practice of a significant segment of the industry in which the taxpayer was engaged.[10]

To satisfy a safe harbor, a taxpayer must demonstrate that it actually and reasonably relied on the safe harbor in treating the workers as nonemployees for the period at issue.[11]

In addition to the three "safe harbors" referenced above, a taxpayer also can establish "reasonable basis" for purposes of Section 530 "in some other manner." The legislative history accompanying the enactment of Section 530 indicates that reasonable basis should be construed liberally in favor of the taxpayer. H.R. Rep. No. 95-1748 (1978). The following are examples of some (but certainly not all) of the ways in which a taxpayer can establish reasonable basis "in some other manner."

- Reliance on an attorney or accountant may constitute a reasonable basis, provided that the taxpayer can establish at a minimum that it reasonably believed the attorney or accountant was familiar with taxpayer's tax issues and that the advice was based on sufficient relevant facts the taxpayer furnished to the adviser.

- Reliance on a prior state administrative action (e.g., workers' compensation or unemployment decision) and other federal determinations may constitute a reasonable basis, provided that the state or federal agency uses the same common law standard that applies for federal employment tax purposes and interprets it

[8] See I.R.M. 4.23.5.2.2.4.
[9] See I.R.M. 4.23.5.2.2.5.
[10] See I.R.M. 4.23.5.2.2.6.
[11] See I.R.M. 4.23.5.2.2.3.

similarly.[12]

Section 530 is subject to important limitations. For example, Section 530 applies only to a company that contracts with an independent contractor. It does not apply to the individual whom the company classifies as an independent contractor. This means that while Section 530 protects a company that satisfies its requirements against any federal employment tax liability with respect to an individual, Section 530 has no application to the individual. Thus, if an individual is determined to be an employee of a company under the common law test, but the company is eligible for protection under Section 530, the company would not be liable for any federal employment taxes with respect to the individual, but the individual would remain liable for the employee share of FICA taxes on compensation received from the company. The employer share of FICA taxes would simply not be paid. If, however, the individual is determined to be an independent contractor under the common law test, the individual would be liable for the full amount of SECA taxes on compensation received from the company.

Another limitation on Section 530 is that it applies only to federal *employment* taxes, but not federal *income* taxes. The primary significance of this limitation is its potential effect on the employee benefit plans maintained by a company. If a company is eligible for Section 530 protection with respect to a group of workers, but the workers are determined to be employees of the company under the common law test, the workers would be treated as employees of the company for purposes of the company's benefit plans.[13]

A final limitation on Section 530 is contained in section 1706 of the Tax Reform Act of 1986 (the provision is commonly referred to as "Section 1706"). Section 1706 provides that Section 530 does not apply with respect to technical personnel who provide services for a business through a third party. Technical personnel are defined as engineers, designers, drafters, computer programmers, systems analysts, and other similarly skilled workers engaged in a similar line of work.

Affordable Care Act's Employer Mandate

The Affordable Care Act ("ACA") created both an individual mandate (requiring an individual to maintain specified health insurance coverage) and an employer mandate (requiring a covered employer to offer its employees specified

[12] See I.R.M. 4.23.5.2.2.7.

[13] In *Kenney v. Commissioner*, T.C. Memo 431 (1995), the U.S. Tax Court disqualified a retirement plan as a consequence of certain workers who were treated as independent contractors being held to be employees. The court held that by not allowing the workers to participate in the qualified retirement plan, the plan violated the Code's minimum coverage requirements. Based on that violation, the court disqualified the plan, which triggered adverse tax consequences to the highly paid participants in the plan.

health insurance coverage). While the consequences of an individual violating the individual mandate was reduced to zero, the employer mandate remains in effect.

The ACA's employer mandate is contained in section 4980H of the Internal Revenue Code (the "Code"). It requires certain employers (called applicable large employers or ALEs) to either offer specified health coverage to their full-time employees (and their dependents), or potentially make an employer shared responsibility payment to the IRS, if at least one of their full-time employees receives a premium tax credit for purchasing individual coverage on a Health Insurance Marketplace (Marketplace), also called the Exchange.[14]

In general, an ALE is an employer that employs at least 50 full-time employees (including full-time equivalent employees, which means a combination of part-time employees that count as one or more full-time employees).[15]

