INDEPENDENT CONTRACTORS/TEMPORARY WORKERS

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THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE CURRENT LAW RELATING TO INDEPENDENT CONTRACTOR ISSUES. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.
I. INTRODUCTION

A. Why Is This Topic Important?

Workers may be classified in one of two basic legal categories: employees or independent contractors. 1 Telling the difference between the two is both at once fundamental to the application of "employment" law and exceedingly complex. As the United States Supreme Court had occasion to note over 50 years ago:

"Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship, and what is clearly one of independent entrepreneurial dealing."  N.L.R.B. v. Hearst Publications, 322 U.S. 111, 121 (1944), reh’g denied, 322 U.S. 769 (1944).

In most circumstances, employers will benefit from an “independent contractor” rather than “employee” classification. As discussed below, however, there may be circumstances where the latter classification may be beneficial to the employer.

Courts and agencies use various tests to determine whether an individual is an independent contractor or an employee. There are at least four identifiable tests:

1. The common law test;
2. The economic realities test;
3. The hybrid test; and
4. The remedial legislation test.

Which test a court will apply depends on the context of the inquiry. We discuss below the substance of each of these tests and describe the various contexts in which courts will apply them. The sheer number of tests, coupled with the numerous statutory and common law liability theories to which they relate, demands vigilance by employers to assess their workers, and to be constantly aware of the changes and variations in both the tests, and the liability theories.

Moreover, employers have and will continue to be affected by both statutory amendments (in California, for one) and decisional authority extending protection from harassment and discrimination to independent contractors, in addition to traditional “employees.” Independent contractors also enjoy strong support from an organizational standpoint, as several organizations have emerged in recent years whose aim is to advance and protect the rights of temporary

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1 We do not discuss here "sole proprietors," "partnerships," "corporations," “Limited Liability Partnerships” or “Joint Ventures.” Questions may also arise concerning the employment status of an individual who “volunteers” his/her services without requesting compensation. Generally, a bona fide volunteer is not an employee; the intent of the parties is controlling. However, the law recognizes very few true volunteers. It is generally the case that a worker who offers to work without compensation for the purpose of gaining experience in an occupation is deemed an employee, not a volunteer.
workers to enjoy the same terms and conditions of employment as traditional employees. Beyond these changes, employers are also faced with difficult assessments of employees versus independent contractors for purposes of taxes, wages and benefits, a point dramatically illustrated by a series of adverse rulings against Microsoft between 1996 and 2000, discussed more fully below.

**B. "Employment" Status Beneficial To Prove "Work for Hire"**

Circumstances exist in which a company may affirmatively wish to characterize a worker as an “employee” rather than an “independent contractor.” For example, a company may wish to avoid alleged tort liability for injuries it caused a worker and subject the claim to workers compensation coverage.

Across the country, too, those companies which have retained the services of freelance technical service workers, including designers, drafters and computer programmers, for example, but which have failed to "expressly agree in a written instrument signed by them that the work shall be considered a work made for hire," have found it necessary to obtain copyright ownership for resulting creative work product by proving up an employment relationship. Proving up such an employment relationship may have "profound significance" to permit a company to protect its copyright to "work made for hire." The United States Supreme Court so noted in Community for Creative Non-Violence, et al. v. Reid, 490 U.S. 730 (1989).

In Reid, the Court held that the Copyright Act of 1976 initially vests copyright ownership "in the author or authors of the work." The Act carves out an exception, however, important to companies contracting for creative works made for hire. If the work is “for hire,” the employer or other person for whom the worker prepared it is considered the "author" and owns the copyright (unless there is a specific contractor agreement to the contrary).

Moreover, the Court held that Section 101 of the Act provides that a creative work could be copyrightable "works for hire" under two sets of circumstances:

1. a work prepared by an employee within the scope of his or her employment; or

2. a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audio visual work, as a translation text, as a test, as

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2 The organization Working Partnerships USA developed a “Code of Conduct” aimed at temporary agencies, which sets forth guidelines regarding hiring and treatment of employees of these agencies. See Attachment A.
answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.\(^3\)

Accordingly, in the absence of an express [probably written] agreement vesting ownership of an independent contractor's creative work in the company, the employer must prove that the employee prepared the work within the scope of his or her employment, or else forfeit ownership. In such a “work made for hire” situation, characterizing a worker as an independent contractor would work against the company's intellectual property ownership interests.

**Addendum for Employers with Independent Contractors in California**

Employers with Independent Contractors in California face a policy decision: they can either (a) forfeit any intellectual property the Independent Contractor develops for the employer (see the Reid case decision, discussed above); or (b) cause ownership of any intellectual property to run to the employer by installing a "work for hire" clause in the independent contractor's service agreement (see discussion below); or (c) assign ownership of any intellectual property to the employer by causing the independent contractor to sign an assignments agreement with the employer (although there are disadvantages to this approach of concern to intellectual property lawyers and beyond the scope of discussion of this paper).

The concern many IP lawyers have with Option b, above--to install a "work for hire" clause in an Independent Contractor service agreement for a California IC--is that it will doom the host client company receiving the service to the burdens of "employee" status by virtue of Labor Code Section 3351.5 (c). This section simply converts an independent contractor signing a "work-for-hire" clause into an "employee", but only for the purposes of workers compensation, and not, apparently, for any other employment law purpose. (Section 3351.5 is part of the definitions section of that part of the California Labor Code which gives "employees" the protection of workers compensation coverage). Different clients will disagree over the amount of concern to attach to this result, depending upon what the client values and what it fears.

If the client prizes protection of intellectual property, and does not fear a potential conclusion that the "worker" will be found to be an "employee" for workers compensation purposes, then the company will want to exercise its discretion to include the "work for hire

\(^3\) In California (and in many other states) for purposes of workers compensation and unemployment compensation, an employee is defined as a person engaged by contract for the creation of a “specially ordered or commissioned work of authorship,” when the parties expressly agree in a written instrument that the work shall be considered a “work made for hire.” See, e.g., Cal. Lab. Code § 3351.5 & Cal. Unemp. Ins. Code § 686. Accordingly, employers have an election to make. If the employer elects not to employ the worker, but rather renders the worker an “independent contractor” whose work product the company will own by contract as a “work made for hire,” the worker will become an “employee” for purposes of workers and unemployment compensation, even if not for other statutes and contract entitlements. However, prudent employers will want to specifically clarify--by contract--the worker’s status, and establish that he or she does or does not enjoy “employee” status triggering various other statutory and contract entitlements beyond workers’ compensation coverage. Moreover, the employer will still need to “manage the relationship” to ensure that it does not in fact control the worker to the point of converting him or her to an “employee” in fact for purposes beyond workers and unemployment compensation.
clause” in the independent contractor's service contract. If your client does not wish to absorb the risk of worker's compensation coverage, then it should not include the work for hire clause in the Independent Contractor's service agreement and should find alternative ways to cause the Independent Contractor's work product to become your client's intellectual property.

C. The Government is Attacking Use of Independent Contractors

Use of independent contractors is generally attributed to corporate concerns about rising employee benefits costs; the desire for increased personnel flexibility and expertise; protection of regular "core" employees from lay-off and worker demands for greater flexibility to work part-time, intermittently or at home.

While corporate reliance on the so-called “contingent workforce” is not growing – despite a popular misconception to the contrary -- federal and state agencies are examining independent contractor relationships more closely to see if such workers are, in fact, employees. The essence of the work relationship governs and not the characterization of the relationship by the parties.

Indeed, the Supreme Court of California handed down a broadly worded opinion (discussed below) expanding the legal definition of the term employee for the purpose of California's Unemployment Insurance, and perhaps other "remedial" statutes designed to protect workers. S.G. Borello & Sons v. Department of Industrial Relations, 48 Cal. 3d 341 (1989).

Apart from governmental agencies, plaintiffs bringing private causes of action, particularly wrongful discharge and employment discrimination suits, have also sought to prove they are protected "employees." Since January 1, 2000, workers in California, for example, have found it much easier to challenge employment harassment without having to prove they are a traditional “employee.” An amendment to California’s Fair Employment and Housing Act (“FEHA”) now makes it unlawful for an employer, or its employees, to harass an independent contractor (specifically, “a person providing services pursuant to a contract”) because of that person’s race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age. Cal. Gov’t. Code § 12940(h)(1).

In practice, companies often characterize "independent contractors" in many different ways. They may be called “contractors,” “consultants,” “temps,” “vendors,” “contract workers” or “leased” employees. Currently, many companies retain independent contractors for a specific

4 These agencies include, but are not limited to, the federal Internal Revenue Service (“IRS”), Immigration and Naturalization Service (“INS”), National Labor Relations Board (“NLRB”), Equal Employment Opportunity Commission (“EEOC”), Department of Labor (“DOL”) and state agencies responsible for unemployment taxes and benefits, state taxation, antidiscrimination, wage-hour laws and workers' compensation statutes.

5 As amended, FEHA provides a three-part test to classify contract workers. “A person providing services pursuant to a contract” is a person who meets all of the following criteria: (1) the person has the right to control the performance of the contract for services and discretion as to the manner of performance; (2) the person is customarily engaged in an independently established business; and (3) the person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer’s work. Cal. Gov’t. Code § 12940(h)(4).
project, by the day or the week or indefinitely. Some companies restrict independent contractors to clerical or blue-collar positions. Other companies use contractors throughout the organization, including in recent years, in a variety of professional positions all the way up to and including the Chief Executive Officer.

Current practice finds some contractors paid on a project basis, i.e., a set fee for services, while others are paid a rate based on the amount of time they perform services, either hourly, daily or weekly. Although contractors ideally have their own facilities, tools and equipment, in many cases they work on company premises, side by side with employees.

D. Attachments


Attachment B provides a general catalogue of references commonly in vogue describing various types of employees and independent contractors and attendant relationship arrangements. Note, however, that the essence of the work relationship governs the conclusion whether the worker is an “employee,” “employer,” “independent contractor,” and not the “label.”

Attachment C provides a graphic view of the four major ways in which the independent contractor or employee relationship may typically present itself.

Attachment D provides a side-by-side four columned chart succinctly comparing the legal elements to determine whether a worker is an "employee" within the meaning of (a) the IRS Code; (b) California Common Law; (c) California Labor Code, (d) legal tests other courts have used; and (e) California's Workers' Compensation statute (the Borello "Bouillabaisse" test).

Attachment E provides a four columned chart identifying a number of possible risks employers face if they misclassify workers as independent contractors, the applicable enforcement agency, the legal test that agency applies and the possible penalties the employer faces if improper classification occurred.

Attachment F provides statistics as of February, 2001 from the United States Department of Labor regarding independent contractors in the U.S. workforce.


Attachment H provides a detailed suggested form employers can use to audit their businesses to help assess the classification of their workers as either employees or independent contractors.
II. WHAT’S NEW

• Ninth Circuit’s *Vizcaino v. Microsoft* decision stands after Supreme Court denies certiorari.

• California Supreme Court holds that an employer is not liable for the death of an independent contractor’s employee.

• EEOC charges Allstate Insurance Company with unlawfully intimidating life insurance agents into agreeing to be classified as independent contractors.

• Ninth Circuit ignores "economic realities test" for determining employee status and finds that “shareholder-employees” of corporation are “employees” under ADA, and not “partners.”

• Seventh Circuit Court of Appeals orders Chicago-based Sidley Austin to disclose documents relevant to the question whether “partners” are in fact “employees” the ADEA will protect.

• 2001 U.S. Department of Labor statistics reveal Independent Contractor use has remained the same over time.

A. The Microsoft Story

The Microsoft story arises from a series of decisions the United States Court of Appeals for the Ninth Circuit has issued, beginning with *Vizcaino v. Microsoft*, 97 F.3d 1187 (9th Cir. 1996) (rehearing en banc, granted, 1997 U.S. App. 2319 (9th Cir. February 10, 1997)). The Microsoft litigation arose after an I.R.S. investigation into the company's compliance with applicable tax laws. Applying the common law test described below, the I.R.S. "concluded that Microsoft's freelancers were not independent contractors but employees for withholding and employment tax purposes, and that Microsoft would thereafter be required to pay withholding taxes and the employer's portion of Federal Insurance Contribution Act (FICA) tax).” *Id.* at 1190 (footnote omitted). Plaintiffs, former freelance employees, then sued Microsoft, seeking various employment benefits, including the right to participate in Microsoft's Savings Plus Plan ("SPP") and Microsoft's Employee Stock Purchase Plan ("ESPP"). Writing for a divided panel, Judge Reinhardt held the employees enjoyed benefits pursuant to the SPP and the ESPP.⁶

In 1997, the Ninth Circuit, en banc, largely agreed with the 1996 decision of the divided panel. *Vizcaino v. Microsoft*, 120 F.3d 1006 (1997). The Ninth Circuit emphasized at the outset

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⁶ With respect to the SPP, governed by ERISA, the court concluded that the plan's definition of "employee" covered the plaintiffs, who the IRS had determined to be common law employees. *Id.* at 1192-95. Similarly, with respect to the ESPP, governed by Washington state law, the court concluded that the plan's incorporation of the I.R.S. code definition of employee manifested an intent to cover the plaintiffs, determined by the IRS to be common law employees.
that there was no question that the affected workers were employees of Microsoft, and not independent contractors (Microsoft conceded this point in its answer to the Complaint.). The court then addressed and agreed with the panel’s construction of the SPP and ESPP, and concluded that both plans applied to the plaintiffs. The court remanded the action so that the federal district court could determine the plaintiffs’ available remedies under the ESPP, and the plan administrator could determine rights under the SPP.

Significantly, throughout this litigation, Microsoft always conceded that the affected workers were common law employees (not independent contractors). However, Microsoft argued that the workers signed agreements which expressly provided that each worker was responsible for his or her own benefits. In short, Microsoft argued that Washington state contract law permitted it to have two classes of common law employees with different terms and conditions of employment and benefits: some with benefits and some without. The contract argument notwithstanding, the Ninth Circuit held that because Microsoft incorporated certain Internal Revenue Code statutes into the agreements (26 U.S.C. § 423), the ESPP was available to all common law employees, including the Vizcaino plaintiffs.

On May 12, 1999, the Ninth Circuit rendered a second decision in Vizcaino, supra. Vizcaino v. Microsoft, 173 F.3d 713 (9th Cir. 1999). There, the Ninth Circuit held that the trial court, following remand after the en banc Vizcaino decision, improperly excluded employees of temporary agencies from the class of workers who could seek benefits from Microsoft. Specifically, the Ninth Circuit concluded that the trial court incorrectly identified the relevant question as: “Which company is the worker’s employer (Microsoft or the temporary agency)”, rather than whether a worker is an employee or an independent contractor. Reversing, the Ninth Circuit held that “even if for some purposes a worker is considered an employee of the agency, that would not preclude his status of common law employee of Microsoft. The two are not mutually exclusive.” In short, the Ninth Circuit held that it was possible for workers to satisfy the definition of “employee” as to two different employers simultaneously. The United States Supreme Court denied certiorari in January, 2000.

The Microsoft decisions have evoked considerable controversy among high technology companies. This is partly due to the ever-increasing use of independent contractors to fulfill the computer industry's need for flexible staffing and quick response to cyclical market demands. Another factor may be Judge Reinhardt's obvious displeasure with Microsoft's employment practices. Although much of the court's analysis is flawed, ultimately, the decision stands for the simple proposition that employers must carefully classify their workers -- or suffer the

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7 The judge begins the opinion by stating: Large corporations have increasingly adopted the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits. This practice has understandably led to a number of problems, legal and otherwise. Vizcaino, 97 F.3d at 1189.
consequences. The Supreme Court’s denial of certiorari in January of the Ninth Circuit’s May 12, 1999 decision indicates that those consequences will be large – 15,000 excluded workers will now be entitled to benefits under the Microsoft plans. In December of 2000, the law firm representing the misclassified workers announced that Microsoft would pay $97 million to settle the litigation. The law firm was awarded $27 million in legal fees, or about 28% of the settlement.

B. Employer Not Liable for Death of Independent Contractor’s Employee

In January of 2002, the California Supreme Court decided Hooker v. Department of Transportation, 27 Cal. 4th 198 (2002). In Hooker, the crane operator of an independent contractor hired by the California Department of Transportation was killed when the crane he was in tipped over, throwing him to the pavement. The crane operator’s widow filed suit against Caltrans - the government agency that hired the general contractor for whom the decedent worked. The decedent’s widow sued Caltrans for negligent retention of control, a variety of the peculiar risk doctrine found in the Restatement of Torts, § 414. Under the peculiar risk doctrine, a party that hires an independent contractor to perform inherently dangerous work may be liable if the contractor injures a third party in the course of that work.

The trial court granted Caltrans' motion for summary judgment reasoning that the entity which secured the services of an independent contractor is not liable to the contractor's employees under that theory. The widow subsequently appealed to the First Appellate District of the Court of Appeals. The First Appellate District had twice ruled on the issue of whether a contractor's employee could sue the entity which secured the services of the contractor for negligent retention of control, with different results and each one taking an approach different

8 Not surprisingly, the Vizcaino decision has spawned numerous similar lawsuits, orchestrated by the same Seattle, Washington law firm (Bendich, Stobaugh & Strong) that represents the Vizcaino plaintiffs. In Shiell v. County of Los Angeles, filed in L.A. County Superior Court, a proposed class of contract attorneys sued Los Angeles County claiming that the county has mis classified them as contract attorneys instead of employees, resulting in pay and benefit inequities. The Bendich firm also represents a group of workers (mechanics, electricians, fuel dock operators) at Atlantic Richfield Corporation (ARCO). The workers brought ERISA claims against the oil company for recovery of retirement, 401(k), stock bonuses and health benefits based on their alleged misclassification as independent contractors, temporary employees and/or leased employees.


10 42 U.S.C. § 1981 prohibits employment discrimination based on race, and it provides all persons the same right to make and enforce contracts as that enjoyed by white citizens. The right “to make and enforce contracts: specifically includes “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” Notably, section 1981 does not apply to claims of sex, religious, or age discrimination, or to claims based solely on national origin. However, section 1981 does apply to whites, as the statute proscribes discrimination in the making and enforcement of contracts for any race. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

11 This same decision, of course, now brings into substantial question, for example, use of corporate minority hiring programs requiring outside law firms (i.e. independent contractors) to supply minority lawyers to represent the corporation.
from the absolute bar to suits in prior cases. In Grahn v. Tosco Corp., 58 Cal. App. 4th 1373 (1997), the First District had held, for example, that an entity which secures the services of an independent contractor will be liable to its contractor's employee if it retains sufficient control to be able to prevent, through reasonable care, the dangerous condition causing injury. In contrast, in Kinney v. CSB Construction, Inc., 87 Cal. App. 4th 28 (2001), the First District had held that an entity which secures the services of an independent contractor will only be liable to its contractor's employee if it retains the ability to control safety and that retention of control affirmatively contributed to the employee's injuries. The Court of Appeal in Hooker followed its reasoning in Grahn, reversed the summary judgment and imposed liability on Caltrans because it had retained sufficient control of the crane company to have been able to have prevented the crane from tipping over. Caltrans then appealed to the California Supreme Court.

The Supreme Court then reversed the Court of Appeal, applying the reasoning in three prior Supreme Court cases regarding the peculiar risk doctrine. In each of the three prior cases, the Court held that a contractor's employee may not sue the entity retaining the services of the contractor under the peculiar risk doctrine. In Hooker, the Court adopted the approach in Kinney, holding that the entity retaining the services of an independent contractor is not liable to the contractor's employee merely because the entity retaining the services of the independent contractor retained control at the worksite. Rather, the entity retaining the services of an independent contractor will be liable only if its exercise of the retained control affirmatively contributed to the employee's injury. Citing Privette and Toland, the Court reasoned that it would be unfair to hold an entity retaining the services of an independent contractor liable merely due to its retention of control because that would subject the entity retaining the services of an independent contractor to greater liability than the contractor who actually caused the injury but whose liability would be limited under worker's compensation laws. The Court also reasoned that it is fair to impose liability where the entity retaining the services of an independent contractor contributed to the injuries of a contractor's employee (as opposed to other peculiar risk torts for which the Court held there is no such liability) because the responsibility of the entity retaining the services of an independent contractor is direct, rather than merely vicarious or derivative.

C. EEOC Sues Allstate for Converting Agents from Employees to Independent Contractors

The U.S. Equal Employment Opportunity Commission filed suit against Allstate alleging that the company engaged in age discrimination against its agents. The suit involves a decision by Allstate to switch its 15,200-member auto and home insurance sales force from regular employees to independent contractors. To stay on as contractors, the agents were required to sign a release that they would not sue Allstate. All but 6,400 of the agents decided to become independent contractors. The remaining agents, 90% of whom were age 40 or older, were dismissed and given the choice of agreeing to become independent contractors or terminating their employment with the company. In September 2000, the EEOC decided that the waiver was

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Then, in May of 2002, the EEOC concluded that Allstate was discriminating against about 650 life insurance agents by requiring them to convert from employees with health and pension benefits to independent contractors. Allstate, as part of a cost-cutting program, decided to offer some agents the option of either becoming independent contractors or leaving the company. Those who agreed to become independent contractors were promised certain incentives to offset the loss of benefits they enjoyed with the company. The company also required these employees to sign waivers forfeiting their right to sue Allstate for discrimination. The company in fact acknowledged telling the agents they would not be permitted to work for the company unless they agreed in writing not to sue for any kind of employment discrimination. In a letter to both sides dated May 10, 2002, Lynn Brunner, a district director of the EEOC, said Allstate had engaged in “unlawful interference, coercion and intimidation” against the life insurance agents.

D. Ninth Circuit Ignores “Economic-Realities Test” To Find “Partners” Are Really “Employees”

In Wells v. Clackamas Gastroenterology Assoc., 271 F.3d 903 (9th Cir. 2001), cert. granted, 123 S. Ct. 31 (2002), the Ninth Circuit held that physician-shareholders of a small medical practice were "employees" for purposes of meeting the minimum number of employees required for a "covered entity" under the ADA. In coming to this holding, the Ninth Circuit not only reversed the federal district court in Oregon, but also ignored the "Economic Realities" test.

Deborah Anne Wells was an employee of Clackamas Gastroenterology, an Oregon corporation. In addition to the four physician-shareholders who worked under individually executed employment agreements, the medical practice employed from 12 to 15 persons at any one time. When Clackamas terminated Wells in 1997, she brought a claim under the Americans with Disabilities Act (ADA), alleging that Clackamas refused to reasonably accommodate her disability and terminated her employment.

Clackamas moved for summary judgment, arguing that it was not an "employer" under the ADA because it did not employ 15 or more employees for the 20 weeks required by the statute. Clackamas also relied on the "economic realities test" and argued that its four physician-shareholders were "partners" and not "employees" within the meaning of 42 U.S.C. § 12111(4) & (5). The district court agreed and entered summary judgment in favor of Clackamas and dismissed the action.

13 The United States Supreme Court granted Clackamas’ petition for writ of certiorari on October 1, 2002. The case is set for oral argument on February 25, 2003.
14 Wells also brought suit alleging wrongful discharge.
The Ninth Circuit reversed, reasoning that the four physician-shareholders were "employees" because not only did they actively participate in the management and operation of the medical practice, but all four also worked as employees of the corporation under employment agreements. Wells, 271 F.3d 903, at 906. Therefore, the Court held the physician-shareholders qualified as "employees" within the meaning of 42 U.S.C. §§ 12111(4) & (5).

The Court went on to reject Clackamas' argument that the Court should use the "economic realities test" under Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (9th Cir. 1996). Clackamas argued that the Court should apply the test and classify the shareholder-employees in question as partners. In Strother, a case arising under state law, the Ninth Circuit held that partners, under appropriate circumstances, could be deemed employees for the purposes of employment discrimination laws. The Wells Court distinguished the case at bar from Strother finding that the economic realities test should not be used to classify shareholder-employees of a corporation as partners. Wells, 271 F.3d 903, at 905. The Court reasoned that "[w]hile the shareholders of a corporation may or may not be 'employees,' they can never be partners in that corporation because the roles are mutually exclusive." Wells, 271 F.3d 903, at 905, citing Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 798 (2d Cir. 1986).

Although the Ninth Circuit is the first to construe the definition of "covered entity," "employer" and "employee" under the ADA, other circuits have interpreted similar provisions under Title VII, the ADEA, ERISA and the FLSA. Most courts agree that the interpretation of these phrases should apply equally under all employment discrimination statutes. Wells, 271 F.3d 903, at 904.15

The Wells Court noted that there existed a split among circuits as to whether shareholders engaged in conducting the business of a corporation are employees. The court noted that in E.E.O.C. v. Dowd, 736 F.2d 1177 (7th Cir. 1984), the Seventh Circuit applied the "economic realities" test and concluded that shareholders in a professional corporation should not be counted as employees. However, in Hyland, 794 F.2d 793, the Second Circuit held that the use of the corporate form "precludes any examination designed to determine whether the entity is in fact a partnership." Wells, 271 F.3d 903, at 905, quoting Hyland, 794 F.2d 793, at 798.

The Ninth Circuit agreed with the Second Circuit’s reasoning in Hyland. The Ninth Circuit felt that Clackamas’ decision to adopt the corporate form should control.

“Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it both to

15See also Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) ("We regard Title VII, ADEA, ERISA, and FLSA as standing in pari passu and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another."); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986) (holding that for the FLSA, Title VII, and the ADEA, "cases construing the definitional provisions of one are persuasive authority when interpreting the others").
assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination.”

Wells, 271 F.3d 903, at 905.

The dissent in Wells articulated three reasons for adopting the economic realities test: (1) the Ninth Circuit has cautioned against being governed by labels, rather than realities; (2) a physicians' professional corporation in Oregon is not merely an ordinary commercial corporation; and (3) the purpose of meeting the minimum number of employees' requirement of the ADA is to separate small practices from large enterprises. Wells, 271 F.3d 903, at 907. The dissent argued that Congress's apparent intent in limiting the ADA’s coverage to entities with 15 or more employees was to separate larger businesses from smaller ones, noting that Congress decided "to spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail."\(^{16}\)

The dissent urged the Ninth Circuit to adopt the "economic realities" test to determine whether a shareholder of a professional corporation is an "employee" under the ADA. The dissent argued that, had an economic realities test been applied, the court would have been forced to find that Clackamas was not a covered entity under the ADA.\(^{17}\)

The United States Supreme Court is scheduled to hear oral arguments in February of 2003.

E. Seventh Circuit Holds That Sidley Austin Law Firm Must Disclose Documents Relevant To Whether “Partners” Are Really “Employees” Within Meaning Of ADEA

The Seventh Circuit Court of Appeals recently issued an opinion in an age discrimination case that could have important repercussions with respect to law partnerships increasing centralized control of Firm decision-making. In E.E.O.C. v. Sidley Austin Brown & Wood, 2002 U.S. App. LEXIS 22152 (7th Cir. 2002), the court ordered Sidley Austin to provide additional documents to the EEOC (See [http://www.fordharrison.com/fh/publications/definitions/eeoc.asp](http://www.fordharrison.com/fh/publications/definitions/eeoc.asp)) to help determine whether the firm's demotion of thirty-two partners was covered by the ADEA (See [http://www.fordharrison.com/fh/publications/definitions/ada.asp](http://www.fordharrison.com/fh/publications/definitions/ada.asp)). The ADEA protects employees but not employers from discrimination on the basis of age. The EEOC sought the information to demonstrate that the demoted individuals were “employees” rather than “employer partners” not protected by the ADEA.

