NAVIGATING WORKER CLASSIFICATION

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I. OVERVIEW

A. Understanding the key factors used to classify workers

B. Recognizing real-world consequences of misclassification

C. Practical steps to apply

II. KEY FACTORS AND THE TESTS

A. There is no single test or criterion to determine whether a worker is an employee or independent contractor.

B. Each agency has its own classification metric. Some are statutory while others are found in common law or as part of a federal rule.

C. Control is the unifying principle across tests. When assessing classification, the key question is who controls the work to be done by the worker.

1. With respect to an employee, the employer will control what work will be done and how the work will be performed.

2. With respect to an independent contractor, the employer will only control what work will be done. The independent contractor will control how the work will be performed.

D. Although there are numerous tests and factors, one thing is for sure: labeling a contract as an “Independent Contractor Agreement” is not sufficient, on its own, to establish a contractor relationship.

E. The Tests

1. IRS 20 Factor Test:

a. Instructions – does the worker have to comply with instructions about when, where, and how to conduct the work?

b. Training – is the worker required to be trained as directed by the employer?

c. Integration – does the worker's work constitute an integral part of the employer's business?

d. Services Rendered Personally – are the services to be rendered by the worker required to be rendered personally?

e. Assistants – does the worker hire, supervise, and pay their own assistants?

f. Continuing Relationship – is the relationship between the worker and the employer ongoing or a one-off engagement?

g. Set Hours of Work – is the worker required to work specific hours?

h. Full-Time Required – is the worker required to devote substantially all of their time to the business of the employer?

i. Work on Employer Premises – is the worker required to perform the work on the employer's premises?

j. Order or Sequence Set - is the worker required to perform the work in an order or sequence determined by the employer?

k. Oral or Written Reports – is the worker required to submit regular oral or written reports to the employer?

l. Payment by Hour, Week, Month – is the worker paid at a regular interval?

m. Payment of Business and/or Traveling Expenses – does the employer ordinarily pay for the worker's business and/or traveling expenses?

n. Furnishing of Tools and Materials – does the employer furnish tools and materials to the worker?

o. Significant Investment – does the worker invest and/or maintain the facilities used by the worker in performing the work?

p. Realization of Profit or Loss – does the worker share in the profit or suffer loss as a result of the work performed?

q. Working for more than One Firm at a Time – does the worker perform more than *de minimis* work for multiple, unrelated employers?

r. Available to General Public – does the worker make their services available to the general public on a regular and consistent basis?

s. Right to Discharge – does the employer retain the right to discharge the worker?

t. Right to Terminate – does the worker retain the right to end the relationship with the employer?

2. Simplified 3-Factor Test:

a. Behavioral Control – does the employer control:

i. When and where the work is performed?

ii. What workers are hired to assist?

iii. What order or sequence the work will be completed in?

b. Financial Control – does the employer control:

i. The worker's reimbursement for expenses?

ii. The worker's investment in the work?

iii. The worker's ability to work for others?

iv. How and when the worker is paid?

c. Type of Relationship – between the worker and the employer:

i. Is there a written agreement describing the relationship between the parties?

ii. Is the worker eligible for, and does the employer provide, benefits like insurance, pension, vacation or sick pay?

iii. Is the working relationship permanent?

iv. Are the services provided by the worker a key aspect of the regular business of the employer?

3. FLSA Tests

a. 2021 Rule: Worker classification determined using two "core" factors:

i. **Core factor:** Nature and degree of control over the relevant work;

ii. **Core factor:** Individual's opportunity for profit or loss;

iii. Amount of skill required for the work;

iv. Degree of permanence of the working relationship; and

v. Whether the work is part of an integrated unit of production.

b. 2024 Rule ("Economic Reality Test"): Abandons the two "core" factors in favor of a totality of the circumstances where no one factor controls:

i. Opportunity for profit or loss depending on managerial skill;

ii. Investments by worker and potential employer;

iii. Degree of permanence of the work relationship;

iv. Nature and degree of control over performance of the work and working relationship;

v. Extent to which the work performed is an integral part of the potential employer's business; and

vi. Skill and initiative of worker.

vii. *additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA.

c. Proposed 2026 Rule: Returns to a core factor assessment and proposes the correct analysis is whether the worker is dependent on the employer for continued work, not dependent on the hiring entity for more income:

i. **Core factor:** Nature and degree of control over the work;

ii. **Core factor:** Individual's opportunity for profit or loss;

iii. Amount of skill required for the work;

iv. Degree of permanence of working relationship between individual and potential employer; and

v. Whether work is an integrated unit of production.

vi. *additional factors considered only to the extent they are probative of whether the individual is in business for themselves or is economically dependent on an employer.

vii. This rule is not yet finalized.

4. National Labor Relations Act ("NLRA")

a. "Common Law" Agency Test

i. Extent of control which, by agreement, the employer may exercise over the details of the work

ii. Whether or not the one employed is in a distinct occupation or business

iii. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer

iv. The skill required

v. Whether the employer supplies the instrumentalities, tools and place of work

vi. Length of time person is employed

vii. Method of payment

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viii. Whether work is part of the regular business of the employer

ix. Whether the parties believe they are creating a master/servant relationship

x. Whether the principal is in business

5. ERISA – similar to the NLRA

6. State Tests

a. Michigan Unemployment Insurance Agency – uses IRS 3-Factor Test

b. Michigan Workers' Disability Compensation Act – applies a statutory test set forth in MCL § 418.161(1)(n)

III. CONSEQUENCES

A. Tax liabilities

1. Failure to withhold

2. Personal liability

B. Wage Claims under FLSA - Back pay and liquidated damages

C. ERISA - Can lead to disqualification of a qualified retirement plan

D. FMLA

E. I-9 Violations

IV. WHAT CAN YOU DO

A. Perform internal audits

B. Separate control out from the employer

C. Engage with businesses