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On behalf of the
Society for Human Resource Management

Subcommittees on Health, Employment, Labor and Pensions
&
Workforce Protections

Committee on Education and Labor
U.S. House of Representatives

Joint Hearing on the "Misclassification of Workers as Independent Contractors: What Policies and Practices Best Protect Workers?"

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Introduction

Chairpersons Woolsey and Andrews, Ranking Members Wilson and Kline, distinguished members of the committee. Thank you for this opportunity to testify on the issue of misclassification of employees as independent contractors (IC). I commend your two subcommittees for holding this joint hearing on this important topic. My comments today will focus on my experience with employers who have faced challenges during or after this classification process

My name is Christine Walters. By way of introduction, I have over 20 years combined experience in HR administration, management, law and teaching. Today I work as an independent human resources and employment law consultant with the FiveL Company and served as an adjunct faculty member of the Johns Hopkins University teaching a variety of courses in graduate, undergraduate and certification level programs from 1999 to 2006.

I appear today on behalf of the Society for Human Resource Management (SHRM). SHRM is the world's largest association devoted to human resource management. Representing more than 225,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

SHRM is well positioned to provide insight on how employers classify individuals as employees or ICs. HR professionals are responsible for applying the law to the situation in their workplace and properly determining, through a mix of factors, whether a person should be classified as an employee or an IC.

The Workplace of the 21st Century

As organizations compete in today's ever changing global marketplace, labor costs are never far from mind. In addition to managing these costs, many employers in a variety of industries are also facing a lack of talented, skilled, people to compete in today's economy. With this changing landscape come new challenges for human resources professionals and employers to reach out and find new employment relationships that may not mirror the traditional models. Depending on the needs of employers and employees, these working arrangements may include part-time employment, or flex-time and telecommuting schedules. In some instances, employers may also use leased employees, direct-hire temps, agency temps, per diem workers, as well as IC's to meet a particular workforce need. Employers may hire contingent workers for a variety of reasons including filling temporary absences, dealing with workload fluctuations, meeting employee requests for part-time work, and continuing to utilize the skills of an employee who has left employment.

While these types of working relationships are of value to employers, they help to meet individual employees and workers needs as well. Sandwich generation workers, those caring for this own children as well as their parents, seek working hours that meet their demanding personal needs; entrepreneurs seek a work situation that gives them mobility and opportunity to engage in multiple working relationships; and some workers just like the flexibility that the IC status provides. Regardless of the motivations, however, every new working relationship brings with it the challenge of asking the right questions to ensure the working relationship is being properly classified as an employee or non-employee worker.

Classification Challenges

With the increased interest in these various working relationships, more employers are faced with making the sometimes complicated classification analysis. In my experience, employers do on occasion unwittingly, misclassify employees as independent contractors.

Much of the difficulty in making an accurate determination lies with the fact that there is not a single definition of an employee; rather, there are numerous definitions and statutes which apply depending on the context in which you are asking the question. Section 825.105 of the federal Family and Medical Leave Act (FMLA) regulations provide, "The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on "isolated factors" or upon a single characteristic or "technical concepts", but depends "upon the circumstances of the whole activity" including the underlying "economic reality."

In 1992, the U.S. Supreme Court reiterated its position that, where a statute contains the term "employee" and does not "helpfully define it, this Court presumes that Congress means an agency law definition unless it clearly indicates otherwise." The Court then reiterated the following factors, "In determining whether a hired party is an employee under the general common law of agency…"

1. the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the;
2. skill required;
3. the source of the instrumentalities and tools;
4. the location of the work;
5. the duration of the relationship between the parties;
6. whether the hiring party has the right to assign additional projects to the hired party;
7. the extent of the hired party's discretion over when and how long to work;

8. the method of payment;
9. the hired party's role in hiring and paying assistants;
10. whether the work is part of the regular business of the hiring party;
11. whether the hiring party is in business;
12. the provision of employee benefits; and
13. the tax treatment of the hired party. *Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992)*

Then in 2003, the U.S. Supreme Court, in a separate decision, citing guidance from the U.S. Equal Employment Opportunity Commission, used a different test when trying to assess whether a managing partner of a firm (physician practice) should be counted as an employee for purposes of the Americans with Disabilities Act These factors include whether:

1. The organization can hire/fire the individual or set the rules and regulations of the individual's work
2. And, if so, to what extent organization supervises the individual's work;
3. The individual reports to someone higher in the organization;
4. And, if so, to what extent the individual is able to influence the organization;
5. The parties intended that the individual be an employee, as expressed in written agreements or contracts;
6. The individual shares in the profits, losses, and liabilities of the organization

(CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P. C. v. WELLS (April 22, 2003).)

The Internal Revenue Service (IRS) historically has used another test, the s 1099-Rule or 20 factor test to ensure the working relationship is being properly classified as an employee or non-employee worker. Those 20 factors include:

1. Is the individual, who is providing services, required to comply with instructions concerning when, where and how the work is to be done?

2. Is the individual provided with training to enable him or her to perform a job in a particular manner?
3. Are the services that are performed by the individual integrated into your business' operations?
4. Must the services be rendered personally by the individual?
5. Does your business hire, supervise or pay assistants to help the individual performing the services under contract?
6. Is the relationship between the individual and the person for whom he or she performs services a continuing relationship?
7. Does the employer/company set the hours of work for the individual?
8. Is the individual required to devote full time to the person for whom he or she performs services?
9. Does the individual perform work on your business premises?
10. Does the employer/company direct the order or sequence in which the work must be done?
11. Are regular oral or written reports required?
12. Is the method of payment at set intervals of regular amounts?
13. Are business or traveling expenses of the individual reimbursed?
14. Does the employer/company furnish tools and materials necessary for the provision of services?
15. Does the individual performing services lack a significant investment in resources used to perform services?
16. Is the individual providing the services without realizing a profit or loss from his services?
17. Is the individual restricted from providing services for a number of firms at the same time?
18. Has the individual not made his/her services available to the general public?
19. Is the individual who is providing services, subject to dismissal for reasons other than non-performance of contract specifications?
20. Can the individual providing services terminate his or her relationship at any time without incurring a liability for failure to complete a job?