\(^{16}\) Wells, 271 F.3d 903, at 908 (citing Papa v. Katy Indus., Inc., 166 F.3d 937, 940 (7th Cir.), cert. denied, 528 U.S. 1019 (1999) (discussing the congressional purpose "of exempting tiny employers from the anti-discrimination laws," including the ADA); see also Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993), cert. denied, 510 U.S. 1109 (1994) (recognizing that Congress exempted small employers from the ADEA and Title VII of the Civil Rights Act in order to protect them from "the costs associated with litigating discrimination claims").

\(^{17}\) Wells, 271 F.3d 903, at 907.
After the demotions, the EEOC commenced an investigation and issued a subpoena to the firm directing it to provide information relating to coverage and the reasons for the demotions. As part of the coverage investigation, the EEOC requested information regarding the dispersal of profits to establish where the majority of profits went. The firm partially complied with the request, but did not provide the profit dispersal information or any information relating to the merits of claims of alleged unlawful age discrimination.

The EEOC obtained an order from the trial court directing the firm to fully comply with the subpoena. On appeal, the Seventh Circuit ordered the firm to provide the profit dispersal information, but did not require it to (yet) provide information relating to the Commission’s investigation of alleged unlawful age discrimination. The court reasoned that ordering the firm to provide information pertaining to the alleged discrimination would be premature. Accordingly, the courts have not yet decided whether the Sidley Austin “partners’ are in fact de facto “employees” subject to the ADEA. Nor have the courts decided whether the Firm engaged in unlawful age discrimination.

In ordering the firm to provide the requested information regarding the disbursal of profits, the court stated that the EEOC “is entitled to the information that it thinks it needs in order to be able to formulate its theory of coverage before the court is asked to choose between the commission’s theory and that of the subpoenaed firm.” Sidley, 2002 U.S. App. LEXIS 22152, at *5.

**F. Labor Statistics Reveal Decreased Use of Independent Contractors.**

A February, 2001 study by the U.S. Department of Labor (“DOL”) reveals that the number of independent contractors employed in the American workforce has leveled off, if not begun to decline. As **Attachment E** to this paper documents, the DOL estimated there were 8,585,000 independent contractors in the workforce as of February, 2001, or 6.4 percent of the total workforce. Between February, 1997 (8,456,000, or 6.7 percent of the total workforce) and February, 2001, the proportion of workers employed as independent contractors declined, but the actual number of workers employed as independent contractors increased.\(^{18}\)

These statistics do not report independent contractor statistics by region. As such, while the use of independent contractors may be on the decline in certain areas of the country, in others (employing “high tech” workers) the use may, in fact, be on the rise. Moreover, and notwithstanding the DOL statistics, employers should not view these numbers as permission to take lightly the task of properly classifying their workers. The **Vizcaino** decision discussed above points up that companies which rely on thousands of workers can pay a high price for misclassification and improper exclusion from any benefits to which they might be entitled by law or contract. The proliferation of employee stock purchase plans (especially in the high tech sector) amplifies the potential costs for misclassification.

III. HOW TO DETERMINE WHETHER YOUR INDEPENDENT CONTRACTORS ARE REALLY YOUR EMPLOYEES

No "bright-line" legal tests are available to determine whether a person performing work is an “independent contractor” or an “employee.” Unfortunately, there is no one single homogenous definition of the term "employee" applicable to all federal and state statutes and legal causes of action. Indeed, recent legal decisions in California and across the country suggest that increasingly fragmented definitions of the term "employee" are emerging.

In summary, the legal tests for employment status increasingly vary depending on the statute or regulatory scheme in question. No single factor or group of factors determines the outcome. Administrative agencies and the courts typically look to the totality of the circumstances and balance the factors to determine whether a worker is an employee. Many different statutes use the same factors, but the weight the courts give to any particular factor varies according to the public policy balancing unique to the statute in question. Case law is very fact specific.

Accordingly, it is difficult to make broad generalizations about the applicability of judicial decisions to specific situations. Rather, a careful customized analysis of the definition of the term "employee" as used in each employment statute is necessary to reach a confident conclusion of employment status. Moreover, workers may be "employees" within the meaning of some statutes, while simultaneously retaining their status as independent contractors within the meaning of other statutes.

In general, however, courts will find an employment relationship to exist if the employer "controls" the "process of work." Conversely, in general, the Courts will find an independent contractor relationship to exist if the employer dictates only "the end result" of the work. Beyond that, the courts have fashioned the following four different legal tests, discussed below, to define the term "employee" depending on the public policy underlying the statute in question:

- Common Law Test (Control, or right to control)
- Economic Realities Test
- Hybrid Test
- Remedial Legislation Test

A. The Common Law Test

Many statutes and regulations are based on the "common law" test. Under the common law test, the Courts will find an employment relationship if the employer exercises (a) "control" or (b) has the "right of control" over the individual's performance of the job and how the individual accomplishes the job. The greater the control exercised over the terms and conditions of employment, the greater the chance the Court will conclude the controlling entity is an employer. (Two entities, each exercising sufficient control, may also be held to be a "joint employer," as discussed more fully below).
The "right of control" test depends upon consideration of the following ten factors, (no one of which is dispositive), which may indicate independent contractor status:

1. the degree of "employer" control over the details of the work;
2. whether the individual's business is a distinct occupation or business;
3. whether the individual's occupation usually is done without supervision;
4. whether a high level of skill is required by the occupation;
5. whether the worker provides the supplies, tools and the place of work;
6. the length of time the services are provided;
7. method of payment, by the job rather than the hour or day;
8. whether or not the work is part of the regular business of the employer;
9. whether the parties believe they are creating an independent contractor relationship; and
10. whether the hiring entity is not in business.


Where the "common law" test is invoked, as the IRS does, the Courts have added several other factors to modify the test to apply under particular statutes.

B. The IRS Test

The Internal Revenue Service is concerned with determining whether a worker is an independent contractor because employers are required to pay three types of employment taxes for their "employees." These taxes are required under:

The Federal Insurance Contributions Act ("FICA") (29 U.S.C. § 3121(d)(2)), which governs employer and employee contributions to the Social Security system;

The Federal Unemployment Tax Act ("FUTA") (26 U.S.C. § 3306(i)), which governs employer contributions to the unemployment fund; and

The IRS rules governing employee personal income tax withholding (26 U.S.C. § 3401(c)).

If the employer categorizes independent contractors incorrectly, and the IRS determines that a worker is actually an employee, the employer may be liable for penalties as well as any unpaid taxes. Vizcaíno v. Microsoft, 97 F.3d 1187, 1190-91 (9th Cir. 1996) (I.R.S. investigation resulted in reclassification of Microsoft's free-lance employees as common law employees subject to withholding taxes, FICA tax and overtime pay.)
Section 170 of the Tax Reform Act of 1986 limited the exemption previously provided employers for workers "other than an ("technical service") employee." Section 1706 now provides that "technical service employees include engineers, designers, drafters, computer programmers, system analysts and other similarly skilled personnel who are engaged in similar lines of work who render services to clients of the technical service firms." Thus, if an employer uses the services of one of these individuals, an employer must comply with most or all of the factors set out in the IRS independent contractor test. Rev. Rul. 87-41.

The IRS test is essentially the common law test to which several "right of control" factors have been added. The resulting more detailed twenty (20) factors "are designed only as guides to determine whether an individual is an employee; special scrutiny is required to apply the 20 factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement." See Rev. Rul. 87-41.

The IRS factors include:

1. whether the individual is required to follow instructions;
2. the amount of training of the individual related to that particular job;
3. the amount of integration of the individual into the employer's business;
4. whether services are rendered personally by the individual;
5. whether the employer hires, fires and pays assistants;
6. the existence of a continuing relationship;
7. the establishment of a set amount of work hours;
8. whether the individual must devote substantially full time to the job;
9. whether the individual works on the employer's premises;
10. whether the individual works according to a sequence set by the employer;
11. whether the individual must submit regular or written reports to the employer;
12. whether the individual is paid by time rather than by project;
13. whether the individual is reimbursed for expenses;
14. whether the individual furnishes the necessary tools and materials;

Attachment D compares the IRS test, the common law test and two popular legal tests courts use to determine independent contractor status.
15. whether the individual has invested in the facilities for performing the services;

16. whether the individual can realize a profit or a loss;

17. whether the individual works for more than one firm at a time;

18. whether the individual makes his/her services available to the general public;

19. whether the employer has the right to discharge the individual; and

20. whether the individual has the right to terminate the relationship.

Although Rev. Rul. 87-41 continues to be cited as a seminal revenue ruling on this subject, the IRS, in a recent non-binding advice memorandum, stated that because of the difficulty inherent in applying the cumbersome 20-factor test, it has employed a new three-factor approach: (1) behavioral control (i.e. right to direct and control performance and the specific tasks); (2) financial control (right to direct and control the business aspects of the worker’s activities); and (3) relationship of the parties (the parties’ perception of their relationship, and their intent as to its permanency or lack thereof). IRS Chief Counsel Advice Memorandum, 1999 IRS CCA LEXIS 239; IRS CCA 199948001 (1999).

The IRS’s "right of control" test has been applied in a variety of contexts. An important element often present in the case law where the courts have found "control" is the ability of the employer to dictate not only the result, but also the process (or methods) the worker uses to produce his or her result.

1. Employees: Right to Control Found

Ewens & Miller, Inc. v. Comm’r, 117 T.C. 263 (2001) (Tax court affirmed IRS determination that taxpayer’s cash payroll workers, bakery workers, and outside sales workers were common law employees because employer exercised control and provided most of the facilities even though workers had the opportunity for profit or loss.)

Eren v. Commissioner of Internal Revenue, 180 F.3d 594 (4th Cir. 1999) (State Department architect who oversaw repairs to U.S. embassies throughout the world and who was bound by personal services contract, was an employee and therefore not entitled to a § 911 foreign earned income exclusion, where: (1) architect was required to follow Department’s project director handbook; (2) he maintained a daily log and submitted monthly progress reports; (3) he could hire and fire his own staff, but their contracts were entered into with and paid for by the Department; and (4) Department dictated his hours and leave).

United States v. Polk, 550 F.2d 566 (9th Cir. 1977) (Workers were employees based on the fact that management gave orders, supplied working materials, established working hours and retained the right to terminate workers).
Walker v. Altmeyer, 137 F.2d 531 (2d Cir. 1943) (Attorney-lessee who performed legal services for another attorney in exchange for office space was employee based on the lessor’s ability to control what attorney-lessee should do and how he should do it).

Chase Mfg., Inc. v. United States, 446 F. Supp. 698 (E.D.Mo. 1978) (Aluminum siding applicators were employees since employer retained sufficient control over work performance. The applicators worked exclusively for employer. They did not provide their own helpers and, if helpers were required, the employer provided assistants).

2. Independent Contractors: Right to Control Not Found

Sam v. U.S., 2002 U.S. Dist. LEXIS 24243 (D. Md. 2002) (Truck drivers of trucking business were independent contractors in that sole-proprietor exercised little control over them, did not provide a workplace and allowed them the opportunity to control their profits).

Ware v. U.S., 67 F.3d 574 (6th Cir. 1995) (AAA insurance agent found to be an independent contractor, and therefore entitled to deduct from his gross income certain unreimbursed business expenses not available to an employee, where agent: (1) received commissions only, (2) paid most of his business and travel expenses, (3) made a significant investment in the enterprise, and (4) may realize profit and is subject to a significant risk of loss).

Aparacor, Inc. v. U.S., 556 F.2d 1004 (Ct.Cl. 1977), opinion supplemented by 571 F.2d 552 (Ct.Cl. 1978) (Distributors of women’s clothing at neighborhood parties were not employees where no indicia of employment were present. Each distributor had his own clientele and controlled his own method of promoting and selling the clothes).

Tristate Developers Inc. v. U.S., 549 F.2d 190 (Ct.Cl. 1977) (Applicators in home improvement business were independent contractors based on lack of supervision, degree of skill, provision of own tools and freedom to hire helpers).

United States v. Aberdeen Aerie No. 24, 148 F.2d 655 (9th Cir. 1945) (Doctor was not an employee even though he was required to keep regular office hours).

In summary, the IRS tends to concentrate on the degree of control the employer may exert over the worker. In reaching a conclusion about control, the IRS weighs and balances the typically numerous facts unique to the case.

3. Consequences of Employment Status: Employer's Liability for Taxes, Penalties and Interest

a. Federal

If independent contractors are reclassified as employees, the employer is liable for all unpaid income, FICA and FUTA taxes. I.R.C. §§ 3402, 3102, 3301. In such reclassification cases, however, the employer's federal tax penalty for failure to withhold income taxes is only 1.5 percent (3 percent if no information returns were filed) of the wages subject to income tax withholding; also, the employee social security tax penalty is 20 percent (40 percent where no information returns were filed) of the social security taxes required to be withheld. I.R.C. §
The employer also remains nonetheless fully liable for the employer's portion of FICA and FUTA taxes at the regular rates. Moreover, the above-reduced rates do not apply to an employer's "intentional disregard of its withholding obligation."

In addition, any responsible person (including corporate officers and employees or members or employees of a partnership) with authority over the financial affairs of the business who willfully fails to collect and pay over taxes may be held personally liable for the total amount of the uncollected tax under the "100 percent penalty" provisions of the Internal Revenue Code. I.R.C. § 6672.

In "employee vs. independent contractor" controversies, the IRS will typically not only seek corporate financial penalties for failing to withhold employee taxes, but will also seek penalties section 6651(a)(1) imposes for failure to file a tax return. This penalty may be abated upon a showing of reasonable cause for the failure to file. The section 6656 penalty for failure to make a deposit of taxes will not be asserted if no tax was withheld. Rev. Rul. 75-191, C.B. 1975-1, 376. The employer is also liable for interest on unpaid taxes at the statutory rate. I.R.C. § 6601.

b. California.

In addition to liability for unpaid personal income, unemployment insurance and state disability insurance taxes, California imposes a 10 percent penalty on any employer which, without good cause, fails to pay any contributions required of it or its employees. Cal. Unemp. Ins. Code § 1112. In addition, employers are liable for interest at the adjusted annual rate on such unpaid contributions from the date of delinquency until paid. Cal. Unemp. Ins. Code § 1113. Under current practice, unpaid personal income tax is generally assessed at a rate of 6 percent of wages subject to withholding. If the personal income tax for which the employer is liable is paid or if the employee reports the wages to the Franchise Tax Board, the employer is relieved of liability for the tax itself but not for penalties or additions to the tax otherwise applicable in respect of the failure to deduct and withhold. Cal. Unemp. Ins. Code § 13071.

C. The Fair Labor Standards Act (FLSA) Test

The FLSA governs the federal minimum wage and overtime pay obligations of many employers. 29 U.S.C. § 201. Employers cannot reduce these obligations merely by classifying workers as independent contractors. If the U.S. Department of Labor determines that the workers are employees, the employer may be subject to substantial penalties, from the payment of unpaid overtime premiums to liquidated damages, fines of $10,000 and six months' imprisonment for willful violations. Unpaid overtime premiums alone may represent substantial monetary liability depending upon the size of the work force and the length of time the company has failed to pay appropriate overtime.

The FLSA "economic realities" test focuses on whether an individual is economically dependent on the business to which services are provided, thus establishing employee status, or whether the worker effectively is in business for himself or herself. Unlike the IRS test, the
FLSA’s “economic realities” test is usually determined by reference to six roughly equal factors:

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a. the extent to which the services in question are part of the company's business;

b. the amount of the individual's investment in the company's facilities and equipment;

c. the nature and degree of control retained by management;

d. individual opportunity for profit or loss;

e. the amount of initiative, skill or judgment required; and

f. the permanency and duration of the relationship.


It is well established that these factors cannot be considered in isolation. All circumstances of the work activity must be taken into account. Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947), reheg denied, 332 U.S. 785 (1947).

1. Employees: Economically Dependent

Heath v. Perdue Farms, Inc., 87 F. Supp. 2d 452 (D. Md. 2000) (Chicken catchers were employees of poultry processing plant where employer controlled every aspect of the chicken catchers’ work and where the chicken catchers had little opportunity to substantially increase their profits).

Baystate Alternative v. Reich, 163 F.3d 668 (1st Cir. 1998) (workers at temporary staffing agency were employees, where agency was solely responsible to hire workers, control work schedules, screen for qualifications, determine rate and method of payment, and where agency had the power to refuse to send workers back to a job site).

Baker v. Barnard Const., 146 F.3d 1214 (10th Cir. 1998) (rig welders were employees of general contractor for oil and natural gas pipelines where, despite fact that welders provided their own welding equipment, contractor controlled work hours and breaks, paid welders a fixed hourly rate, and did not ask welders to exercise discretion in applying their skills), but see Carrell v. Sunland Const., Inc., 998 F.2d 330 (5th Cir. 1993) (rig welders for natural gas pipeline construction companies were independent contractors).

Some federal courts, however, have held that control is the determining factor. Holt v. Winpisinger, 811 F.2d 1532 (D.C.Cir. 1987); Blankenship v. Western Union Tel. Co., 161 F.2d 168 (4th Cir. 1947).
McLaughlin v. Seafood, Inc., 867 F.2d 875 (5th Cir. 1989) (Unskilled packers, pickers and peelers of crabmeat and crawfish found to be employees of a seafood processor. Economic reality, rather than the common law test, provides that frequent movement from plant to plant does not establish economic independence for mostly non-English speaking Vietnamese).


Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir.), cert. denied, 484 U.S. 924 (1987) (Operators of fireworks stands were employees based on: (1) the owner's control regarding location and size of stands, prices, merchandise sold, display of merchandise, the hours the operators must attend the stands, advertising and method of paying the operators; (2) the owner's control of opportunity for profit and loss; (3) the amount of investment made by the owner in the business; and (4) the absence of need for any particular skill for the job. As to permanency of employment, operators worked through the entire fireworks season. The court held that when an industry is seasonal, the proper test to determine permanency of the relationship is not whether the alleged employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season).

Doty v. Elias, 733 F.2d 720 (10th Cir. 1984) (Waiters and waitresses working for tips at a steakhouse were employees where: (1) the restaurant essentially established work schedules by establishing the restaurant's business hours; the court did not consider an otherwise flexible work schedule sufficient to warrant independent contractor status; (2) the restaurant also exerted control by its ability to fire workers at will; (3) the waitpersons did not invest in the enterprise; (4) waiters and waitresses did not share in the profits or losses; and (5) waiting tables did not require specialized skills).

Castillo v. Givens, 704 F.2d 181 (5th Cir.), cert. denied, 464 U.S. 850 (1983) (Procurer and supervisor of cotton harvesting crew was an employee; therefore, crew members also were employees).

Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981) (Dry cleaner's "agents" were employees based on: (1) lack of control over pricing or location; (2) absence of investment; and (3) absence of sharing of business profits or losses. Their jobs also required little skill).

Marshall v. Truman Arnold Dist. Co., 640 F.2d 906 (8th Cir. 1981) (Operators of gasoline service stations under restrictive lease agreements with distributor were employees since: (1) the distributor controlled many of the details of running each station, e.g., hours of operation, prices to be charged, management of money, physical appearance of station; (2) the lessee provided only his/her labor or services; and (3) the risk of profit or loss was small since each lessee received a minimum guaranteed payment plus a small percentage commission on the amount of gasoline sold).

Donovan v. Tehco, Inc., 642 F.2d 141 (5th Cir. 1981) (Construction workers building, maintaining and rehabilitating gas service stations were "employees" since they: (1) had no
other business organization; (2) with exception of hand tools, supplied only labor; and (3) supervised company employees and, in turn, were supervised by admitted company employees. Workers' ability to choose job assignments, to elect hourly wages or payment by the job and to determine when work would be done were insufficient to counterbalance strong indicia of employee status).

Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308 (5th Cir.), cert. denied, 429 U.S. 826 (1976) (Operators of laundry pick-up stations were employees when they were totally dependent on the company for direction and control, made no substantial investment and had no real opportunity for profit or loss).

Mednick v. Albert Enterprises, 508 F.2d 297 (5th Cir. 1975) (Hotel cardroom operator was an employee based on hotel's provision of uniform, tools, equipment, menial skills and his economic dependence on hotel).

Thomas v. Brock, 810 F.2d 448 (4th Cir. 1987) (Economic realities test showed that local cookie and candy distributor was employee of seller since distributor was completely integrated into the seller's business. He followed seller's recommended prices on all but a few occasions, filed weekly reports on his sales and relied on the seller for bookkeeping. He worked solely for seller for three years and was prevented from competing with seller within 100 miles for a period of two years. He made little investment in the business. Although the distributor's initiative was important in the success of his operations, his job did not require any special skills).

2. Independent Contractors: Not Economically Dependent

Catani v. Chiodi, 2001 U.S. Dist. LEXIS 17023 (D. Minn. 2001) (Staffing agency hired by steel manufacturer as intermediary when hiring back former employees was not an employer since it did not exercise any degree of control over persons alleged to be employees).

Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984), reh'g, en banc, denied, 760 F.2d 126 (1985) (Pickers of cucumbers for pickling were independent contractors where: (1) the relationship with the cucumber farmer was temporary even though 40-50% of the harvesters return annually; (2) skill in tending the plant and judging when the fruit should be picked are required; (3) the lack of heavy capital investment was not determinative; (4) the workers' participation in plant management provides an opportunity for profit or loss that is not solely a function of compensation by piecework; and (5) the demand for pickle harvesters led to the farmer's relinquishment of daily control over the pickle growing operation. Court refused to find that agricultural workers always are employees.) NOTE: The California Supreme Court in a decision discussed below, dealt with essentially the same facts and came to the opposite conclusion. S.G. Borello & Sons v. Department of Industrial Relations, supra, 48 Cal. 3d 341.

Elizondo v. Podgorniak, 70 F. Supp. 2d 758 (E.D.Mich. 1999) (Distinguishing Brandel, supra, court found that pickers of cucumbers for pickling were employees of farm owners, where: (1) none of the plaintiffs had full-time jobs elsewhere or treated their work for defendants as supplemental; (2) fundamentals of picking could be learned in half a day, and, despite no experience, plaintiffs picked a good yield in their first year, (3) plaintiffs' investment was limited to $5 hoes, while defendant incurred over $130,000 in equipment and harvesting expenses over
two year period; (4) plaintiffs had no role in determining the price of pickles, and therefore had no opportunity to earn a “profit” on their work; (5) defendants assigned plots to workers, and otherwise retained significant control over their work; and (6) defendants provided free housing to plaintiffs (labor camps) and posted employment rights in the camps).

Bartels v. Birmingham, 329 U.S. 711 (1947) (Band leaders were independent contractors vis-à-vis hall operators based on their complete control over the musicians; by the same token, the musicians were employees of the band leaders).

Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376 (3d Cir.), cert. denied, 474 U.S. 919 (1985) (A telephone marketing firm hired two groups of workers: home researchers who performed telephone number research at home and who were employees; and distributors who recruited and supervised the home researchers.

The right of control factor weighed in favor of finding that the home researchers were independent contractors, but the circumstances as a whole supported a finding of employment. The decision determined that: (1) each home researcher worked for DialAmerica continuously and many worked for long periods of time; (2) the services rendered by home researchers were an integral part of DialAmerica's business; and (3) the home researchers were dependent on DialAmerica's business for their continued employment. The court held that whether the workers depended on the money they earned for obtaining the necessities of life was not relevant to the issue of economic dependence.

With respect to the distributors, the court found that they were independent contractors based on the following factors: (1) DialAmerica exercised little control over the distributors; they were permitted to recruit their own distributors and had the authority to set the rate at which their own distributors would be paid; (2) they risked higher financial loss if they did not manage their distribution network properly; (3) they paid for their own operating expenses; (4) their job required a special skill; and (5) the service rendered by the distributors was incidental and not an integral part of DialAmerica's business).

D. California’s Borello Test

California's approach to regulating employment differs considerably from that of the federal government, both in the breadth of California's coverage and the extent to which enforcement is achieved through assessment of penalties. California's wage-hour laws, set forth in the California Labor Code and the Industrial Welfare Orders, regulate time, place and manner of payment. While federal wage-hour requirements impose an economic realities test, California employers--until 1989--generally had to meet common law "right of control" tests to avoid costly confrontations with state wage and hour administrators. Whether the California Supreme Court's decision in Borello will change this historical "right of control" standard remains an open question as we discuss below.

On March 23, 1989, the Supreme Court of California rejected long-standing application of the common law right of control to determine independent contractor status under at least California's workers' compensation statute. At the same time, the Court declined to adopt any
"detailed new standards for examination of the [independent contractor] issue."  

Borello, supra, 48 Cal. 3d 341 at 353. Rather, the Court seemed to credit heavily three different legal tests.

The decision noted that Restatement guidelines regarding the common law "right of control" test "remain a useful reference" and that the standards set forth in Cal. Lab. Code 2750.5 are also a "helpful means of identifying the employer/contractor distinction." In addition, the Court suggested that six factors adopted by other courts to consider the remedial purpose of the legislation were also helpful to draw lines between the status of employees and independent contractors.

In the final analysis, the Borello Court appears to bring California more closely in line with the IRS's 20 factor analysis (see Attachment D which compares the 20 factor IRS test to the factors set forth in the common law, California Labor Code § 2750.5 (which provides the requirements for licensed construction contractors to be independent contractors) and the factors considered by other courts).

In Borello, the Supreme Court of California held specifically that cucumber pickers were "employees" entitled to workers' compensation coverage based on the following facts: (1) the "sharefarmer" workers at issue had no control over the operation as a whole, e.g., crop cultivation, selection of the buyer and price; (2) sharefarmers had no particular skill or expertise; (3) the work was seasonal, but permanent; (4) sharefarmers had no distinct trade or calling; (5) sharefarmers did not hold themselves out in business; (6) workers invested only their personal service and hand tools; (7) there was no opportunity for profit or loss; the possibility that the crop would fail "is the chance faced by any at-will wage earner that his services will not be needed after all" (Borello, supra, 48 Cal. 3d 341 at 358, n. 11); (8) sharefarmers relied solely on field work for their livelihood; (9) there was no practical opportunity for the sharefarmers and their families to self-insure for workers' compensation coverage; and (10) there was no real opportunity to bargain over the preprinted contract that was offered to heads of families who would harvest the crop.

In a workers' compensation setting, independent contractor status now is found in California "when the provider of service has the primary power over work safety, is best situated to distribute the risk and cost of injury as an expense of his own business, and has independently chosen the burdens and benefits of self-employment."  Borello, supra, 48 Cal. 3d 341 at 354.