If an ALE does not offer coverage or offers coverage to less than 95 percent of its full-time employees (and their dependents) for an entire calendar year, and at least one of its full-time employees receives a premium tax credit, the ALE will owe an employer shared responsibility payment equal to the number of full-time employees the ALE employed for the calendar year (minus up to 30) multiplied by $2,000 (as adjusted). For calendar year 2021, the adjusted $2,000 amount is $2,700.[16]

The final regulations implementing the ACA's employer mandate define an "employee" for purposes of Code section 4980H as an individual who is an employee under the common law standard, and as not including a leased employee (as defined in Code section 414 (n) (2)), a sole proprietor, a partner in a partnership, a 2-percent S corporation shareholder, or a worker described in Code section 3508.[17] Importantly, the Section 530 safe harbor is not applicable to worker status determinations for purposes of the ACA.

Employee Retirement Security Act of 1974

To determine whether an individual qualifies as an "employee" for purposes of employee benefit plans governed by the Employee Retirement Security Act of 1974 ("ERISA"), which includes qualified retirement plans and most types of welfare benefit plans, the applicable test is the common law test. The U.S. Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24, 112 S. Ct. 1344, 1348–49, 117 L. Ed. 2d 581 (1992), explained the test as follows:

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[14] See https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Calculation.
[15] Id.
[16] Id.
[17] Shared Responsibility for Employers Regarding Health Coverage, 79 FR 8544, 8567 (Feb. 12, 2014).

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other 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. (citations omitted).

National Labor Relations Act

The National Labor Relations Act ("NLRA") is the federal statute governing union organizing and collective bargaining. A determination of whether an individual should be classified as an employee or an independent contractor, for purposes of the NLRA, is governed by a common-law agency test.[18] This test considers principally the following factors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;

[18] See *NLRB v. United Ins. Co.,* 390 U.S. 254, 256, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968); *see also St. Joseph News Press,* 345 N.L.R.B. 474, 478 (2005).

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.[19]

In *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 495–96 (D.C. Cir. 2009), the court explained that in *Corporate Express Delivery Systems v. NLRB,* 292 F.3d 777 (D.C.Cir.2002), the court, while retaining all of the common law factors, "shift[ed the] emphasis" away from the unwieldy control inquiry in favor of a more accurate proxy: whether the "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss." The court noted that "while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism."[20]

In a case currently pending before the National Labor Relations Board ("NLRB"), *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case 10– RC–276292 (Dec. 27, 2021) Board Decision (2).pdf, the NLRB requested public input on the prospect of adopting a different test for determining "employee" status for purposes of the NLRA. The NLRB is considering adopting a more expansive test that would bring more individuals within the scope of the term "employee." The request was made notwithstanding the U.S. Court of Appeals for the District of Columbia twice now having rejected similar efforts by the NLRB to adopt a broader test for determining "employee" status.[21]

Fair Labor Standards Act

The determination of whether an individual is an employee or independent contractor for purposes of the Fair Labor Standards Act ("FLSA") is made under a test commonly referred to as the *economic realities* test. This is another multifactor test, but it is generally considered to be a more expansive test that covers a broader swath of individuals than a common-law test.

In the Fourth Circuit, which includes Maryland, the economic realities test has been explained as follows:

> In analyzing the economic realities of the relationship between an individual and a putative employer, the court

[19] Restatement (Second) of Agency § 220(2).
[20] *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 496–97 (D.C. Cir. 2009).
[21] See *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), and *FedEx Home Delivery*, 849 F.3d 1123 (D.C. Cir. 2017).

must consider:

> (1) the degree of control putative employer had over the manner in which the individuals performed their work;
>
> (2) the individuals' opportunities for profit or loss based on their managerial skill;
>
> (3) the individuals' investment in equipment or material, or the employment of other workers;
>
> (4) the degree of skill required for the individuals' work;
>
> (5) the permanence of the working relationship between the individuals and putative employer; and
>
> (6) the degree to which the individuals' services are integral to putative employer's business.[22]

During the Trump Administration, the U.S. Department of Labor ("DOL") issued regulations providing new clarity to the application of the "economic realities" test. These regulations were published in the *Federal Register* on January 7, 2021.[23] The regulations provide that to determine whether an employment relationship exists for purposes of the FLSA, the following nonexhaustive list of factors may be considered:

> (1) the nature and degree of control over the work;
>
> (2) the individual's opportunity for profit or loss;
>
> (3) the amount of skill required for the work;
>
> (4) the degree of permanence of the working relationship between the individual and the potential employer; and
>
> (5) whether the work is part of an integrated unit of production.

