


# Employment Law for Human Resource Practice

## Chapter 2 The Employment Relationship



# Duties Arising From an Employment Relationship

- If an employment relationship exists, for each employee, the employer must:
  - Withhold income taxes from wages, and pay the employer's share of Social Security and Medicare taxes.
  - Provide Workers' Compensation Insurance.
  - Provide Unemployment Insurance.

# Who is an Employee?

- Most of the employment laws in this text apply only if an employment relationship exists.
- Yet, work is often performed for pay outside the traditional employer-employee relationship, by what are termed “contingent” workers.
- Distinguishing between employees and independent contractors (ICs) is the central issue in determining who is an employee.

# A Variety of Criteria

- The Economic Realities Test
  - Used in Fair Labor Standards Act (FLSA) cases regarding overtime, wage cases
- The Common Law Test
  - Used by some courts
- The Hybrid Test
  - Used by some courts
- The Right to Control Test
  - Used in Internal Revenue Service (IRS) cases regarding withholding, payment of taxes

# Economic Realities Test - Factors

- 1) Who has the right to control how, when & where the work is done?
- 2) Who provides tools, materials & other resources for the work to be done?
- 3) Does the method of payment provide opportunity for profit or loss?
- 4) What is the duration of the working relationship?
- 5) Does the work require a “special skill?”
- 6) How integral to the business is the work performed?
- 7) Overall, how dependent is the hired party on the hiring party?

# Just the Facts

- Freund installed home satellite systems for a manufacturer. They scheduled appointments, but he could reschedule them. He wore a company shirt and followed certain minimum specifications for installations. Though Freund was free to work for others, he often worked 6 days/week for this firm, while fellow installers did not. Is he an employee under the Fair Labor Standards Act?
  - *Freund v. Hi-Tech Satellite*, 185 Fed. Appx. 782 (11<sup>th</sup> Cir. 2006)

# Common Law Test - Factors <sup>1</sup>

- 1) The extent of the hiring party's right to control the manner and means by which work is done
- 2) The level of skill required
- 3) The source for necessary tools & materials
- 4) The location of the work
- 5) The duration of the work
- 6) The extent to which the hiring party has the right to assign additional projects
- 7) Who has control over when & how long to work

# Common Law Test - Factors <sup>2</sup>

- 8) The method of payment
- 9) The hired party's role in hiring and paying assistants
- 10) The extent to which the work is part of the regular business of the hiring party
- 11) Whether the hiring party is in business
- 12) Whether benefits of any kind are provided to the hired party
- 13) The tax treatment of the hired party



# Comparing the Tests

- While there is significant overlap between the tests:
  - The Common Law test focuses on the right to control the worker
  - The Economic Realities test focuses on the market for the contractor's services, and whether the contractor is in business for herself

# Narayan v. EGL, Inc.

Summary

- Facts: Texas firm hired California residents as drivers to haul freight in California, requiring them to sign a contract agreeing that they were independent contractors, and that the contract would be interpreted according to Texas law, where such agreements were enforceable. Drivers sued, contending they were employees, subject to California law. Summary judgment was entered for the employer, and drivers appealed.
- Issue: May an employer avoid benefits due employees pursuant to the California Labor Code by a contract in which the employee agrees that he is an independent contractor under Texas law?
- Held: Under California law, the legal status of the workers does not depend solely on their agreement, but on a multi-faceted test, which shows indicia of employment. Judgment reversed.

# Smart Practice – IC Agreements <sup>1</sup>

- Declaring someone to be an independent contractor does not make it so.
- The firm must give up the right of control over the worker.
- The firm should not have ICs doing work that is central to the firm's business or the same work as employees perform.
- The firm should closely review long term IC agreements and not assign new projects without renewing agreements.

# Smart Practice – IC Agreements <sup>2</sup>

- A good IC Agreement should:
  - Require that the IC supply his own tools, materials & equipment, and pay his own assistants and business expenses.
  - Document the firm's payment of a flat fee, rather than hourly or weekly payment.
  - Provide no benefits, not even time off.
  - Make it clear that the IC is free to offer his services to others.

