

The 2015 White Paper on Independent Contractor Misclassification: How Companies Can Minimize the Risks

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SUMMARY: This 2015 update of our White Paper details three ways by which companies that use independent contractors can minimize or avoid future independent contractor misclassification exposure:

- bona fide restructuring and re-documentation, using IC Diagnostics™
- reclassification, either under a government program or voluntarily
- redistribution of independent contractors, using a workforce management or staffing company.

These alternatives work for virtually all companies that use independent contractors – whether to supplement their workforce or to refer or offer qualified service providers to customers or clients as part of their business model. The same proprietary tool used to minimize independent contractor misclassification liability can be used to defend against misclassification claims brought in the courts and before administrative agencies.

The three years since the last update of our White Paper, first published in 2010, coincides with the period when independent contractors have become an integral resource in the sharing economy, where organizations such as Uber and other tech start-ups have avoided or limited their use of employees in favor of on-demand contract workers. While on the one hand, new companies may wish to emulate the most successful on-demand business models, on the other hand they do not want to become a defendant like Uber, which was recently unable to dismiss a class action challenge to the allegedly imperfect structure, documentation and implementation of its driver relationships and is now scheduled to face scrutiny by a jury.

This 2015 update – a comprehensive expansion of the prior editions of this White Paper – also addresses how independent contractor misclassification has arisen; the recent crackdown by federal and state regulators and legislators, the difficulty experienced by companies trying to comply with various tests for independent contractor status, the costly consequences of misclassification, the proliferation of class action lawsuits resulting in multi-million dollar claims, settlements and judgments, and the potential for unionization of workers re-characterized as employees by the courts and administrative agencies.

THIS WHITE PAPER, “INDEPENDENT CONTRACTOR MISCLASSIFICATION: HOW COMPANIES CAN MINIMIZE THE RISKS,” UPDATES OUR 2012 WHITE PAPER OF THE SAME NAME. THE ORIGINAL VERSION OF THIS WHITE PAPER WAS FIRST PUBLISHED BY THE LAW FIRM PEPPER HAMILTON LLP ON APRIL 26, 2010.

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I. INTRODUCTION

“Misclassification of employees as independent contractors” is now a common phrase uttered by state and federal legislators and regulators, as well as plaintiffs’ class action lawyers. An increasing number of state task forces have been formed to crack down on businesses that do not pay unemployment insurance and workers’ compensation premiums or that withhold taxes for workers whom states claim to be employees and not independent contractors. The U.S. Department of Labor, state labor commissioners and the Internal Revenue Service (IRS) remain active in investigating and auditing companies in an array of industries where independent contractor misclassification is regarded as prevalent.¹ Class action lawyers continue to target some of those same types of companies, seeking unpaid employee benefits, expenses and overtime for workers who are not treated as employees.²

This White Paper first examines the increased use of independent contractors in the United States and the causes of intentional and unintentional misclassification. Next, we examine the risks posed to private businesses, nonprofit organizations and governmental entities that have business models reliant upon the use of independent contractors and other contingent workers, and we detail the costly consequences of misclassification. We then survey the sharp focus by state and federal legislative bodies on independent contractor misclassification, state and federal administrative agencies, plaintiffs’ class action lawyers and unions.

Finally, this White Paper discusses the steps that businesses can take to avoid or minimize independent contractor misclassification liability, including (a) restructuring, re-documenting and re-implementing their business models in a manner that complies with applicable laws; (b) undertaking voluntary or government-sponsored reclassification; and/or (c) redistributing independent contractors through the use of a workforce management or staffing firm. At a time when independent contractors are becoming an integral resource in the on-demand economy, organizations that have eschewed or limited their use of employees do not want to become a defendant like Uber, which was recently unable to dismiss a class action challenge to the allegedly imperfect structure, documentation and implementation of its driver relationships and which is now scheduled to face scrutiny by a jury.³

II. INDEPENDENT CONTRACTOR MISCLASSIFICATION: HOW IT HAS ARISEN

Independent contractors — sometimes referred to as freelancers, consultants, per diems, 1099ers, contractors, project workers, temps, specialists and the like — are found in virtually every industry. Some companies use independent contractors to supplement their workforce, while other businesses have been built on an independent contractor or 1099 model and classify relatively few workers as employees.

Just as independent contractors are being used across a wide range of industries, the misclassification of employees as independent contractors is not industry specific — even though misclassification is more prevalent in certain industries. (Nonetheless, as noted in Section VIII below, most companies can effectively minimize or avoid independent contractor misclassification by enhancing their levels of compliance.)

The use and misuse of independent contractors has increased dramatically over the last two decades. This has been due, in large part, to the combination of two factors: (1) economic and other business advantages derived from the use of 1099ers and (2) lax regulatory enforcement — a classic risk/reward calculus.

A. The Economic and Business Advantages to Using Independent Contractors

Many of the economic and business advantages of using independent contractors are well understood by most businesses. They include the following:

- The earnings of independent contractors are reported to the IRS on a Form 1099 basis instead of on a Form W-2. Employers are not required to withhold taxes or make Social Security and Medicare contributions.
- Businesses are not required to pay unemployment and workers’ compensation premiums for independent contractors.
- Independent contractors are not required to be paid the minimum wage or overtime pay for working more than 40 hours in a workweek.
- Employee benefit plans, including group health insurance and 401(k) plans, only cover employees, not independent contractors, and need not be accounted for under the Affordable Care Act (ACA).⁴

- The federal labor laws do not afford independent contractors the right to be represented by a labor union, whereas workers who qualify as employees are subject to being organized.
- Independent contractors have no right to sue companies for discrimination, with few exceptions, and persons injured by independent contractors generally cannot recover against the business that retains the independent contractor.
- The custom and practice in particular industries is to use independent contractors.
- A company may have either an internal hiring “freeze” in place, or managers may be discouraged by their superiors from increasing headcount or payroll costs.
- Businesses may choose to hire independent contractors so they can more easily expand or contract their workforces to accommodate workload fluctuations.
- Workers who have specialized talents or technical expertise, and hence are in demand, may insist or indicate a strong preference that they be retained on an independent contractor basis. Their reasons for making such a request may include tax considerations (such as being able to lawfully deduct more business expenses under the tax code than if they were employees), a desire to maintain control over their work schedules or because they do not wish to have a “boss.”⁵

These considerable economic and business reasons have led many companies to classify a host of workers as independent contractors, even though such workers may fall within one or more of the definitions of “employee” under the labor, tax, and/or benefit laws.

B. Lax Enforcement and Different Legal Tests

Prior to the recent crackdown on independent contractor misclassification, years of lax enforcement by governmental revenue and workforce agencies contributed greatly to the classification and misclassification of employees as independent contractors. Government inattention to the issue of proper worker classification has also contributed to a demonstrable lack of understanding of the legal distinctions between independent contractors and employees.

As stated in a seminal 2009 Government Accountability Office report, “[m]any independent contractors are classified properly, and the independent contractor relationship can offer advantages to both businesses and workers.”⁶

On the other hand, some businesses knowingly have misclassified employees as independent contractors. For those businesses, the term “wage theft” may well be suitable — especially for organizations that have paid such workers on a cash basis.⁷ This is one of the chief reasons cited by proponents for new laws that are designed to curtail the use of independent contractors.

However, the overwhelming number of businesses that misclassify employees as independent contractors has simply paid insufficient attention to the legal requirements or do not understand the laws in this area, either because they have mistaken conceptions of the laws or because they are confused by the array of different laws at the federal and state levels.

This is not the least bit surprising. Even many legal “treatises” and compendiums that purport to list the various independent contractor laws fail to take into account that the tests for independent contractor status are varied — not only at the federal level and between states, but sometimes within a single state — and that the same language found in a statute in one state is often interpreted differently by the courts and administrative agencies in another state. A 2006 Government Accountability Office Report addressing employee misclassification reached the conclusion that “the tests used to determine whether a worker is an independent contractor or an employee are complex, subjective, and differ from law to law.”⁸ As varied as the tests are under federal law, some state laws are even more complex and far more varied, having been referred to as a “crazy quilt set of state laws.”⁹

One of the few constants in most federal and state tests for independent contractor versus employee status is whether a business has the “right to control the manner and means” by which a worker accomplishes the end product of his or her work.¹⁰ In determining whether a business has the right to control the worker’s manner and means of performing his or her tasks, some federal and state agencies consider as many as two dozen factors, which may indicate whether or not the hiring party has such control. Except for a few states with laws that essentially prohibit the use of independent contractors for businesses operating in some industries, courts and

government agencies have repeatedly stated that no one factor determines whether a worker is an independent contractor or an employee. For example, the IRS has stated that “all information that provides evidence of the degree of control and the degree of independence must be considered.”¹¹ Our 2009 review of the factors used by the courts and by various state and federal agencies revealed that, collectively, far more than 48 factors were used by different decision-making bodies in determining independent contractor status — and, in the years since, dozens of additional factors have been considered.

Because there is no one definition of “independent contractor” under federal or state laws, a few regulators, commentators and nonprofit associations have advocated for a universal definition based on the “ABC” test or another form of statutory “bright line” test.¹² This approach is highly unlikely from a political standpoint. Moreover, it disregards the fact that many businesses, which have sought to comply with federal and all applicable state independent contractor laws, have based their decisions as to how to structure and operate their business models and whether to classify certain categories of workers as independent contractors on decades of judicial opinions and administrative rulings.