Of perhaps even greater import from the Borello decision are "implications for the employer-employee relationship upon which other state social legislation depends."  Borello, supra, 48 Cal. 3d 341 at 345 (emphasis added). The court noted in dicta that the implications of its decision included application of California laws governing minimum wages, maximum hours and employment of minors (Cal. Lab. Code § 1171, et seq.; Cal. Lab. Code § 1285, et seq.), the antidiscrimination provisions of the Fair Employment and Housing Act (Cal. Gov't Code § 12940, et seq.) and the Agricultural Labor Relations Act (Cal. Lab. Code § 1141, et seq. The decision did not apply specifically to the California unemployment insurance coverage statute since that statute itself requires that the status of a covered "employee" be determined by the "usual common law rules."  Cal. Unemp. Ins. Code § 621(b); Borello, supra, 48 Cal. 3d at 359, n. 16.
Using a similar "control" analysis, the court of appeals for the First Appellate District held that a taxi driver was an employee of the Yellow Cab Company for the purposes of the California workers' compensation statute, even though the employer did not completely control the way in which the taxi drivers performed their work. The court noted that Yellow Cab acted as a clearing house for customers and that it promoted a "distinct identity" to attract members of the traveling public, that the driver's relationship with Yellow Cab could be terminated for misconduct, and that the driver was prohibited from driving for other companies. *Yellow Cab Cooperative, Inc. v. Workers' Compensation Appeals Board and Richard Edwinson*, 226 Cal. App. 3d 1288 (1991).

California appellate courts continue to apply *Borello*, but they have failed to offer a clear indication of whether the common law “right of control” test has been abandoned. Rather, the courts seem content to apply *Borello’s* multi-factor approach. See, e.g., *Gonzales v Workers’ Comp. Appeals Bd.*, 46 Cal. App. 4th 1584 (1995) (court applied Borello factors, as well as “right of control” concept, to conclude that newspaper route carrier injured in traffic accident was an employee for purposes of workers compensation, where newspaper specified time of delivery, controlled customers, and received and addressed customer complaints); *Braun v. County of San Mateo*, 2001 U.S. Dist. LEXIS 13769 (N.D. Cal. 2001) (Emergency medical services medical director was independent contractor under right to control test since principal task of the job was being performed independently, with little or no supervision).

**E. Discrimination Tests**


By their terms, the above-referenced federal laws protect only “employees.” However, in California, the legislature recently granted independent contractors the direct right to bring actions against employers for employment discrimination arising out of their membership in a protected class, as noted above. Under FEHA, employers are now liable to traditional employees as well as contract workers from employment discrimination. At least one federal circuit court, the First Circuit, has also interpreted 42 U.S.C. § 1981 to include a cause of action for independent contractors for race-based harassment.

To determine whether an individual is an employee, and therefore is protected by discrimination laws, some courts have applied the "economic realities test," whereas other courts have developed a hybrid test that combines the "control" and the "economic realities" tests. The "right to control" is the most important among several factors, including: method of payment;
skill required; furnishing of supplies, tools and workplace; duration of employment; terminability at will; work supervision; and the parties' intentions.

In 1992, the Supreme Court ruled that courts should construe federal statutes using the term "employees" under the common law test if the statute does not meaningfully define the term "employee." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-323 (1992). Though Darden was an ERISA case, the holding does not rest on that particular statute. Rather, the Court focused on the absence of a definition of "employee" other than "any individual employed by an employer" (29 U.S.C. § 1002(6)). Prior to Darden, a leading court found that substantive interpretation of the ADEA must follow Title VII precedent. E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32, 38 (3rd Cir. 1983). A subsequent District Court ruling held that Darden overruled Zippo. Cox v. Master Lock Co., 815 F. Supp. 844, 846 (E.D. Pa. 1993), aff'd, 14 F.3d 46 (3rd Cir. 1993).

Interpretation of the FEHA similarly follows Title VII precedent to the extent both statutes share identical antidiscriminatory objectives and overriding public policy concerns. Los Angeles County Dept. of Parks & Recreation v. Civil Service Commission, 8 Cal. App. 4th 273 (1992), review denied, 1992 Cal. LEXIS 5104 (1992); County of Alameda v. Fair Employment & Housing Com., 153 Cal. App. 3d 499, 504 (1984); see Price v. Civil Service Com., 26 Cal. 3d 257, 271, cert. dis'm sub nom., District Attorney for Sacramento County v. Sacramento County Civil Service Commission, 449 U.S. 811 (1980). In light of Borello, supra, it is unclear whether the California FEHA standard will continue to parallel the Title VII hybrid test in the future. It is too early to tell how Darden may affect the development of state law.

Plaintiffs may argue, even though they are independent contractors, that discrimination led to denial of a privilege that is basic to an employment relationship. For instance, a Palestine-born medical student could sue the hospital in which he was serving his residency for discriminatory failure to extend staff privileges. Amro v. St. Luke's, 39 Fair Empl. Prac. Cas. (BNA) 1574 (E.D.Pa. 1986). Similarly, a Hispanic doctor could sue a hospital for discrimination in not awarding an emergency room care contract to his medical group. Gomez v. Alexian Bros. Hosp. of San Jose, 698 F.2d 1019, 1021 (9th Cir. 1983). Such a broad interpretation of Title VII's language should make employers sensitive to potential discrimination claims from bona fide independent contractors as well as employees.

1. Title VII: Employees: Right to control and economic dependence found.

Mitchell v. Frank R. Howard Memorial Hosp., 853 F.2d 762 (9th Cir. 1988), cert. denied, 489 U.S. 1013 (1989) (Mormon radiologist alleging religious discrimination was a hospital employee because he used hospital radiology equipment; he agreed to treat hospital patients; and he was paid by the hospital rather than patients).

Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983) (Case remanded to district court to determine whether "Manufacturer's representative" was employee under economic realities test given Title VII's broad language and the legislative history which favors coverage of all persons in a position to be harmed by discrimination that Title VII seeks to prevent; district court had ruled below that the manufacturer's representatives were not employees under Title VII because
the company did not control the work hours, timing of sales calls, or customers called on, and because the representatives sold product lines from other companies).

2. Title VII: Independent contractors: No right to control or economic dependence found.

Adcock v. Chrysler Corp., 166 F.3d 1290 (9th Cir. 1999) (Automobile company’s denial of dealership to female applicant did not give rise to gender discrimination claim under Title VII since contemplated contract would have created an independent contractor relationship).

Bender v. Suburban Hosp., 998 F. Supp. 631 (D.Md. 1998) (physician with privileges at defendant hospital who had complete discretion regarding patient treatment, received no assignments or additional work from the hospital, and was entitled to few hospital benefits, was not the hospital’s employee for purposes of Title VII gender discrimination claim, despite fact that hospital provided many of the instrumentalities of physician’s work, and provided nursing and clerical staff for her assistance).

Ost v. West Suburban Travelers Limousine, Inc., 88 F.3d 435 (7th Cir. 1996) (Title VII gender discrimination claim by limousine driver against dispatching company properly dismissed, where driver owned her own limousine, paid all fees associated with its ownership, received no paycheck from dispatcher, and could choose to work whenever she wanted, and therefore was not dispatcher’s employee, despite fact that dispatcher set the rates drivers could receive from customers, and determined which drivers would receive which customers).

Diggs v. Harris Hospital-Methodist, Inc., 847 F.2d 270 (5th Cir.), cert. denied, 488 U.S. 956 (1988) (Black female obstetrician-gynecologist was not a hospital employee for purposes of Title VII because: (1) there was no evidence that staff privileges were necessary to medical practice; (2) under economic realities/common law test, hospital did not direct the manner or means by which the doctor provided medical care; (3) physician was not required to admit her patients to the hospital; and (4) the hospital did not pay the doctor for her services).

Broussard v. L. H. Bossier, Inc., 789 F.2d 1158 (5th Cir. 1986) (Woman truck driver, and co-owner of truck with husband, was an independent contractor for purposes of sex discrimination suit. Under an economic realities test of right to control, the female driver co-owned the truck and was responsible for its operating costs; her employment was intermittent; payment was to the couple's trucking company; and options as to the payment method allowed for entrepreneurship to increase profits).

Mares v. Marsh, 777 F.2d 1066 (5th Cir. 1985) (Grocery bagger at an Army commissary was not an employee under hybrid economic realities/common law test where the Army had no role in hiring, firing, supervision or establishing work schedules. Compensation came exclusively from tips and, accordingly, the Army did not report income or withhold taxes. Neither did the Army provide annual medical leave or retirement benefits).

Dixon v. Burman, 593 F. Supp. 6 (N.D.Ind. 1983), aff’d without opinion, 742 F.2d 1459 (7th Cir. 1984) (Independent insurance agent was not an employee where the company did not control her territory, daily activities or outside employment. Company did not reimburse expenses or provide employee benefits).
Cobb v. Sun Papers, Inc., 673 F.2d 337, reh'g denied, 679 F.2d 253 (11th Cir.), cert. denied, 459 U.S. 874 (1982) (A janitor was an independent contractor based on discretion as to how or by whom the work would be performed; janitor was responsible for hiring helpers. These facts outweighed indicia of employee status: (1) the company gave some detailed instructions to janitor; (2) company provided the basic supplies and equipment; (3) there was no written independent contractor agreement; (4) janitorial firm that replaced the plaintiff had a written independent contractor agreement; and (5) the janitor did not report payments as business income on his tax returns).

Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980) (A musician whose Seventh Day Adventist beliefs prohibited payment of union membership dues was undisputedly an independent contractor for purposes of a religious discrimination suit against union. The musician employed, transported and equipped members of the group, paid his own insurance and received compensation upon completion of each performance. The Ninth Circuit applied an economic realities/"right to control" test).

a. Age Discrimination in Employment Act (ADEA): Right to control found.

Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996) (partner in Arthur Young terminated shortly after merger of with Ernst & Whinney held to be an employee because of partnership agreement which centralized all firm management power in a small committee of partners, and which gave the plaintiff no right to participate in firm management, to examine the firm’s books and records, or to have any involvement in personnel decisions).

b. Age Discrimination in Employment Act (ADEA): No right to control or economic realities found.

Barnhart v. New York Life Insurance Co., 141 F.3d 1310 (9th Cir. 1998) (insurance agent who sued his employer under the ADEA after his termination for failure to maintain minimum production standards held to be an independent contractor and not covered by the ADEA, because of contract which clearly identified him as independent contractor, and tax returns wherein plaintiff stated he obtained most of his income from self-employment).

E.E.O.C. v. North Knox School Corp., 154 F.3d 744 (7th Cir.1998) (ADEA claims brought by bus drivers who contracted with school district were dismissed on summary judgment, where drivers were required to supply their own buses and absorb all associated costs, including insurance and maintenance, and despite fact that school district, as dictated by statute, could control the use to which the buses could be put when the drivers were not transporting school children).

E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32 (3rd Cir. 1983) (Salespersons were independent contractors where they established their own business organizations, hired their own employees, made their own customer contacts and were not required to account to the company for their daily activities. Duration of employment, more than 10 years in some instances, was not sufficient alone to establish employee status).
Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983) (Finding that salesman was independent contractor was based on minimal supervision by company. Salesman also paid his own expenses, paid self-employment taxes and established a Keogh retirement plan).

Hickey v. Arkla Industries, Inc., 699 F.2d 748 (5th Cir. 1983) (Sales representative was independent contractor because he was not required to deal exclusively with company, he could establish his own business organization and terminate relationship with company on 30 days' notice. Sales representative also paid his own business expenses).

F. The National Labor Relations Act (NRLA)

The National Labor Relations Act excludes from its coverage independent contractors. 29 U.S.C. § 152(3). The National Labor Relations Board ("NLRB") and the courts generally apply the "right of control" test to determine whether a worker is an employee entitled to protection under the Act. See N.L.R.B. v. United Insurance Co., 390 U.S. 254, 256 (1968). If the employer retains the right to control the way the task is performed, the Board is likely to find an employment relationship. If control is only reserved as to the end result, a finding of independent status is substantially more likely. All of the facts and circumstances are balanced to determine the extent to which the employer exerted control over performance. This standard applies in all NLRA contexts, such as protection of concerted activity and the right to vote in representation elections.

The California Agricultural Labor Relations Act ("ALRA") (Cal. Lab. Code § 1141, et seq.), by its terms, covers agricultural workers excluded from coverage under the NLRA. These workers are among those who appear to be subject to Borello's rejection of the common law right-to-control test for determining independent contractor status.

1. Employees: Right to control found.

Time Auto Transportation, Inc., 2002 NLRB LEXIS 628, 338 NLRB No. 75 (2002) (drivers who haul vehicles using tractor-trailers they lease from company are statutory employees of company since company sought to exercise control over the manner of driver’s work performance by encouraging drivers to exceed Department of Transportation drive-time limits and falsifying logs).

First Legal Support Services, 2002 NLRB LEXIS 231 (2001) (Bike messengers working for business that provided courier services and court records research for law firms were employees).

Roadway Package System, Inc., 326 N.L.R.B. No. 72, 159 L.R.R.M. (BNA) 1153 (1998) (Pickup/delivery drivers who: (1) receive training from the company, (2) perform pickups and deliveries in the company’s name, (3) are prohibited from conducting outside business for other companies throughout the day, and (4) although they own their own trucks, essentially are unable to use the trucks for other purposes during off-hours, are employees of the company, not independent contractors, under the right of control test).
Siracusa Moving & Storage Service Co., 291 N.L.R.B. 143, 130 L.R.R.M. (BNA) 1062 (1988) (Truck driver on commission, who attempted to organize a union, was an employee, rather than an independent contractor, where the company owned the truck and paid for insurance and repair even though the truck driver paid for fuel, tolls and any additional labor).

Roadway Package System, Inc., 288 N.L.R.B. 196, 128 L.R.R.M. (BNA) 1016 (1988) (Pick-up and delivery drivers are employees under common law test where: (1) owner has substantial control over manner and means of operating business; (2) the owner supervises, disciplines and fires drivers; and (3) drivers bear few risks and enjoy little opportunity for gain. Drivers receive no commissions for sales leads and have no proprietary interest in the geographical zones they service).

Merry Oldsmobile, Inc., 287 N.R.L.B. 847, 127 L.R.R.M. (BNA) 1175 (1987) (A salesperson selling financing, different types of insurance, alarm systems and extended warranty programs, after purchase of car, is an employee under the "right of control" test. The "after sale" worker's hours are controlled by the company's hours of operation; the work is done at the car dealership; earnings ultimately are dependent on referrals from salespeople; and sales of items are from the dealer's inventory).

N.L.R.B. v. H & H Pretzel Co., 831 F.2d 650 (6th Cir. 1987) (Employer failed to transform unionized pretzel company drivers into independent contractors by setting up separate company for leased drivers, which, incidentally, was owned by same person who owned pretzel company. Drivers were employees since distributor controlled the work and could discharge the drivers, and the drivers had no proprietary interest in the business).

ARA Leisure Services, Inc. v. N.L.R.B., 782 F.2d 456 (4th Cir. 1986) (Sports arena concessionaire unlawfully discharged employees, rather than independent contractors, two weeks before scheduled union election. Application of the "right to control" test found that the novelty vendor "tableheads" exhibited indicia of employee status: (1) the concessionaire made payroll deductions for state and federal withholding taxes, workers' compensation and Social Security; (2) vendors check in and out of work, follow an employee handbook and are subject to progressive discipline; and (3) the work is largely unskilled and of indefinite duration. Although the vendors could exercise some entrepreneurial skill in hawking their wares, the products and prices were predetermined. All necessary equipment was provided to the vendors without any capital outlay).

a. Independent contractors: No right to control found.

Dial-A-Mattress Operating Corp., 326 N.L.R.B. No. 75, 159 L.R.R.M. (BNA) 1166 (1998) (drivers for mattress company who: (1) arrange their own training, (2) hire and have sole responsibility for their own employees; (3) own and maintain their own trucks, (4) maintain their own workers compensation insurance; and (5) are held out by the company as "independently owned and operated" drivers, were independent contractors under the right of control test).

North American Van Lines, Inc. v. N.L.R.B., 869 F.2d 596 (D.C.Cir. 1989) (The Board overstepped its jurisdictional bounds in finding truck drivers employees; they were independent contractors since they (1) exercised nearly absolute control over work performance, work
clothing, route to be followed and decisions where and when to work, stop, eat and rest; (2) held equity interests in their trucks and a significant minority owned one or more trucks outright; (3) assumed significant entrepreneurial risks regarding frequency of work, maintenance and repair; and (4) admitted employees received a fringe, supplemental and profit-sharing benefits not available to the drivers. The circuit court cautioned the Board that: (1) oversight of worker performance does not necessarily equate with the right to control; (2) government regulations that structure work performance do not constitute employer control; and (3) unequal bargaining power, without more, is not evidence indicative of employer control. Note that the Board, in Container Transit, Inc., 281 N.L.R.B. 1039, 124 L.R.R.M. (BNA) 1349 (1986), agreed that government regulations were insufficient in and of themselves to show employment status.

City Cab Company of Orlando, Inc., 285 N.L.R.B. 1191, 129 L.R.R.M. (BNA) 1246 (1987) (Taxi cab drivers are independent contractors because: (1) cab owner does not control or supervise drivers' work performance; (2) lease fees paid by drivers represent substantial investment; (3) safety requirements and other rules do not constitute owner control over cab operations; (4) cab owner does not deduct for state, federal or Social Security taxes; (5) lease drivers do not receive health benefits, workers' compensation or unemployment compensation; and (6) finding that cab drivers are independent contractors agrees with findings by other governmental agencies, including Internal Revenue Service and Equal Employment Opportunity Commission).

La Salle Investment Co., Ltd., 280 N.L.R.B. 379, 122 L.R.R.M. (BNA) 1281 (1986) (A janitor at a commercial building was an independent contractor since he decided how to do work; cleaning could be done at any time outside normal business hours; work was paid at flat rate; and janitor could subcontract work).

G. **The Immigration Reform and Control Act ("IRCA")**

The Immigration and Naturalization Service ("INS") has stated it will use the IRS's 20-factor test to make employee/independent contractor determinations under this statute which regulates the employment of aliens. 52 Fed.Reg. 16219 (1987). Under IRCA, all employers with three or more employees are required to verify that their employees hired after November 6, 1986 are legally entitled to be employed in the United States. Employer penalties for hiring illegal aliens and for failing to maintain records of verification will not apply if the worker truly is an independent contractor. The INS will examine closely the work relationship to determine that independent contractor status is not a sham. If the employer has classified workers incorrectly, substantial civil and criminal penalties can result.

H. **Worker Adjustment and Retraining Notification Act ("WARN")**

The federal Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101, et seq.) went into effect February 4, 1989. Under this law:

1. covered "employers" must give 60 days' written notice of "plant closures" or "mass layoffs;"
2. such notice must be given to each "affected employee" (or the collective bargaining representative(s), if applicable), to the local government and to the state "dislocated worker unit;" and

3. remedies include lost wages and benefits to affected employees; $500 per day fine, up to 60 days, to local government unless the employer pays the full amount of "notice pay" to the employee within three weeks of the plant closing or mass layoff; and attorneys’ fees. There is no provision for injunctive relief.

WARN governs all businesses employing (a) 100 or more full-time employees, excluding part-time workers, or (b) 100 or more full- or part-time workers who in the aggregate work at least 4,000 hours per week (exclusive of overtime). A "part-time worker" is defined as one who works 20 hours per week or less, or has been employed fewer than six of the 12 months preceding the date on which notice is required.21 Workers on temporary layoff are counted as employees for the purpose of determining coverage of WARN. Bona fide independent contractors are not employees under WARN.

The U.S. Department of Labor's Final WARN regulations issued April 20, 1989 exclude independent contractors from the definition of "affected employees" covered by the WARN statute. See 20 C.F.R. § 639.3(e). Moreover, the preamble to the final WARN regulations indicates that the Department did not intend to specially define the term "independent contractor" in the regulations. Rather, the final WARN regulations at 20 C.F.R. § 639.3 are intended to

"...summarize existing law developed under such statutes as the NLRA, the Fair Labor Standards Act [FLSA] and the Employee Retirement Income Security Act [ERISA]. The Department does not believe that there is any reason to attempt to create new law in this area especially for WARN purposes when relevant concepts of State and federal law adequately cover the issue."


Accordingly, employers will face the not insubstantial task of trying to demonstrate that workers they believe to be independent contractors are not employees within the meaning of the several different legal tests for independent contractors set out in the three labor statutes referenced in the regulatory preamble. However, once it is established that a worker is an independent contractor, the employer will have the comfort of knowing that that worker is not covered by the Act.

I. California Unemployment Insurance

The California Supreme Court's Borello decision implies that California courts will continue to use the common law "control" test to determine "employee" eligibility for California

21 Although part-time employees are not counted for coverage purposes, once WARN is triggered, all full-time and part-time employees must receive notice of a plant closing or mass layoff that affects them. However, "temporary" employees are excluded from this requirement.
Unemployment Insurance, noting the Unemployment Insurance Code itself requires application of the usual common law rules.\textsuperscript{22} Unemp. Ins. Code § 621(b); Borello, supra, 48 Cal. 3d 341 at 359, n. 16. At least one court subsequent to Borello, which construed § 621, affirmed the use of the right of control test. Santa Cruz Transp. Co. v. Unempl. Ins. Appeals Bd., 235 Cal. App. 3d 1363 (1991) (“The right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship”). The Borello decision also noted that a prior precedential decision of the Unemployment Insurance Appeals Board found that cucumber pickers were independent contractors. Borello, supra, 48 Cal. 3d 341 at 359, n. 16. California Unemployment Insurance Code section 656 also provides a rebuttable presumption that engineers, architects, accountants and various types of physical and chemical scientists are independent contractors because of their specialized knowledge and skill.

1. \textbf{Employees: Right to Control Found}

Associated Indian Services, Inc. v. Employment Development Department, Precedent Tax Decision No. P-T-450 (1986) (Doctors, dentists, hygienists, nurses, optometrists, nutritionists and paramedics providing health care at clinic were employees despite contracts declaring health care professionals to be independent contractors. The presumption of Unemployment Insurance Code section 656 that professionals (including engineers, architects and accountants) are independent contractors was rebutted because health care providers did not act as consultants. Applying the common law test and emphasizing right of control, the decision found employees subject to the clinic's control, a probationary period, set hours and a defined place of work. The clinic provided most supplies and equipment, and the clinic failed to show that physicians had private practices).

2. \textbf{Independent contractors: No Right to Control Found}

Armstrong v. Department of Employment, Precedent Tax Decision No. P-T-404 (1979) ("Right of control" is most important of common law factors; accountant was independent contractor even though working for accounting practices which employees possessed similar skills; only a small part of working time was devoted to accounting firm and worker determined time and manner of performance; engagement at inexpensive hourly rate and furnishing of instrumentalities not sufficient to find employment relationship).

Charted Services of California, Precedent Tax Decision No. P-T-406 (1979) (Individual operating in multiple roles for corporation--owner, officer, director and salesman--may be employee for some roles and independent contractor for other roles. Insurance sales commission payments legitimately were made to salesman as independent contractor).

J. \textbf{California Workers' Compensation Laws}

California employers must carry workers' compensation insurance for all employees or provide self-insurance. Once insurance is obtained, the workers' compensation statute provides the sole remedy for job-related illness or injury suffered by the employee. A covered employee

\textsuperscript{22} Except corporate officers, who are classified as employees per that code. Cal. Unemp. Ins. Code § 621.
cannot sue the employer for tort damages in court, but the employee need not prove employer fault or negligence to recover benefits. Independent contractors, conversely, are not entitled to recover workers' compensation benefits, but they may sue the employer in tort for harm caused by the employer. As the Supreme Court of California noted in S.G. Borello & Sons v. Department of Industrial Relations, supra, 48 Cal. 3d 341, the determination of who is an employee for purposes of workers' compensation coverage is no longer governed by the common law right-to-control test in California. However, as described above in Gonzales, supra, the details of its replacement are no more clear now than they were in 1989.

An employer also has the option to make an independent contractor a "special employee" solely for the purpose of workers' compensation. The employer can accomplish this by naming the individual a special employee in the agreement "for the purpose of workers' compensation coverage only." This step may provide the employer with some protection from exposure to tort suits. However, the employer runs the risk that a classification of "employment" status for workers' compensation purposes will be used as evidence of employment in regard to other statutes.

If an employer chooses to maintain a complete independent contractor relationship, and the independent contractor has his own employees, employers frequently require the contractor to obtain his own workers' compensation coverage for those employees. In Rinaldi v. Workers' Compensation Appeals Board, 196 Cal. App. 3d 571 (1987), a licensed general contractor was found liable to pay workers' compensation to the employee of an unlicensed and uninsured subcontractor burned while hot-tarring a roof for his employer. The ultimate service provider (the general contractor) was liable for injuries to the unlicensed contractor and that contractor's employees.

The Rinaldi holding comports with Cal. Lab. Code § 2750.5 which provides that an unlicensed construction subcontractor cannot maintain independent contractor status. The court in Travelers Ins. Co. v. Workers' Comp. Appeals Bd., 147 Cal. App. 3d 1033, 1037 (1983) has held that as a matter of law, independent contractor status cannot be found unless the person holds a valid contractor's license. Conversely, a similar rebuttable presumption under Cal. Lab. Code § 2750.6 states that a licensed physician providing services to a primary care clinic is an independent contractor.

K. Workers' Compensation vs. The "Peculiar Risk" Doctrine

The "peculiar risk" doctrine is an exception to the general rule that a person who hires an independent contractor is not liable to third parties for injury caused by the contractor's

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23 The court in Travelers Ins. Co. v. Workers' Comp. Appeals Bd., 147 Cal. App. 3d 1033, 1037 (1983) has held that as a matter of law, independent contractor status cannot be found unless the person holds a valid contractor's license. Conversely, a similar rebuttable presumption under Cal. Lab. Code § 2750.6 states that a licensed physician providing services to a primary care clinic is an independent contractor.
negligence in performing the work. The peculiar risk exception pertains to contracted work that poses some inherent risk of injury to others. California courts have historically reasoned that a property owner who undertakes inherently dangerous work on his property should not escape liability for injuries to others simply by hiring an independent worker to perform the work. The courts therefore adopted the peculiar risk doctrine to ensure that innocent third parties injured by the negligence of an independent contractor hired by a property owner to do inherently dangerous work on the property would not have to depend on the independent contractor's solvency to receive compensation for the injuries. See Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 508 (1979); Woolen v. Aerojet General Corp., 57 Cal. 2d 407, 410-411 (1962).

In a landmark 1993 decision, Privette v. Superior Court, 5 Cal. 4th 689 (1993), however, the Supreme Court of California partially overruled Aceves and Woolen, and altered the application of the peculiar risk doctrine as it relates to employees of independent contractors. The case began when Franklin Privette hired Jim Krause Roofing, Inc., to install a tar and gravel roof on his duplex used as rental property. A Krause foreman instructed Jesus Contreras, a Krause employee, to carry a bucket of molten tar up an unstable ladder. Contreras was burned severely by the tar when he fell from the ladder.

Contreras recovered workers compensation from Krause but also sued Privette on a peculiar risk theory (under which an independent contractor's employees seek to recover from a nonnegligent property owner for injuries the negligent independent contractor caused). A minority of jurisdictions, including California, had recognized and permitted recovery under the "peculiar risk" doctrine. Landlord Privette argued that the peculiar risk doctrine should not be applicable to injuries employees of independent contractors suffered because employees are covered by workers compensation.

The trial court denied Privette's motion for summary judgment. The court of appeal summarily denied Privette's petition for a writ of mandate. The California Supreme Court granted review, however, and reversed. The court held that when injuries from an independent contractor's performance of inherently dangerous work are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis for the employee to seek recovery in tort damages from the person who hired the contractor but did not cause the injuries.

The court explained that the peculiar risk doctrine should not be applied to claims by an injured contractor's employee because the policy underpinnings for the doctrine are already served by the workers' compensation laws: (1) to ensure that the cost of industrial injuries are part of the cost of goods rather than a burden on society; (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as a cost of production; (3) to encourage industrial safety; and (4) to insulate the employer from tort liability for his employee's injuries.