Still other situations may require review under the National Labor Relations Act.

Then you have the federal courts. When assessing a working relationship under the federal Fair Labor Standards Act the "Right to Control" or "Manner and Means" tests are usually applied. When assessing a working relationship under Title VII of the Civil Rights Act of 1964, the FMLA or the Age Discrimination in Employment Act, the "Economic Realities" test is usually applied. While slightly different, all three of the tests have four common factors:

- Who had power to hire and fire?
- Who supervised and controlled employees' work schedules and conditions of employment?
- Who determined rate and method of payment?
- Who maintained employee records?

The problem with much of the above, however, is that the tests applied come *after* the working relationship has been established. There is little guidance for employers to use, other than the IRS guidance to apply when the working relationship is first formed. So the dilemma arises when an employer properly uses the IRS guidance but is later challenged and, when a different test is used, is held to have misclassified a worker.

Finally, add to the above, state definitions such as in each state's unemployment insurance code. There you will likely find yet another definition of employee.

The use of independent contractors is a common practice in some industries. Health care, particularly hospitals often use per diem or contractors nurses to supplement emergent, unforeseen staffing shortages, such as in the case of an external disaster. These health care workers often work two, three or more different jobs, choosing their preferred shifts and work schedules at each health care institution.

Consider a small business owner with ten employees that provides audio-visual support services to clients. Of its ten employees, the organization employs just one sound engineer. The engineer is highly skilled, quick and remarkably adept at assessing a problem and fixing it. He is a highly valued employee. One day that employee tells the business owner that he wants to start his own business specializing in sound engineering only. They agree this would not be direct competition. The employee needs significant periods of time off from work to begin marketing and setting up his new business. The employer's policies do not provide for the kind of time off that this employee wants. The employee then offers that in lieu of his resigning, his willingness to be available to work on an independent contactor on an as-needed basis. The employer is delighted to be able retain access to this worker's skills and agrees to the relationship. They then agree to a part-time on-call work schedule, agree the (former) employee may continue to use and have access to company equipment, will be paid on the same basis but as an independent contractor. Both parties are delighted to have worked out an arrangement that is amenable to both. That is, until the business owners is advised by legal counsel of the possible pitfalls of proceeding with this type of relationship. The business owner now has to decide, does he risk a possible determination that he may have misclassified this worker in order to keep this highly skilled worker or does he take no risk but keep the worker and both are happy?

There are many other similar stories to share: workers who want or need income while they are between jobs; mothers returning to the workforce after a number of years and seeking a flexible or occasional opportunity to gain working experience before returning to full time status; and more.

SHRM and FiveL Educational Efforts on the Issue

As the largest association for human resource professionals, SHRM provides extensive resources and educational opportunities to help our members comply with workplace laws. Understanding how to properly classify workers is an issue in constant demand by SHRM members. Last year, our knowledge center received approximately 1, 485 calls about independent contractors—questions ranging from "I have a former

employee that I would like to keep on in an independent contractor status, how do I do it?" to "What forms do I need to file with the IRS and DOL?" .SHRM hosts several educational conferences a year and we offer educational sessions on the topic of worker classification. In addition, our online products are constantly updated and include our "Independent Contractor Toolkit" containing articles, frequently asked questions, links to IRS and DOL resources, checklists and sample agreements. In my experience and that of SHRM, employers are sincere in their attempts to comply with the law. Similarly, in my capacity as a consultant, I have given numerous educational presentations to audiences comprised from industry groups, local chambers of commerce and professional associations, like SHRM, on this topic. I have also posted IRS publications 1779 and 15-A on my website and direct new clients and other to these for guidance, and in some cases IRS Form SS-8.

Possible Solutions to Problem of Misclassification: Unintentional and Intentional

While my experience demonstrates that the vast majority of employers are honestly trying to comply with the law, I recognize that there are some employers and perhaps some industries in which there are deliberate attempts to skirt the law. I do not think, however, that additional legislation attempting to clarify the law would provide the intended benefit. Instead, additional law in this area is likely to only add to the existing confusion. Instead, solutions need to focus on the education and the enforcement aspects of the problem.

In many ways, the confusion created by the multiple agency and statutory jurisdiction over the issue of who qualifies as an independent contractor is similar to confusion and overlap created by requirements under the Health Insurance Portability and Accountability Act. In this situation, the Departments of Labor, Health and Human Services and the Internal Revenue Service were faced with issuing guidance on this new, and complex law. The agencies working together, issued joint guidance to the regulated community on the various requirements of the law. The same needs to be done with

worker classification. Joint guidance from the various agencies on the classification of employees would greatly assist employers in complying with the law.

Secondly, increased and targeted education should be combined with increased and targeted enforcement. I concur with the general consensus that emerged from the March 27 Workforce Protection Subcommittee hearing that additional legislation is not needed and the focus should be on improved enforcement, clarification and information-sharing. Enforcement of existing law should not only be increased, it should be coordinated among the relevant federal agencies.

Employers need a one-stop shop for guidance on employee classification. This combined with enhanced and targeted enforcement would go a long way toward addressing current problems with misclassification.

Again, I thank the subcommittees for listening to our perspective on the issue of misclassification of employees and SHRM looks forward to working with you on this issue. I will be happy to answer any questions you may have.