To make an abrupt change solely for uniformity would subvert legitimate independent contractor relationships based on existing laws and instantly turn many long-term lawful relationships between independent contractors and the businesses that have retained them into unlawful misclassification. This would result in stripping those companies of anticipated revenues generated as a result of their lawful business investment, as well as a loss of the goodwill the businesses have developed from years of providing quality services to customers and clients through independent contractors. An abrupt and drastic change in the law would also run counter to the expressed views of both the current Administrator of the Wage and Hour Division of the Labor Department, who has stated that “*legitimate independent contractors are an important part of our economy*,”¹³ and the U.S. Secretary of Labor, who has stated that, while the use of independent contractors has been abused, “*there’s an important place for independent contractors in our economy*.”¹⁴

In addition, dramatic changes in the definitions of “employee” and “independent contractor” would likely run the risk that many companies that retain independent contractors will end

their relationships with those individuals if such companies are unwilling or unable to modify or sustain their business models. This would result in a harsh unintended consequence for those individuals who are currently in legitimate independent contractor relationships and who rely on fees generated by such relationships for their livelihood. It would also curtail entrepreneurial efforts by individuals who are looking to develop their own businesses.

For these reasons, many thoughtful stakeholders that are seeking to crack down on wage theft, while still facilitating and promoting legitimate business and entrepreneurial interests, have suggested that efforts similar to recent legislation in California be undertaken. In California, the legislature left unchanged the existing legal test for determining independent contractor status, but increased considerably the penalties for *intentional* misclassification in 2011 — an example of “IC neutral” legislation.¹⁵ To that end, the new California law prohibits “willful” misclassification, which is statutorily defined as “avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor.”¹⁶

C. Increased Use of Independent Contractors Leads to Rise in Intentional and Unintentional Misclassification

The economic and other business benefits derived from using independent contractors in lieu of employees — when combined with lax enforcement and variable tests for independent contractor status — have resulted in a surge in the use of independent contractors, including an increase in both intentional and unintentional *misclassification*.

The U.S. Bureau of Labor Statistics estimated in 2005 that more than 10.3 million workers in the United States (7.4 percent of the workforce) were treated by businesses as independent contractors.¹⁷ A U.S. Department of Labor study in 2000 found that as many as 30 percent of businesses misclassified employees as independent contractors.¹⁸ These statistics indicate that hundreds of thousands of businesses have exposure to considerable financial liability for noncompliance with existing state and federal labor, tax and benefit laws, absent steps to attain compliance, such as those described in Section VIII below.

In the last five years alone, we have observed that one of the more prevalent types of independent contractor misclassifica-

tion is the unintentional form — legitimate companies using individuals whom they regard as legitimate independent contractors but failing to structure, document and implement the independent contractor relationship in a manner that complies with myriad federal and state laws. Unless such businesses restructure, re-document and re-implement their independent contractor relationships to enhance their levels of compliance, and do so in a timely manner, they will remain exposed to the costly consequences of misclassification.

III. THE COSTLY CONSEQUENCES OF MISCLASSIFICATION

Independent contractor misclassification liability can be crippling to most for-profit and nonprofit organizations and those governmental entities that rely on the use of 1099 contractors, regardless of whether the employees have been mistakenly or intentionally misclassified. Some of the businesses that have the greatest risks of exposure are those using an “on demand” business model in the “sharing” economy, deploying workers paid on a 1099 basis that are available at times when the demand for services arise.

A. Unpaid Payroll and Unemployment Taxes, Overtime, Minimum Wages, Employee Expenses and Other Employee Payments

Risks include years of exposure to some of the most common forms of independent contractor misclassification liability, such as:

- unpaid federal, state and local income tax withholdings and Social Security and Medicare contributions
- unpaid unemployment insurance taxes, both to the federal government and to state governments
- unpaid workers’ compensation premiums
- unpaid overtime compensation and/or minimum wages
- unpaid work-related expenses
- unpaid sick and vacation pay.

Any one of these types of liabilities (plus interest and penalties for noncompliance) could be devastating for businesses that make substantial use of independent contractors.

B. ERISA and Affordable Care Act Exposure

Another costly liability risk arises if misclassified employees, who are otherwise entitled to coverage under ERISA employee benefit plans, have not been provided with group health, disability and life insurance coverage, as well as contributions to a 401(k) plan or other pension and profit-sharing plan. The *Microsoft* case in the 1990s demonstrates how costly misclassification can be, no matter how unintended, when workers classified as independent contractors are re-characterized by the courts or regulatory agencies as employees. In addition to satisfying a very substantial payment obligation to the IRS, Microsoft paid \$97 million to settle a benefits case brought by its long-term temps, who were not afforded coverage under Microsoft’s stock purchase plan, plus millions more in legal fees for the workers’ class action lawyers.¹⁹

The ACA (also known as Obamacare) gives rise to yet another form of independent contractor misclassification liability. If an employer (including all employees in the employer’s controlled group) has fewer than 50 full-time equivalent employees, but would equal or exceed that number if independent contractors were re-characterized as employees by the IRS or a court, the ACA would require that company to provide qualifying medical coverage to its employees (which includes misclassified independent contractors). Employment status is also relevant in determining whether a “large employer” is subject to the excise tax when a particular worker receives subsidized health insurance coverage offered through a state or federal exchange. A large employer is required to offer minimal essential coverage that is affordable and provides minimum value to at least 95 percent of its full-time employees (including those who are misclassified) and their dependents.²⁰

IV. FEDERAL AND STATE REGULATORY ENFORCEMENT INITIATIVES

A. U.S. Department of Labor

With funds authorized by the Obama administration in each of its budgets released since 2011, the U.S. Department of Labor has embarked on a multifaceted enforcement approach. First, it has been hiring more investigators to “detect and deter” independent contractor misclassification. Second, it has been prosecuting more companies that fail to pay overtime or minimum wages to employees whom the Labor Department believes are being misclassified as independent contractors.

Third, the Labor Department has made grants to state workforce agencies to identify misclassification and recover unpaid unemployment taxes.

To finance these enforcement activities, the last three budgets submitted to Congress by the president all included \$10 million for the Labor Department to distribute to state workforce agencies to increase their enforcement efforts, as well as almost \$4 million to hire and retain additional federal personnel to investigate and prosecute misclassification.²¹ In 2014, a total of \$10.2 million was awarded to 19 states to help finance their crackdown on independent contractor misclassification, with four states receiving “high-performance bonuses” due to improved detection of worker misclassification.²²

The U.S. Department of Labor has also commenced a “Misclassification Initiative,” in which it has entered into memoranda of understanding with an increasing number of state workforce agencies from coast to coast. The dual objectives of these federal-state partnerships are to coordinate enforcement efforts and to share information between the state and federal agencies about noncompliant companies. By the end of 2014, the Labor Department had announced that it had entered into such agreements with agencies in 18 states,²³ and it announced in January 2015 that two more states had signed memoranda of agreement.²⁴

The U.S. Labor Department has itself successfully investigated and prosecuted hundreds of businesses that it concluded were misclassifying employees as independent contractors. These include both small and large enforcement actions, some resulting in seven-figure settlements. Among the more notable cases in the last three years were:

- a \$1.075 million consent judgment against a cable company for allegedly misclassifying its cable installers and failing to pay them overtime²⁵
- a \$1.3 million consent judgment against a text message and Internet information provider for misclassifying its “special agents” who answered text messages from website users and failing to pay them minimum wage²⁶
- a \$560,000 consent judgment against a telemarketing company for misclassifying telemarketers and failing to pay them minimum wage and overtime compensation²⁷

- a \$1.5 million judgment in a federal court lawsuit brought against a cable installation company providing installations for Time Warner by the Labor Department on behalf of 250 former cable installers, who were found to have been misclassified as independent contractors and denied overtime compensation²⁸
- back wages totaling \$687,000 collected from a drilling rig company for misclassifying roughnecks and crane operators and failing to pay them overtime compensation²⁹
- a \$395,000 consent judgment against a construction contractor for misclassifying carpenters, electricians, masons, laborers, painters and drywall hangers and failing to pay them overtime compensation³⁰
- a \$277,000 assessment against a janitorial service subcontractor and its payroll services company found to be a joint employer of 233 low-wage custodians misclassified as independent contractors.³¹

Despite this continuing focus on detecting, deterring and eliminating the misclassification of employees as independent contractors, the current Administrator of the of the Labor Department’s Wage and Hour Division, Dr. David Weil, has stated publicly that, although an independent contractor relationship may not be used to evade compliance with federal labor law, “*the use of independent contractors [is] not inherently illegal, . . . [and] legitimate independent contractors are an important part of our economy[.]*”³² This position by the chief misclassification enforcement officer of the federal government reassures the business community that using independent contractors is permissible if the relationships are structured, documented and implemented in compliance with applicable laws, as elaborated in Section VIII.A. of this White Paper.

B. The Internal Revenue Service

The IRS has also been active in seeking to restore what it estimates are billions of dollars in lost tax revenue due to the misclassification of independent contractors. As far back as November 2007, the IRS announced that it had entered into agreements with nearly 30 state revenue commissioners and workforce agencies as part of its Questionable Employment Tax Practices (QETP) program to share information and enforcement techniques about employers suspected of misclassifying employees.³³ That QETP program remains a priority of

the IRS, and at least 37 state workforce and revenue agencies have signed a QETP memorandum of agreement with the IRS.³⁴

In February 2010, the IRS announced that it was commencing a three-year Employment Tax National Research Project to conduct line-by-line audits of 6,000 businesses focusing on, among other things, employee misclassification.³⁵

In September 2011, the IRS unveiled a new program, the Voluntary Classification Settlement Program (VCSP), to permit taxpayers to voluntarily reclassify independent contractors as employees for federal employment tax purposes.³⁶ The VCSP was modified in December 2012³⁷ and updated in 2014.³⁸ Enrollment in the voluntary program has been relatively scant, as companies recognize that this form of “amnesty” may be an invitation to state and federal workplace agencies and plaintiffs’ class action lawyers to treat a company’s reclassification as a tacit admission of past wrongdoing.³⁹

In early 2014, the IRS launched an enhanced effort to promote its SS-8 program, which allows individual workers to file a Form SS-8 to initiate a review of their independent contractor status if they feel they have been misclassified.⁴⁰ More recently, the IRS announced in June 2014 that it is increasing its corporate audits of S corporations because it has found that many are misclassifying their workers as independent contractors.⁴¹

In addition, the IRS has entered into a memorandum of agreement with the U.S. Department of Labor.⁴² That agreement seeks to reduce incidences of misclassification of employees as independent contractors by providing for the sharing of information and collaboration by the tax and labor agencies, as well as employment tax examinations of questionable taxpayers brought to the attention of the IRS by the Labor Department.