# Other Contingent Workers <sup>1</sup>

- Temporary Workers
  - If hired to do the same work as regular employees or kept on for a long time, they may become employees under the common law test, entitled to the same benefits as regular employees.
  - Example: Microsoft’s “permatemps”
  - Rule: Employers should not employ temps on a long term basis, or hire them to do the work of regular employees.

# Other Contingent Workers <sup>2</sup>

- Students and Interns
  - Graduate and teaching assistants who work for their universities are generally considered students and not employees
  - Student athletes are not employees
  - However, a determination of status for employment law purposes does not necessarily compel the same conclusion for purposes of tax laws

# Other Contingent Workers <sup>3</sup>

- Volunteers
  - Volunteers are generally not employees. But auxiliary choristers who were paid a fee for singing on an on-call basis were employees.
- Partners, Officers, Board Members, and Major Shareholders are generally not employees.
  - The extent to which the individual acts autonomously and participates in management controls.

# Other Employee Status Issues

- Managers & Supervisors
  - Despite being part of management, they are still employees, entitled to the benefit of laws for the protection and benefit of employees
- Undocumented Workers
  - The general policy of federal agencies is to enforce employment laws without inquiry into immigration status, but illegal status may affect the remedies due



# Who is the Employer?

- To what extent is an employer liable for the actions of its employees (agents)?
- What parts of far-flung corporate structures are sufficiently related to constitute single employers?
- Under what circumstances can firms be considered joint employers of the same employees?

# Agency <sup>1</sup>

- Rule: Employers are responsible for the actions of their employees while they are acting within the scope of employment.
- Actions are within the scope of employment when they:
  - Relate to the work the employee was hired to perform;
  - Take place substantially within the workplace and during working hours; and
  - Serve, at least partially, the interests of the employer.

# Agency <sup>2</sup>

- Exception: Employers may also be liable for harmful actions of their employees that are *outside* the scope of employment if:
  - The employer intended the harm to occur;
  - The employer was negligent or reckless in allowing the harm to occur; or
  - The harmful actions were aided by *actual or apparent authority* conferred on the employee by the employer.

# Single, Integrated Enterprise

- Organizational structures are often complex and overlapping.
- To determine whether two or more ostensibly separate entities should be considered parts of an *integrated enterprise*, the EEOC considers the degree to which there is:
  - An interrelation between the operations
  - Common management of the entities
  - A centralized control of HR and labor policies
  - Common ownership or financial control of the entities

# Joint Employers

- Employers who, though separate, both maintain relationships with the same employees, may be joint employers.
- Joint employers share in the liability for violation of an employee's rights.

## *Zheng v. Liberty Apparel Co.* Summary

- Facts: 26 garment workers who performed the final assembly work of garments pursuant to sub-contracts for an apparel company sued the apparel company and the sub-contractors who had hired and paid them for violations of the FLSA. Because the sub-contractors had gone out of business, plaintiffs sought damages from the apparel company.
- Issue: Under the facts, is the apparel manufacturer a joint employer of the garment workers, along with the sub-contractors?
- Held: A genuine issue of material fact exists regarding whether the apparel company is a joint employer. Summary Judgment vacated and case remanded for additional fact finding, since all necessary factors were not considered.

# What Would You Do?

- Try your hand at drafting an independent contractor agreement that a company like Hi-Tech Satellite might use for its installers. Don't worry about making your agreement sound like "legalese." Focus instead on what such an agreement should specify.

## Next:

- Chapter 3 – Overview of Employment Discrimination
  - Has employment discrimination ended?
  - What are the more subtle forms of discrimination?
- The answers to these and other questions are our next topic.



## *Instructor's Note*

- Instructor's Notes for What Would You Do?
  - Students should address the issues outlined in slides 11 and 12