The court also noted that, under California's historically expansive view of the doctrine, an anomalous result is produced because a nonnegligent third party's liability for an injury is

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24 This doctrine also goes by the names "specific risk" and "inherent risk."
greater than that of the negligent employer's. Adding to the inequity is the contractor's immunity from equitable indemnification of the innocent hiring party when workers' compensation covers the employee's injury, the court said. This situation had been subject to considerable criticism, because the availability of equitable indemnity and compensation to the injured worker were among the main policy reasons behind the development of the peculiar risk doctrine, the court observed.

Considering the peculiar risk doctrine in light of the goals the workers' compensation statutes seek to achieve, the court concluded that extending the doctrine to the employees of an independent contractor was unwarranted. In light of its decision, the court did not address Privette's contentions that the transport of hot tar up a shaky ladder was a "collateral," as opposed to a "peculiar," risk of tar and gravel roofing.

In 1998, the California Supreme Court clarified the broad scope of its opinion in Privette, supra. In Toland v. Sunland Housing Group, Inc., 18 Cal. 4th 253 (1998), the plaintiff argued that Privette eliminated peculiar risk liability under section 416 of the Restatement (Second) of Torts, but not under section 413. The court rejected this interpretation, holding that Privette bars employees of a hired contractor injured by the contractor's negligence from seeking recovery against the hiring person, "irrespective of whether recovery is sought under the theory of peculiar risk set forth in section 416 or 413 of the Restatement Second of Torts."

As noted above, the California Supreme Court in Hooker followed its prior holdings in Privette and Toland. In Hooker, the court held that an entity which retains the services of an independent contractor is not liable to the contractor's employee merely because the entity retaining the service retained control at the worksite. Rather, the entity which retained the services, would be liable if its exercise of the retained control affirmatively contributed to the employee's injury. Citing both Privete and Toland, the Court expressed reluctance to subject the entity retaining the services to greater liability than the contractor who actually caused the injury but whose liability would be limited under worker's compensation laws.

The peculiar risk doctrine has been addressed (and largely rejected) by most other jurisdictions. Two federal appellate opinions, Monk v. Virgin Islands Water & Power Auth., 53 F.3d 1381 (3rd Cir. 1995), cert. denied, 516 U.S. 914 (1995), and Chaffin v. United States, 176 F.3d 1208 (9th Cir. 1999), provide a good summary of the treatment of this doctrine by other state and federal courts.

25 Toland, 18 Cal. 4th at 267. The Restatement (Second) of Torts § 413 provides:
One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Restatement (Second) of Torts § 416 provides:
One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.
IV. JOINT EMPLOYER DOCTRINE

The "joint employer" doctrine is frequently raised when the government seeks to enforce statutes, such as the Fair Labor Standards Act, against both a temporary help agency and its client. The Wage-Hour Division of the U.S. Department of Labor has issued regulations discussing joint employment. 29 C.F.R. § 791.2. These regulations provide that a joint employment relationship may be found where employers share an employee's services, where one employer is acting in the interest of another employer or where the employers are not completely disassociated with respect to the employment of the individual and may be deemed to share control of the employee.

Regulations issued by the U.S. Department of Labor in the farm labor context provide additional guidance to determine joint employer status. 29 C.F.R. § 500.20. The courts have applied these regulations in non-agricultural contexts. Economic reality has been the key to determining whether a joint employment relationship exists in the wage and hour context.

The U.S. Department of Labor has long recognized the joint employer concept where temporary worker agencies are involved. The Wage-Hour Division has issued opinion letters concluding that "employees of a temporary help agency working on assignment in various business establishments are joint employees of both the agency and the business establishment in which they are employed." Wage-Hour Administrative Ruling, No. 781 [Transfer Binder] Lab.L.Rep. (CCH) ¶ 30,778 (1968); See also, Wage-Hour Administrative Ruling, No. 960 [Transfer Binder] Lab.L.Rep. (CCH) ¶ 30,975 (1969).

Courts have considered the following factors: (1) the power to hire, fire and supervise; (2) control of the worker's work schedule and other conditions of employment; (3) determination of the rate and method of payment; and (4) maintenance of employment records. Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983). In Bonnette, individuals who performed chores for disabled welfare recipients were found to be jointly employed by state agencies and the welfare recipients to whom the workers were assigned by the state. The agencies provided the funds to pay the workers, but the welfare recipients supervised the workers on a day-to-day basis.

Other factors include where the work is done, how much control the employer exerts, whether the company has the power to hire, fire or modify the terms and conditions of employment, whether the employees perform "specialty jobs" within the employer's organization and whether the employees can work for others. Hodgson v. Griffin and Brand of McAllen, Inc., 471 F.2d 235 (5th Cir. 1973), cert. denied, 414 U.S. 819 (1973). In Hodgson, joint employment was found where independent "crew leaders" recruited farm workers and provided some supervision, but the farm owner set the rate of pay, made Social Security payments and was ultimately responsible for the workers, supervision. Joint employer status was similarly found in Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979) where strawberry growers worked under a patent sublicense agreement with a farm owner and were paid by the owner, but hiring, firing and control were shared by the farm owner and the owner of strawberry patent.
If joint employment status is established, "employers" can be held jointly and severally liable for compliance with wage and hour laws (29 C.F.R. § 791.2). Joint employment status also can have an impact in the other areas discussed in this outline, such as liability for work-incurred injuries, discriminatory acts and company benefits.

Joint employer issues often arise in the context of “leased employees,” one of the many classes of workers which fall within the penumbra of independent contractors. With staffing firms, the relationship between the firm and its workers typically qualifies as an employer-employee relationship, because of the firm’s control over hiring, firing, and payment of the worker. EEOC Policy Guidance on Contingent Workers (Dec. 3, 1997) (Attachment H hereto). However, the staffing firm might not qualify as the employer where a separate company places its own employees on a staffing firm’s payroll, so as to transfer the time-consuming tasks of administering wages and benefits. Id. In that scenario, the staffing firm leases back the workers to the company, and the workers do not have an employer-employee relationship with the staffing firm. See, e.g., Astrowsky v. First Portland Mortgage Corp., 887 F. Supp. 332 (D. Me. 1995) (in action for wrongful discharge and Title VII violations, employee leasing firm not a joint employer of worker whom it leased back to original employer, where firm merely processed payroll, but exercised no control over the worker).

V. EMERGING WRONGFUL DISCHARGE LIABILITY

The California Supreme Court in Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal. 3d 752 (1984), discussed the potential application of the implied covenant of good faith and fair dealing to contexts outside of just insurance relationships. The court, in commentary not necessary to the decision, noted that injecting the tort remedy into purely "commercial contexts" would involve entering "uncharted and potentially dangerous waters . . . . This is not to say that tort remedies have no place in such a commercial context, but that it is wise to proceed with caution in determining their scope and application." Id. at 769. Since the independent contractor relationship lies somewhere between the employment relationship and a "purely commercial" arrangement, the potential for application of the tort remedy seems considerable. Note that the Foley decision has limited the remedy for breach of the covenant of good faith and fair dealing to (as yet not defined) contract damages. Foley v. Interactive Data Corp., 47 Cal. 3d 654 (1988).

An appellate decision in California in which the court found the distinction between employees and independent contractors "trivial" has been depublished and therefore is not valid precedent. The decision had assumed that wrongful termination tort remedies were available to an independent contractor. Caplan v. St. Joseph's Hospital, 188 Cal. App. 3d 1193 (1987) (depublished).

The valid precedential position, at least in California, is that independent contractors cannot sue in tort for wrongful discharge. In Abrahamson v. NME Hospitals, Inc., 195 Cal. App. 3d 1325 (1987), a doctor had contracted with the hospital to manage the laboratory and pathology department for one year. Each party had the right to terminate without cause upon 90 day's notice. The doctor sued under a variety of public policy and good faith covenant theories after his services were terminated with notice. The doctor claimed he was terminated because he would not condone the poor patient care in the hospital.

In Wallis v. Farmers Group, Inc., 220 Cal. App. 3d 718 (1990), review denied, 1990 Cal. LEXIS 3716 (1990), the court upheld a jury verdict awarding contract damages to an insurance agent whose agency was terminated without good cause. However, the court reversed the verdict to the extent it awarded the agent--an "independent contractor" in the court's terms--tort damages for breach of the implied covenant of good faith and fair dealing, ruling that under Foley such damages were unavailable. Id. at 734-736.

VI. EMPLOYMENT LAWS THAT APPLY (OR MAY APPLY) TO INDEPENDENT CONTRACTORS

As noted above, the law pertaining to independent contractors is always evolving. A trend has been emerging, both on the federal and state level, whereby independent contractors are being granted more and more rights traditionally afforded only to employees. This section examines how employment laws which in the past only applied to employees, are now being used (or may be used) to protect independent contractors.

A. Prohibited Forms of Discrimination

Although independent contractors have no rights under most employment discrimination laws, Title 42 United States Code Section 1981 provides a cause of action to independent contractors for discrimination in contracting on the basis of race, color, or ancestry. Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8 (1st Cir. 1999), modified, 79 FEP 1737 (1st Cir. 1999), cert. denied, 145 L. Ed. 2d 712 (1999). The Court interpreted Section 1981 to apply to independent contractors based on its language. Section 1981(b) defines the phrase "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." The court concluded that the racially offensive actions of store officials resulted in a hostile environment, which also led to the termination of plaintiff’s contract with the store.

Since Danco, more and more federal courts are applying Section 1981 to independent contractors. See Benton v. Cousins Props., Inc., 2002 U.S. Dist. LEXIS 23056, at *71 (N.D. Ga. 2002) (“Like the First Circuit, this Court will likewise assume that Congress did not omit

In Sistare-Meyer v. Young Men’s Christian Ass’n, 58 Cal. App. 4th 10, 16-18 (1997), review denied (1998), the California Court of Appeals held that independent contractors did not have a right to bring a claim for wrongful termination in violation of public policy based upon the California Constitution.

Footnote 26: In Sistare-Meyer v. Young Men’s Christian Ass’n, 58 Cal. App. 4th 10, 16-18 (1997), review denied (1998), the California Court of Appeals held that independent contractors did not have a right to bring a claim for wrongful termination in violation of public policy based upon the California Constitution.
independent contractors from coverage under amended Section 1981.”); Webster v. Fulton County, 283 F.3d 1254 (11th Cir. 2002) (Independent contractor states a claim for violation of Section 1981 when contractor alleges that governmental entity refused to award contract in retaliation for contractor's filing of a lawsuit charging governmental entity with discrimination).

Moreover, state anti-discrimination statutes may also protect independent contractors, as well as employees. For example, California Civil Code Section 51.5 is the state equivalent of 42 U.S.C. § 1981, although it covers more types of discrimination. The relevant section of the statute states:

No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

Very few cases have interpreted Section 51.5. Although Section 51.5 would appear to prohibit discrimination against independent contractors, no court rulings have confirmed this yet. One recent federal decision, Strother v. Southern Cal. Permanente Med. Group, 79 F.3d 859, 875 (9th Cir. 1996), held that someone in a partnership relationship could not bring a claim under Section 51.5 against another partner, reasoning that the statute “appears to be aimed only at discrimination in relationships similar to the proprietor/customer relationship” (i.e., where the person claiming discrimination sought to buy something from the discriminator). Companies should be very cautious about relying upon this interpretation of Section 51.5. Since the statute specifically states that it applies to decisions to “refuse to buy from [or] contract with” another person or business (emphasis added), companies should not be surprised if future decisions interpret Section 51.5 to apply to discrimination against independent contractors.

B. Sexual Harassment

California law (apparently uniquely) provides a cause of action for independent contractors who suffer sexual harassment. California Civil Code Section 51.9 provides a cause of action where “there is a business, service, or professional relationship between the plaintiff and the defendant,” the plaintiff suffers sexual harassment, the plaintiff could not terminate the business relationship without difficulty, and the plaintiff suffers an injury. In 1999, Governor Davis signed into law Assembly Bill 519, which makes Civil Code Section 51.9 an even more powerful cause of action for independent contractors. Assembly Bill 519 makes the following changes:

(1) the independent contractor is no longer required to show that the sexual harassment continued after he or she requested it to stop;
(2) the law now provides a cause of action when an “agent” of the defendant commits the harassment;

(3) verbal, visual or physical conduct of a sexual nature, or hostile conduct based on gender is now enough to support a cause of action; previously sexual advances, solicitations, sexual requests or demands for sexual compliance were required;

(4) the law previously stated that the plaintiff had to suffer “economic loss or disadvantage” or “personal injury” because of the harassment to sue; now the law provides specifically that an employee also can sue if he or she merely suffers “emotional distress or the violation of statutory or constitutional rights.”

C. Discriminatory Harassment

California has also amended its employment laws to protect independent contractors from discriminatory harassment. The California Fair Employment & Housing Act (“FEHA”) now protects “person[s] providing services pursuant to a contract” from discriminatory harassment. Previously, FEHA protected only traditional employees or applicants from harassment. Thus, if a secretary, who was an employee, and a computer programmer, who was an independent contractor, sat next to each other in an office, and both were subjected to racial harassment by a supervisor, the secretary could assert a FEHA claim while the computer programmer could not. Now, it is equally unlawful under FEHA for employers to harass contract workers and employees based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or age. Cal. Gov’t. Code § 12940(h)(1).

As defined by FEHA, a contract worker or, more precisely, “[a] person providing services pursuant to a contract,” is a person who meets all of the following criteria:

1. The person has the right to control the performance of the contract for services and discretion as to the manner of performance;

2. The person is customarily engaged in an independently established business; and

3. The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer’s work.

Cal. Gov’t. Code, §12940(h)(4) (emphasis added).

Although this definition of a “contract worker” is very similar to the traditional test for an independent contractor, it is noticeably more narrow. Under the traditional test, the worker’s right to control the manner of performance is normally sufficient (in and of itself) to make the

Bridge, Catherine, Assembly Bill Would Protect Contract Workers, The Recorder (May 12, 1999).
worker an independent contractor. Under the FEHA definition, by contrast, in addition to having
the right to control the performance and manner of performance, the worker also must be
“customarily engaged in an independently established business,” have “control over the time and
place the work is performed,” supply “the tools and instruments used in the work,” and “perform
work that requires a particular skill not ordinarily used in the course of the employer’s work.”
This definition leaves several situations in which FEHA will not protect particular independent
contractors from harassment because the independent contractor neither qualifies as an employee
or contract worker as defined by FEHA.

For example, assume Mr. Smith is a computer programming employee of Company A
and, to earn extra money, works on the side as an independent contractor for Company B writing
a computer program for a flat fee. Mr. Smith does not have his own business and he uses a
Company B computer (which contains all necessary software) to write the computer program.
FEHA apparently would not cover Mr. Smith because: (1) he is not an employee but an
independent contractor; yet, (2) he does not meet FEHA’s definition of a contract worker
because he is not engaged in an independently established business and he does not use his own
tools and instruments to conduct the work.

Since the legislature probably did not intend to create this gap in FEHA coverage, the
legislature may further amend FEHA to make its harassment provisions cover all independent
contractors.

D. W-2 Reporting of Contractor’s Income Could Trigger “Employee”
Status

A law that took effect in California in January of 2000 provides that “there is a rebuttable
presumption” that the term “employer” under FEHA “includes any person or entity identified as
the employer on the employee’s federal form W-2 (wage and tax statement).” Cal. Govt. Code
§ 12928. Sometimes companies incorrectly withhold wages and issue W-2 forms for
independent contractors. Issuing a W-2 to a contractor could have the effect of giving the
contractor all of the rights of an employee to sue for discrimination under FEHA. As a general
rule, independent contractors may not sue companies under FEHA unless the claim is for
discriminatory harassment (i.e., they cannot sue for discriminatory terminations, nonpromotion,
compensation, etc.). There are many close cases where it is unclear whether a worker is an
employee or a contractor and the W-2 form presumption could be determinative in those cases.

E. EDD Reporting Requirements

Effective January 1, 2001, companies have expanded reporting obligations to the
Employment Development Department (“EDD”) regarding independent contractor earnings data.
The reporting obligations apply only if and when the aggregate payments to the contractor equal
or exceed $600 in any year, or a contract is entered into that provides for present or future
payments to the contractor of at least $600 in any year. Cal. Unemp. Ins. Code §1088.8(c). As
soon as either of the above events occurs, the company must within 20 days submit a report to
EDD that includes particular information about the contractor.
The law contains explicit restrictions as to the circumstances under which the EDD may release the above information. Specifically, the information may be released only for purposes of establishing, modifying, or enforcing child support obligations, and for child support collection purposes as provided in the tax code. Cal. Unemp. Ins. Code §1088.8(e). The law prohibits the EDD from using this information for any other purpose. Nonetheless, knowledge by the EDD of specific details of employer-independent contractor contracts and relationships could prompt an audit by that entity as to the classification of the employer’s workers. Cal. Unemp. Ins. Code §1088.8(e). As such, employers should view this law as a call to verify that their workers are properly classified.

VII. PROCEDURES IF THE WORKER’S STATUS IS NOT CLEAR

Often, it may not be clear whether the worker is a bona fide independent contractor or perhaps inadvertently converted to employee status. Indeed, the case may involve "good" and "bad," or at least "muddy facts." Since actions speak louder than words, many companies have concluded that there needs to be some centralized corporate coordination to conform the working relationship to the language of an independent contractor agreement and minimize risk by controlling carefully the manner in which the company receives the services of independent contractors. A mutual desire to avoid employment taxes and withholding is not in and of itself sufficient to create an independent contractor relationship.

Many companies have accordingly found it advisable to have either a centralized corporate independent contractor "clearing house" or a set of established procedures to determine who may be retained as an independent contractor. Such procedures are particularly well suited to those situations in which there is a managerial tendency to accommodate workers who wish to avoid employee status and be characterized as independent contractors while they function in fact as employees. The employer can incorporate the various factors--or the most stringent statement of factors taken from the various contexts--into written guidelines. Indeed, many corporations--particularly those using "technical service employees"--are creating formal written policies for the selection and use of independent contractors, using Revenue Ruling 87-41 as guidance. An independent contractor “self audit,” discussed below and attached hereto as Attachment I, is one example of a concrete procedure employers can use to aid their classification of service providers.

VIII. PRACTICAL TIPS TO MINIMIZE RISK OR DRAFT AN INDEPENDENT CONTRACTOR AGREEMENT

The fact that the agencies and the courts judge the contractor’s relationship to the company by actions, rather than expressed intentions, should not dissuade the employer from using some care to draft an independent contractor agreement. Courts also tend to look closely at the agreement, where one is in evidence. In addition, the claim of an independent contractor relationship is strengthened if the parties take the time to reduce their understanding to writing.

The regulatory tests for an independent contractor relationship offer some obvious suggestions for contractual terms. The same terms can serve as a cautionary list in those circumstances in which a formal agreement is not used but the company nonetheless wishes to
retain the services of an independent contractor while minimizing legal risks. The most important terms to consider include:

1. a statement that the contractor is an independent contractor and not an employee, and that the parties understand and intend such a relationship;

2. a statement to the effect that the contractor, not the employer, has the right to control how the project is to be accomplished; if the worker truly is an independent contractor, the employer's only legitimate actions will be to insure that the product meets specifications, not control the means of production;

3. a provision for payment by the project, where feasible, and not by increment of hour, day or week;

4. a provision that the contractor supply all tools and equipment, if possible (and the workplace, if applicable);

5. a provision specifying methods, rights and consequences of termination by either party;

6. a statement that the contractor shall pay all out-of-pocket expenses of the project, such as telephone calls, copying costs and travel;

7. a statement that the contractor shall be responsible to account for all taxes for itself and contractor's own employees;

8. a provision requiring the contractor to provide workers compensation coverage for its employees (or a provision making the contractor a special employee for the purpose of workers' compensation coverage only) and any legally required benefits;

9. a provision expressly exempting the contractor from all employee benefits; and

10. a cut-off date for the agreement, if the nature of the relationship demands that the agreement be open-ended instead of project-based.

The decision in Borello, supra, cautions that an "employee" cannot waive the benefits of state social legislation, specifically workers' compensation coverage. Contractual language does not control if the agreement does not truly reflect an independent contractor relationship. Ultimately, the essence of the relationship---whether independent contractor or employee---will be revealed by a review of the facts unique to the relationship established against the legal standards of the particular statute of interest.

IX. MANAGING THE RISK OF A CONTINGENT WORKFORCE

A myriad of different employment law and human resources operations questions arise when a “supplier” company contracts with a “host” company to supply it with workers on-site at the host company’s premises. For example:
1) Who is liable if the host company refuses to pay overtime to non-exempt employees of the supplier company due such compensation?28

   • Would it change your answer if you were to conclude that the federal Fair Labor Standards Act (“FLSA”) does not impose joint and several liability for violations of the FLSA?

   • Would it change your answer if you discovered facts which suggested the “host” company enjoyed a de facto “joint-employer” relationship with the supplier company? (See Attachment C, at column 3: “Independent Contractor Models,” which illustrates this concept).

2) Who is liable if a “host” company manager is surprised to discover the “supplier” company employee just sent over to work on-site at the “host” company has a physical impairment the “host” manager cannot or refuses to accommodate?

   Would your answer change if you were to conclude that Title I (applicable to employment) of the American with Disabilities Act of 1990 (“ADA”) makes an employer jointly and severally liable for unlawful acts against an employer’s employee.29

3) Who is liable if a “host” company employee sexually or racially harasses the “supplier” company’s employee on-site at the “host” company?

   Does it matter if the “host” company harasser is a manager or only an employee?

   Does it change your answer if I were to advise you that some courts have interpreted Title VII of the 1964 Civil Rights Act to include a so-called “interference” clause? See Attachment G: EEOC 12/03/97

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28 The FLSA defines an “employer” to include: “. . . any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.” Accordingly, overtime and minimum wage liability attaches to an “employer,” and not third parties.

29 See for example, 42 U.S.C. § 12112
   (a) General rule
      “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . .
   (b) Construction
      as used in subsection (a) of this section, the term ‘discriminate’ includes -
      (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity’s qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs) . . . .”
“Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms”, at pp. 9-10 and footnote 17 (at p.29).

A. Legal Framework For Analysis

1. Generally, “employers” only liable: With certain exceptions (i.e. the recently amended California FEHA), most employment law statutes only provide for “employer” obligations to “employees”.

2. Joint-Employer Work Around: The joint employer doctrine, addressed above, avoids the roadblock that a third party is not the employee’s employer by finding that a third party company is the employee’s employer simultaneously in time the employee is also an employee of the other employer.

3. “Interference Clause” Work Around: Title VII, the ADA and the Age Discrimination in Employment Act (“ADEA”), however, may also make it unlawful for an employer to discriminate against “an individual” and not just the employer’s employees. This is the so-called “interference” clause prohibiting an employer (i.e. “host” company) from interfering with an individual’s employment by the “supplier” company (perhaps by subjecting the individual to unlawful discrimination).

4. “Agent of the Employer” Work Around: An “employer” may be liable for the actions of its “agents.” Depending upon the facts, a “head hunter,” union or temporary employment firm could be an agent of the employer.

5. Third Party “Tort” Liability Work Around: Depending upon the facts, an employee may sue a third party (i.e., a “host” company) in tort even though the worker is a statutory employee of his/her employer (i.e., the “supplier” company).

6. Third Party Interference with Contract Liability Work Around: Depending upon the facts, an employee may sue a third party (i.e., perhaps a manufacturer) in contract for interfering with the employee’s employment with the “supplier” company.


31 Generally, an agent of the employer is one which it has a right to control.

32 Thus, while workplace injuries may, for example, be subject to the exclusive remedies of the workers compensation code and the Occupational Safety and Health Act (“OSHA”) as to the employee’s employer, the employee can nonetheless sue third party manufacturers (perhaps of defective equipment) in tort for alleged negligence.

33 In California, a tort cause of action for “intentional interference with contractual advantage” will lie when (a) there is a culpable intent to cause the breach; (b) plaintiff’s performance of the contract is more expensive or burdensome, or interferes with the formation of a prospective or existing economic relationship by unlawfully disrupting same). See Savage v. PG&E, 21 Cal. App. 4th 434 (1993); Seaman’s Direct Buying Service, Inc. v. Standard Oil Company of California, 36 Cal. 3d 752 (1984).
B. Does Either The “Host” Or “Supplier” Company Enjoy A Right Of Indemnity, As A Matter Of Law?

In the absence of an express contractual right of indemnity running between the “host” and “supplier” company, state law contract law may give rise between “host” and “supplier” companies to implied indemnities as to both “loss” and the cost of defense. As an example, we discuss below California state law.

1. Express and Implied Indemnity

Under California law, a right of indemnity is either express or implied. Express indemnity arises by written contract, and operates to effect a complete shift of the loss from the indemnitee to the indemnitor. Thus, express indemnity is an “all or nothing” right of indemnity.

Implied indemnity, by contrast, is judicially created and finds its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular (tort) case. Implied indemnity, unlike express indemnity, is based on principles of comparative fault. Thus, implied indemnity includes the entire range of possible apportionments of loss, from no right to any indemnity, to a right to partial indemnity, to a right to complete indemnity.

In addition, the doctrine of partial implied indemnity applies even if one of the tortfeasors is held liable on a strict liability theory and the other tortfeasor is held liable only for negligence.

34 Cal. Civ. Code §§ 2772-2784.5 govern the interpretation of express indemnity agreements. Cal. Civ. Code §§ 1549-1701 also generally govern interpretation of express indemnity agreements. Public policy limitations on contracts for indemnity are set forth in Civil Code § 1668 (contracts for exempting one from liability for fraud, willful injury, or violation of law), 2773 (agreement indemnify against unlawful act), 2782-2782.5 (construction contracts), and 2784.5 & hauling, trucking, or cartage contracts).

35 The right of implied indemnity in contract is a judicially created doctrine. See American Motorcycle Assn. v. Superior Court, 20 Cal. 3d 578, 598 (1978). The term “implied indemnity” is also sometimes referred to as “equitable indemnity” or “comparative indemnity,” or any combination of the three.


37 All the law we could find in California imposing implied indemnity obligations arose in the context of “tort” liability, and did not spring from statutory causes of action (whether joint and several liability arose under the statute or not.) We assume, however, there is no impediment to an implied indemnity arising from statute.

38 Bay Development Ltd. v. Superior Court, 50 Cal. 3d 1012, 1028-1029 (1990).

39 American Motorcycle Assn. v. Superior Court, 20 Cal. 3d 578, 598 (1978). In American Motorcycle, the California Supreme Court restructured the right of implied indemnity from a method to effect a complete shift of loss depending on relative degrees of culpability, to a method to achieve equitable apportionment of loss among multiple tortfeasors based on principles of comparative fault.

For either express or implied indemnity, it is important to note that indemnity rights do not accrue until the indemnitee suffers actual “loss” by paying a claim. Thus, there is no right of indemnity if the indemnitee is not liable to the plaintiff. In addition, there is no right of indemnity if the indemnitor is determined to have no liability to the plaintiff. Therefore, as a practical matter, there is no right to indemnity unless and until there has been a “loss” by both the indemnitor and the indemnitee.