C. State Workforce Agencies

State workforce agencies have been equally vigorous in their regulatory and enforcement efforts. Most state workforce and tax agencies have substantially increased the number of random and targeted audits they conduct each year. Some states have done so as part of a coordinated enforcement effort among various state agencies. To date, at least 21 states have created task forces designed to identify and remediate independent contractor misclassification.⁴³

Many state workforce agencies have been as aggressive as the U.S. Department of Labor. For example, the most recent figures from the New York Labor Department show that, in 2014, it completed more than 12,000 audits and investigations. Through these audits, the department found 133,000 misclassified workers and assessed more than \$40 million in unpaid unemployment contributions.⁴⁴ Similarly, Massachusetts reportedly audited more than 18,000 businesses in 2013 and recovered \$15.6 million from companies found to have misclassified independent contractors.⁴⁵ Likewise, Illinois audited more than 3,500 employers in 2013 and recovered \$5.1 million in unreported unemployment contributions attributable to wages of employees found to have been misclassified.⁴⁶

California has also been diligent in pursuing businesses that are believed to have misclassified employees as independent contractors. In March 2014, the California Labor Commissioner’s Division of Labor Standards Enforcement ordered a large logistics company to pay \$2.2 million in back pay, attorneys’ fees and interest for having allegedly misclassified seven short-haul drivers.⁴⁷ In May 2014, the commissioner issued citations of more than \$1.5 million to two janitorial companies for allegedly misclassifying 52 workers as independent contractors.⁴⁸

An even more effective way in which regulatory agencies are focusing on independent contractor misclassification is through the unemployment and workers’ compensation claims process. Local claims offices are more frequently issuing initial determinations of “employee” status in benefit claims filed by workers, including individuals who have signed independent contractor agreements or who are receiving compensation on a 1099 basis. Many workers who regard themselves as independent contractors are nonetheless applying for unemployment benefits — and more claims examiners are finding that such workers have been misclassified and are entitled to unemployment benefits as “employees.”

When a business has not paid unemployment contributions to a state fund on behalf of a worker, the initial determination can have the same effect as an adverse audit if an administrative law judge or referee upholds the determination that the worker has been misclassified as an independent contractor. Once a single worker is found to have been misclassified, the business is then normally charged for unpaid contributions for “all similarly situated” workers, along with costly penalties and

finer. Thus, prudent employers treat even a simple claim for unemployment benefits as having the potential for resulting in a regulatory “mini-class action.” Further, some businesses that have become the objects of class action lawsuits can trace the genesis of their litigations to a successful claim for unemployment benefits by a single employee found to be misclassified as an independent contractor.⁴⁹

V. LEGISLATIVE INITIATIVES

A. State Laws Designed to Curtail Misclassification

Since July 2007, at least 26 states have enacted legislation intended to curtail misclassification of employees as independent contractors.⁵⁰ Some states have passed multiple misclassification bills. Most of these new independent contractor laws provide for civil and criminal penalties, debarment from state contracts, presumptions in favor of employee status and/or private rights to bring individual or class action suits for misclassification of employees. Some of the state laws create the misclassification task forces described earlier in this White Paper.⁵¹

The majority of state laws enacted since July 2007 apply generally to all industries, such as the California Independent Contractor Law that became effective January 1, 2012. It prohibits “willful misclassification” by businesses; adds hefty penalties for violations, especially those pursuant to a “pattern or practice;” and imposes joint liability on any outside nonlegal consultant or other person who “knowingly advises an employer to treat an individual as an independent contractor to avoid employee status” if the individual is found not to be an independent contractor.⁵²

A number of the new laws, however, have targeted specific industries where misclassification is regarded by legislators as more prevalent. One such industry is construction, which has been the subject of new laws in Delaware,⁵³ Illinois,⁵⁴ Maine,⁵⁵ Maryland,⁵⁶ New Jersey,⁵⁷ New York⁵⁸ and Pennsylvania.⁵⁹

Similarly, Maryland has passed a law that specifically addresses the use of independent contractors in the landscaping industry.⁶⁰

In 2013, New York enacted a law seeking to curtail the use of independent contractors in the commercial goods transportation industry. That bill went into effect in 2014 and similar

bills are likely to be introduced in the legislative chambers of other states.⁶¹

In September 2014, California passed a law that imposes liability on businesses that use staffing companies and other “labor contractors.” Under that law, client companies “share with a labor contractor all civil legal responsibility and liability for all workers supplied by that labor contractor for . . . the payment of wages and failure to secure workers’ compensation coverage”⁶² Thus, companies using staffing firms have more reason than ever to ensure that their staffing companies have an enhanced understanding of independent contractor compliance.

Some of the new state laws set forth more restrictive definitions of independent contractor status or, conversely, more expansive tests for employee status. One such expansive definition is the so-called “ABC” test, where all of the prongs of a three-part test must be satisfied for a business to establish that a worker is an independent contractor.⁶³ These statutory tests are generally regarded as far more worker-friendly than the common law or “economic realities” tests used by federal courts and some state courts.⁶⁴

Notably, although more than two dozen states have enacted laws pertaining to independent contractors since July 2007, *all of those statutes permit the continued use of properly classified independent contractors.* Thus, the key under virtually all of these new laws is whether an independent contractor relationship is structured, documented and implemented in a compliant manner or, where a new law has changed its test for independent contractor status, whether the relationship needs to be restructured, re-documented and re-implemented in a manner that complies with a new statutory scheme. We discuss this issue further in Section VIII.A. below.

B. Federal Bills Aimed at Misclassification

Congress has tried to follow suit, but none of its initiatives in this area have become law. In 2008, the Employee Misclassification Prevention Act (EMPA) was introduced in both houses of Congress. It was reintroduced in both the House and Senate in a different form in 2010 and again in 2011.⁶⁵ If passed, the bill would have, for the first time, made misclassification of employees as independent contractors a federal labor law violation, imposed substantial recordkeeping and notice obligations on businesses (even those that properly classify their indepen-

dent contractors), and subjected businesses to hefty penalties for noncompliance with the proposed new law.⁶⁶

In 2011⁶⁷ and again in 2013⁶⁸ and 2014,⁶⁹ Congress introduced the Payroll Fraud Prevention Act. This was a trimmed-down version of the earlier EMPA and, like EMPA, would have made independent contractor misclassification a federal offense.⁷⁰

Another misclassification bill, the Fair Playing Field Act,⁷¹ was first introduced in September 2010 and reintroduced in March 2012⁷² and again in November 2013.⁷³ This bill would have eliminated a long-standing “safe harbor” found in section 530 of the Revenue Act of 1978 that many businesses have relied on for continuing to classify certain workers as independent contractors.⁷⁴ Indeed, it was reported that FedEx used the “safe harbor” to escape a \$319 million back tax assessment by the IRS related to its classification of drivers in its Ground Division as independent contractors.⁷⁵

None of the federal bills, if passed, would have foreclosed the use of independent contractors that are properly classified as such.

VI. CLASS ACTION LAWSUITS

Businesses that either use independent contractors to supplement their workforces or that operate on the basis of independent contractor business models have increasingly been targeted not only by regulatory agencies and legislators, but also by plaintiffs’ class action lawyers. Independent contractor misclassification lawsuits have mushroomed against both large and small businesses. Almost no industry is free from these types of lawsuits, although some industries have been harder hit and others are particularly vulnerable.

A review of court papers in hundreds of class and collective action lawsuits shows that the industries and businesses that have experienced the most lawsuits of this nature include the courier, transportation and logistics industries; the adult entertainment business; the cable installation industry; cleaning and sanitation companies; and the staffing and workforce management business. Industries that have also been the subject of such class action lawsuits include car rental, communications, financial services, insurance, car service, media, publishing, security, fashion, pharmaceutical, cosmetics, energy, sports and national defense. Drivers of commercial goods, such as bakery

goods and soft drinks, have also been the subject of a number of class action misclassification lawsuits.

Among the businesses that are particularly vulnerable to misclassification class actions are Silicon Valley start-ups and other “on demand” companies in the “sharing economy” that use hundreds or thousands of low-wage independent contractors that are often indistinguishable from low-wage employees.⁷⁶

A representative sampling of class action cases that were resolved in the last few years in favor of workers who claimed they were misclassified as independent contractors include the following:

- a newspaper publisher that lost a class action lawsuit brought by its newspaper carriers, who were awarded \$11 million by a state court in California,⁷⁷ and another newspaper that settled a misclassification lawsuit for \$3.2 million⁷⁸
- a home improvement retailer that settled with its installers for \$6.5 million⁷⁹
- a nationwide overnight courier that settled a claim in Maine with 141 of its drivers for \$5.8 million⁸⁰
- a New York adult entertainment club that settled with exotic dancers for \$8 million,⁸¹ another club that settled in Texas for \$2.3 million⁸² and a third club that was the subject of a \$10.9 million judgment⁸³
- a cleaning and janitorial services company that paid \$10 million to settle a class action lawsuit in Massachusetts brought by more than 100 custodians, who alleged that they were misclassified as “franchisees” instead of employees⁸⁴
- a nationwide food distribution company that paid \$3.53 million in allegedly unpaid employee benefits to settle one of a number of class action cases brought by bakery food drivers who made deliveries in Connecticut and Massachusetts⁸⁵
- a nationwide workforce management/staffing company supplying “outsourcing and contact center services” for the financial services, retail, technology, e-commerce, telecommunications, travel and hospitality industries that paid \$1.25 million in settlement to more than 200 customer and technical support service workers in California⁸⁶

- a car service company that paid \$3.5 million to 489 drivers and their lawyers⁸⁷
- an oil and gas company that settled for \$2 million with oil-field workers that monitored oil and gas wells⁸⁸
- a nationwide logistics and last-mile delivery company that settled class actions filed by drivers in Oregon and Washington for \$2.25 million⁸⁹
- an airport shuttle company that settled with more than 3,000 drivers for \$11.9 million in damages and legal fees⁹⁰
- an Ohio cable installation company that was found to have misclassified its installers and ordered by a federal court to pay \$1.5 million in damages.