The regulations also identify two core factors—(1) the nature and degree of control over the work and (2) the individual's opportunity for profit or loss. The regulations state that "the two core factors … are the most probative as to whether or not an individual is an economically dependent "employee," … and each therefore typically carries greater weight in the analysis than any other factor."[24]

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[22] *Walsh v. Med. Staffing of Am., LLC*, 2022 WL 141528 (E.D. Va. Jan. 14, 2022).
[23] 86 Fed. Reg. 1168 (Jan. 7, 2021).
[24] 86 Fed. Reg. 1168, 1246.

In DOL's September 2020 Notice of Proposed Rulemaking[25] that produced these regulations, DOL explained that the proposed five-factor test, with two "core factors," represents "general interpretations to which courts and the Department have long adhered."[26]

The Biden Administration's DOL delayed the effective date of these regulations and subsequently withdrew the regulations. A lawsuit was instituted that questioned the legality of the DOL's actions. On March 14th, a federal district court in Texas vacated DOL's actions that delayed the effective date of the regulations and that withdrew the regulations.

Subsequent to the court's decision, the DOL website containing Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA) | U.S. Department of Labor (dol.gov) contains the following notice:

> On March 14, 2022 a district court in the Eastern District of Texas vacated the Department's Delay Rule, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 FR 12535 (Mar. 4, 2021), and the Withdrawal Rule, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 FR 24303 (May 6, 2021). The district court further stated that the Independent Contractor Rule, Independent Contractor Status Under the Fair Labor Standards Act, 86 FR

[25] 85 Fed. Reg. 60600 (Sep. 25, 2020).

[26] Id. The unabridged explanation is as follows:

> The proposed regulations would adopt general interpretations to which courts and the Department have long adhered. For example, the proposed regulations would explain that independent contractors are workers who, as a matter of economic reality, are in business for themselves as opposed to being economically dependent on the potential employer for work. The proposed regulations would also explain that the inquiry into economic dependence is conducted through application of several factors, with no one factor being dispositive, and that actual practices are entitled to greater weight than what may be contractually or theoretically possible. The Department proposes to sharpen this inquiry into five distinct factors, instead of the five or more overlapping factors used by most courts and the Department previously. Moreover, consistent with the FLSA's text, its purpose, and the Department's experience administrating and enforcing it, the Department proposes that two of those factors—the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss—should be more probative of the question of economic dependence or lack thereof, and thus are afforded greater weight in the analysis than any others.

Accord, 85 Fed. Reg. 60600, 60619 ("The Department's proposal is consistent with case law and adopting a more focused approach.")

> 1168 (Jan. 7, 2021), became effective as of March 8, 2021, the rule's original effective date, and remains in effect.

But the Fact Sheet, itself, does not reflect the Trump Administration regulations. Instead, it provides:

> The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:
>
> 1. The extent to which the services rendered are an integral part of the principal's business.
>
> 2. The permanency of the relationship.
>
> 3. The amount of the alleged contractor's investment in facilities and equipment.
>
> 4. The nature and degree of control by the principal.
>
> 5. The alleged contractor's opportunities for profit and loss.
>
> 6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
>
> 7. The degree of independent business organization and operation.

Nondiscrimination laws, e.g., Title VII, ADEA, ADA

Courts apply either a common-law test (discussed above) or what is sometimes referred to as a "hybrid" test to determine an individual's status for purposes of federal nondiscrimination laws.[27] A hybrid test is a hybrid of the common law test and the economic realities test. The hybrid test is explained in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979):

> the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review here, as it is at common law and in the context of several other federal statutes.

[27] *The Time Has Come ,* 26 J.L. & POL'Y 439 at p. 478.

> If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.
>
> Additional matters of fact that an agency or reviewing court must consider include, among others, (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; I. e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[28]

B. State law examples

Maryland Unemployment

The test for determining an individual's status for purposes of Maryland unemployment is commonly known as an "ABC" test. It is contained in MD Code, Labor and Employment, § 8-205:

> (a) Work that an individual performs under any contract of hire is not covered employment if the Secretary is satisfied that:
>
> (1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract;
>
> (2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and
>
> (3) the work is:
>
> (i) outside of the usual course of business of the person for

[28] 613 F.2d 826, 831-32.