2. Proceedings To Enforce Indemnity Rights

Any party may obtain a determination of indemnity rights by filing a cross complaint for declaratory relief in an action brought by a third party, prior to the final disposition of the proceedings. In addition, an indemnitee may also enforce indemnity rights in a subsequent action after paying the underlying claim. In either event, the parties should use a special verdict asking the trier of fact to apportion the respective percentages of fault between the parties, therefore obviating the need for a separate determination of fault apportionment after the conclusion of the underlying matter.

3. Award of Attorney’s Fees

If a co-defendant is found to be without fault and prevails in the underlying action, the party has not suffered “loss,” and therefore, cannot prevail on a claim for indemnity against the party at fault. The prevailing co-defendant, however, may seek attorney’s fees incurred in defending the third-party litigation. Pursuant to Code of Civil Procedure Section 1021.6, a court may award attorney’s fees to a party that prevails on a claim for implied indemnity if, on motion, the court reviews the evidence in the principal case and finds that: (1) the bad act of the indemnitor required the indemnitee to act in protection of its interests by defending an action by a third party; (2) the indemnitor was properly notified of the demand to provide a defense on behalf of the indemnitee and did not do so; and (3) the trier of fact determined that the indemnitee was without fault in the underlying case that the indemnitee has a final judgment entered in its favor granting a summary judgment, a nonsuit, or a directed verdict.

X. CONDUCTING AN INDEPENDENT CONTRACTOR SELF-AUDIT

Employers increasingly recognize the potential liabilities and obligations created by the misclassification of a worker as an independent contractor. An incorrect assessment may result in years of litigation and unexpected contract, tax, wage and benefit liabilities. The failure by

44 See Valley Circle Estates v. VTN Consolidated, Inc., 33 Cal. 3d 604, 611-612 (1983) (noting that proper form of cross complaint for indemnity is one for declaratory relief).
47 California Code of Civil Procedure Section 1021.6.
corporate management to appreciate, recognize and correctly classify independent contractors can produce disastrous results.

The continued use of independent contractors and the potential for significant liability mandates that companies take preventive measures to minimize the prospect of litigation. This self-audit is designed to aid companies to determine whether a “true” independent contractor relationship exists with members of its contingent workforce. This audit is designed to identify potentially problematic relationships and to raise important questions regarding the use of independent contractors. Although some of these issues may already be self-evident, this audit serves to focus attention on deficiencies and potential problems that companies overlook but need to address and solve. Of course, there may be issues that are not included in this self-audit which are important to your organization. Therefore, we recommend that you incorporate issues specific to your company.

Issues and problems raised by this audit may require consultation with legal counsel to ensure that your companies’ classifications comply with state and federal law. Consequently, careful analysis under this audit, before legal consultation, can greatly reduce the time and expense of having legal counsel review your contingent workforce from “square one.”

When conducting an audit, companies should recognize that discussions and notes may be subject to discovery in subsequent litigation. Litigants could use this audit as a “road map” to areas of weakness in your classifications, or even to prove liability. However, companies may be able to use several privileges to limit access to audit information if it properly invokes those privileges. Nevertheless, as is apparent from the discussion below, these privileges apply in only limited circumstances, and may be extremely difficult to satisfy. Prudent companies will therefore conduct this audit as though the information obtained will be discoverable.

A. Self–Critical Analysis Privilege

One privilege to limit access to information is referred to as the “self-critical analysis” privilege. The self-critical analysis privilege is recognized as a qualified privilege which protects certain critical self-appraisals. It allows individuals or businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them in future litigation. The rationale for the doctrine is that such critical self-evaluation fosters the compelling public interest in observance of the law. A corporation that knows its evaluations will remain confidential will be more likely to self-audit and thereby produce more candid and accurate evaluations. Accordingly, the company could proactively prevent violations and discover minor infractions before they develop into major litigation.

Not all courts recognize or accept the “self-critical analysis” privilege. Even courts that recognize the “self-critical analysis” privilege hold that a parties’ need for

relevant evidence may outweigh the risk that disclosure will impede self-evaluation. Therefore, courts hold that plaintiffs are entitled to discovery of documents where the information is necessary to prove the parties’ case.

B. Attorney-Client Privilege

The attorney-client privilege normally protects communications, made in confidence, to an attorney, by a client, for the purpose of seeking or obtaining legal advice. Its purpose is to promote freedom of consultation, to encourage clients to be completely truthful, and thus to assist the attorney in giving competent legal advice. Attorneys are sometimes the best auditors, particularly where an understanding of complex legal considerations is critical to determining the “true” nature of a worker. However, where an attorney conducts an audit, the parties must recognize a risk that the attorney will be deemed to be acting in a role other than as counsel, and that neither the attorney’s efforts nor communications between the attorney and company management will be legally privileged.

The attorney-client privilege does not automatically attach simply because an attorney is involved in an audit. Rather, you must observe certain procedural formalities; both with respect to the inclusion of inside or outside counsel.

The privilege generally applies in federal courts when the party asserting the privilege can show:

1. a professional relationship exists between the attorney and the corporation;
2. the communication involves information needed for the attorney to provide the corporation with legal representation;
3. the company was aware at the time the communication was made that the information was being given to the attorney so the attorney could provide the company with legal services or advice; and
4. the company intended the communications to remain confidential.

Accordingly, to properly invoke the privilege, the company should do, at least, the following:

---

50 Documents sent to an attorney who worked in the company's Employee Relations Department are not necessarily covered by the attorney-client privilege in the absence of proof that the same were "intended to be confidential", or that the "dominant purpose of the communication was to obtain legal advice". Governale v. Airborne Express, Inc., 1997 U.S. Dist. LEXIS 7562 (E.D.N.Y. 1997); See also USPS v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994) ("The mere fact that a communication is made directly to an attorney, or an attorney is copied on a memorandum, does not mean that the communication is necessarily privileged.")
51 Some state codes impose additional or other procedures and protocols applicable to state court matters.
a. A person within the company with sufficient authority to ask attorneys for legal advice and/or to act upon legal advice received should request the assistance of counsel. (Preferably, this is done through a short written communication to the lawyer creating a record memorandum to file of the precise date after which all protected communications would be subject to the privilege.)

b. Once the privilege is invoked, non-lawyer corporate managers within the company should report to the company's legal department or to outside counsel thereafter, taking instruction from counsel, or counsel's agents (i.e., investigators, paralegals, etc.).

c. It is useful to recite, from time to time, that the matter under consideration is proceeding pursuant to the need for legal advice. For example, auditors could begin or end written reports (not only addressing them to counsel) but also requesting counsel to advise what appropriate legal options exist in light of the developing facts. Similarly, counsel should direct the non-lawyer corporate auditor to gather appropriate facts "to allow counsel to give appropriate legal advice to the company".

It is also important to note that the privilege protects only communications and does not prevent the disclosure of underlying facts.\(^5\) It is also necessary that the company not "waive" the privilege by communicating the information to third parties other than those to whom disclosure would be made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for transmission of the communication.

C. Attorney Work Product

Separate from the attorney-client privilege is protection of “attorney work product”. The “work product doctrine” protects from discovery the documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal conclusions counsel prepares \textit{in anticipation of litigation or for trial}.

Like the attorney-client privilege, the work product doctrine is subject to waiver and does not protect factual information in preparation of the lawsuit. The United States Supreme Court

\(^5\) See UpJohn v. United States, supra, 449 U.S. at 395; \textit{In re: Six Grand Jury Witnesses}, 979 F.2d 939, 944 (2nd Cir. 1992) \textit{(Communications between attorney and client regarding an internal investigation were privileged, but factual information contained in written communications, including the results of investigation, were not shielded from discovery): Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, reh'g denied 977 F.2d 1533 (9th Cir. 1992) \textit{(detailed billing statements of counsel not protected by attorney-client privilege). Federal common law allowed discoverability of identity of a client, the amount of the fee, identification of payment by case file name and the general purpose of the work. However, billing statements which revealed the client's motive to seek representation, litigation strategy or the specific nature of those services (for example, the area of law researched) fell within the attorney-client privilege).}

has yet to clarify whether the attorney work product doctrine is "absolute" or whether it is only a "qualified" privilege, and if so, what standards may apply to permit a party litigant to discover opposing counsel’s "work product" prepared in anticipation of litigation or trial.55

After reviewing the preceding issues and concerns, it is evident that conducting a self-audit is a significant task. The limitations of this section make it impossible to raise every issue and, therefore, employers should include all other issues of importance to their companies in their self-audit. Nonetheless, the short-term effort of conducting such an audit yields important long-term gains by identifying problems that companies need to address.

This audit is only the first step in preventing and confronting the misclassification of workers. Once companies identify problems, they must act to correct policies, procedures, and practices that are inconsistent with legal requirements. This audit must not be regarded as a one-time event, but rather as an ongoing process that must be engaged in with regularity as circumstances change.

J.C.F.
D.J.M.
J.N.J.

55 It is beyond the scope of this paper to explore the many conflicting decisions arising under state and federal interpretations of the attorney "work product" doctrine or the doctrine as codified in Federal Rule of Civil Procedure 26(b)(3).
ATTACHMENTS

Attachment A: Code of Conduct for Temporary Placement and Staffing Agencies
Attachment B: Classification of Workers
Attachment C: Independent Contractor Models
Attachment D: Comparison Of IRS Twenty-Factor Tests To Three-Part Borello Tests
Attachment E: Employer Risks Of Misclassifying Employees As Independent Contractors
Attachment G: EEOC 12/03/97 “Enforcement Guidance”: Application of EEO Laws to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms.”
Attachment H: Fenwick & West LLP Independent Contractor Audit form
ATTACHMENT A

Working Partnerships Membership Association
we have joined together to improve the lives of temporary workers

Code of Conduct
Text of Code of Conduct for Temporary Placement and Staffing Agencies

1. Truthful Advertising
2. Fair and Respectful Interviewing Process
3. Standard for Assigning Workers
4. Standards for the Legal Relationship to temporary workers
5. Guidelines for Relationship between Temporary Workers and Regular Employees

RELATED LINKS:
- National Alliance for Fair Employment (NAFFE)
- Washington Alliance of Technology Workers (WashTech)
- Working Partnerships USA

Share Your Temp Tale!
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Code of Conduct Forum
Join discussions of the WPMA code of conduct for temporary placement and staffing agencies....

Code of Conduct

Truthful Advertising
A. Advertisements and information that is given to temporary workers accurately describe in writing available positions and benefits.
B. The Agency fully discloses all service fees as well as benefit requirements and co-payments, at the time of registration.
C. Upon request, the Agency makes its placement, pay and retention figures available to applicants.

<-- Return to Code of Conduct index page
Code of Conduct

Fair and Respectful Interviewing Process

A. All applicants and employees are treated courteously, with dignity and respect.

B. A knowledgeable interviewer informs applicants if they lack necessary qualifications for placement. The interviewer also advises them of ways and places to go to improve their skills and/or qualifications.

C. The Agency shall not discriminate against any applicant based on gender, race, ancestry, age, national origin, religion, marital status, sexual orientation, physical or mental disability, medical condition, socioeconomic level, previous receipt of public benefits, or any other basis protected by local, state or federal law, in accordance with the Fair Employment and Housing Act and Title VII.

D. Applicants should be given copies of all documents signed by the applicants.

<-- Return to Code of Conduct index page
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Code of Conduct

Standard for Assigning workers

A. Notifying and Offering Assignments to Qualified Workers

1. Temporary workers are given reasonable advance notice of the time they start to work their next assignment.

2. Within a reasonable amount of time, the Agency provides the temporary worker, via mail, fax, e-mail or in person, with a written job description for each new assignment detailing:
   - name of the supervisor and place to report
   - hours, days, wages, holidays schedule and anticipated duration
   - tasks to be performed and any training required
   - any changes in the job description will be reflected in an update written agreement

3. Once an assignment is made, the temporary agency does its best to ensure that the actual duties match the position's description. The Agency will respond promptly to any inquiries or problems.

B. Ineligibility Standards

1. At minimum, the Agency does not deny appropriate assignments or place a person on an "ineligible" list because the worker has previously:
   - Filed for workers' compensation or unemployment insurance
   - Reported unsafe working conditions at a worksite
   - Needed to leave an assignment for health of family reasons
   - Turned down as assignment for legitimate reasons, include:
     - Travel time/distance
     - Insufficient notice of the assignment
     - Hours incompatible with available child care arrangements

- Dangerous working conditions or exposure to hazardous materials
- Length of the assignment does not conform to the worker's specifications
- Experience with past discriminatory or disrespectful treatment at the worksite offered
- A payrate that is below that workers' average payrate
- Refusal to serve as a replacement worker during a strike

C. Orientation, Training and Performance Evaluation Standards

1. In an orientation or training session, the Agency clearly articulates all general expectations temporary works must fulfill.
2. The Agency requests that the client provide on-site orientation and training adequate for each assignment.
3. The Agency provides clear and timely feedback on performance which is given to temporary workers after each assignments. Reports on performance are recorded in the temporary worker's personnel file.
4. The Agency encourages and supports temporary workers' efforts to upgrade their skills. If the Agency does not provide training, the Agency will develop a workplan to provide training free of charge or a training reimbursement program within two years.

D. Notice and Penalty Standards

1. Workers are required to give verbal notice to their Agency before leaving any assignment. The Agency does not penalize workers who must leave an assignment due to a family emergency.
2. If an assignment is to be extended beyond he agreed upon duration, the worker may decline without reprisal.
3. If an assignment is to be shortened beyond the agreed upon duration, workers are informed within 24 hours after the client form notifies the Agency of the change.

E. Wage and Benefit Standards

1. Workers should earn a living wage and have realistic access to benefits.
2. The Agency will provide group-rate health insurance. Eligibility requirements and cost associated with accessing healthcare benefits should be
reasonable in regards to the healthcare insurance industry’s current standards and the feasibility of a worker to pay.

3. Sick and holiday pay will begin after 80 hours of work, regardless of the number of assignments or worksite.

4. Upon request, the Agency fully discloses eligibility and premium requirements, as well as the percentage of temporary workers who actually participate in insurance plan(s).

5. All written materials that disclose benefit plans and qualifications are provided in languages most commonly spoken in the area (In Santa Clara County all material will be written in at least English, Spanish and Vietnamese).

6. To the greatest extent possible, the Agency will encourage companies that participate in the Eco Pass program to make it available to temporary employees.

F. Standards for the Treatment of Workers Seeking Regular Employment

1. The employment agreements among the Agency, the Client, and temporary employee, do not unreasonable restrict temporary workers from accepting a job directly with a client.

2. Upon request, the Agency makes it known to applicants the percentage of long-term placement and rate of conversion to regular jobs, including data for specific clients.

3. The Agency provides references promptly upon request.

4. The Agency does not discriminate in offering assignments to temporary workers looking for regular work.

G. Standard for Contesting Unemployment Claims

1. The Agency will not use a different standard for contesting unemployment claims than that normally used for directly hired, regular employees. The Agency does not deny unemployment because the worker has previously:
   - Reported unsafe working conditions at a worksite
   - Needed to take leave for family or health reasons
   - Turned down an assignment for legitimate reasons, including:
     - Insufficient notice of the assignment
     - Dangerous working conditions or exposure to hazardous material
     - Documented experience with past discriminatory or disrespectful treatment

at the work site offered
  o Refusal to serve as a replacement worker during a strike
  o The assignment offer significantly differ from the
    assignment specifications
  in the employment agreement

H. Standard on Workplace Safety

1. The Agency makes every reasonable effort to ensure temporary
  workers are
  assigned to safe work environments with adequate on-site
  supervision.
2. If the job calls for safety equipment or training, the Agency makes
  every
  effort to ensure that the Client will provide every temporary
  worker with
  comparable safety equipment and training to that of regular
  employees at the
  same job site. If the temporary workers will be required to
  purchase safety
  equipment, it will be disclosed to the temporary worker at the time
  the assignment
  is offered.
3. If workers are required to pay for some equipment, that
  requirement may
  not exceed more than one hour worth of wages. Temporary
  workers that are assigned
  longer than 90 days should be provided all of the same safety
  equipment that
  regular workers use.
4. The Agency provides workers with information about state and
  federal employment
  laws and what to do if they experience or identify a health and
  safety violation
  at a client company. The Agency informs its employees of its
  responsibility
  to act on behalf of the worker in such an instant.

<-- Return to Code of Conduct index page
Working Partnerships Membership Association

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Code of Conduct

Standards for the Legal Relationship to temporary workers

A. The Agency clearly states its legal responsibility to the worker in an employment agreement. Minimally, legal issues such as discrimination, harassment, health and safety, unemployment, and workers compensation will be addressed in the employment agreement.

B. The employment agreement clearly states legal remedies temporary workers may pursue in the case of discrimination, harassment, health and safety violations, and collection of unemployment or workers compensation.

C. The Agency makes reasonable efforts to resolve any disputes (outside legal categories) amongst the temporary worker, the Agency or the client firm.

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RELATED LINKS:
National Alliance for Fair Employment (NAFFE)
Washington Alliance of Technology Workers (WashTech)
Working Partnerships USA

Share Your Temp Tale!
You can make a positive difference in the lives of temporary workers by sharing your temp tale. Documented stories we collect through this website will be shared with political leaders, members of the press, other temporary workers, and the greater community.

Code of Conduct Forum
Join discussions of the WPMA code of conduct for temporary placement and staffing agencies....

Working Partnerships Membership Association
2102 Almaden Road, Suite 107
San Jose, California 95125
Phone: (408) 269.7872 Fax:(408) 266.2653
Email: wpma@atwork.org

Training Center
60 S. Market St., Suite 450
San Jose, CA 95113

Code of Conduct

Guidelines for Relationship between Temporary Workers and Regular Employees

If a union organizing effort is underway under National Labor Board regulations or any employees exercise their legal rights to join a union, the temporary agency shall not become involved.

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RELATED LINKS:
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## ATTACHMENT B
### CLASSIFICATION OF WORKERS

### 1. Frequently Used Language

<table>
<thead>
<tr>
<th>Employee</th>
<th>Independent Contractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Full-time</td>
<td>- Consultants</td>
</tr>
<tr>
<td>- Part-time</td>
<td>- Contract Workers</td>
</tr>
<tr>
<td></td>
<td>- Contractors</td>
</tr>
<tr>
<td></td>
<td>- Independent Contractors</td>
</tr>
<tr>
<td></td>
<td>- Intermittent Workers</td>
</tr>
<tr>
<td></td>
<td>- Leased Workers</td>
</tr>
<tr>
<td></td>
<td>- Suppliers</td>
</tr>
<tr>
<td></td>
<td>- Temps. (temporary workers)</td>
</tr>
<tr>
<td></td>
<td>- Vendors</td>
</tr>
</tbody>
</table>

* The essence of the worker’s service controls the result, however, and not his or her title (i.e. “Temp”).

### 2. Typical Durations of Relationship

<table>
<thead>
<tr>
<th>Employee</th>
<th>Independent Contractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Temporary</td>
<td>- Temporary</td>
</tr>
<tr>
<td>- Seasonal</td>
<td>- Long-Term (under limited</td>
</tr>
<tr>
<td>- Probationary</td>
<td>circumstances)</td>
</tr>
<tr>
<td>- Regular (“formerly</td>
<td></td>
</tr>
<tr>
<td>known as permanent”)</td>
<td></td>
</tr>
</tbody>
</table>

* The duration of the service relationship is not dispositive, but is one of many factors in forming the question whether the worker is an employee.

### 3. Typical Methods of Compensation

<table>
<thead>
<tr>
<th>Employee</th>
<th>Independent Contractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Salary</td>
<td>- Project fee (other</td>
</tr>
<tr>
<td>- Hourly</td>
<td>arrangements present greater</td>
</tr>
<tr>
<td></td>
<td>risk)</td>
</tr>
</tbody>
</table>

* The method of compensation, above, is not dispositive of the question whether the worker is an employee or independent contractor.
<table>
<thead>
<tr>
<th>1. Independent Contractor Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corp. A</td>
</tr>
<tr>
<td>Agency Supplying Independent Contractor</td>
</tr>
<tr>
<td>Corp. A</td>
</tr>
<tr>
<td>Independent Contractor</td>
</tr>
</tbody>
</table>

A bona fide independent contractor may enter into an agreement to provide services (a) directly to or (b) through a referring agency.

<table>
<thead>
<tr>
<th>2. Classic Single Employer Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corp. A</td>
</tr>
<tr>
<td>Corp. B</td>
</tr>
<tr>
<td>Employee</td>
</tr>
</tbody>
</table>

A worker may contract to be an employee with a corporation ("B" in this example), perform services for "B" which benefit "A" (i.e., a technician may repair A's photocopier and do so without becoming an employee of "A").

<table>
<thead>
<tr>
<th>3. Joint Employer Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corp. A</td>
</tr>
<tr>
<td>Corp. B</td>
</tr>
<tr>
<td>Employee</td>
</tr>
</tbody>
</table>

If a worker is under the direction and control of both the corporation using his or her services and another corporation (perhaps even a referring agency), a joint employment relationship can exist whereby both companies "employ" the worker.

<table>
<thead>
<tr>
<th>4. Alter-Ego/Ally Doctrine/Single Entity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corp. A</td>
</tr>
<tr>
<td>Corp. B</td>
</tr>
<tr>
<td>Employee</td>
</tr>
</tbody>
</table>

Corporation "A" (the parent Corporation) may find that it is jointly legally responsible for an employee of "B" (a subsidiary) if "A" exerts sufficient "control" over "B".
## ATTACHMENT D
COMPARISON OF IRS TWENTY-FACTOR TESTS TO THREE-PART BORELLO TESTS

<table>
<thead>
<tr>
<th>IRS Test</th>
<th>Common Law</th>
<th>California Labor Code</th>
<th>Other Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. whether the individual is required to follow instructions;</td>
<td>1. whether the &quot;employer&quot; has the right to control the manner and means of accomplishing the result;</td>
<td>1. whether the individual has the right of control;</td>
<td>1. the principal's right of control;</td>
</tr>
<tr>
<td>2. amount of training of the individual related to that particular job;</td>
<td>5. whether a high level of skill is required by the occupation;</td>
<td>11. whether a particular skill is required;</td>
<td>4. whether special skill is required;</td>
</tr>
<tr>
<td>3. amount of integration of the individual into the employer's business;</td>
<td>9. whether or not the work is part of the regular business of the employer;</td>
<td>10. performing work which is not in the ordinary course of the principal's work;</td>
<td>6. whether the services are an integral part of the employer's business;</td>
</tr>
<tr>
<td>4. whether services are rendered personally;</td>
<td>2. substantial investment other than personal services;</td>
<td>6. whether the individual hires employees;</td>
<td>3. individual's investment in materials or equipment, or his helpers;</td>
</tr>
<tr>
<td>5. whether the employer hires, fires and pays assistants; instructions;</td>
<td>7. the length of time the services are provided;</td>
<td></td>
<td>5. the degree of permanence of the working relationship;</td>
</tr>
<tr>
<td>6. existence of a continuing relationship;</td>
<td>1. right of control;</td>
<td>1. right of control;</td>
<td>1. right of control;</td>
</tr>
<tr>
<td>7. establishment of set amount of work hours;</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

56 We have distilled these nine “common law rules” from the Supreme Court of California’s decision in S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341 (1989).

57 We have distilled these eleven rules from California Labor Code section 2750.5, which the Borello court cited as helpful to determine independent contractor status. Id. at 2074.

58 We have distilled this “six factor [economic realities] test” which courts often apply in wage/hour matters.
<table>
<thead>
<tr>
<th>IRS Test</th>
<th>Common Law</th>
<th>California Labor Code</th>
<th>Other Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. whether the individual must devote substantially full time to the job;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9. whether the individual works on the employer's premises;</td>
<td>6. worker provides the supplies, tools and the place of work;</td>
<td>1. right of control;</td>
<td>1. right of control;</td>
</tr>
<tr>
<td>10. whether the individual works according to a sequence set by the employer;</td>
<td>4. individual's occupation usually is done without supervision;</td>
<td>1. right of control;</td>
<td>1. right of control;</td>
</tr>
<tr>
<td>11. whether the individual must submit regular or written reports to the employer;</td>
<td>1. right of control;</td>
<td>1. right of control</td>
<td>1. right of control;</td>
</tr>
<tr>
<td>12. whether the individual is paid by time rather than by project;</td>
<td>8. method of payment, by the job rather than the hour or day;</td>
<td>8. compensation by project rather than by time;</td>
<td>1. right of control;</td>
</tr>
<tr>
<td>13. whether the individual is reimbursed for expenses;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>14. whether the individual furnishes the necessary tools and materials;</td>
<td>6. worker provides the supplies, tools and the place of work;</td>
<td>9. individual supplies the tools;</td>
<td>3. individual's investment in materials or equipment, or his employment of helpers;</td>
</tr>
<tr>
<td>15. whether the individual has invested in the facilities for performing the services;</td>
<td>3. individual's business is a distinct occupation or business;</td>
<td>2. individual has a substantial investment other than personal services</td>
<td>3. individual's investment in materials or equipment, or his employment of helpers;</td>
</tr>
<tr>
<td>16. whether the individual can realize a profit or a loss;</td>
<td></td>
<td>4. the individual's opportunity for profit or loss depending on his managerial skills;</td>
<td>2. the individual's opportunity for profit or loss depending on his managerial skills;</td>
</tr>
<tr>
<td>17. whether the individual works for more than one firm at a time;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IRS Test</td>
<td>Common Law</td>
<td>California Labor Code</td>
<td>Other Courts</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
<td>------------------------------------------------------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>18. whether the individual makes his/her services available to the general public;</td>
<td>3. whether the individual's business is a distinct occupation or business;</td>
<td>3. whether the individual holds himself out to be in business for himself;</td>
<td></td>
</tr>
<tr>
<td>19. whether the &quot;employer&quot; has the right to discharge the individual; and</td>
<td>2. whether the &quot;employer&quot; has the right to discharge at will, without cause;</td>
<td>7. whether the relationship is severable or terminable at will by the principal or gives rise to an action for breach of controls.</td>
<td></td>
</tr>
<tr>
<td>20. whether the individual has the right to terminate the relationship.</td>
<td>10. whether the parties believe they are creating an independent contractor relationship;</td>
<td>7. whether the relationship is severable or terminable at-will by the principal or gives rise to an action for breach of contract.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>12. the intent of the parties;</td>
<td>5. whether the individual holds a license pursuant to the Business and Professions Code;</td>
<td></td>
</tr>
</tbody>
</table>
## ATTACHMENT E
### EMPLOYER RISKS OF MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS

<table>
<thead>
<tr>
<th>Risk</th>
<th>Agency</th>
<th>Legal Test</th>
<th>Possible Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. State and federal tax liability for failure to withhold payroll</td>
<td>Internal Revenue Service (&quot;IRS&quot;)</td>
<td>IRS Test</td>
<td>Unpaid taxes</td>
</tr>
<tr>
<td>taxes on wages; pay social security or unemployment tax, or make</td>
<td></td>
<td></td>
<td>Penalty: 5% per month (maximum 25%)</td>
</tr>
<tr>
<td>State Disability Insurance payments</td>
<td></td>
<td></td>
<td>penalty for failure to file a payroll tax return (IRC §§ 6651(a)(1)) Interest</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(IRC §§ 6601)</td>
</tr>
<tr>
<td>2. Employer may owe minimum wages/overtime to &quot;contractors&quot;</td>
<td>California Franchise Tax Board</td>
<td>Common Law Test (Rev. &amp; Taxation Code §§ 18801.5)</td>
<td>Unpaid taxes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Penalty: 6% of wages subject to withholding</td>
</tr>
<tr>
<td></td>
<td>California Employment</td>
<td>Common Law Test (Unemp. Ins. Code § 621(a))</td>
<td></td>
</tr>
<tr>
<td>Development Department (&quot;EDD&quot;)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Unpaid taxes</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Penalty: 10% of required contribution (Unemployment Insurance Code §§ 1112)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Interest (Unemployment Insurance Code §§ 1113)</td>
<td></td>
</tr>
<tr>
<td>3. &quot;Contractors&quot; may pursue employment discrimination charges, and</td>
<td>U.S. Department of Labor (&quot;DOL&quot;)</td>
<td>Economic Realities Test: Right-to-Control is one of six factors</td>
<td>Back wages</td>
</tr>
<tr>
<td>will be counted as &quot;employees&quot; for purposes of compliance with</td>
<td></td>
<td></td>
<td>Liquidated damages</td>
</tr>
<tr>
<td>affirmative action plans</td>
<td></td>
<td></td>
<td>$10,000 Fine, 6 months' imprisonment</td>
</tr>
<tr>
<td></td>
<td>California Labor Commissioner</td>
<td>Borello implies rejection of Common Law Test</td>
<td>Back wages</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>$50 Fine, 30 days' imprisonment</td>
</tr>
<tr>
<td></td>
<td>Equal Employment Opportunity Commission</td>
<td>Hybrid Test: Economic Realities Test with Emphasis on Right-to-Control</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Factors</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Office of Federal Contract Compliance Programs (&quot;OFCCP&quot;)</td>
<td>Hybrid Tests: Economic Realities Test with emphasis on Right-to-Control</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Factors</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Debarment</td>
<td></td>
</tr>
<tr>
<td>Risk</td>
<td>Agency</td>
<td>Legal Test</td>
<td>Possible Penalties</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>------------------------------------------------</td>
<td>------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>California Department of Fair Employment and Housing Commission (“DFEH”)</td>
<td>Borello implies rejection of Common Law Test</td>
<td>- Back Pay</td>
<td></td>
</tr>
<tr>
<td>- Back Pay</td>
<td></td>
<td>- Front Pay</td>
<td></td>
</tr>
<tr>
<td>- Compensatory Damages</td>
<td></td>
<td>- (Punitive Damages if civil suit)</td>
<td></td>
</tr>
<tr>
<td>4. Employer may treat &quot;contractors&quot; as part of the bargaining unit for purposes of jurisdiction</td>
<td>National Labor Relations Board (“NLRB”)</td>
<td>Common Law Test with emphasis on Right-to-Control Factors</td>
<td>- Reinstatement</td>
</tr>
<tr>
<td>- Reinstatement</td>
<td></td>
<td>- Back Pay</td>
<td></td>
</tr>
<tr>
<td>- Election</td>
<td></td>
<td>- Cease-and-Desist Order</td>
<td></td>
</tr>
<tr>
<td>- Bargaining Order</td>
<td></td>
<td>- Litigation</td>
<td></td>
</tr>
<tr>
<td>- Litigation</td>
<td></td>
<td>- Expenses</td>
<td></td>
</tr>
<tr>
<td>- Equitable Relief</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>California Agricultural Labor Relations Board (“ALRB”)</td>
<td>Borello implies rejection of Common Law Test</td>
<td>- $100-$1,000 fine for each individual violation</td>
<td>- Reinstatement</td>
</tr>
<tr>
<td>- Reinstatement</td>
<td></td>
<td>- Back Pay</td>
<td></td>
</tr>
<tr>
<td>- Cease-and-Desist Order</td>
<td></td>
<td>- Cease-and-Desist Order</td>
<td></td>
</tr>
<tr>
<td>- Bargaining Order</td>
<td></td>
<td>- Bargaining Order</td>
<td></td>
</tr>
<tr>
<td>5. I-9 immigration forms will not be on file for &quot;contractors&quot;</td>
<td>Immigration and Naturalization Service (“INS”)</td>
<td>IRS Test</td>
<td>- $100-$1,000 fine for each individual violation</td>
</tr>
<tr>
<td>- DR</td>
<td></td>
<td></td>
<td>- Reinstatement</td>
</tr>
<tr>
<td>- Back Pay</td>
<td></td>
<td>- Cease-and-Desist Order</td>
<td></td>
</tr>
<tr>
<td>- Bargaining Order</td>
<td></td>
<td>- Litigation</td>
<td></td>
</tr>
<tr>
<td>- Litigation</td>
<td></td>
<td>- Expenses</td>
<td></td>
</tr>
<tr>
<td>- Equitable Relief</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Employer may fail to count faux &quot;contractors&quot; as employees when determining coverage under Work Adjustment and Retraining Notification Act (“WARN”); employer will not give nee employees and local government required 60 days' notice</td>
<td>Private Right of Action</td>
<td>Totality of circumstances</td>
<td>Failure to give notice to individual--up to 60 days' back pay and benefits; failure to give notice to local government--fines of up to $500 pr day</td>
</tr>
<tr>
<td>7. Nee employees will be eligible for workers' compensation insurance benefits</td>
<td>California Workers' Compensation Appeals Board</td>
<td>Borello rejected Common Law Test</td>
<td></td>
</tr>
<tr>
<td>Risk</td>
<td>Agency</td>
<td>Legal Test</td>
<td>Possible Penalties</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-------------------------</td>
<td>------------</td>
<td>------------------------------</td>
</tr>
<tr>
<td>8. Nee employees may file wrongful discharge claims</td>
<td>Private Right of Action</td>
<td>Undecided</td>
<td>- Back Pay</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Front Pay</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Punitive Damages</td>
</tr>
<tr>
<td>9. Nee employees may be eligible for pension and employee welfare</td>
<td>Private Right of Action</td>
<td>Undecided</td>
<td>- Compensatory - Damages</td>
</tr>
<tr>
<td>benefits (such as medical insurance, vacations, sabbaticals and</td>
<td></td>
<td></td>
<td>- Punitive Damages</td>
</tr>
<tr>
<td>severance pay)</td>
<td></td>
<td></td>
<td>- Benefits</td>
</tr>
</tbody>
</table>
ATTACHMENT F

LABOR DEPARTMENT STATISTICS

The attached document entitled “Employed Workers with Alternative and Traditional Work Arrangements by Occupation and Industry, February 2001,” is a U.S. Department of Labor spreadsheet containing data as to the number and percentage of independent contractors in the U.S. workforce. This is the most current data provided by the Department of Labor.

Statistics for prior years (1997 and 1999), which are referenced above, can be found by accessing the Internet website address identified on this attachment.
Table 8. Employed workers with alternative and traditional work arrangements by occupation and industry, February 2001

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Independent contractors</th>
<th>On-call workers</th>
<th>Temporary help agency workers</th>
<th>Workers provided by contract firms</th>
<th>Workers with traditional arrangements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occupation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total, 16 years and over (thousands)</td>
<td>8,585</td>
<td>2,089</td>
<td>1,169</td>
<td>633</td>
<td>121,917</td>
</tr>
<tr>
<td>Percent</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>Executive, administrative, and managerial</td>
<td>10.4</td>
<td>5.5</td>
<td>6.7</td>
<td>13.1</td>
<td>15.1</td>
</tr>
<tr>
<td>Professional specialty</td>
<td>10.6</td>
<td>25.9</td>
<td>10.4</td>
<td>25.4</td>
<td>16.0</td>
</tr>
<tr>
<td>Technicians and related support</td>
<td>3.2</td>
<td>4.2</td>
<td>6.5</td>
<td>9.1</td>
<td>3.5</td>
</tr>
<tr>
<td>Sales occupations</td>
<td>15.6</td>
<td>6.6</td>
<td>7.7</td>
<td>3.1</td>
<td>12.0</td>
</tr>
<tr>
<td>Administrative support, including clerical</td>
<td>3.9</td>
<td>0.7</td>
<td>29.5</td>
<td>4.4</td>
<td>14.8</td>
</tr>
<tr>
<td>Services</td>
<td>12.7</td>
<td>18.8</td>
<td>7.6</td>
<td>18.6</td>
<td>13.3</td>
</tr>
<tr>
<td>Precision production, crafts, and repair</td>
<td>10.5</td>
<td>13.0</td>
<td>7.6</td>
<td>19.3</td>
<td>10.3</td>
</tr>
<tr>
<td>Operators, fabricators, and laborers</td>
<td>7.8</td>
<td>15.0</td>
<td>23.3</td>
<td>6.3</td>
<td>13.3</td>
</tr>
<tr>
<td>Farming, forestry, and fishing</td>
<td>5.6</td>
<td>2.2</td>
<td>9</td>
<td>7.7</td>
<td>1.8</td>
</tr>
<tr>
<td>Industry</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total, 16 years and over (thousands)</td>
<td>8,585</td>
<td>2,089</td>
<td>1,169</td>
<td>633</td>
<td>121,917</td>
</tr>
<tr>
<td>Percent</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>Agriculture</td>
<td>5.7</td>
<td>2.1</td>
<td>.5</td>
<td>.5</td>
<td>1.8</td>
</tr>
<tr>
<td>Mining</td>
<td>.3</td>
<td>.4</td>
<td>.9</td>
<td>1.3</td>
<td>.4</td>
</tr>
<tr>
<td>Construction</td>
<td>19.6</td>
<td>16.1</td>
<td>2.9</td>
<td>5.8</td>
<td>5.4</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>3.7</td>
<td>5.3</td>
<td>21.1</td>
<td>20.8</td>
<td>15.7</td>
</tr>
<tr>
<td>Transportation and public utilities</td>
<td>5.6</td>
<td>3.7</td>
<td>7.3</td>
<td>6.4</td>
<td>7.3</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>2.7</td>
<td>2.3</td>
<td>2.8</td>
<td>3.6</td>
<td>4.1</td>
</tr>
<tr>
<td>Retail trade</td>
<td>8.8</td>
<td>13.8</td>
<td>3.7</td>
<td>2.6</td>
<td>17.2</td>
</tr>
<tr>
<td>Finance, insurance, and real estate</td>
<td>9.2</td>
<td>3.4</td>
<td>6.6</td>
<td>4.1</td>
<td>6.9</td>
</tr>
<tr>
<td>Services</td>
<td>44.4</td>
<td>50.5</td>
<td>45.6</td>
<td>36.8</td>
<td>36.3</td>
</tr>
<tr>
<td>Public administration</td>
<td>1.1</td>
<td>5.3</td>
<td>(1)</td>
<td>31.9</td>
<td>4.9</td>
</tr>
<tr>
<td>Not reported or ascertained</td>
<td>-</td>
<td>-</td>
<td>6.1</td>
<td>6.5</td>
<td>-</td>
</tr>
</tbody>
</table>

1 Less than 0.05 percent.

NOTE: Workers with traditional arrangements are those who do not fall into any of the "alternative arrangements" categories. Detail may not sum to totals due to rounding. For temporary help agency workers and workers provided by contract firms, the industry classification is that of the place to which they were assigned. Dash represents zero.

http://www.bls.gov/news.release/conemp.t08.htm

1/27/2003
ATTACHMENT G

The U.S. Equal Employment Opportunity Commission

EEOC NOTICE
Number 915.002
Date 12/03/97


2. PURPOSE: This document provides guidance regarding the application of the anti-discrimination statutes to temporary, contract, and other contingent employees.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel.


12/3/97
Date
\s\ 
Gilbert F. Casellas
Chairman

EXECUTIVE SUMMARY

This Guidance addresses the application of the federal employment discrimination statutes to individuals placed in job assignments by temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firms' clients. The term "staffing firm" is used in this document to refer to these types of firms.

Staffing firm workers are generally covered under the anti-discrimination statutes. This is because they

1/30/2003 http://www.eeoc.gov/docs/conting.html
typically qualify as "employees" of the staffing firm, the client to whom they are assigned, or both. Thus, staffing firms and the clients to whom they assign workers may not discriminate against the workers on the basis of race, color, religion, sex, national origin, age, or disability.

The guidance makes clear that a staffing firm must hire and make job assignments in a non-discriminatory manner. It also makes clear that the client must treat the staffing firm worker assigned to it in a non-discriminatory manner, and that the staffing firm must take immediate and appropriate corrective action if it learns that the client has discriminated against one of the staffing firm workers. The document also explains that staffing firms and their clients are responsible for ensuring that the staffing firm workers are paid wages on a non-discriminatory basis. Finally, the guidance describes how remedies are allocated between a staffing firm and its client when the EEOC finds that both have engaged in unlawful discrimination.

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[NOTE: Page numbers removed in electronic version]

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DISCRIMINATORY ASSIGNMENT PRACTICES

DISCRIMINATION AT WORK SITE

DISCRIMINATORY WAGE PRACTICES

ALLOCATION OF REMEDIES

CHARGE PROCESSING INSTRUCTIONS

Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms

INTRODUCTION

This Guidance addresses the application of Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA) to individuals placed in job assignments by temporary

1/30/2003 http://www.eeoc.gov/docs/conting.html
employment agencies and other staffing firms, i.e., "contingent workers." The term "contingent workers" generally refers to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long-term employment.

This guidance focuses on a large subgroup of the contingent work force -- those who are hired and paid by a "staffing firm," such as a temporary employment agency or contract firm, but whose working conditions are controlled in whole or in part by the clients to whom they are assigned.

Recent statistics compiled by the National Association of Temporary and Staffing Services (NATSS) show that the temporary help industry currently employs more than 2.3 million individuals.1 That number represents a 100% increase since 1991, when 1.15 million individuals were employed in temporary help jobs. NATSS statistics also show that the professional segment of the temporary help industry (including occupations in accounting, law, sales, and management) has risen significantly.

A 1995 survey by the Bureau of Labor Statistics (BLS) showed that workers paid by temporary employment agencies were more likely to be female and African American than workers in traditional job arrangements.2 While workers provided by contract firms were disproportionately male.3 BLS found that workers paid by temporary help agencies were heavily concentrated in administrative support and laborer occupations and earned 60 percent of the traditional worker wage.4 The largest proportion of contract workers was employed in the services industry, and female contract workers earned slightly less than traditional workers while male contract workers earned more. BLS also found that contract and temporary workers had lower rates of health insurance and pension coverage than traditional workers, and that the majority of temporary workers would have preferred traditional work arrangements.

Staffing firms may assume that they are not responsible for any discrimination or harassment that their workers confront at the clients' work sites. Similarly, some clients of staffing firms may assume that they are not the employers of temporary or contract workers assigned to them, and that they therefore have no EEO obligations toward these workers. However, as this guidance explains, both staffing firms and their clients share EEO responsibilities toward these workers.

The Commission has addressed in previous guidance several of the coverage issues discussed in this document.5 However, because use of contingent workers is increasing, it is important to set out an updated and unified policy that more specifically explains how the anti-discrimination laws apply to this segment of the workforce.

This document provides guidance concerning the following

1/30/2003 http://www.eeoc.gov/docs/conting.html
issues:

coverage under the EEO laws, including coverage of workers assigned to federal agencies;

liability of staffing firms and/or clients for discriminatory hiring, assignment, or wage practices;

liability of staffing firms and/or clients for unlawful discrimination or harassment at the assigned work site; and

allocation of damages where both the staffing firm and its client violate EEO laws.

STAFFING SERVICE WORK ARRANGEMENTS

The activities of the following types of staffing firms are addressed in this guidance:

Temporary Employment Agencies

Unlike a standard employment agency, a temporary employment agency employs the individuals that it places in temporary jobs at its clients' work sites. The agency recruits, screens, hires, and sometimes trains its employees. It sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage. The agency bills the client for the services performed.

While the worker is on a temporary job assignment, the client typically controls the individual's working conditions, supervises the individual, and determines the length of the assignment.

Contract Firms

Under a variety of arrangements, a firm may contract with a client to perform a certain service on a long-term basis and place its own employees, including supervisors, at the client's work site to carry out the service. Examples of contract firm services include security, landscaping, janitorial, data processing, and cafeteria services.

Like a temporary employment agency, a contract firm typically recruits, screens, hires, and sometimes trains its workers. It sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage.

The primary difference between a temporary agency and a contract firm is that a contract firm takes on full operational responsibility for performing an ongoing service and supervises its workers at the client's work site.

1/30/2003 http://www.eeoc.gov/docs/conting.html
Other Types of Staffing Firms

There are many variants on the staffing firm/client model. For example, "facilities staffing" is an arrangement in which a staffing firm provides one or more workers to staff a particular client operation on an ongoing basis, but does not manage the operation.

Under another model, a client of a staffing firm puts its workers on the firm's payroll, and the firm leases the workers back to the client. The purpose of this arrangement is to transfer responsibility for administering payroll and benefits from the client to the staffing firm. A staffing firm that offers this service does not recruit, screen, or train the workers.

The term "staffing firm" is used in this document to describe generically these types of firms, although more specific terms are used where necessary for purposes of clarity.

COVERAGE ISSUES

This section sets forth criteria for determining whether a staffing firm worker qualifies as an "employee" within the meaning of the anti-discrimination statutes or an independent contractor; whether the staffing firm and/or its client qualifies as the worker's employer(s); and whether the staffing firm or its client can be liable for discriminating against the worker even if it does not qualify as the worker's employer. This section also discusses coverage of staffing firm workers assigned to jobs in the Federal Government and coverage of workers assigned to jobs in connection with welfare programs. Finally, this section explains the method for counting workers of a staffing firm or its client to determine whether an entity has the minimum number of employees to be covered under the applicable anti-discrimination statute.

1. Are staffing firm workers "employees" within the meaning of the federal employment discrimination laws?

Yes, in the great majority of circumstances.7 The threshold question is whether a staffing firm worker is an "employee" or an "independent contractor." The worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself. The label used to describe the worker in the employment contract is not determinative. One must consider all aspects of the worker's relationship with the firm and the firm's client.8 As the Supreme Court has emphasized, there is "no shorthand formula or magic phrase that can be applied to find the answer... . . . all incidents of the relationship must be assessed with no one factor being
Factors that indicate that the worker is a covered employee include:

a) the firm or the client has the right to control when, where, and how the worker performs the job;

b) the work does not require a high level of skill or expertise;

c) the firm or the client rather than the worker furnishes the tools, materials, and equipment;

d) the work is performed on the premises of the firm or the client;

e) there is a continuing relationship between the worker and the firm or the client;

f) the firm or the client has the right to assign additional projects to the worker;

g) the firm or the client sets the hours of work and the duration of the job;

h) the worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;

i) the worker has no role in hiring and paying assistants;

j) the work performed by the worker is part of the regular business of the firm or the client;

k) the firm or the client is itself in business;

l) the worker is not engaged in his or her own distinct occupation or business;
m) the firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;

n) the worker is considered an employee of the firm or the client for tax purposes (i.e., the entity withholds federal, state, and Social Security taxes);

o) the firm or the client can discharge the worker; and

p) the worker and the firm or client believe that they are creating an employer-employee relationship.

This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the fact-finder must make an assessment based on all of the circumstances in the relationship between the parties.
Example 1: A temporary employment agency hires a worker and assigns him to serve as a computer programmer for one of the agency's clients. The agency pays the worker a salary based on the number of hours worked as reported by the client. The agency also withholds social security and taxes and provides workers' compensation coverage. The client establishes the hours of work and oversees the individual's work. The individual uses the client's equipment and supplies and works on the client's premises. The agency reviews the individual's work based on reports by the client. The agency can terminate the worker if his or her services are unacceptable to the client. Moreover, the worker can terminate the relationship without incurring a penalty. In these circumstances, the worker is an "employee."

2. Is a staffing firm worker who is assigned to a client an employee of the firm, its client, or both?

Once it is determined that a staffing firm worker is an "employee," the second question is who is the worker's employer. The staffing firm and/or its client will qualify as the worker's employer(s) if, under the factors described in Question 1, one or both businesses have the right to exercise control over the worker's employment. As noted above, no one factor is decisive, and it is not necessary even to satisfy a majority of factors. The determination of who qualifies as an employer of the worker cannot be based on simply counting the number of factors. Many factors may be wholly irrelevant to particular facts. Rather, all of the circumstances in the worker's relationship with each of the businesses should be considered to determine if either or both should be deemed his or her employer. If either entity qualifies as the worker's employer, and if that entity has the statutory minimum number of employees (see Question 6), then it can be held liable for unlawful discriminatory conduct against the worker. If both the staffing firm and its client have the right to control the worker, and each has the statutory minimum number of employees, they are covered as "joint employers."

a. Staffing Firm:

The relationship between a staffing firm and each of its workers generally qualifies as an employer...

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employee relationship because the firm typically hires the worker, determines when and where the worker should report to work, pays the wages, is itself in business, withholds taxes and social security, provides workers' compensation coverage, and has the right to discharge the worker. The worker generally receives wages by the hour or week rather than by the job and often has a continuing relationship with the staffing firm. Furthermore, the intent of the parties typically is to establish an employer-employee relationship.12

In limited circumstances, a staffing firm might not qualify as an employer of the workers that it assigns to a client. For example, in some circumstances, a client puts its employees on the staffing firm's payroll solely in order to transfer the responsibility of administering wages and insurance benefits. This is often referred to as employee leasing. If the firm does not have the right to exercise any control over these workers, it would not be considered their "employer."13

b. Client:

A client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment, along with the agency. This is because the client usually exercises significant supervisory control over the worker.14

Example 2: Under the facts of Example 1, above, the temporary employment agency and its client qualify as joint employers of the worker because both have the right to exercise control over the worker's employment.

Example 3: A staffing firm hires the charging party (CP) and sends her to perform a long term accounting project for a client. Her contract with the staffing firm states that she is an independent contractor. CP retains the right to work for others, but spends substantially all of her work time performing services for the client, on the client's premises. The client supervises CP, sets her work schedule, provides the necessary equipment and supplies, and specifies how the work is to be accomplished. CP reports the number of hours she has worked to the staffing firm. The firm pays her and bills the client for the time worked. It reviews her work based on reports by the client and has the right to terminate her if she is failing to perform the requested services. The staffing firm will
replace her with another worker if her work is unacceptable to the client.

In these circumstances, despite the statement in the contract that she is an independent contractor, both the staffing firm and the client are joint employers of CP.15

Clients of contract firms and other types of staffing firms also qualify as employers of the workers assigned to them if the clients have sufficient control over the workers, under the standards set forth in Question 1, above. For example, the client is an employer of the worker if it supplies the work space, equipment, and supplies, and if it has the right to control the details of the work to be performed, to make or change assignments, and to terminate the relationship. On the other hand, the client would not qualify as an employer if the staffing firm furnishes the job equipment and has the exclusive right, through on-site managers, to control the details of the work, to make or change assignments, and to terminate the workers.

Example 4: A staffing firm provides janitorial services for its clients. It hires the workers and places them on each client's premises under the supervision of the contract firm's own managerial employees. The firm's manager sets the work schedules, assigns tasks to the janitors, provides the equipment they need to do the job, and supervises their work performance. The client has no role in controlling the details of the work, making assignments, or setting the hours or duration of the work. Nor does the client have authority to discharge the worker. In these circumstances, the staffing firm is the worker's exclusive employer; its client is not a joint employer.

Example 5: A staffing firm provides landscaping services for clients on an ongoing basis. The staffing firm selects and pays the workers, provides health insurance and withholds taxes. The firm provides the equipment and supplies necessary to do the work. It also supervises the workers on the clients' premises. Client A reserves the right to direct the staffing firm workers to perform particular tasks at particular times or in a specified manner, although it does

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not generally exercise that
authority. Client A evaluates the
quality of the workers' performance
and regularly reports its findings
to the firm. It can require the
firm to remove the worker from the
job assignment if it is
dissatisfied. The firm and the
Client A are joint employers.

3. Can a staffing firm or its client be liable for
unlawfully discriminating against a staffing firm
worker even if it does not qualify as the worker's
employer?

An entity that has enough employees to qualify as
an employer under the applicable EEO statute can be
held liable for discriminating against an
individual who is not its employee. The anti-
discrimination statutes not only prohibit an
employer from discriminating against its own
employees, but also prohibit an employer from
interfering with an individual's employment
opportunities with another employer. Thus, a
staffing firm that discriminates against its
client's employee or a client that discriminates
against a staffing firm's employee is liable for
unlawfully interfering in the individual's
employment opportunities.

Example 6: A staffing firm assigned
one of its employees to maintain and
repair a client's computers. The
firm supplied all the tools and
direction for the repairs. The
technician was on the client's
premises only sporadically over a
three to four week period and worked
independently while there. The
client did not report to the firm
about the number of hours worked or
about the quality of the work. The
client had no authority to make
assignments or require work to be
done at particular times. After a
few visits, the client asked the
contract firm to assign someone
else, stating that it was not
satisfied with the worker's computer
repair skills. However, the worker
believes that the true reason for
the client's action was racial bias.

The client does not qualify as a
joint employer of the worker because
it had no ongoing relationship with
the worker, did not pay the worker
or firm based on the hours worked,
and had no authority over hours,
assignments, or other aspects of the
means or manner by which the work
was achieved. However, if the

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client's request to replace the worker was due to racial bias, and if the client had fifteen or more employees, it would be liable for interfering in the worker's employment opportunities with the staffing firm.

Example 7: A company puts its employees on the payroll of a staffing firm solely in order to transfer the responsibility of administering wages and insurance benefits for the company's workers. The staffing firm administers a health insurance policy for its client's workers that does not cover AIDS-related illness. Two workers file ADA charges against the staffing firm and the client. The staffing firm claims that it is not an employer of the workers and therefore falls outside ADA coverage.

The staffing firm does not qualify as a joint employer of the workers because it does not have the requisite degree of control -- it did not hire the workers; establish their wage rates or hours; control the conditions of work; manage personnel disputes; or have the right to fire the workers. Nevertheless, the firm shares liability with its client for the discriminatory health insurance plan if it has fifteen or more employees of its own to fall under the coverage of the ADA.19 This is because the firm's administration of the insurance plan interferes in the workers' access to employment opportunities or benefits.20

4. Do the same coverage principles apply when a staffing firm assigns a worker to a federal agency?

The principles regarding joint employer coverage are the same. Thus, a federal agency qualifies as a joint employer of an individual assigned to it if it has the requisite control over that worker, as discussed in Questions 1 and 2. If so, and if the agency discriminates against the individual, it is liable whether or not the individual is on the federal payroll.21

In contrast to private employers, a federal agency that does not qualify as a joint employer of the worker assigned to it cannot be found liable for discrimination under a "third party interference" theory. This is because Title VII, the ADEA, and

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Section 501 of the Rehabilitation Act only permit claims against the federal government by "employees or applicants for employment."  