These examples highlight the value of independent contractor misclassification cases to plaintiffs' class action lawyers, who typically receive between 20 percent and 30 percent of the settlement as an attorney's fee award, or the full amount of their legal fees if higher, when they secure a settlement or judgment in favor of their class member clients. In addition, companies beset by these types of lawsuits incur "hidden costs," including their own legal fees and the distraction of key management personnel that are needed to defend class action lawsuits of this nature.⁹¹

VII. THE IMPACT OF LABOR ORGANIZATIONS AND THE POTENTIAL FOR UNIONIZATION

Under federal labor law, only employees can be unionized; independent contractors are not covered by the National Labor Relations Act and have no right to organize. Recognizing that independent contractors are beyond the reach of labor organizations, unions have been at the forefront of the regulatory and legislative efforts to curtail the use of independent contractors.

One of the earliest academic studies to examine the extent and effects of independent contractor misclassification was undertaken under the auspices of the Cornell University School of Industrial and Labor Relations. The February 2007 report, "The Cost of Worker Misclassification in New York State," was conducted at the request of UNICON, which the authors describe as a construction labor-management organization based in Rochester, New York.⁹² That organization promotes the use of unionized work forces in the construction industry.⁹³

One of the principal conclusions reached by the Cornell Report was that "Worker misclassification disrupts labor markets by enabling unscrupulous employers to ignore labor standards,"⁹⁴ which essentially refers to unionized construction employers paying area-standard wages.

Labor organizations have used the Cornell Report to support state legislative initiatives resulting in new laws, such as those referenced in Section V.A. above, which seek to curtail the use of independent contractors in two heavily unionized industries: construction and the courier delivery/transportation business. Following the passage of state laws that set forth stringent requirements for construction employers to classify workers as independent contractors, union membership in the construction industry has undoubtedly risen in those states that have passed such laws since 2007 (including New Jersey,⁹⁵ Pennsylvania,⁹⁶ Illinois⁹⁷ and New York,⁹⁸ among other states).

After years of effort by the Teamsters Union, the National Labor Relations Board in 2014 certified a Teamsters local union as the collective bargaining representative of drivers in Connecticut for FedEx Home Delivery, following that agency's finding that such drivers were employees and not independent contractors or separate business entities, as argued by FedEx.⁹⁹

Similarly, years of efforts by the Teamsters to organize drivers who had been classified as independent contractors by drayage companies operating at the Ports of Los Angeles and Long Beach, California, has recently succeeded. As of January 2015, a number of those drayage companies that previously classified drivers as independent contractors converted to employee business model and have begun to bargain with a Teamsters local union for an initial collective bargaining agreement.¹⁰⁰

VIII. THREE ALTERNATIVES TO MINIMIZE OR AVOID FUTURE MISCLASSIFICATION EXPOSURE

Despite media attention that has been focused on the issue of independent contractor misclassification in recent years, including articles in newspapers and trade publications,¹⁰¹ most companies have yet to diagnose their state of compliance or determine their potential exposure for independent contractor misclassification liability. Fewer still have enhanced or updated their workforce models in a manner sufficient to meaningfully minimize or eliminate the risks of costly government regulatory and enforcement actions and class action litigation attacks.

For companies that would like to continue their current workforce strategies, instead of being required to reclassify every independent contractor as an employee under government or court compulsion, there is every incentive to restructure, re-document and re-implement their business models or reclassify or redistribute contingent workers currently treated as independent contractors.

Virtually all of the newly enacted state laws (as well as the proposed federal legislation) permit the continued use of independent contractors, provided the workers are properly classified. Nonetheless, some lawyers and legal commentators routinely advise businesses to cease using independent contractors or to reclassify them as employees to avoid the potential for misclassification liability. There are, however, a number of proven alternatives that permit companies to maintain their use of independent contractors while minimizing or avoiding future misclassification liability.

Those alternatives include restructuring, re-documenting and re-implementing the independent contractor relationship; reclassifying (either voluntarily or through a government program); and/or redistributing independent contractors through a workforce management or staffing company.

A. Bona Fide Restructuring and Re-documentation — and the Use of IC Diagnostics™

Businesses that are concerned about the potential for misclassification liability often recognize that, at best, their independent contractors probably fall within a “gray area,” where some facts favor contractor status while other facts indicate employee status. As noted above, it is a basic precept of independent contractor law that the tests used to determine whether a worker is an independent contractor or an employee “differ from law to law.”¹⁰²

Most tests are based, in whole or in large part, on whether the hiring party has the “right to control the manner and means” by which the worker performs his or her services,¹⁰³ with the exception of a few state laws.¹⁰⁴ In determining whether a business has retained or has exercised the right to control a worker’s manner and means of performing work, some federal and state agencies list as many as two dozen factors that may indicate whether or not the “hiring” party has such control.

Courts and government agencies have repeatedly stated that no one factor determines whether there is sufficient direction

and control to support a determination of an employment relationship. For example, the IRS has stated that it will consider “all information that provides evidence of the degree of control and the degree of independence.”¹⁰⁵ Our 2009 review of the factors used by the courts and by various state and federal agencies revealed that at least 48 factors were used by different decision-making bodies or were found in statutory tests used to determine independent contractor status.¹⁰⁶ In the succeeding five years, our list of factors that have been used by agencies and courts to determine whether a worker is an employee or independent contractor has mushroomed.

The first step that is typically recommended by most lawyers and consultants to companies concerned about misclassification liability is to diagnose whether the company’s independent contractors are properly classified. That step, however, is wholly unnecessary for any business that wishes to consider a bona fide restructuring of its independent contractor relationships.

Once a company has determined that it wishes to consider the restructuring alternative, it may then be beneficial to perform a comprehensive analysis on the company’s anticipated level of compliance after restructuring. Some businesses have conducted that review and assessment using IC Diagnostics™,¹⁰⁷ a process that examines whether the position would likely pass the applicable independent contractor tests under governing state and federal laws. This process uses a “48 Factors-Plus™” list to determine worker status, with each of the factors weighted to reflect its relative importance in assessing compliance with applicable laws.

A compliance analysis should then measure the company’s anticipated compliance with each of the applicable independent contractor laws. For example, the IC Diagnostics™ process uses an IC Compliance Scale™ that is calibrated to provide assessments of alternative ways to minimize misclassification liability — depending on where the restructured relationship falls on the IC Compliance Scale™. Even for businesses that operate in those states that have strict tests for determining independent contractor status, this process can provide an assessment of how much restructuring is needed and, once implemented, how that alternative will minimize or eliminate future misclassification liability.

Where bona fide restructuring is considered a sound alternative, the business can proceed to the next step in the process:

re-documenting the restructured independent contractor relationship. This is a comprehensive undertaking; it should embody the entire relationship between the independent contractors in question and the business. Re-documentation should also be accomplished in a manner designed to further enhance independent contractor compliance, consistent with applicable laws. Tools such as the 48 Factors-Plus™ list can be used to ensure that the re-documentation of the independent contractor relationship is thorough and state of the art.

Many independent contractors work without an agreement or, worse, work under agreements that do not reflect the true relationship between the contractor and the company. A contract that misstates the true relationship between the parties (such as one that states that a worker is not subject to the supervision of the company, even though he or she is regularly supervised by a superior at the company or given regular evaluations) is generally of little or no benefit.

Similarly, a contract that recites that a worker is an independent contractor offers no protection if the factors used by a court or government agency to determine the worker's status demonstrate sufficient direction and control to create an employment relationship. Even agreements drafted for companies by otherwise talented lawyers include language that a plaintiff's class action lawyer may use to support his or her argument that the business has retained a right to direct and control the manner and means by which the worker performs the agreed-upon services.¹⁰⁸

After the restructured relationship is memorialized in a written independent contractor agreement, the final step is implementing the restructured relationship. Companies must ensure that what is set forth in the contractor agreement will be implemented in the field and that it does not include empty recitals or misstatements of the relationship. Equally important, businesses must avoid exercising direction and control, which is often unintended yet has the potential to undermine an otherwise enhanced state of independent contractor compliance.

Other aspects of the re-implementation process may include reviewing and revising company operating manuals and procedures, documenting the implementation of certain provisions in the updated contractor agreement and putting safeguards in place to ensure conformity with the restructured independent contractor relationship.

As is readily evident, there are no “quick and dirty” ways to enhance independent contractor compliance, and “one size fits all” solutions are likely to be ill fitting. The use of form or model independent contractor agreements (sometimes called templates) tends to cause businesses to overlook the need to restructure and to implement a sustainable independent contractor model that will withstand legal scrutiny and serve a company's unique business model. On the other hand, bona fide restructuring, re-documentation and re-implementation need not be a prohibitive undertaking and, once completed within a reasonably short period of time, can place a business in an enhanced and sustained state of compliance. That itself may substantially minimize the likelihood that a regulator or class action lawyer will seek to challenge a company's compliance with independent contractor laws.

When a process such as IC Diagnostics™ indicates that a business is unable to attain compliance, there are at least two alternatives to restructuring that some businesses may wish to consider: reclassification and redistribution. These alternatives may also be used by companies that have properly classified a group of workers if the business nonetheless wishes to minimize or cease its use of independent contractors in the future.

B. Reclassification — Either Under a Governmental Program or Voluntarily

Businesses that are at greater risk for misclassification liability are more likely to have to defend their classification of workers as independent contractors. More companies are receiving notices from state unemployment agencies that question whether a former worker classified as an independent contractor should be reclassified as an employee, thereby exposing the company to the risk of liability for any prior misclassification. Some businesses also have received notices from state labor commissioners and workers' compensation agencies inquiring whether an entire group of workers are independent contractors or employees, and some have received tax audit notices — even companies whose compliance with independent contractor laws should be beyond dispute.

