



# *Independent Contractors*

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# What will we cover?

- ▶ How does the law define an independent contractor?
- ▶ The science, art and risk of independent contractor classification
- ▶ Pros and cons of independent contractor classification
- ▶ Use of independent contractors in creative industries
- ▶ Emerging trends
- ▶ Questions

# Independent Contractor vs. Employee

- ▶ Can't you just choose?
- ▶ The right way to decide
  - ▶ Tests differ based on purpose and government agency
  - ▶ Tests differ from state to state
  - ▶ Generally multi-factor balancing tests
- ▶ Right to control and/or "economic realities" are key considerations
- ▶ How are problems surfaced?

# Not an Exact Science

The land of factors and balancing: worker classification is not an exact science.



# "Control" tests

- ▶ IRS, ADA, EEOC, common law
- ▶ Behavioral control: right to direct and control how the worker does the job. Instructions about how to accomplish work, tools, equipment, supplies or personnel, and training.
- ▶ Financial Control: right to control business aspects of the worker's job. Services available on open market, unreimbursed expenses, worker investment, pay based on job v. regular (hourly, weekly), opportunity for profit or risk of loss
- ▶ Relationship: indicators of the kind of relationship the parties intended to establish. Written contracts, employee benefits, permanency, services related to core aspect of business

# “Economic reality” tests

- ▶ FLSA, WA Minimum Wage Act, FMLA
- ▶ Based on broader interpretation of “employee”
- ▶ Nature and degree of company’s control over worker
- ▶ Permanency of worker's relationship with company
- ▶ Worker's investment in facilities, equipment, or helpers
- ▶ Skill, initiative, judgment, or foresight required
- ▶ Worker's opportunities for profit or loss
- ▶ Integration of worker's services into the company's business

# "ABC" tests

- ▶ WA Unemployment, Workers Compensation
- ▶ Generally broadest interpretation of "employee"
- ▶ **A**bsence of control or direction over performance of work;
- ▶ **B**usiness is outside usual scope of company business or performed outside its places of business; and
- ▶ **C**ustomarily engaged in independently established trade, occupation, profession, or business.
- ▶ Alternate 6-factor test (required for workers comp.), includes separate business location, books and business tax filings, and registration with State DOR

# Clauses to consider

## Contractor

- "...you may work **wherever you choose**, and may perform at other venues while you are under contract with this Venue."
- "...whether you take breaks, when you take your breaks, and the number and duration of any breaks are **totally up to you**."
- "...you can perform for **whomever you choose**, and can reject any customers you want."
- "...**you will determine** the days you perform at the Venue...In addition, you can work as many hours per day **as you desire**, although you will receive no 'overtime' pay from the Venue."

## Employee

- "As an Employee, the Venue can **prohibit you** from performing at other establishments."
- "...the **Venue will determine** the time, number, and duration of your breaks consistent with state law."
- "...**you will be required** to perform for all customers."
- "...**the Venue will select** your schedule...In general, you will be **limited** to working a maximum of 29 hours per week and the Venue **will not permit** you to work any 'overtime'..."

# Take-aways!

- ▶ Consider the following in any business/worker relationship:
  - ▶ What control can the business exert over how the worker performs work, in theory and in fact?
  - ▶ Is the worker in business for themselves, with attendant benefits and risks, and providing services openly to the public, or is the worker dependent on the business?
  - ▶ What is the worker required to provide – helpers, supplies, equipment, specialized skill?
  - ▶ Is the relationship structured like employment or arms-length contracting?
  - ▶ Is the work part of the business's usual scope of operations?

# Worker pros and cons

## Independent Contractor

- ▶ Independence – ability to work for whomever, choose work, and set hours
- ▶ No immediate payroll tax withholdings, but responsibility for business tax, individual tax payments, and/or self employment tax
- ▶ Control over intellectual property, especially with clear agreements

## Employee

- ▶ Legal rights and benefits of employee status: federal and state wage and hour protections, federal anti-discrimination laws (WA provides some anti-discrimination protection to contractors), protected leave
- ▶ Minimum wage and overtime (for non-exempt employment)
- ▶ Employee benefit programs

# Business benefits and risks

## Benefits

- ▶ Avoid minimum wage, overtime, mandatory leave, and other legal requirements/protections for employees
- ▶ Avoid employer-paid payroll taxes and insurance premiums
- ▶ Avoid employee benefits
- ▶ More flexible personnel arrangements

## Risks

- ▶ Volatile “hot button” issue
- ▶ Misclassification
  - ▶ Individual and class action law suits, including punitive recoveries, interest and attorneys’ fees
  - ▶ Audits, assessments and penalties by federal, state and local governments
  - ▶ Payroll tax liability and penalties
  - ▶ Often uninsured claims
- ▶ Loss of control and long-term relationship
- ▶ Limited protection from worker injury suits