5. Are workers participating in work-related activities in connection with welfare programs protected by the federal employment discrimination laws? If so, who is the employer of such a worker? What types of claims might arise?

a. Employee Status

Welfare recipients participating in work-related activities are protected by the federal anti-discrimination statutes if they are "employees" within the meaning of the federal employment discrimination laws. See Question 1. The simple fact of participation in one of these activities is not dispositive of the question of whether the federal employment discrimination laws apply. Rather, the same analysis applies which is used to determine whether any other worker is covered by the federal employment discrimination laws. Under the criteria that have been set out, welfare recipients would likely be considered employees in most of the work activities described in the new welfare law, including unsubsidized and subsidized public and private sector employment, work experience, and on-the-job training programs. On the other hand, individuals engaged in activities such as vocational education, job search assistance, and secondary school attendance would probably not be covered.

b. Employer Status

While some workers participating in these programs will have a single employer, others may have joint employers. For example, a state or local welfare agency may function as a staffing firm and the "direct" employer may function as the client. In some cases, a state or local welfare agency may contract with a temporary employment agency to place the welfare recipients in job assignments. The determination of whether any or all of these entities are employers of the worker is based on the same criteria set forth in answer to Questions 1 and 2 that apply to any other employment situation. The fact that an entity does not pay the worker a salary does not, by itself, defeat a finding of an employment relationship. Moreover, even if an entity is not the worker's employer, it can be found liable under the employment discrimination laws based on the interference theory explained in the answer to Question 3.

c. Types of Claims

Types of claims which may arise include, for example, harassment, discriminatory assignments, discriminatory termination, failure to provide

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reasonable accommodation to persons covered under the Americans with Disabilities Act, and retaliation.

6. Which workers are counted when determining whether a staffing firm or its client is covered under Title VII, the ADEA, or the ADA?

The staffing firm and the client each must count every worker with whom it has an employment relationship. Although a worker assigned by a staffing firm to a client may not appear on the client’s payroll, the worker must be counted as an employee of both entities if they qualify as joint employers. The Supreme Court has made clear that a respondent must count each employee from the day that the employment relationship begins until the day that it ends, regardless of whether the employee is present at work or on leave on each working day during that period. Thus, a client of a staffing firm must count each worker assigned to it from the first day of the job assignment until the last day. The staffing firm also must count the worker as its employee during every period in which the worker is sent on a job assignment.

Staffing firms are typically covered under the anti-discrimination statutes, because their permanent staff plus the workers that they send to clients generally exceeds the minimum statutory threshold. Clients may or may not be covered, depending on their size.

In cases where questions are raised regarding coverage, the investigator should ask the respondent to name and provide records regarding every individual who performed work for it, including all individuals assigned by staffing firms and any temporary, seasonal, or other contingent workers hired directly by the respondent. If the investigator has questions about the documents produced and cannot otherwise obtain the necessary information, he or she may consider deposing the respondent. The investigator should then determine which of the named individuals qualified as employees of the respondent rather than independent contractors, according to the standards set forth in Questions 1 and 2, above.

**DISCRIMINATORY ASSIGNMENT PRACTICES**

A staffing firm is obligated, as an employer, to make job assignments in a nondiscriminatory manner. It is also obligated as an employment agency to make job referrals in a nondiscriminatory manner. The staffing firm’s client is liable if it sets discriminatory criteria for

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the assignment of workers. The following question and answer explore these issues in detail.

7. If a worker is denied a job assignment by a staffing firm because its client refuses to accept the worker for discriminatory reasons, is the staffing firm liable? Is the client?

a. Staffing Firm

The staffing firm is liable for its discriminatory assignment decisions. Liability can be found on any of the following bases: 1) as an employer of the workers assigned to clients (for discriminatory job assignments); 2) as a third party interferer (for discriminatory interference in the workers' employment opportunities with the firm's client); and/or 3) as an employment agency for (discriminatory job referrals).31

The fact that a staffing firm's discriminatory assignment practice is based on its client's requirement is no defense. Thus, a staffing firm is liable if it honors a client's discriminatory assignment request or if it knows that its client has rejected workers in a protected class for discriminatory reasons and for that reason refuses to assign individuals in that protected class to that client. Furthermore, the staffing firm is liable if it administers on behalf of its client a test or other selection requirement that has an adverse impact on a protected class and is not job-related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k).

b. Client

A client that rejects workers for discriminatory reasons is liable either as a joint employer or third party interferer if it has the requisite number of employees to be covered under the applicable anti-discrimination statute.

Example 8: A staffing firm that provides job placements for nurses receives a job order from an individual client for a white nurse to provide her with home-based nursing care. The firm agrees to refer only white nurses for the job. The firm is violating Title VII, both as an employment agency for its discriminatory referral practice and as an employer for the discriminatory job assignment. The client is not covered by Title VII because she does not have fifteen or more employees.

Example 9: A temporary employment agency receives a job order for a temporary receptionist. The client
requires that the individual assigned to it speak English fluently because a large part of the job entails communication with English-speaking persons who call the client or who come to the client's work place. The agency assigns an Asian American individual who speaks English fluently, but with an accent. The client insists that the agency replace her with someone who can speak unaccented English. The agency complies with that request and sends an individual who speaks English fluently with no accent.

The Asian American individual files a charge with the EEOC. The investigator determines that English fluency was necessary for the job. However, he further determines that CP's accent does not interfere with her ability to communicate and that she has effectively performed similar jobs. The investigator properly concludes that both the client and the staffing firm are liable for terminating CP on the basis of her national origin.

Example 10: A staffing firm provides machine operators to its clients. One of its clients requires that all workers assigned to it pass a certain paper and pencil test. The firm administers the test to its available workers and refers only those who pass the test. An African American individual who is denied an assignment with the client files charges against both the staffing firm and its client, alleging that administration of the test results in the disproportionate exclusion of African Americans. An investigation shows that the test does have an adverse impact on African Americans and does not accurately measure the skills that are necessary for job performance. Therefore, both the staffing firm and its client are in violation of Title VII.

DISCRIMINATION AT WORK SITE

A client of a staffing firm is obligated to treat the workers assigned to it in a nondiscriminatory manner. Where the client fails to fulfill this obligation, and the staffing firm knows or should know of the client's discrimination, the firm must take corrective action.

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within its control. The following questions and answers explore these issues in detail.

8. If a client discriminates against a worker assigned by a staffing firm, who is liable?

Client: If the client qualifies as an employer of the worker (see Questions 1 and 2), it is liable for discriminating against the worker on the same basis that it would be liable for discriminating against any of its other employees.

Even if the client does not qualify as an employer of the worker, it is liable for discriminating against that individual if the client’s misconduct interferes with the worker’s employment opportunities with the staffing firm, and if the client has the minimum number of employees to be covered under the applicable discrimination statute. See Question 3.

Staffing Firm: The firm is liable if it participates in the client’s discrimination. For example, if the firm honors its client's request to remove a worker from a job assignment for a discriminatory reason and replace him or her with an individual outside the worker's protected class, the firm is liable for the discriminatory discharge. The firm also is liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control.

The adequacy of corrective measures taken by a staffing firm depends on the particular facts. Corrective measures may include, but are not limited to: 1) ensuring that the client is aware of the alleged misconduct; 2) asserting the firm’s commitment to protect its workers from unlawful harassment and other forms of prohibited discrimination; 3) insisting that prompt investigative and corrective measures be undertaken; and 4) affording the worker an opportunity, if (s)he so desires, to take a different job assignment at the same rate of pay.

The staffing firm should not assign other workers to that work site unless the client has undertaken the necessary corrective and preventive measures to ensure that the discrimination will not recur. Otherwise, the staffing firm will be liable along with the client if a worker later assigned to that client is subjected to similar misconduct.

Example 11: A temporary receptionist placed by a temporary employment agency is subjected to severe and pervasive unwelcome sexual comments and advances by her supervisor at the assigned work site. She complains to the agency, and the agency informs its client of

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the allegation. The client refuses to investigate the matter, and instead asks the agency to replace the worker with one who is not a "troublemaker." The agency tells the worker that it cannot force the client to take corrective action, finds the worker a different job assignment, and sends another worker to complete the original job assignment.

The client is liable as an employer of the worker for harassment and for retaliatory discharge.

The temporary employment agency also is liable for the harassment and retaliatory discharge because it knew of the misconduct and failed to undertake adequate corrective action. Informing the client of the harassment complaint was not sufficient -- the agency should have insisted that the client investigate the allegation of harassment and take immediate and appropriate corrective action. The agency should also have asserted the right of its workers to be free from unlawful discrimination and harassment, and declined to assign any other workers until the client undertook the necessary corrective and preventive measures. The agency unlawfully participated in its client's discriminatory misconduct when it acceded to the client's request to replace the worker with one who was not a "troublemaker."

If the replacement worker is subjected to similar harassment, the agency and the client will be subject to additional liability.

Example 12: A staffing firm provides computer services for a company that has more than 15 employees. The staffing firm assigns an individual to work on-site for that client. When the client discovers that the worker has AIDS, it tells the staffing firm to replace him because the client's employees fear infection. The staffing firm alerts the client that they are both prohibited from discriminating against the worker, and that such a discharge would violate the ADA. The client nevertheless continues to insist that the firm remove the worker from
the work assignment and replace him with someone else. The staffing firm has no choice but to remove the worker. However, it declines to replace him with another worker to complete the assignment because to do so would constitute acquiescence in the discrimination. Furthermore, the firm offers the worker a different job assignment at the same rate of pay. The client is liable for the discriminatory discharge, either as an employer or third party interferer. The staffing firm is not liable because it took immediate and appropriate corrective action within its control.

9. If a staffing firm sends its employee on a job assignment with a federal agency and the individual is subjected to discrimination while on the assignment, is the federal agency liable? Is the staffing firm? What procedures should the individual follow in filing a complaint?

The federal agency is liable for discriminating against the worker if it qualifies as an employer of the worker. If the federal agency does not qualify as an employer of the staffing firm worker under the criteria in Questions 1 and 2, it will not be liable for discriminating against that worker under the statutes enforced by the EEOC. A federal agency is liable for employment discrimination under these statutes only where it has sufficient control to be deemed an employer of the worker. See Question 4.

The staffing firm is liable if it participated in the federal agency's discrimination or if it knew or should have known of the discrimination and failed to intervene, under the principles discussed in Question 8, above.

If the staffing firm worker seeks to pursue a complaint against the federal agency as his or her employer, (s)he should contact an EEO Counselor at the federal agency within 45 days of the date of the alleged discrimination. If the individual also seeks to pursue a claim against the staffing firm, (s)he should file a separate charge with an EEOC field office. In such circumstances, the EEOC investigator should alert the individual as to the different time frames and procedures in the federal and private sectors. The investigator should also contact the EEO office of the federal agency once the individual files the federal sector complaint in order to coordinate the federal and private sector investigations.

DISCRIMINATORY WAGE PRACTICES

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A staffing firm may not discriminate in the payment of wages on the basis of race, sex, religion, national origin, age, or disability. Its clients share that obligation.

10. If a staffing firm assigns a male and female to a client to perform substantially equal work, and the female is paid a lower wage than the male, would the firm and/or the client be subject to Equal Pay Act or Title VII liability?

Under the EPA, men and women must receive equal pay for equal work.37 The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, a sex-based wage disparity violates the EPA if the jobs are in the same establishment, require substantially equal skill, effort, and responsibility, are performed under similar working conditions, and if no statutory defense applies. Wage differences that are not based on sex, but on bona fide distinctions between temporary and permanent workers, can be justified under the EPA as based on a "factor other than sex."38 Both the staffing firm and its client are liable for a violation of the Equal Pay Act if they both qualify as "employers" of the worker bringing the complaint.39

A violation of the EPA also constitutes a violation of Title VII as long as there is Title VII coverage.40 Furthermore, a sex-based wage disparity violates Title VII even if the jobs are not substantially equal under EPA standards, if there is other evidence of wage discrimination.41 Moreover, an entity with fifteen or more employees is liable under Title VII for wage discrimination even if it does not qualify as an employer of the worker assigned to it, if the wage discrimination interferes with the worker's employment opportunities.

Example 13: A temporary employment agency assigned CP (female) to a temporary job as a hospital aide. CP discovered that the agency had also assigned a male to a temporary job as an "orderly" at the same hospital at a higher wage. CP files charges against the agency and the hospital, alleging that her job and that of the male orderly were substantially equal, and that the wage disparity violated the Equal Pay Act and Title VII. CP's charge against the hospital also challenges a disparity between her wages and those of permanent male aides and orderlies at the hospital.

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The investigator determines that the temporary employment agency and the hospital were joint employers of CP and that both entities had control over the rates of pay for the hospital aide and orderly jobs. The investigator also determines that the temporary aide and orderly jobs were substantially equal under EPA standards, and that no defense applies. Therefore, he finds that the agency and the hospital are both liable under the EPA and Title VII on the claim that the temporary aide and orderly should have received the same wage. The investigator further determines that the wage differential between the temporary and permanent aide and orderly jobs was based on a factor other than sex, since the hospital paid all its temporary workers less than permanent workers filling the same jobs, regardless of sex. Therefore, "no cause" is found on this latter claim.

ALLOCATION OF REMEDIES

11. If the Commission finds reasonable cause to believe that both a staffing firm and its client have engaged in unlawful discrimination, how are back wages and damages allocated between the respondents?

Where the combined discriminatory actions of a staffing firm and its client result in harm to the worker, the two respondents are jointly and severally liable for back pay, front pay, and compensatory damages. This means that the complainant can obtain the full amount of back pay, front pay, and compensatory damages from either one of the respondents alone or from both respondents combined.42 Punitive damages under Title VII and the ADA,43 and liquidated damages under the ADEA,44 are individually assessed against and borne by each respondent in accordance with its respective degree of malicious or reckless misconduct.45 This is because punitive damages are designed not to compensate the victim for his or her harm, but to punish the respondent.46 Of course, no respondent can be required to pay a sum of future pecuniary damages, damages for emotional distress, and punitive damages, in excess of its applicable statutory cap. The investigator should contact the legal unit in his or her office for advice in determining how to allocate damages between the parties.

Computation of Monetary Relief

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The first step is to compute lost wages (including back and front pay); compensatory damages for both pecuniary loss and emotional distress; and punitive damages.47 This computation should be made without regard to the statutory caps on damages,48 and, except for punitive damages, without regard to either respondent’s ability to pay.49 This initial computation will establish the charging party’s total wage and other compensable losses, as well as the full calculation of punitive damages.

Back Pay, Front Pay, and Past Pecuniary Damages

The next step is to determine the allocation between the respondents of back and front pay and past pecuniary damages. The charging party can obtain the full amount of these remedies because they are not subject to the statutory caps. The Commission can pursue the entire amount from either the staffing firm or the client, or from both combined.50 However, the total amount actually paid cannot exceed the sum of back and front wages and past pecuniary damages owed to the worker.

Application of the Statutory Cap on Damages

The final step is to determine each respondent’s liability for compensatory and punitive damages subject to the statutory caps. The total amount paid by a respondent for compensatory damages for emotional distress and future pecuniary harm, and for punitive damages, cannot exceed its statutory cap. Thus, while the initial determination of the appropriate amount of compensatory and/or punitive damages is made without regard to the caps, the caps may affect the allocation of damages between two respondents as well as the total damages paid to the charging party. In applying the caps to the actual allocation of damages, the following principles apply:

For compensatory damages subject to the caps, each respondent is responsible for any portion of the total damages up to its cap.

For punitive damages, each respondent is only responsible for the damages which have been assessed against it and only up to its applicable statutory cap.

After the fact-finder has determined the amount of compensatory damages for emotional distress and future pecuniary harm, and the amount of punitive damages for which either or both respondents are liable, these amounts should be allocated between the two respondents in order to yield the maximum payable relief for the charging party.

If the total compensatory damages are within the sum of the two respondents’ caps, the

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damages should be allocated to assure that
the full amount is paid.

If one or both respondents are liable for punitive
damages as well as compensatory damages, 
and the total sum of damages is within 
the applicable caps, the damages should 
be allocated, both between the 
respondents, and between compensatory and punitive damages for each respondent, to 
assure full payment. Thus, each 
respondent should pay the full amount of 
punitive damages for which it is liable, 
and any portion of the compensatory 
damages up to its statutory cap.

If the sum of damages exceeds the sum of the applicable 
caps, the damages should be allocated, 
both between the respondents and between 
compensatory and punitive damages for 
each respondent, to maximize the payment 
to the charging party.

Example 14: CP was assigned by 
Staff Serve to work as a security 
guard at a store called Value, 
U.S.A. ("Value"). CP was subjected 
to persistent and egregious racial 
epithets by two supervisory 
employees of the store. CP 
complained several times to both a 
higher level manager at Value and to 
a supervisor at Staff Serve, but 
neither took any action to address 
the problem. After being subjected 
to egregious racial epithets that 
involved his family, CP informed the 
manager at Value and the supervisor 
at Staff Serve that the situation 
was intolerable. These individuals 
told CP to stop complaining and to 
live with these epithets as the 
price of holding the job. CP 
stopped reporting to work and asked 
Staff Serve to assign him elsewhere, 
but the firm failed to do so. CP 
was unable to find work for eight 
months.

CP files a charge against Staff 
Serve and Value. The investigator 
determines that both are liable for 
the racial harassment and 
constructive discharge. The 
investigator further determines that 
CP is due $40,000 in back pay and 
$60,000 in damages for emotional 
distress and that Staff Serve and 
Value are jointly and severally 
liable for these amounts. Although 
Value's conduct was at least as 
egregious as Staff Serve's, the

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investigator determines that Value’s financial position is relatively weak, and that a punitive damage award of $30,000 against Value is appropriate, as compared to $50,000 for Staff Serve.

Staff Serve employs 137 employees (counting its regular staff people and the workers it has sent on assignment), and is subject to the $100,000 damages cap. Value employs 45 workers and is subject to the $50,000 cap on damages.

In conciliation, the investigator determines that Staff Serve and Value should work out a division of the $40,000 in back pay, for which they are jointly and severally liable. The investigator further determines that the damages should be allocated as follows: Staff Serve should pay $40,000 and Value $20,000 in compensatory damages, and Staff Serve should pay $50,000 and Value $30,000 in punitive damages. CP can thus obtain the full amount of damages due him, with neither respondent’s liability exceeding its cap.

Example 15: Same facts as in Example 14, but CP only names Staff Serve as a respondent because Value has gone bankrupt. The sum of compensatory and punitive damages assessed by the Commission is $110,000 ($60,000 for emotional distress and $50,000 in punitive damages assessed against Staff Serve). The Commission pursues $100,000 in combined damages due to Staff Serve’s statutory cap. The Commission and Staff Serve may agree to deduct the $10,000 in excess of the caps from either the emotional distress or the punitive damages. The Commission also pursues the full $40,000 in back pay from Staff Serve, which is not subject to the cap.

Example 16: Same facts as Example 14, except that both Staff Serve and Value are subject to the $50,000 cap. CP could obtain only a total of $100,000 in damages, even though the sum of compensatory and punitive damages was $140,000. The investigator works with CP and the respondents to determine how to allocate the damages between

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compensatory and punitive damages. The full amount of back-pay remains payable since it is not subject to the caps.

CHARGE PROCESSING INSTRUCTIONS

When a charge is filed by a worker who was hired by a temporary agency, contract firm, or other staffing firm and who alleges discrimination by the staffing firm or the firm's client, consider the following questions (refer to the questions and answers in the guidance for detailed information):

I. Coverage

1. Is the charging party (CP) an employee or an independent contractor? (Q&A 1)

   - Determine whether the right to control the means and manner of CP's work performance rested with the staffing firm and/or the client or with the worker herself. Consider the factors listed in Question and Answer 1 of this guidance and all other aspects of CP's relationship to the firm and its client.

   If CP is an independent contractor, dismiss the charge for lack of jurisdiction. If CP is an employee, determine who qualifies as his or her employer. It is possible that both the staffing firm and its client qualify as joint employers. In that regard consider the following:

2. Is CP an employee of the staffing firm? (Q&A 2(a))

   - Consider the factors listed in Question 1 as they apply to the relationship between CP and the staffing firm.

3. Is CP an employee of the firm's client? (Q&A 2(b))

   - Consider the factors listed in Question 1 as they apply to the relationship between CP and the client.

Even if the client does not qualify as CP's employer, it is still covered under the applicable anti-discrimination statute if it interfered on a discriminatory basis with CP's employment opportunities with the staffing firm and has the requisite number of employees. (Q&A 3) The same is true if the staffing firm does not qualify as CP's employer. However, a federal agency can only be held liable as an employer, not as a third-party interferer. (Q&A 4)

If CP is a welfare recipient alleging discrimination in a work-related activity connected with a welfare program, the above considerations apply to determine coverage. (Q&A 5) In such circumstances, the state or local welfare agency

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may function as a staffing firm and the employer
for whom CP performed work as the client.

4. If there is a question about coverage, does the
staffing firm and/or the client have the
minimum number of employees to be covered
under the applicable anti-discrimination
statute? (Q&A 6)

- Ask the respondent to name and provide records
regarding each individual who performed
work for it during the applicable time
period, including individuals assigned by
staffing firms and any temporary,
seasonal, or other contingent workers
hired directly by the respondent.
Determine which of these individuals
qualified as employees rather than
independent contractors.

II. Assignment Practices (Q&A 7)

If CP alleges that a staffing firm declined to
assign him or her to its client for discriminatory
reasons, consider the following questions:

1. Does the evidence show that the staffing firm
denied CP a job assignment for discriminatory
reasons?

   - If so, the staffing firm is liable as an
   employer of CP for its discriminatory
   assignment practice, as a third party
   interferer, and/or as an employment
   agency for its discriminatory referral
   practice.

2. Does the evidence show that the client set
discriminatory criteria for assignments by the
staffing firm?

   - If so, the client is liable either as a joint
   employer of CP or a third party
   interferer.

III. Discrimination at Work Site (Q&A 8, 9)

If CP alleges that (s)he was subjected to
discrimination while performing a job assignment
for the staffing firm's client, consider the
following questions:

1. Client: Does the evidence show that the client
discriminated against CP?

   - If so, the client is liable as CP's employer
   or as a third party interferer. However,
   if the client is a federal agency it can
   only be held liable as an employer.

2. Staffing firm:
a. Does the evidence show that the staffing firm participated in its client's discrimination, e.g., by honoring the client's discriminatory request to replace CP with someone outside his or her protected class?

b. Does the evidence show that the staffing firm knew or should have known of its client's discrimination and failed to take immediate and appropriate corrective measures within its control?

If the answer to (a) or (b) is "yes," the staffing firm is liable for its discrimination.

IV. Discriminatory Wage Practices (Q&A 10)

If CP alleges that the staffing firm paid discriminatory wages for his or her work for the firm's client, consider the following:

1. Is there an Equal Pay Act violation?
   - Did the staffing firm assign a person of the opposite sex to the same client to perform substantially equal work and pay that individual a higher wage?

   If so, the staffing firm is liable for the EPA violation. The client also can be found liable if it qualified as CP's joint employer.

2. Is there a violation of Title VII, the ADEA, or the ADA?
   - A violation of the EPA also constitutes a violation of Title VII as long as there is Title VII coverage.
   - A sex-based wage disparity violates Title VII even if the jobs are not substantially equal under EPA standards, if there is other evidence of wage discrimination. Title VII also prohibits wage discrimination based on race, national origin, and religion.

   If the respondent committed wage discrimination in violation of Title VII, the ADEA, or the ADA it is liable as CP's employer or as a third-party interferer.

V. Allocation of Remedies (Q&A 11)

If both the staffing firm and its client have unlawfully discriminated against CP, remedies can be allocated as follows:

1. CP can obtain the full amount of back pay, front pay, and compensatory damages from either respondent, or from both combined.
2. Punitive damages under Title VII and the ADA, and liquidated damages under the ADEA, are individually assessed against each respondent according to its degree of malicious or reckless misconduct.

3. The total amount paid by a respondent for future pecuniary damages, damages for emotional distress, and punitive damages cannot exceed its statutory cap.

Damages should be allocated between the respondents in a way that maximizes the payable relief to CP. Contact the legal unit for advice in determining the allocation.

1 June 18, 1997 News Release of the National Association of Temporary and Staffing Services.

2 Seasonal and temporary foreign employees performing work for companies in this country form another category of the contingent workforce. The Commission intends to address at a future date particular issues regarding coverage of these workers.


4 For a discussion of wage data for contingent workers, see Steven Hipple and Jay Stewart, Earnings and benefits of workers in alternative work arrangements, Monthly Labor Review 46 (October 1996).

5 See Policy Statement on control by third parties over the employment relationship between an individual and his/her direct employer, Compliance Manual Section 605, Appendix F (BNA) 605:0087 (5/20/87); Policy Statement on the concepts of integrated enterprise and joint employer, Compliance Manual Section 605, Appendix G (BNA) 605:0095 (5/6/87); Policy Statement on Title VII Coverage of Independent Contractors, Compliance Manual Section 605, Appendix H (BNA) 605:0105 (9/4/87); and Policy Statement: What constitutes an employment agency under Title VII, how should charges against employment agencies be investigated, and what remedies can be obtained for employment agency violations of the Act, Compliance Manual (BNA) N:3935 (9/20/91).

The above-referenced policy documents set forth some general principles regarding coverage under the anti-discrimination statutes, and they remain in effect. The current guidance explains more specifically how the coverage principles apply to workers who are hired by staffing firms and placed in job assignments with the firms' clients.


7 See, infra, cases cited in notes 12, 14, and 15.

8 The coverage principles set forth here apply not only to workers who are hired by staffing firms and assigned to the firms' clients, but also to temporary, seasonal, part-time, and other contingent workers who are hired directly by employers.

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10 The listed factors are drawn from Darden, 503 U.S. at 323-324 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752 (1989)); Rev Ruling 87-41, 1987-1 Cum. Bull. 296 (cited in Darden, 503 U.S. at 325); and Restatement (Second) of Agency § 220(2) (1958) (cited in Darden, 503 U.S. at 325). The Court in Darden held that the "common law" test governs who qualifies as an "employee" under the Employee Retirement Income Security Act of 1974 (ERISA). That test, as described by the Court, is indistinguishable from the "hybrid test" for determining an employment relationship adopted by the EEOC in the Policy Statement on Title VII Coverage of Independent Contractors, Compliance Manual Section 605, Appendix G (BNA) 605:0105 (9/4/87). Although the Supreme Court has not had occasion to address the standards that govern who is an "employee" under Title VII, the ADEA, and the ADA, the rationale in Darden should apply. This is because the ERISA definition of "employee" that the Court interpreted in Darden is identical to the definition of "employee" in Title VII, the ADEA, and the ADA.

Courts have stated that the definition of "employee" is broader under the Fair Labor Standards Act (FLSA), of which the Equal Pay Act is a part, than under the other EEO statutes. However, there is no significant functional difference between the tests. Under the FLSA, employees are those who, as a matter of economic reality, are dependent upon the business to which they render service. See 29 C.F.R. § 1620.8 (1996); Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235 (5th Cir.) (under FLSA's "economic realities" test, fruit and vegetable company qualified as joint employer of harvest workers supplied by crew leaders), reh'g denied, 472 F.2d 1005 (5th Cir.), cert. denied, 414 U.S. 819 (1973). All three tests (common law, hybrid, and economic realities) consider similar factors and often result in the same conclusions as to "employee" status.

11 For additional guidance on criteria for determining whether two or more entities are joint employers of a charging party, see EEOC's Policy Statement on the concepts of integrated enterprise and joint employer, Compliance Manual Section 605, Appendix G (BNA) 605:0095 (5/6/87).