Even when IC Diagnostics™ reveals that a company may survive a legal challenge to its independent contractor relationships, businesses may wish to consider reclassification. This step is likely to be far less painful and costly than being compelled by a government agency to reclassify and ordered to make payment of back taxes, unpaid Social Security and

Medicare contributions and unpaid unemployment insurance and workers' compensation premiums, along with applicable penalties and interest, *if* there is a finding of misclassification.

The costs of compelled and voluntary reclassification are often weighed against the savings derived from continuing a business structured, in whole or in part, on an independent contractor model. This is a business decision that is premised on a host of competing considerations — far too many to mention here.

Reclassification can be undertaken in one of two ways: under a government-sponsored reclassification program or voluntarily, without government involvement. As noted earlier, in September 2011, the IRS announced its Voluntary Classification Settlement Program (VCSP), which allows a business to voluntarily reclassify workers who currently receive Forms 1099 from the company by making what is referred to by the IRS as a “minimal payment covering past payroll tax obligations.”¹⁰⁹ That payment to the IRS would be “10 percent of the employment tax liability that may have been due on compensation paid to the workers for the most recent tax year, determined under the reduced rates of section 3509 of the Internal Revenue Code,” according to the IRS announcement. Participation in the VCSP would also eliminate interest and penalties on the liability and, most importantly, exempt companies from an employment tax audit for worker misclassification in prior years.¹¹⁰

Although the VCSP appears to be an attractive form of “amnesty,” there have been only a scant number of participants, for obvious reasons. First, it does not provide any form of reduced penalties or interest with respect to the array of other federal and state laws that are implicated by reclassification, including state tax, unemployment and workers' compensation laws, as well as the federal wage and hour laws. Second, although the program evidently contains a provision that there is no admission that the taxpayer erroneously classified its workers as independent contractors, the likely “takeaway” by the workers themselves, their lawyers (if any) and other federal and state agencies that may become involved is that the company would not have entered the program if it had been classifying its independent contractors correctly.¹¹¹

For these and other reasons, businesses interested in reclassification are more likely to do so voluntarily without entering the VCSP. However, voluntary reclassification should be imple-

mented in a manner that does not create unfair inferences of past noncompliance. On one hand, some workers that have been paid on a 1099 basis might welcome their reclassification but may also fail to understand why they were not treated as employees from the beginning of their tenure with the company. On the other hand, other workers who are accustomed to being compensated on a 1099 basis may object strenuously to becoming an employee and losing the tax advantages of self-employment, including tax deductions for legitimate business expenses. In addition, reclassification of workers from 1099 to W-2 status may require some businesses to engage in an array of administrative changes to comply with federal and state tax, employee benefits, and labor laws.

Reclassification does not require that all workers previously excluded from an employee benefit plan be included in the future. Exclusion would be permissible if the governing documentation for the company's plans is drafted properly and the exclusion does not violate applicable tax or ERISA rules or any rules associated with the Affordable Care Act.¹¹²

C. Redistribution of Independent Contractors — Using a Workforce Management or Staffing Company

Where voluntary reclassification is not a practical or viable alternative, another choice is to use a knowledgeable and reputable workforce management or staffing company. This alternative cannot completely eliminate all potential liability for misclassification, but using a responsible workforce organization may dramatically reduce the risk of such liability, as well as the likelihood of a lawsuit challenging the classification of a group of workers paid on a 1099 basis.¹¹³

Workforce management and staffing organizations are not payroll companies; when they hire or retain some or all of a company's independent contractors, they may either treat them as 1099 contractors or as W-2 employees.

If the talent is treated as independent contractors, a knowledgeable workforce solutions company will take its own steps to maximize compliance with state and federal workforce, tax and benefit laws while facilitating the engagement of a company's valuable contingent workforce. If a staffing company instead treats the workers as employees, the staffing company will withhold income taxes, make Medicare and Social Security contributions, pay workers' compensation and unemployment insurance premiums, and can provide an array of benefits

to the former independent contractors, including health insurance under a plan maintained by the staffing or workforce management company. If the workforce solutions firm treats the workers as independent contractors, it is imperative to select a firm that is knowledgeable about independent contractor compliance issues; otherwise, the workforce solutions or outsourcing company can offer little or no protection from misclassification liability.¹¹⁴

Although using a knowledgeable and experienced outsourcing company may substantially lessen the risk of future misclassification liability, it is not a panacea. For example, a business that contracts with a leasing workforce management organization may still have to account for the independent contractors or employees it has retained or hired in the company's benefit plan language and discrimination testing.

IX. CONCLUSION

The use of independent contractors is still a viable means to supplement a company's workforce or to structure a business in almost all states, and Congress has never considered a prohibition on the use of independent contractors. All a business is required to do is not misclassify employees as independent contractors.¹¹⁵

Lax enforcement of the tax and labor laws in the past, as they apply to independent contractors, has placed most businesses in a position in which misclassification liability has become a genuine risk — if steps are not undertaken to reduce or eliminate this exposure using any of the alternatives discussed above. Some companies, in fact, may choose to use not just one, but perhaps two or even all three of these alternatives for different groups of independent contractors. In view of the current and pending legislative, regulatory and judicial landscape, there is only one undesirable alternative: inaction.

ENDNOTES

- 1 Although few industries are immune from independent contractor misclassification exposure, federal and state regulators have targeted dozens of industries for enforcement. For example, our review of public statements, press releases and congressional testimony by the governmental officials over the last several years indicates that the U.S. Department of Labor has targeted the following industries for independent contractor misclassification enforcement: janitorial services; construction; home health care; nursing; staffing; Internet services; child care; transportation and trucking; cable companies; security; restaurants; catering services; hotel/motel (hospitality); ship repair; oil and gas; landscaping and nurseries; car service and limousines; and supermarkets. *See* The 2016 Federal Budget: Targeting Independent Contractor Misclassification as Part of the "Fissured Workplace" (Feb. 2, 2015), <http://independentcontractorcompliance.com/2015/02/02/the-2016-federal-budget-targeting-independent-contractor-misclassification-as-part-of-the-fissured-workplace/>.

Although many states have informal lists of priority industries, at least one state, New York, has published its list of industries found to have the "highest incidence of worker misclassification." New York's list, which has some overlap with the federal government's list, includes the following industries: professional, scientific and technical services; construction of buildings; food services and drinking places; publishing; administrative and support services; specialty trade contractors; ambulatory health care services; personal and laundry services; performing arts, spectator sports and related industries; educational services; motion picture and sound recording; and merchant wholesalers and nondurable goods. *See* 133,000 Misclassified Workers Detected in New York in the Course of 12,000 Audits and Investigations in 2014, According to the State's Newest Task Force Report on Employee Misclassification (Feb. 5, 2015), <http://independentcontractorcompliance.com/2015/02/05/133000-misclassified-workers-detected-in-new-york-in-the-course-of-12000-audits-and-investigations-in-2014-according-to-the-states-task-force-report-on-employee-misclassification/>.

- 2 Our review of major class action lawsuits over the last few years indicated that class action lawyers have targeted the technology industry, as well as many other business sectors, including the following: courier, transportation and logistics; adult entertainment; cable installation; cleaning and sanitation companies; staffing; car rental; communications; financial services; insurance; car service; media; publishing; security; fashion; pharmaceutical; cosmetics; energy; sports; and national defense.
- 3 *See* Uber and Lyft Lose Key Motions in California Independent Contractor Class Actions; Decisions Have Far-Reaching Implications for Companies that Fail to Properly Structure and Document Independent Contractor Relationships (Mar. 12, 2015), http://www.pepperlaw.com/publications_article.aspx?ArticleKey=3159. A number of Silicon Valley tech start-up companies that operate their businesses using a 1099 model in the sharing economy are now facing the risk of independent contractor misclassification liability. *See* 1099ers Exposing Startups, Private Equity Firms to Costly Liability (Sept. 24, 2014), http://www.pepperlaw.com/publications_article.aspx?ArticleKey=3043. For private equity firms and other investors considering acquisitions or investments in Silicon Valley start-ups, due diligence is often overlooked in the area of independent contractor compliance and misclassification exposure. *See* Hidden Due Diligence Risk in Mergers, Acquisitions and Investments: Independent Contractor Misclassification Oftentimes Overlooked by Private Equity Firms, Hedge Funds and Other Investors (Jan. 8, 2013), http://www.pepperlaw.com/publications_article.aspx?ArticleKey=2523.
- 4 *See* Worker Classification Issues Are Raised by Affordable Care Act Proposed Regulations (Mar. 21, 2013), <http://independentcontractorcompliance.com/2013/03/21/worker-classification-issues-raised-by-affordable-care-act-proposed-regulations/>.
- 5 Another reason may be that a company that was acquired has, from its inception, used an independent contractor model, as was the case when FedEx acquired Roadway Package System, which became FedEx's Ground Delivery service in 1998. *See* FedEx Home Delivery, an Operating Div. of FedEx Ground Package Sys., 361 N.L.R.B. No. 55 at 3, n.15 (Sept. 30, 2014), *available at* <http://apps.nrlb.gov/link/document.aspx/09031d45818e44c8>.
- 6 *See* U.S. Gov't Accountability Office, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, GAO Report 09-717, at 4 (Aug. 2009), *available at* <http://www.gao.gov/new.items/d09717.pdf> [hereinafter GAO Report 09-717].
- 7 *See* Misclassifying the "Underground Workforce" as a Form of Independent Contractor Misclassification (Nov. 15, 2012), <http://independentcontractorcompliance.com/2012/11/15/misclassifying-the-underground-workforce-as-a-form-of-independent-contractor-misclassification/>.
- 8 U.S. Gov't Accountability Office, Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification, GAO Report 06-656, at 25 (July 2006), *available at* <http://www.gao.gov/new.items/d06656.pdf> [hereinafter GAO Report 06-656]. Congress has not sought to eliminate the confusion. The bills that have been introduced would merely perpetuate the situation where an individual may be deemed an employee for overtime and minimum wage purposes under federal law but may be deemed an independent contractor for tax purposes. *See* Congressional Bills Intended to Clarify Independent Contractor Status Would Instead Create Confusion for Employers Seeking to Avoid Misclassification Liability (Nov. 3, 2010), http://www.pepperlaw.com/publications_article.aspx?ArticleKey=1930.
- 9 *See* Q&A: Reuters Interviews IC Compliance and Misclassification Legal Blog Publisher Richard Reibstein (June 12, 2013), <http://independentcontractorcompliance.com/2013/06/12/qa-reuters-interviews-ic-compliance-and-misclassification-legal-blog-publisher-richard-reibstein/>.
- 10 This basic statement of the test was articulated by the U.S. Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322 (1992).
- 11 *See* IRS, Publication 15-A, Employer's Supplemental Tax Guide, at 7 (Dec. 22, 2014), *available at* <http://www.irs.gov/pub/irs-pdf/p15a.pdf>.