> whom the work is performed; or
>
> (ii) performed outside of any place of business of the person for whom the work is performed.

This version of the "ABC" test is less demanding than the version that California and Massachusetts adopted and that is proposed in the PRO Act. The more demanding iteration of the test contains a more demanding version of the "C" factor of Maryland's "ABC" test. The "C" factor of Maryland's "ABC" test is satisfied by demonstrating that the work an individual performs is *either* outside of the usual course of business of the person for whom the work is performed; or (ii) performed outside of any place of business of the person for whom the work is performed. By contrast, this factor of the more demanding version of the test can be satisfied *only* by demonstrating that the work an individual performs is outside of the usual course of business of the person for whom the work is performed.

In addition to the general test for determining an individual's status, unemployment statutes commonly contain multiple categories of workers that are treated as statutory independent contractors or as statutory employees, which supersede the general test.

Workers' Compensation

A state's workers' compensation statute generally applies only to employees but not to independent contractors. For purposes of determining an individual's status for purposes of workers' compensation in Maryland, courts generally apply a common-law test. In *Elms v. Renewal by Andersen,* 439 Md. 381 (2014), the court explained the test as follows:

> a worker will be deemed a "covered employee" unless it is established that he or she is an "independent contractor" under the common law rules… In undertaking this analysis, we typically consider five factors: "(1) the power to select and hire the employee, (2) the payment of wages, (3) the power to discharge, (4) the power to control the employee's conduct, and (5) whether the work is part of the regular business of the employer." *Whitehead v. Safway Steel Products, Inc.,* 304 Md. 67, 77–78, 497 A.2d 803, 808–09 (1985). Although all five factors are relevant in determining whether there is an employer/employee relationship, we held in *Whitehead* that the power to control the employee's conduct is the most important factor. 304 Md. at 78, 497 A.2d at 809 (stating that the employer's " 'right to control and direct the employee in the performance of the work and in the manner in which the

work is to be done' is the 'decisive' or 'controlling' test"). In other words, the one exercising control is the employer.

V. A heuristic method for quickly evaluating the defensibility or vulnerability of an independent contractor relationship

Sometimes it is helpful to be able to quickly evaluate the defensibility or vulnerability of a company's independent contractor relationships. Examples include when evaluating a potential claimant's assertion of having been misclassified as an independent contractor by a company, when evaluating the defensibility of a company's independent contractor relationships due to the company being audited, investigated, or sued based on an allegation of worker misclassification, or when evaluating a potential acquisition of a company that does business with independent contractors.

When conducting such a quick evaluation, the following identifies the principal items to examine and the salient aspects of the putative independent-contractor relationships to evaluate.

A. What to examine

- Company's website to see how the company describes its relationship with the individuals (this is especially relevant to a company that contracts with independent contractors to provide services for other third-party clients).
- Company's agreements with independent contractors.
- Documents the company uses to engage the independent contractors, e.g., registration forms, documents given to independent contractors, and documents the independent contractors are asked to complete and return to the company.
- Any documents the company gives to the independent contractors that pertain to the services the independent contractors are engaged to perform.

B. What to look for

- Whether the independent contractor agreement *imposes any requirements* on the individuals, e.g., concerning where, when, or how the services are to be performed.
- Whether the independent contractor agreement *imposes any prohibitions* on the individuals, e.g., a noncompete provision or a prohibition against the use of assistants or substitutes.

    - Whether the individuals are given any policies or procedures that govern the services they are engaged to perform.

- Whether the company provides the individuals with any training.
- Whether the individuals are required to wear name badges or logo wear that identifies the company.
- Whether the company sets the individuals' pay rate
- Whether company employees perform (or have in the past performed) services similar to the services the individuals are engaged to perform.
    - Whether the individuals have previously been classified by the company as its employees (and were converted to independent contractors).
- Whether the individuals perform a type of services that the company is business of providing.
- Whether the company reports the individual's earnings on an IRS Form 1099 or Form W-2, or both.
- Whether the individuals participate in any employee benefit programs the company maintains.
- Whether the company provides any tools, supplies, or equipment the individuals use, or the premises where the individuals perform their services.
- Whether the individuals perform services for the company on a full-time basis or for an extended period of time.
- Whether the individuals also perform similar services for clients other than the company.

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If you have any questions or comments concerning the foregoing, please let me know, at (202) 659-0878 or rhollrah@hollrahllc.com.