12 For cases holding that a staffing firm is an "employer" of the workers it sends on job assignments, see Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500, 508 (E.D. Va. 1992) (personnel firm that provided employees to clients pursuant to service contracts and the worker that it assigned to one of its clients "clearly had the type of direct employer-employee relationship that is typically the subject of Title VII lawsuits"); aff'd mem., 40 F.3d 1244 (4th Cir. 1994); Amarnare v. Merrill, Lynch, Pierce, Fenner & Smith, 611 F. Supp. 344, 349 (D.C.N.Y. 1984) (worker paid by "Mature Temps" employment agency and assigned to Merrill Lynch for temporary job assignment was employee of both Mature Temps and Merrill Lynch during period of assignment), aff'd mem., 770 F.2d 157 (2d Cir. 1985). Cf. NLRB v. Western Temporary Services, Inc., 821 F.2d 1258, 1266-67 (7th Cir. 1987) (NLRB correctly determined that temporary employment service and its client were joint employers of temporary worker); Maynard v. Kenova Chemical Company, 626 F.2d 359, 362 (4th Cir. 1980) (temporary employee injured while working on defendant's premises could not sue defendant in tort because he was employee of both defendant and temp agency, and workers' compensation provided sole remedy).


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aff’d mem., 65 F.3d 162 (3d Cir. 1996). In Williams, the court ruled that a temporary employment agency was not a Title VII employer of a temporary worker whom it hired and placed in a job assignment. The court followed its earlier reasoning in Relliam, in which it declined to count the workers assigned by a temporary employment agency as its employees on the ground that the agency did not supervise the workers on a day-to-day basis. In the Commission’s view, the court in both cases placed undue emphasis on daily supervision of job tasks and underestimated the significance of other factors indicating an employment relationship.

13 See, e.g., Astrowsky v. First Portland Mortgage Corp., 887 F. Supp. 332 (D. Me. 1995) (holding that employee leasing firm was not a joint employer of workers that it leased back to original employer; firm only processed pay checks and made tax withholdings but did not exercise any control over employees; original employer remained exclusive employer of the workers for purposes of EEO coverage).

14 See Reynolds v. CSX Transportation, Inc., 115 F.3d 860 (11th Cir. 1997) (finding that temporary employment agency’s client qualified as employer of worker assigned to it and upholding jury award for retaliation by client); King v. Booz-Allen & Hamilton, Inc., No. 83 Civ. 7420 (MJJ), 1987 WL 11546, n.3 (S.D.N.Y. May 21, 1987) (finding that plaintiff who was paid by temporary employment agency and assigned to work at Booz-Allen was an employee of Booz-Allen); Amanare, 611 F. Supp. at 349 (finding that temporary employment agency’s client qualified as joint employer of worker assigned to it).


16 For examples of cases finding that a client of a staffing firm can qualify as a joint employer of the worker assigned to it, see Poff v. Prudential Insurance Co. of America, 882 F. Supp. 1534 (E.D. Pa. 1995) (where plaintiff was hired by computer services contractor and assigned to work on-site at insurance company, issue of fact existed as to whether insurance company exercised sufficient control over the manner and means by which plaintiff’s work was accomplished to qualify as employer); Magnuson, 808 F. Supp. at 508-10 (where car company contracted with staffing firm for plaintiff’s services and assigned her to work at its car dealership, genuine issue of fact was raised as to whether car company, dealership, and staffing firm all qualified as her joint employers); Guerra v. Tishman East Realty, 52 Fair Empl. Pract. Cas. (BNA) 286 (S.D.N.Y. 1989) (security guard employed by management firm who worked in building owned by insurance company could seek to prove that insurance company exercised sufficient control over him to qualify as his “employer”); EEOC v. Sage Realty, 507 F. Supp. 599 (S.D.N.Y. 1981) (building management company that contracted with cleaning company for services of building lobby attendant qualified as joint employer of lobby attendant; contractor carried lobby attendant on its payroll but management company supervised her day-to-day work).

For examples of cases finding that the client did not qualify as a joint employer of the contract worker because the client did not have sufficient control over the worker, see Rivas v. Federacion de Asociaciones Pecuarias, 929 F.2d 814 (1st Cir. 1991) (client of shipping services contractor was not a joint employer of workers who unloaded ships; although client set time for ship unloading, had some disciplinary authority over foremen, and directed order of unloading, contractor selected, scheduled, and supervised the workers and handled disciplinary matters); King v. Dalton, 896 F. Supp. 831 (E.D. Va. 1995) (Navy was not
joint employer of worker assigned by contract firm to work on project due to insufficient direct supervisory control over the daily details of the plaintiff's work).

17 See 42 U.S.C. § 2000e-2(a) (Title VII), 29 U.S.C. § 623(a) (ADEA), and 42 U.S.C. § 12112(a) (ADA), which do not limit their protections to a covered employer's own employees, but rather protect an "individual" from discrimination. Section 503 of the ADA, 42 U.S.C. § 12203(b), additionally makes it unlawful to "interfere with any individual in the exercise or enjoyment of ... any right granted or protected by this chapter." The EEOA, 29 U.S.C. § 206, limits its protections to an employer's own employees, and therefore third party interference theory does not apply.

For cases allowing staffing firm workers to bring claims against the firms' clients as third party interners, see King v. Chrysler Corp., 812 F. Supp. 151 (E.D. Mo. 1993) (cashier employed by company that operated cafeteria on automobile company's premises could sue automobile company for failing to take sufficient corrective action to remedy sexually hostile work environment; Title VII does not specify that employer committing an unlawful employment practice must employ the injured individual); Fairman v. Saks Fifth Avenue, 1988 U.S. Dist. LEXIS 13087 (W.D. Mo. 1988) (plaintiff who was employed by cleaning contractor to perform cleaning duties at store and who was allegedly discharged due to her race could proceed with Title VII action against store; store claimed that it was not plaintiff's employer because it did not pay her wages, supervise her or terminate her; however, even if the store was not plaintiff's employer, it could be sued for improperly interfering with her employment opportunities with the cleaning contractor); Amarnare, 611 F. Supp. at 349 (temporary employee assigned by "Mature Temps" to work for Merrill Lynch could challenge discrimination by Merrill Lynch either on basis that Merrill Lynch was her joint employer or that Merrill Lynch interfered with her employment opportunities with Mature Temps).

18 See Policy Statement on control by third parties over the employment relationship between an individual and his/her direct employer, Compliance Manual Section 605, Appendix F (BNA) 605:0087 (5/20/87).

19 While Title I of the ADA only applies to entities with fifteen or more employees, the Commission has not yet addressed the scope of the interference provision in Section 503, which applies to all titles of the ADA and does not contain a specific coverage limitation. See n.17.

20 See Carpets Distribution. Ctr. v. Automotive Wholesalers, 37 F.3d 12, 17-18 (1st Cir. 1994) (trade association and its administering trust for health benefit plan provided by plaintiff's employer was sued under Title I for limiting coverage of AIDS; court held that defendants were covered under Title I if they functioned as plaintiff's employer with respect to his health care coverage or if they affected plaintiff's access to employment opportunities); Spirt v. Teachers Insurance and Annuity Ass'n, 691 F.2d 1054, 1063 (2d Cir. 1982) (association that managed retirement plans for college and university employees could be found liable for using sex-based mortality tables to calculate benefits; although association was not plaintiff's "employer" in any commonly understood sense, the term "employer" under Title VII encompasses any party who significantly affects worker's access to employment opportunities), vacated and remanded sub nom Long Island University v. Spirt, 465 U.S. 1223 (1983), reinstated on remand, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 883 (1984).

21 See Mares v. Marsh, 777 F.2d 1066 (5th Cir. 1985) (in determining whether individual is a federal employee for purposes of Title VII coverage, key issue is extent to which government exercises control over that individual). For guidance on procedures in handling joint federal
sector/private sector complaints, see Question 9.


23 A variety of work and work-related activities may be required as a condition of receipt of welfare, food stamps, or other benefits. Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, 110 Stat. 2105 (1996), for example, welfare recipients may be required to perform work activities which are defined to include unsubsidized employment, subsidized private or public sector employment, work experience, on-the-job training, job search and job readiness assistance, community service programs, vocational educational or job skills training, educational activities, or child care services. Section 103 of Welfare Reform Act, 110 Stat. 2133, amending Part A of Title IV of Social Security Act, 42 U.S.C. § 601, et seq. See also Section 824 of Welfare Reform Act, 110 Stat. 2323, amending Section 6 of Food Stamp Act of 1977, 7 U.S.C. § 2015.

24 The Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997), requires states that receive a grant from the Secretary of Labor as "welfare-to-work state" to establish a procedure for handling complaints by participants in work activities who allege certain violations, including gender discrimination. The Act does not preempt application of Title VII, the ADEA, the ADA, or the EPA. See Morton v. Mancari, 417, U.S. 535, 550 (1973). Therefore, welfare recipients who perform work activities and qualify as "employees" are covered under the anti-discrimination statutes enforced by the EEOC.

25 Title VII specifically makes it unlawful to discriminate in admission to or employment in any program established to provide apprenticeship or other training. 42 U.S.C. § 2000e- 2(d). The ADA and the ADEA also prohibit discrimination in job training and apprenticeship programs. 42 U.S.C. § 12112(a); 29 C.F.R. § 1625.21.


27 Title VII and the ADA apply to any employer who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). The ADEA applies to any employer who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b). Counting issues do not arise in EPA claims because that Act applies to any employer who has more than one employee engaged in commerce or in the production of goods for commerce, unless an exception applies. 29 C.F.R. § 1620.1 - 1620.7.

28 Cf. 29 C.F.R. § 825.106(d) (1996) (under the Family and Medical Leave Act, employees jointly employed by two employers must be counted by both employers, whether or not they are maintained on both employers' payrolls.

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in determining employer coverage and employee eligibility).


30 Staffing firms and their clients are subject to the same record preservation requirements as other employers that are covered by the anti-discrimination statutes. They therefore must preserve all personnel records that they have made relating to job assignments or any other aspect of a staffing firm worker's employment for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. Personnel records relevant to a discrimination charge or an action brought by the EEOC or the U.S. Attorney General must be preserved until final disposition of the charge or action. 29 C.F.R. §§ 1602.14, 1627.3(b). The Commission can pursue an enforcement action where the respondent fails to keep records pertaining to all its contingent and non-contingent employees and applicants for employment.

31 Section 701(c) of Title VII defines the term "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person." For further guidance, see Policy Guidance: What constitutes an employment agency under Title VII, how should charges against employment agencies be investigated, and what remedies can be obtained for employment agency violations of the Act?, Compliance Manual (BNA) N:13935 (9/29/91).

32 The questions and answers in this section assume that the staffing firm is an "employer" of the worker.

33 See EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(3) (1996) (an employer is liable for harassment of its employee by a non-employee if it knew or should have known of the misconduct and failed to take immediate and appropriate corrective action within its control); see also Caldwell v. ServiceMaster Corp. and Norrell Temporary Services, 966 F. Supp. 33 (D.D.C. 1997) (joint employer temporary agency is liable for discrimination against temporary worker by agency's client if agency knew or should have known of the discrimination and failed to take corrective measures within its control); Magnuson v. Peak Technical Servs., 808 F. Supp. 500, 511-14 (E.D. Va. 1992) (where plaintiff was subjected to sexual harassment by her supervisor during a job assignment, three entities could be found liable: staffing firm that paid her salary and benefits, automobile company that contracted for her services, and retail car dealership to which she was assigned; staffing firm and automobile company were held to standard for harassment by non-employees, under which an entity is liable if it had actual or constructive knowledge of the harassment and failed to take immediate and appropriate corrective action within its control); EEOC v. Sage Realty, 507 F. Supp. 599, 612-613 (S.D.N.Y. 1981) (cleaning contractor and joint employer building management company found jointly liable for sex discrimination against lobby attendant on contractor's payroll where management company required attendant to wear revealing costume that subjected her to harassment by Passersby, and where plaintiff was discharged for refusing to continue wearing outfit; court rejected contractor's argument that management company was exclusively liable because it had set the costume requirement; contractor knew of plaintiff's complaints of harassment and there was no evidence that it was powerless to remedy the situation); cf. Capitol EMI
Music, Inc., 311 N.L.R.B. No. 103, 143 L.R.R.M. (BNA) 1331 (May 28, 1993) (in joint employer relationships in which one employer supplies employees to the other, National Labor Relations Board holds both joint employers liable for unlawful employment termination or other discriminatory discipline if the non-acting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it).

34 Cf. Paroline v. Unisys Corp., 879 F.2d 100, 107 (4th Cir. 1989) (employer is liable where it anticipated or reasonably should have anticipated that plaintiff would be subjected to sexual harassment yet failed to take action reasonably calculated to prevent it: "[a]n employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct"), vacated in part on other grounds, 900 F.2d 27 (4th Cir. 1990).

35 If the federal agency refuses to accept a complaint based on a belief that the staffing firm worker is not its employee, the worker can file an appeal with the Commission's Office of Federal Operations.

36 If the federal agency does not wish to coordinate the investigations, then the EEOC office should proceed independently. If the federal agency refuses to provide documents or testimony requested by the EEOC investigator, the Commission can issue a subpoena to compel production of the evidence.

37 The EPA applies to any employer that has more than one employee engaged in commerce or in the production of goods for commerce, unless a statutory exception applies. 29 U.S.C. § 203(s).

38 See Compliance Manual Section 708.5(3) (BNA) 708:0023. As that subsection explains, in determining whether a wage differential between temporary and permanent employees is based on a factor other than sex, the following issues should be considered: 1) whether the wage differential is applied uniformly to males and females; 2) whether the differential conforms with the nature and duration of the job; and 3) whether the differential conforms with a nondiscriminatory customary practice within the industry and establishment.

39 See 29 C.F.R. § 1620.8 (1996) (two or more employers may be jointly or severally responsible for compliance with EPA requirements applicable to employment of a particular employee). For guidance on elements of an EPA claim, see Compliance Manual Sections 704 and 708 (BNA) 704:001 and 708:001, et seq. Cf., 29 C.F.R. § 791.2 (1986) (regulations issued by Wage and Hour Division, Department of Labor, on Joint Employment Relationship under FLSA) (joint employers are individually and jointly responsible for compliance with FLSA, including overtime requirements).

The EPA, unlike Title VII, the ADA, and the ADEA, only permits claims by employees against their employers, not against third party interferers.

40 If the EEOC determines that the client had no involvement in or control over the wages paid to the worker, it may decline to pursue relief against the client.

41 For guidance on wage discrimination claims under Title VII, see Compliance Manual Section 633 (BNA) 633:001, et seq. Title VII prohibits wage discrimination on the basis of race, national origin, and religion, as well as sex.

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However, even where there is joint liability, neither a charging party nor the Commission is obliged to pursue a claim against both entities; nor does one party have a right to bring the other into the proceeding, or a right of contribution from the other. See Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 91-95 (1981); EEOC v. Gard Corp. v. Tall Services, Inc., 795 F. Supp. 1070, 1071-72 (D. Kan. 1992).

Punitive damages are not available against federal, state, and local government agencies.

Liquidated damages under the ADEA are punitive in nature. Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985). Therefore, each respond individually bears a liquidated damages award under the ADEA.

See Hafner v. Brown, 983 F.2d 570, 573 (4th Cir. 1992) (holding under 42 U.S.C. § 1960a that compensatory damages are joint and several but punitive damages are born by each defendant individually); Erwin v. County of Manitowoc, 872 F.2d 1292, 1296 (7th Cir. 1989) (same); Bosco v. Serhant, 836 F.2d 271, 280-81 (7th Cir. 1987) (tort principles require joint and several liability for compensatory damages but not punitive damages), cert. denied, 108 S. Ct. 2824 (1988); Hurley v. Atlantic City Police Dept., 933 F. Supp. 396, 420-23 (D.N.J. 1996) (reaching same conclusion in a Title VII case).

The respondents are also jointly and severally liable for liquidated damages in EPA claims because such damages are compensatory in nature. Laffey v. Northwest Airlines, 740 F.2d 1071, 1096 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985); Marshall v. Bruner, 668 F.2d 748, 753 (3d Cir. 1982).

Compensatory and punitive damages are available in Title VII and ADA cases, and in retaliation cases under the ADEA and the EPA. The ADEA and EPA damages, which are not subject to statutory caps, are available pursuant to a 1977 amendment to the Fair Labor Standards Act that authorizes both legal and equitable relief for retaliation claims. 29 U.S.C. § 216(b). See Moskowitz v. Trustees of Purdue University, 5 F.3d 279, 283-84 (7th Cir. 1993) (FLSA amendment allows common law damages where plaintiff is retaliated against for exercising his rights under ADEA); Soto v. Adams Elevator Equip. Co., 941 F.2d 543, 551 (7th Cir. 1991) (FLSA amendment authorizes compensatory and punitive damages for retaliation claims under EPA, in addition to lost wages and liquidated damages).


ATTACHMENT H
Model Independent Contractor Audit Form

Name of Worker(s) _______________________________________________________________________________________

Title of Worker(s)_______________________________________ Total number of workers in class ______

Describe the essential elements of the worker’s work ...............................................................................................................................................

This information is about services the worker performed from _________________________ to __________________________
(month, day, year) (month, day, year)

Is the worker still performing services for the firm? ....................................................................................................
Yes ☐ No ☐

• If “No,” what was the date of termination?  ? _______________________
(month, day, year)

CONTRACTUAL TERMS

1a Attach a copy if the work is done under a written agreement between the firm and the worker.

b If the agreement is not in writing, describe the terms and conditions of the work arrangement .................................................................

2a Does the contract contain a statement the worker is an independent contractor? ……………………☐ Yes ☐ No

b Does the contract contain a statement to the effect that the contractor has the right to control
how the project is to be accomplished? ☐ Yes ☐ No

c Does the contract contain a provision for payment by the project? .................................................... ☐ Yes ☐ No

d Does the contract contain a provision that the contractor supply all tools and equipment if possible?...☐ Yes ☐ No

e Does the contract contain a provision specifying methods, rights and consequences of termination?....☐ Yes ☐ No

f Does the contract contain a statement the worker will pay all out-of-pocket expenses?....................☐ Yes ☐ No

g Does the contract contain a statement the contractor will be responsible for taxes?..........................☐ Yes ☐ No
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<tbody>
<tr>
<td><strong>h</strong></td>
<td>Does the contract contain a provision requiring the contractor to provide workers’ compensation coverage for its employees and any legally required benefits? ☐ Yes ☐ No</td>
</tr>
<tr>
<td><strong>i</strong></td>
<td>Does the contract contain a provision expressly exempting the contractor from employee benefits? ☐ Yes ☐ No</td>
</tr>
<tr>
<td><strong>j</strong></td>
<td>Does the contract posit a cut-off date for the agreement, if the agreement is not project based? ☐ Yes ☐ No</td>
</tr>
<tr>
<td>3</td>
<td>If the actual working arrangement differs in any way from the agreement, explain the differences and why they occur.</td>
</tr>
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**DEGREE OF CONTROL**

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<tr>
<td><strong>1a</strong></td>
<td>Does the service user train the worker? ☐ Yes ☐ No</td>
</tr>
<tr>
<td></td>
<td>• If “Yes,” what kind?</td>
</tr>
<tr>
<td></td>
<td>• How often?</td>
</tr>
<tr>
<td><strong>b</strong></td>
<td>Does the service user instruct the worker in the way the work is to be done (exclusive of actual training)? ☐ Yes ☐ No</td>
</tr>
<tr>
<td></td>
<td>• If “Yes,” give specific examples</td>
</tr>
<tr>
<td><strong>d</strong></td>
<td>Does the firm have the right to change the methods the worker uses or to direct that person on how to do the work? ☐ Yes ☐ No</td>
</tr>
<tr>
<td></td>
<td>• Explain your answer</td>
</tr>
<tr>
<td><strong>e</strong></td>
<td>Does the operation of the firm’s business require the worker to be supervised or controlled in the performance of the service? ☐ Yes ☐ No</td>
</tr>
<tr>
<td></td>
<td>• Explain your answer</td>
</tr>
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<tbody>
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<td><strong>2a</strong></td>
<td>The firm engages the worker: ☐ To perform and complete a particular job only ☐ To work at a job for an indefinite period of time ☐ Other (explain)</td>
</tr>
<tr>
<td><strong>b</strong></td>
<td>Does the service user permit the worker to follow a routine or a schedule the firm has established? ☐ Yes ☐ No</td>
</tr>
<tr>
<td></td>
<td>• If “Yes,” what is the routine or schedule?</td>
</tr>
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</table>
DISTINCT OCCUPATION / BUSINESS

1a  Does the worker perform services for the firm under:
    □ The firm’s business name    □ The worker’s own business name    □ Other (specify)

b  Does the worker advertise or maintain a business listing in the telephone directory, a trade
journal, etc.?.................................................................□ Yes  □ No  □ Unknown

c  Does the worker represent himself or herself to the public as being in business to perform
the same or similar services?.................................................................□ Yes  □ No  □ Unknown
    • If “Yes,” how?...................................................................................

d  Does the worker have his or her own shop or office? ........................................□ Yes  □ No  □ Unknown
    • If “Yes,” where?..................................................................................

e  Does the firm represent the worker as an employee of the firm to its customers?................□ Yes  □ No
    • If “No,” how is the worker represented?...........................................................

f  How did the firm learn of the worker’s services?

2  At what location are the services performed? □ Firm’s      □ Worker’s      □ Other (specify)

3a  Will the worker perform the services personally? .................................................................□ Yes  □ No

b  Does the worker have helpers?..............................................................................................□ Yes  □ No
    • Whom does the customer pay? □ Firm    □ Worker
ATTORNEY CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Date: __________, 2003
Author: _______________

- If the helpers are hired by the worker, is the firm’s approval necessary? ............................................
  □ Yes □ No
- Who pays the helpers? □ Firm □ Worker
- If the worker pays the helpers, does the firm repay the worker? ..........................................................
  □ Yes □ No
- Are social security and Medicare taxes and Federal income tax withheld from the helpers’ pay? ............................................
  □ Yes □ No
- If “Yes,” who reports and pays these taxes? □ Firm □ Worker
- Who reports the helpers’ earnings to the Internal Revenue Service? □ Firm □ Worker
- What services do the helpers perform? ..........................................................................................................................

4 Does the worker have a financial investment in a business related to the services performed? ............................................
  □ Yes □ No □ Unknown

5 Can the worker incur a loss in the performance of the service for the firm? ............................................
  □ Yes □ No

6 Does the worker assemble or process a product at home or away from the firm’s place of business? □ Yes □ No
- If “Yes,” who furnishes materials or goods used by the worker? □ Firm □ Worker □ Other
- Is the worker furnished a pattern or given instructions to follow in making the product? ..............
  □ Yes □ No
- Is the worker required to return the finished product to the firm or to someone the firm designates? □ Yes □ No

DEVOTION / PERMANENCY

1a Does the worker perform similar services for others? ............................................
  □ Yes □ No □ Unknown
- If “Yes,” are these services performed on a daily basis for other firms? ..............
  □ Yes □ No □ Unknown
- If “Yes,” does the firm have first call on the worker’s time and efforts? ..............
  □ Yes □ No

b Percentage of time spent in performing these services for:
  This firm % □ Unknown
  Other firms % □ Unknown

c Percentage of worker’s total income derived from:
  This firm % □ Unknown
  Other firms % □ Unknown

2a Can the firm discharge the worker at any time without incurring liability? ............................................
  □ Yes □ No
- If “No,” explain ..........................................................................................................................................................

b Can the worker terminate the services at any time without incurring a liability? ............................................
  □ Yes □ No
- If “No,” explain ..........................................................................................................................................................
### LEVEL OF SKILL / EXPERTISE

1. Is a degree necessary for the work? ................................................................. □ Yes □ No □ Unknown
   - If “Yes,” what kind of degree is required? .........................................................

2. Is a license necessary for the work? ................................................................. □ Yes □ No □ Unknown
   - If “Yes,” what kind of license is required? .........................................................
   - Who issues the license? ........................................................................................
   - Who pays the license fee? ...................................................................................

### SUPPLIES, TOOLS, AND EXPENSES

1a. State the kind and value of tools, equipment, supplies, and materials furnished by:
   - The firm ............................................................................................................
   - The worker ........................................................................................................

b. What expenses does the worker incur in the performance of services for the firm? ..........................................................
   .........................................................................................................................

c. Does the firm reimburse the worker for any expenses? .............................. □ Yes □ No
   - If “Yes,” specify the reimbursed expenses .......................................................

### PAYMENT / WITHHOLDINGS

1a. Type of pay worker receives:
   □ Salary □ Commission □ Hourly Wage □ Piecework □ Lump sum □ Other (specify) ........................................

b. Does the firm guarantee a minimum amount of pay to the worker? .............. □ Yes □ No

c. Does the firm allow the worker a drawing account or advances against pay? ........................................................................
   - If “Yes,” is the worker paid such advances on a regular basis? ...................... □ Yes □ No

d. How does the worker repay such advances? .........................................................
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<th>Yes</th>
<th>No</th>
<th>Does not apply</th>
</tr>
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<td>2a Are the worker's earnings reportable to the Internal Revenue Service?</td>
<td></td>
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<tr>
<td>b Does the firm carry worker's compensation insurance on the worker?</td>
<td></td>
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<tr>
<td>c Does the firm withhold social security and Medicare taxes from amounts</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>paid the worker?</td>
<td></td>
<td></td>
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<tr>
<td>d Does the firm withhold Federal income tax from amounts paid the worker?</td>
<td></td>
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<tr>
<td>e How does the firm report the worker's earnings to the Internal Revenue</td>
<td></td>
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<tr>
<td>Service?</td>
<td></td>
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<tr>
<td>f Does the firm bond the worker?</td>
<td></td>
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</table>

**Answer Only If Worker Is Salesperson Or Provides A Service Directly To Customers.**

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Does not apply</th>
</tr>
</thead>
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<td>1a Are leads to prospective customers furnished by the firm?</td>
<td></td>
<td></td>
<td>Does not apply</td>
</tr>
<tr>
<td>b Is the worker required to pursue or report on leads?</td>
<td></td>
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<tr>
<td>c Is the worker required to adhere to prices, terms, and conditions of</td>
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<tr>
<td>sale established by the firm?</td>
<td></td>
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<tr>
<td>d Are orders submitted to and subject to approval by the firm?</td>
<td></td>
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<tr>
<td>e Is the worker expected to attend sales meetings?</td>
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<tr>
<td>f Does the firm assign a specific territory to the worker?</td>
<td></td>
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<tr>
<td>g Whom does the customer pay?</td>
<td></td>
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<tr>
<td>h Did the firm or another person assign the route or territory and a</td>
<td></td>
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<tr>
<td>list of customers to the worker?</td>
<td></td>
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<tr>
<td>i Did the worker pay the firm or person for the privilege of serving</td>
<td></td>
<td></td>
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<tr>
<td>customers on the route or in the territory?</td>
<td></td>
<td></td>
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<tr>
<td>j How are new customers obtained by the worker? Explain fully, showing</td>
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<tr>
<td>whether the new customers called the firm for service, were solicited</td>
<td></td>
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<tr>
<td>by the worker, or both</td>
<td></td>
<td></td>
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<tr>
<td>k Is the worker a traveling or city salesperson?</td>
<td></td>
<td></td>
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<tr>
<td>l If &quot;Yes,&quot; from whom does the worker principally solicit orders for</td>
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<tr>
<td>the firm?</td>
<td></td>
<td></td>
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<tr>
<td>m If the worker solicits orders from wholesalers, retailers, contractors,</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>or operators of hotels, restaurants, or other similar establishments,</td>
<td></td>
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<tr>
<td>specify the percentage of the worker's time spent in the solicitation %</td>
<td></td>
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