- 12 *See, e.g.*, Testimony of Catherine K. Ruckelshaus, Nat'l Employment Law Project, Hearing Before the U.S. Congress Senate Comm. on Health, Educ., Labor & Pensions Subcomm. on Employment & Workplace Safety (Nov. 12, 2013), *available at* <http://www.nelp.org/page/-/Justice/2013/independent-contractor-testimony-2013FINAL.pdf?nocdn=1>; February 2015 Independent Contractor Compliance and Misclassification Update (Mar. 4, 2015), <http://independentcontractorcompliance.com/2015/03/04/february-2015-independent-contractor-compliance-and-misclassification-update/> (discussing the position of former Secretary of Labor Robert Reich).
- 13 *See* Florida is 19th State to Partner with U.S. Department of Labor to Combat Unlawful Independent Contractor Misclassification (Jan. 13, 2015), <http://independentcontractorcompliance.com/2015/01/13/florida-is-19th-state-to-partner-with-u-s-department-of-labor-to-combat-unlawful-independent-contractor-misclassification/>.
- 14 *See* Testimony of Labor Sec'y Thomas Perez at the Hearing of the House Educ. & the Workforce Comm. on "Reviewing the President's FY2016 Budget Proposal for the Depart. of Labor" (Mar. 18, 2015).
- 15 New laws that continue to permit workers and businesses to maintain their current independent contractor relationships but that increase penalties for misclassification have been referred to as "IC-neutral" laws, whereas those that would render unlawful currently legal independent contractor relationships have been referred to as "IC-minus" laws. *See* 'IC-Neutral' and 'IC-Minus' Legislation, Rule-Making and Court Decisions, <http://independentcontractorcompliance.com/legal-resources/pros-and-cons-of-ic-neutral-and-ic-minus-legislation/>.
- 16 *See* Update on Independent Contractor Misclassification: The States Have Taken the Lead in Cracking Down (June 25, 2012), http://www.pepperlaw.com/publications_article.aspx?ArticleKey=2384. *See also* California Joins Growing Number of States to Enact Independent Contractor Misclassification Legislation: State adds new, costly penalties for willful misclassification, but protects the right of businesses to continue to legitimately use independent contractors (Oct. 12, 2011), <http://independentcontractorcompliance.com/2011/10/12/california-joins-growing-number-of-states-to-enact-in-dependent-contractor-misclassification-legislation-state-adds-new-costly-penalties-for-willful-misclassification-but-protects-the-right-of-busi/>.
- 17 *See* GAO Report 09-717, *supra* note 6, at 12.
- 18 *See id.* at 11.
- 19 *See* Vizcaino v. Microsoft Corp., 142 F.Supp.2d 1299 (W.D. Wash. 2001), *available at* <http://independentcontractorcompliance.com/legal-resources/court-casesdecisions-of-significance/>.
- 20 *See* Worker Classification Issues Are Raised by Affordable Care Act Proposed Regulations, *supra* note 4.
- 21 *See* Fiscal Year 2016 Dep't of Labor, Budget in Brief, at 24, *available at* <http://www.dol.gov/dol/budget/2016/PDF/FY2016BIB.pdf>; Fiscal Year 2015 Budget of the United States, Dep't of Labor, at 108, *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/labor.pdf>; Fiscal Year 2014 Budget of the United States, Dep't of Labor, at 126, *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf>; Fiscal Year 2013 Budget of the United States, Dep't of Labor, at 146, *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/labor.pdf>. \$3.8 million was dedicated to the hiring of an additional 35 full-time investigators. *See* Fiscal Year 2015 Dep't of Labor, Budget in Brief, at 37, *available at* <http://www.dol.gov/dol/budget/2015/PDF/FY2015BIB.pdf>.
- 22 *See* Press Release, U.S. Dep't of Labor, \$10.2M awarded to fund worker misclassification detection, enforcement activities in 19 state unemployment insurance programs (Sept. 15, 2014), *available at* <http://www.dol.gov/opa/media/press/eta/ETA20141708.htm>.
- 23 The U.S. Department of Labor has its own Misclassification Initiative website at <http://www.dol.gov/whd/workers/misclassification>. By year-end 2014, the Labor Department had announced that it had signed memoranda of understanding with 18 states: Alabama, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New York, Utah, Washington and Wyoming.

- 24 The U.S. Labor Department announced on January 13, 2015 that it entered into a cooperation agreement with Florida. *See* Press Release, U.S. Dep't of Labor, US Labor Department signs agreement with Florida Department of Revenue to reduce misclassification of employees (Jan. 13, 2015), *available at* <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20150113.xml>. On January 20, it announced that it signed a cooperation agreement with Wisconsin. *See* Press Release, U.S. Dep't of Labor, US Labor Department and Wisconsin Department of Workforce Development sign agreement to reduce misclassification of employees (Jan. 20, 2015), *available at* <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20150120.xml>.
- 25 *See* Cable Company Pays \$1.075 Million to Settle Misclassification Case with U.S. Department of Labor for Cable, Telephone, and Internet Installers (May 14, 2013), <http://independentcontractorcompliance.com/2013/05/14/cable-company-pays-1-075-million-to-settle-misclassification-case-with-u-s-department-of-labor-for-cable-telephone-and-internet-installers/>.
- 26 *See* KGB USA, Text Message and Internet Information Provider, Settles Independent Contractor Misclassification Claim with U.S. Department of Labor for \$1.3 Million (Jan. 24, 2013), <http://independentcontractorcompliance.com/2013/01/24/text-message-and-internet-information-provider-kgb-usa-settles-independent-contractor-misclassification-claim-with-u-s-department-of-labor-for-1-3-million/>.
- 27 *See* February 2015 Independent Contractor Compliance and Misclassification Update, *supra* note 12.
- 28 *See* September 2013 Monthly Independent Contractor Compliance and Misclassification Update (Oct. 3, 2013), <http://independentcontractorcompliance.com/2013/10/03/september-2013-monthly-independent-contractor-compliance-and-misclassification-update/>.
- 29 *See* June 2013 Monthly Independent Contractor Compliance and Misclassification Update (July 1, 2013), <http://independentcontractorcompliance.com/2013/07/01/june-2013-monthly-independent-contractor-compliance-and-misclassification-update/>.
- 30 *See* December 2013 Monthly Independent Contractor Compliance and Misclassification Update (Jan. 8, 2014), <http://independentcontractorcompliance.com/2014/01/08/december-2013-monthly-independent-contractor-compliance-and-misclassification-update/>.
- 31 *See* March 2014 Monthly Independent Contractor Compliance and Misclassification Update (Apr. 3, 2014), <http://independentcontractorcompliance.com/2014/04/03/march-2014-monthly-independent-contractor-compliance-and-misclassification-update/>.
- 32 *See* Press Release, U.S. Dep't of Labor, US Labor Department signs agreement with Florida Department of Revenue, *supra* note 24 (emphasis added).
- 33 *See* Press Release, IRS, IRS and States to Share Employment Tax Examination Results (Nov. 6, 2007), *available at* <http://www.unclefed.com/Tax-News/2007/nr07-184.html>.
- 34 *See* IRS to Reinvigorate its QETP Program in Effort to Crack Down Harder on Independent Contractor Misclassification (May 16, 2013), <http://independentcontractorcompliance.com/2013/05/16/irs-to-reinvigorate-its-qetp-program-in-effort-to-crack-down-harder-on-independent-contractor-misclassification/>.
- 35 *See* Tax Blawg, Tax Blawg Report on IRS National Employment Tax Research Project (May 6, 2010), <http://taxblawg.net/2010/05/06/tax-blawg-report-on-irs-national-employment-tax-research-project/>.
- 36 *See* IRS Announcement 2011-64, *available at* <http://www.irs.gov/pub/irs-drop/a-11-64.pdf>. *See also* IRS's New Voluntary Classification Program Adds Another Choice for Companies Concerned About Their 1099ers (Sept. 23, 2011), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2199.
- 37 *See* IRS Announcement 2012-45 (Dec. 17, 2012), *available at* http://www.irs.gov/irb/2012-51_IRB/ar16.html.
- 38 *See* IRM 4.23.6, Employment Tax, Classification Settlement Program (CSP) (revised 2014), *available at* http://www.irs.gov/irm/part4/irm_04-023-006.html#d0e208.
- 39 *See* IRS Confirms Valid Use of Independent Contractors (Feb. 28, 2012), <http://independentcontractorcompliance.com>.