# Independent Contractor – Best Practices

- ▶ Determine and follow state and local requirements
- ▶ Use and follow written independent contractor agreements
- ▶ Consider arbitration agreements with collective action waivers
- ▶ Engage business entities, not individuals
- ▶ Engage contractors who actively work for others
- ▶ Define specific term
- ▶ Avoid shoulder-to-shoulder work with employees
- ▶ Avoid non-competition
- ▶ Periodic review of relationship and reporting by contractors
- ▶ Get legal advice

# ICs in the creative industries

- ▶ Nearly 44 percent of creatives work part-time (less than 35 hours per week) and part-year (less than 50 weeks per year)
- ▶ Three times as likely to be self-employed
- ▶ 33 percent of all creatives (including the self-employed) “arrive at work” in the afternoon or later

# The gig economy

- ▶ 16% of workers at U.S. business are independent contractors
- ▶ 30% of those workers are over 50
- ▶ Between 2013-2017, the state of Washington lost \$152 million in unemployment taxes and the state's workers' compensation system lost \$268 million via unpaid premiums due to misclassified employees

# Emerging trends - Litigation

- Henry Indus., Inc. v. Dep't of Labor & Indus., 195 Wn. App. 593, 381 P.3d 172 (2016)
  - drivers who contracted with Henry Industries Inc. to perform courier services for third parties are “workers” under the Industrial Insurance Act (IIA).
- Essig v. Lai, 9 Wn. App. 2d 587, 597, 444 P.3d 646, 651, review dismissed, 194 Wn.2d 1016, 455 P.3d 135 (2020)
  - An employer who breached an employment contract could not rely on an offer to employee to make them an independent contractor to mitigate employee’s damages.

# Emerging trends - Litigation

## *O'Connor v. Uber Techs., Inc.*, 82 F. Supp.3d 1133 (N.D. Cal. 2015)

- Performing services for another person or entity shows a prima facie case of employment
- Uber drivers are presumptive employees because they provide a service to Uber.
  - **“Even more fundamentally, it is obvious that drivers perform a service to Uber because Uber simply would not be a viable business without them.”**  
*O'Connor*, F. Supp.3d at 1142.

## *JKH Enterprises, Inc. v. Dep't. of Indus. Relations*, 142 Cal. App.4th 1046, (2006)

- Delivery drivers were considered employees because **“the worker’s duties are an integral part of the operation”** and **“their work is the basis for [defendant’s] business.”** *JKH Enterprises, Inc.*, 142 Cal. App.4th at 1049.

# Emerging trends - Litigation

- ▶ *Dynamex Operations W. v. Superior Court* - 4 Cal. 5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (2018)
  - ▶ Court elucidated a standard presuming that all workers are employees instead of contractors, and placed the burden on any entity classifying an individual as an independent contractor of establishing that such classification is proper under the "ABC test".
  - ▶ The Ninth Circuit applied the "new" ABC test retroactively in *Vasquez v. Jan-Pro Franchising International, Inc.*
  - ▶ That decision has now been withdrawn and the question of whether *Dynamex* applies retroactively has been certified to the California Supreme Court.

# Emerging trends - Litigation

- ▶ New Prime, Inc. v. Oliveira, 139 S. Ct. 532
  - ▶ In a unanimous decision, Supreme Court held that “contract of employment” in the Federal Arbitration Act refers to any agreement to perform work, including work as an independent contractor.
- ▶ What will be the impact of the new Supreme Court Justice?
  - ▶ Limited scope of opinions from Judge Barrett
  - ▶ Shift to a more conservative bench

# Emerging trends - legislation

- ▶ Washington Senate Bill 6032
  - ▶ 2018 legislation authorizing Department of Commerce to complete a study of independent contractors in Washington.
  - ▶ Study conclusions can be found at <https://deptofcommerce.app.box.com/v/independent-contractor-study>.
  - ▶ Demonstrate the Legislature's interest in the area, and show a likelihood of additional legislation.

# Emerging trends - legislation

- ▶ Washington House Bill 1515, “Employee Fair Classification Act”
  - ▶ Would create one test to determine who is an independent contractor, providing a single definition across minimum wage, prevailing wage, workers’ compensation, and unemployment insurance statutes. Would create enforcement provisions so workers who are misclassified as independent contractors can more easily correct their status
  - ▶ Puts the burden on the party asserting the worker is not an employee

# Emerging trends - legislation

- ▶ California Assembly Bill 5
  - ▶ Builds on Dynamex Operations West, Inc. v. Superior Court to apply ABC test to most employment relationships
  - ▶ Exemption for “bona fide business-to-business contracting relationships” where a contractor “acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership or corporation contracts to provide services to another such business.”
- ▶ AB 2257 enacted on September 4, 2020
  - ▶ Expands many of the exceptions to the ABC rule in AB 5
- ▶ Washington Senate Bill 6276
  - ▶ Based on AB 5

# Emerging trends - legislation

On September 22, DOL proposed a new rule clarifying the definition of employee under the Fair Labor Standards Act (FLSA) as it relates to independent contractors.

The rule would not invalidate laws in states, like California, that seek to add more protections for workers.

For those states that have not weighed in on the debate over contract employees, this rule will act as a baseline.

