



Independent Contractor Misclassification Can Pose Big Problems for Small Businesses

By Todd Lebowitz, Esq.

Once upon a time, it was easy to know who was an employee. An employee would punch in, clock a full day's work, and then punch out. The modern economy, however, looks very different. There are staffing agency workers, leased workers, joint employees, independent contractors, gig workers, part-timers and consultants. Sometimes these workers are considered employees; sometimes they are not. Does it matter? Absolutely!

For workers deemed to be employees, companies must withhold taxes and make deductions for unemployment, Social Security and Medicare; must carry workers' compensation insurance and generally provide employee benefits; and must pay employees a minimum wage, including

time-and-a-half pay to non-exempt employees who work more than 40 hours in a week.

Unfortunately, it is not always easy to tell employees from other types of workers. Labels do not matter, even if the worker has signed an independent contractor agreement.

Determining whether a worker is an employee is one of the most complicated and uncertain tasks in employment law. Different laws use different standards and consider different factors. Most tests are susceptible to the subjective weighing of factors by different judges or juries.

When courts and government agencies evaluate work relationships, they consider the facts of the relation-

ship rather than what the parties call themselves. For example, the Internal Revenue Service and the Ohio Department of Taxation use a "Right to Control Test" to determine whether a worker is an employee and therefore subject to tax and withholding laws. Right to Control tests evaluate whether the company has the right to control how the work is performed. Factors favoring employee status include ability to exert control over when, where and how work is performed, the amount of worker training or instruction provided, the level of and supervision or oversight, the duration of the relationship, reimbursement of expenses, supplying of tools and equipment, and limits placed on the worker's ability to perform services for other businesses, including competitors. The more control the company exerts over a worker, the more likely the worker will be considered an employee.

The Department of Labor (DOL) applies an Economic Realities Test to determine whether a worker is an employee for purposes of wage and hour law (e.g., minimum wage, overtime). This test examines the extent to which a worker is dependent on the company to earn a living. Even if a company exerts minimal control over how the work is performed, a worker may be an employee if the company provides the worker's main source of income, especially if the company pays the workers' expenses so the worker

Drugs and Drug Testing in the Workplace: An Overview

By Christina L. Corl, Esq.

In Ohio, employers can legally drug test employees or potential employees if they are: 1) applicants for employment and you have not yet hired them; 2) current employees about whom you have a "reasonable suspicion" of drug use (if, for example, an employee appears to be under the influence of drugs, his/her work performance has changed dramatically and/or the employee is chronically absent); 3) current employees and you have a policy providing for random drug testing; 4) current employees following a workplace accident or injury; and 5) current employees following the return to

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will not incur a loss. An independent contractor, on the other hand, tends to have a stand-alone business, offers services to the open market, negotiates rates, and risks incurring a loss.

Different tests are also used to determine whether a worker is an employee for union organizing purposes, employee benefit purposes, unemployment insurance purposes and workers' compensation eligibility purposes.

A true independent contractor relationship can be upheld as legitimate if properly set up and documented. Too often, however, companies misapply labels to workers who should really be deemed employees under the law.

As of 2016, the DOL, the IRS and the National Labor Relations Board are focusing on independent contractor misclassification, and audits and lawsuits are increasing. Companies that use non-employee workers should closely evaluate these relationships. Steps can usually be taken to enhance the legitimacy of independent contractor status while preserving the company's business objectives. A proactive review can limit legal exposure that can range from tens to hundreds of thousands of dollars.

Todd Lebowitz, a partner with the law firm Baker Hostetler, focuses on helping companies limit the risks of independent contractor misclassification and the related issue of joint employment.

**What Employers Should Know:
DOL Expected To Increase
Salary Thresholds**

By Margie Conner, Esq.

It is widely anticipated the Department of Labor (DOL) will act in 2016 to significantly increase the salary threshold for exempt workers from the current \$23,660 to \$50,440 annually and for highly compensated

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work from an extended absence or drug rehabilitation.

Employees who are actively using illegal drugs or illegally using prescription drugs are not protected by federal employment statutes such as the Americans with Disabilities Act or the Family and Medical Leave Act. However, employees who are not actively using drugs (for example, recovering addicts) may be entitled to an accommodation under the ADA or leave under the FMLA for their recovery under certain circumstances.

Many employers have questions about drug testing if marijuana is legalized in Ohio. There has been no proposal to legalize marijuana at the state level that would require an employer to allow employees to work under the influence of marijuana. Therefore, an employer is legally entitled to prohibit the use of marijuana as a term of employment. The same is true with respect to the use of alcohol. Alcohol is a legal substance, but most employers prohibit their employees from reporting to work drunk. The use of medical marijuana in an Ohio workplace likely would be treated the same as the use of any other prescription drug. Even if the use of the substance is legal and prescribed by a medical professional, employers still have the right to make sure that

workers from the current \$100,000 to at least \$122,148 annually. To prepare for this change, employers should:

- review their workforce to determine which workers will be affected by the new rules;
- review actual job duties, not just job titles, to determine if exempt employees meet the requirements.

To assist with compliance, reference DOL Fact Sheets #17A through

the legal drugs are not affecting the employee's job performance or workplace safety. However, employers may be required to make an accommodation or move the employee to a different job position while he or she is taking the prescription drug.

Ohio has a drug-testing program that qualifies employers to receive a discount on workers' compensation premiums. The *Ohio Administrative Code*, Section 4234-17-58, allows employers who establish a drug free workplace program

to qualify for discounts on their state workers' compensation insurance premiums. In order to qualify, employers must maintain a written policy that provides for the following: 1) a company-sponsored employee addiction assistance program; 2) employer payment for all drug testing; 3) company-sponsored education for all employees regarding drug and alcohol abuse; 4) company-sponsored training for supervisors regarding employee drug and alcohol abuse; and 5) a five-panel drug screen plus alcohol testing that is consistent with federal drug-testing standards.

Christina L. Corl, a partner in the Columbus office of Plunkett Cooney, has advised employers on workplace issues and policy for more than 20 years.

#17R, available at www.dol.gov/whd/regs/compliance/whdcomp.htm;

- determine whether to increase salaries to meet the new thresholds; whether to convert affected employees from salary to hourly and pay overtime; and how to pay for or absorb possible increased labor costs.

Margie Conner serves as general counsel to The Davey Tree Expert Company in Kent.

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