- com/2012/02/28/irs-confirms-valid-use-of-independent-contractors/. The effectiveness of the program was also questioned by the Treasury Inspector General for Tax Administration (TIGTA) in a report issued on September 24, 2014. See Press Release, Treasury Inspector Gen. for Tax Admin., TIGTA: Better Worker Identification Data Are Needed For the Voluntary Classification Settlement Program (Sept. 24, 2014), http://www.treasury.gov/tigta/press/press_tigta-2014-22.htm.
- 40 See March 2014 Monthly Independent Contractor Compliance and Misclassification Update, *supra* note 31.
- 41 See June 2014 Monthly Independent Contractor Compliance and Misclassification Update (July 7, 2014), <http://independentcontractorcompliance.com/2014/07/07/june-2014-monthly-independent-contractor-compliance-and-misclassification-update/>.
- 42 See Memorandum of Understanding Between the Internal Revenue Serv. and the U.S. Dep't of Labor (Sept. 19, 2011), *available at* <http://www.dol.gov/whd/workers/MOU/irs.pdf>.
- 43 Those states include Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington and Wisconsin.
- 44 See 133,000 Misclassified Workers Detected in New York, *supra* note 1.
- 45 See 2013 Annual Report of the Joint Enforcement Task Force on the Underground Economy and Employee Misclassification, at 4 (July 2014), *available at* <http://www.mass.gov/lwd/eolwd/jtf/annual-report-2013.pdf>.
- 46 See Press Release, Ill. Dep't of Employment Sec., Misclassified Employees Force Taxpayers To Subsidize Costs, Harm Economy (Aug. 11, 2014), *available at* <http://www.ides.illinois.gov/SitePages/NewsArticleDisplay.aspx?NewsID=227>.
- 47 See March 2014 Monthly Independent Contractor Compliance and Misclassification Update, *supra* note 31.
- 48 See Press Release, Ca. Dep't of Indus. Relations, California Labor Comm'r Cites Two Janitorial Cos. More Than \$1.5 Million for Multiple Wage Theft Violations (May 8, 2014), *available at* <http://www.dir.ca.gov/DIRNews/2014/2014-42.pdf>.
- 49 See, e.g., *Coverall N. Am. v. Comm'r of the Div. of Unemployment*, 447 Mass. 852 (Mass. 2006) (which led to custodians, who were found by an unemployment agency to have been misclassified, to commence a class action lawsuit against the company in *Awuah v. Coverall North America*, 707 F.Supp.2d 80 (D. Mass. 2010)). See also Unemployment Benefit Claims and Independent Contractor Misclassification Liability: A Single Claim by One Worker Can Lead to Disastrous Results (Feb. 5, 2013), <http://independentcontractorcompliance.com/2013/02/05/unemployment-benefit-claims-and-independent-contractor-misclassification-liability-a-single-claim-by-one-worker-can-lead-to-disastrous-results/>.
- 50 See IC Laws: State Laws Enacted and Federal Bills Proposed (Since July 2007), <http://independentcontractorcompliance.com/legal-resources/state-ic-laws-and-selected-bills/>.
- 51 See, e.g., Connecticut Public Act No. 08-156 (June 12, 2008) (establishing the Connecticut Joint Enforcement Commission on Employee Misclassification), *available at* <http://www.cga.ct.gov/2008/ACT/PA/2008PA-00156-R00SB-00454-PA.htm>; Illinois Public Act 095-0026 (Jan. 1, 2008) (creating the Illinois Task Force), *available at* <http://www.ilga.gov/legislation/publicacts/fulltext.asp?name=095-0026&GA=95&SessionId=51&DocTypeId=HB&DocNum=1795&GAID=9&Session>.
- 52 See California Joins Growing Number of States to Enact Independent Contractor Misclassification Legislation, *supra* note 16.
- 53 See Delaware Workplace Fraud Act, Del. Code tit. 9, §§ 3501–3515, *available at* <http://delcode.delaware.gov/title19/c035/index.shtml>.
- 54 See Illinois Employee Classification Act, 820 Ill. Comp. Stat. § 185/1–999, *available at* <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2898&ChapAct=820%26nbsp%3BILCS%26nbsp%3B185%2F&ChapterID=68&ChapterName=EMPLOYMENT&ActName=Employee+Classification+Act%2E>.

- 55 See Maine L.D. 1456 (P.L. 2009, Ch. 452) (June 19, 2009), *available at* http://www.mainelegislature.org/legis/bills/bills_124th/chapters/PUBLIC452.asp.
- 56 See Maryland Workplace Fraud Act of 2009, Md. Senate Bill 909, *available at* http://mlis.state.md.us/2009rs/chapters_noln/Ch_188_sb0909E.pdf.
- 57 See N.J. Construction Industry Independent Contractor Act, N.J. Stat. Ann. § 34:20-1 to -11, *available at* http://lwd.dol.state.nj.us/labor/wagehour/lawregs/indep_contractor_act.html.
- 58 See N.Y. Construction Industry Fair Play Act, N.Y. Law S05847 (June 11, 2009), *available at* <http://labor.ny.gov/legal/construction-industry-fair-play-act.shtm>.
- 59 See Pennsylvania Construction Workplace Misclassification Act, 43 P.S. §§ 933.1–933.17, *available at* <http://www.portal.state.pa.us/portal/server.pt?open=514&objID=927756&mode=2>.
- 60 See Maryland Workplace Fraud Act of 2009, Md. Senate Bill 909.
- 61 See New York State Cracks Down on Independent Contractor Misclassification in the Transportation and Delivery Industry (Jan. 15, 2014), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2803.
- 62 See New California Law Imposes Costly Risks to Companies Using Independent Contractors Supplied by Staffing and Recruiting Firms – But Risks Can Be Minimized (Oct. 1, 2014), <http://independentcontractorcompliance.com/2014/10/01/new-california-law-imposes-costly-risks-to-companies-using-independent-contractors-supplied-by-staffing-and-recruiting-firms-but-risks-can-be-minimized/>.
- 63 See, e.g., N.J. Construction Industry Independent Contractor Act, N.J. Stat. Ann. § 34:20-1 to -11; Illinois Employee Classification Act, 820 Ill. Comp. Stat. § 185/1–999; New York Commercial Goods Transportation Fair Play Act, Bill A8451-2013 (Jan. 16, 2014), *available at* <http://open.nysenate.gov/legislation/bill/A8451-2013>; Minnesota Employee Classification of Independent Contractors Act, S.F.No. 1653 (May 14, 2012), *available at* <https://www.revisor.mn.gov/laws/?year=2012&type=0&doctype=Chapter&id=295>.
- 64 For the key differences between the common law, economic realities and ABC tests for independent contractor status, see New Jersey Supreme Court Sets Low Bar for Workers Who Sue for Independent Contractor Misclassification (Jan. 15, 2015), <http://independentcontractorcompliance.com/2015/01/15/new-jersey-supreme-court-sets-low-bar-for-workers-who-sue-for-independent-contractor-misclassification-2/>; New California Law Imposes Costly Risks to Companies Using Independent Contractors, *supra* note 62.
- 65 See Congress Reintroduces the “Employee Misclassification Prevention Act,” Which Would Create a Federal Offense for Misclassification of Employees as Independent Contractors (Oct. 17, 2011), <http://independentcontractorcompliance.com/2011/10/17/congress-reintroduces-the-employee-misclassification-prevention-act-making-misclassification-of-employees-as-independent-contractors-a-federal-offense/>.
- 66 See Congress Reintroduces the Employee Misclassification Prevention Act that Would Make Misclassification of Employees as Independent Contractors a Federal Offense (Oct. 17, 2011), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2221.
- 67 See Senate Re-Loads on Independent Contractor Misclassification: New Bill Characterizes Misclassification as “Payroll Fraud” (Apr. 13, 2011), <http://independentcontractorcompliance.com/2011/04/13/senate-re-loads-on-independent-contractor-misclassification-new-bill-characterizes-misclassification-as-%e2%80%9cpayroll-fraud%e2%80%9d/>.
- 68 See Preview into the 2013 Version of the Payroll Fraud Prevention Act: Yet Another Congressional Effort to Crack Down on Independent Contractor Misclassification (Nov. 13, 2013), <http://independentcontractorcompliance.com/2013/11/13/preview-into-the-2013-version-of-the-payroll-fraud-prevention-act-yet-another-congressional-effort-to-crack-down-on-independent-contractor-misclassification/>.
- 69 See With No Fanfare, Congress Re-Introduces the Payroll Fraud Prevention Act of 2014 to Crack Down on Independent Contractor Misclassification (May 20, 2014), <http://independentcontractorcompliance.com/2014/05/20/with-no-fanfare-congress-re-introduces-the-payroll-fraud-prevention-act-of-2014-to-crack-down-on-independent-contractor-misclassification/>.

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- 70 See Congress Re-Introduces Independent Contractor Misclassification Law (Nov. 15, 2013), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2792.
- 71 See Fair Playing Field Act of 2010 Would End ‘Safe Harbor’ for Businesses Misclassifying Employees as Independent Contractors (Sept. 17, 2010), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=1890.
- 72 See The Fair Playing Field Act of 2012: Congress Is Trying Once Again to End ‘Safe Harbor’ for Businesses that May Have Misclassified Employees as Independent Contractors (Mar. 4, 2012), <http://independentcontractorcompliance.com/2012/03/04/the-fair-playing-field-act-of-2012-congress-is-trying-once-again-to-end-safe-harbor-for-businesses-that-may-have-misclassified-employees-as-independent-contractors/>.
- 73 See New Independent Contractor Misclassification Law Re-Introduced in Congress (Nov. 14, 2013), <http://independentcontractorcompliance.com/2013/11/14/new-independent-contractor-misclassification-law-re-introduced-in-congress/>.
- 74 See Fair Playing Field Act of 2012: Congress Trying Again to End ‘Safe Harbor’ for Businesses that May Have Misclassified Employees as Independent Contractors (Mar. 5, 2012), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2314.
- 75 See The Fair Playing Field Act of 2012, *supra* note 72.
- 76 See Silicon Valley Misclassification: ‘New York’ Magazine Focuses on How the 1099 Economy May Be Exposing Tech Start-Up Companies to Costly Liability for Their Use of Independent Contractors (Sept. 18, 2014), <http://independentcontractorcompliance.com/2014/09/18/silicon-valley-misclassification-new-york-magazine-focuses-on-how-the-1099-economy-may-be-exposing-tech-companies-to-costly-employment-law-liability-for-their-use-of-independent-con/>.
- 77 See \$11 Million Verdict Against Newspaper Found to Have Misclassified Paper Carriers as Independent Contractors (Jan. 24, 2014), <http://independentcontractorcompliance.com/2014/01/24/latest-newspaper-found-to-have-misclassified-paper-carriers-as-independent-contractors-hit-with-11-million-verdict/>.
- 78 See September 2014 Independent Contractor Compliance and Misclassification Update (Oct. 6, 2014), <http://independentcontractorcompliance.com/2014/10/06/september-2014-independent-contractor-compliance-and-misclassification-update/>.
- 79 See \$6.5 Million Class Action Settlement Imparts Four Lessons for Companies Seeking to Minimize Independent Contractor Misclassification Liability (Jan. 14, 2015), <http://independentcontractorcompliance.com/2015/01/14/four-lessons/>.
- 80 See FedEx Ground Settles Drivers’ Independent Contractor Misclassification Case in Maine for \$5.8 Million (Mar. 21, 2014), <http://independentcontractorcompliance.com/2014/03/21/fedex-ground-settles-drivers-independent-contractor-misclassification-case-in-maine-for-5-8-million/>.
- 81 See \$8 Million Independent Contractor Misclassification Class Action Settlement (Apr. 9, 2013), <http://independentcontractorcompliance.com/2013/04/09/class-action-for-independent-contractor-misclassification-to-settle-for-8-million/>.
- 82 See December 2014 Independent Contractor Compliance and Misclassification Update (Jan. 4, 2015), <http://independentcontractorcompliance.com/2015/01/04/december-2014-independent-contractor-compliance-and-misclassification-update/>.
- 83 See November 2014 Independent Contractor Compliance and Misclassification Update (Dec. 2, 2014), <http://independentcontractorcompliance.com/2014/12/02/november-2014-independent-contractor-compliance-and-misclassification-update/>.
- 84 See November 2013 Monthly Independent Contractor Compliance and Misclassification Update (Dec. 2, 2013), <http://independentcontractorcompliance.com/2013/12/02/november-2013-monthly-independent-contractor-compliance-and-misclassification-update/>.

- 85 See Monthly Independent Contractor Compliance and Misclassification News Update (December 2012) (Dec. 27, 2012), <http://independentcontractorcompliance.com/2012/12/27/monthly-ic-compliance-news-update/>.
- 86 See Staffing and Workforce Solutions Company Using Independent Contractors Face Misclassification Liability and Expose Clients to Undue Risks (Jan. 17, 2013), <http://independentcontractorcompliance.com/2013/01/17/staffing-agencies-using-independent-contractors-face-misclassification-liability-and-expose-clients-to-undue-risks/>.
- 87 See Car Services Continue to Be Hard Hit by Independent Contractor Misclassification: Next Class Action Settlement is for \$3.5 Million Covering Close to 500 Drivers (Apr. 21, 2014), <http://independentcontractorcompliance.com/2014/04/21/car-services-continue-to-be-hard-hit-by-independent-contractor-misclassification-next-class-action-settlement-is-for-3-5-million-covering-close-to-500-drivers/>.
- 88 See April/May 2014 Monthly Independent Contractor Compliance and Misclassification Update (June 2, 2014), <http://independentcontractorcompliance.com/2014/06/02/aprilmay-monthly-independent-contractor-compliance-and-misclassification-update/>.
- 89 See Monthly Independent Contractor Compliance and Misclassification News Update (December 2012), *supra* note 85.
- 90 See June 2014 Monthly Independent Contractor Compliance and Misclassification Update (July 7, 2014), <http://independentcontractorcompliance.com/2014/07/07/june-2014-monthly-independent-contractor-compliance-and-misclassification-update/>.
- 91 See \$6.5 Million Class Action Settlement, *supra* note 79 (discussing hidden costs in the third of four “takeaways”).
- 92 See Linda H. Donahue et al., The Cost of Worker Misclassification in New York State, at 1 (Feb. 1, 2007), *available at* <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009&context=reports> [hereinafter Cornell Report].
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- 94 See Cornell Report, *supra* note 92, at page 6.
- 95 See N.J. Construction Industry Independent Contractor Act, N.J. Stat. Ann. § 34:20-1 to -11.
- 96 See Pennsylvania Cracks Down on Independent Contractor Misclassification in the Construction Industry: Governor Signs Law that Imposes Strict Standards, Substantial Fines and Criminal Penalties (Oct. 14, 2010), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=1909.
- 97 See Illinois Employee Classification Act, 820 Ill. Comp. Stat. § 185/1-999.
- 98 Independent Contractor Compliance Legal Blog articles on this topic are available at <http://independentcontractorcompliance.com/?s=new+york+construction+industry+fair+play+act>. See also NYS Construction Industry Fair Play Act: An End to Independent Contractors? (Sept. 9, 2010), http://www.pepperlaw.com/publications_article.aspx?ArticleKey=1888.
- 99 See FedEx Hit with Avalanche of Independent Contractor Misclassification Rulings (Oct. 6, 2014), <http://independentcontractorcompliance.com/2014/10/06/fedex-hit-with-avalanche-of-independent-contractor-misclassification-rulings/>.
- 100 See Press Release, Int’l Brotherhood of Teamsters, Teamsters: Port Truck Drivers From Major Drayage Firm Serving Twin Ports of Los Angeles and Long Beach Reclassified as Employees; Elect to Join Teamsters Following Neutral Unionization Process (Jan. 9, 2015), *available at* http://www.bizjournals.com/prnewswire/press_releases/2015/01/09/DC04487.

- 101 See Newspaper and Other Articles of Note, <http://independentcontractorcompliance.com/legal-resources/newspaper-and-other-articles-of-note/>.
- 102 GAO Report 06-656, *supra* note 8, at 25.
- 103 See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 322.
- 104 Some types of work are also governed by separate state or federal laws.
- 105 See IRS Publication 15-A, *supra* note 11, at 7.
- 106 A number of states have statutes or judicial decisions that set forth a specific set of criteria that must be met, such as states that use an “ABC” or other multifactor test for unemployment, wage and hour, workers’ compensation and/or other purposes. See Section V.A. above.
- 107 More information about IC Diagnostics™ can be found at <http://independentcontractorcompliance.com/legal-resources/ic-diagnostics/>.
- 108 By their very nature, therefore, independent contractor agreements and policies and procedures that are not drafted in a state-of-the-art manner, free from language that can be used against the company, may cause businesses that use independent contractors to face class action litigation or regulatory audits or enforcement proceedings they may be able to otherwise avoid. See *Earthquake in the Independent Contractor Field* (Aug. 29, 2014), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=3029. Mere recitation of the factors that a government agency or court will examine, written in a manner favorable to independent contractor status, is little more than false comfort for companies seeking to avoid misclassification liability.

For example, in a watershed decision involving FedEx Ground issued on August 27, 2014 by the U.S. Court of Appeals for the Ninth Circuit — in which the court held that FedEx Ground drivers had been misclassified as independent contractors — the court relied on the very language used by FedEx in its standard independent contractor agreement to find that the drivers were actually employees. A quick review of the language in the FedEx agreement and the policies and procedures drafted by FedEx would suggest that the company knew what to

write and how to write it, but close scrutiny by a court found one fallacy after another — sufficient in degree to lead the court to rule against FedEx. In October 2014, the Supreme Court of Kansas also found that “FedEx has established an employment relationship with its delivery drivers but dressed that relationship in independent contractor clothing.” See *FedEx Hit with Avalanche of Independent Contractor Misclassification Rulings*, *supra* note 99.

- 109 See IRS Announcement 2011-64, *supra* note 36.
- 110 See IRS’s New Voluntary Classification Program Adds Another Means to Minimize Independent Contractor Misclassification Liability (Sept. 22, 2011), <http://independentcontractorcompliance.com/2011/09/22/irs%e2%80%99s-new-voluntary-classification-settlement-program-adds-additional-choice-for-companies-concerned-about-independent-contractor-misclassification-liability/>.
- 111 See *IRS Confirms Valid Use of Independent Contractors*, *supra* note 39.
- 112 Proper drafting of employee benefit plans to exclude certain categories of workers remains an imperative, regardless of reclassification. Even where a court re-characterizes an independent contractor, a company need not be exposed to employee benefit liability if it has utilized proper eligibility language in those benefit plans where “carve outs” are permissible.
- 113 The IRS and Congress have long accepted the concept of leased employees. See, e.g., I.R.C. § 414(n) (referring to “leased employees” in determining if an employee retirement benefit plan satisfies the nondiscrimination mandates of the tax laws).
- 114 See, e.g., *New California Law Imposes Costly Risks to Companies Using Independent Contractors*, *supra* note 62 (discussing the recent California law that imposes responsibility on companies using staffing and recruiting firms that fail to adhere to independent contractor laws); D.C. Act 20-426 (Sept. 19, 2014) (a District of Columbia law that make companies jointly and severally liable for their staffing companies’ violations of the D.C. wage and hour laws), *available at* <http://lims.dccouncil.us/Download/31203/B20-0671-SignedAct.pdf>. Other government

regulators have also begun to utilize the joint employer doctrine, which could be used to expose a client company to misclassification liability. *See, e.g.*, Nat'l Labor Relations Bd., McDonald's Fact Sheet, <http://www.nlr.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet>.

115 Even companies in industries beset by multimillion-dollar independent contractor misclassification judgments, such as the adult entertainment and cable installation industries, can take steps to enhance independent contractor compliance and effectively avoid or defend against class actions. *See* Even an Exotic Dance Club (a.k.a. Strip Joint) Can Comply with Independent Contractor Laws – And Avoid or Defend Against Class Actions (Feb. 8, 2015), <http://independentcontractorcompliance.com/2015/02/08/even-an-exotic-dance-club-a-k-a-strip-joint-can-comply-with-independent-contractor-laws/>; Cable Company Pays \$1.075 Million to Settle Misclassification Case, *supra* note 25.

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