

LE.402

Non-Traditional Employees

INSTRUCTORS

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Common Issues and Pitfalls

- Are you properly classifying employees and independent contractors?
- What penalties or liabilities do you face if you misclassify an employee?
- Are you aware of the benefits and risks associated with using temporary employees?
- What duties do you owe temporary employees?





Common Issues and Pitfalls

Cont.

- What is your potential liability as a joint employer?
- What is your responsibility to employees who work from home?
- Are you properly tracking the hours your employees work?
- Are you calculating and paying wages in compliance with federal and state law?





A Case Study

- XYZ Staffing, a temporary staffing agency, provides Big Corp. with temporary workers for clerical support services
 - XYZ and Big Corp. do not have a written contract
- XYZ assigns Sally to Big Corp. to provide clerical services
 - Sally is a 51-year-old woman
 - Sally's job duties include entering orders, reconciling account statements, and transcribing field reports
 - Sally is one of 25 XYZ workers assigned to work temporarily for Big Corp
- The temporary workers do not receive any benefits





A Case Study *Cont.*

- Big Corp. also has 25 “regular” employees that perform substantially the same work as the temporary workers
 - Big Corp. has a generous benefits package for its regular workers
- In addition to temporary workers and “regular” employees, Big Corp. contracts with about 20 different individuals to provide clerical support services from their homes
 - Big Corp. classifies these individuals as independent contractors
 - These individuals set their own hours and use their own computers
 - The workers are paid by the project
 - There is little skill required to perform the job
 - These workers also do substantially the same work as Big Corp.’s on-site workers





A Case Study *Cont.*

- All of the XYZ workers at Big Corp. are under the direct supervision of two Big Corp. employees
 - The independent contractors also report to the Big Corp. employees, but are not under their direct supervision
- When Sally had worked at Big Corp. as a temporary worker for 11 months, she started having seizures
 - Her doctor said that it was not safe for Sally to drive
 - Sally requested that Big Corp. accommodate her inability to drive by allowing her to work from home





A Case Study *Cont.*

- Big Corp. agreed to allow Sally to work from home
 - Big Corp. does not talk with XYZ before talking to Sally about working from home
 - Big Corp. and Sally do not discuss whether Sally would be classified as an independent contractor or would retain her temporary worker status
- Sally was given VPN access to allow her to access the computer network
 - Sally was also given a computer
 - Big Corp. delivered weekly project assignments to Sally's house
 - The weekly project assignments were in big boxes and weighed over 50 pounds
 - Sally was paid 40 hours per project and cautioned not to work more than 40 hours





A Case Study *Cont.*

- Sally kept excellent time keeping records
 - Despite the warning, Sally routinely worked between 45 and 50 hours per week
- While working from home, Sally also contracted with Tiny Inc. to perform clerical support services
 - Tiny Inc. is a direct competitor of Big Corp.
- Two months later, while working from home, Sally was carrying one of the big boxes containing her weekly Big Corp. project up the stairs of her house
 - While on the stairs, Sally had a seizure, fell down the stairs, and broke both of her arms
 - One of her arms broke because the heavy project box fell on it





A Case Study *Cont.*

- With both arms broken, Sally was no longer able to work from home
 - Sally applied with Big Corp. to take FMLA leave
 - At the time of the accident, Sally had worked 1264 hours in the past 12 months
 - Big Corp. never responded to Sally's request
 - Sally then contacted XYZ to request taking FMLA leave
 - XYZ told Sally that she was not entitled to FMLA leave, but that she could take off as much time as she needed
 - XYZ then informed Big Corp.





A Case Study *Cont.*

- While Sally was on leave, Sally's Big Corp. supervisors performed the annual audit
 - The audit included reviewing Sally's work
 - The Big Corp. supervisors discovered that Sally had made several careless errors – one of which cost Big Corp. \$75,000
 - During the audit, Big Corp. also discovered that XYZ had not made any of the required withholdings for the temporary workers
- While on leave, Sally visited another doctor
 - The doctor put Sally on medication to control her seizures
 - The doctor cleared Sally to drive





A Case Study *Cont.*

- After Sally's arms healed, she requested that she be allowed to return to work
 - Because she was able to drive again, Sally no longer wished to work from home
- Sally called her Big Corp. supervisor to discuss returning to work and discuss filing a worker's compensation claim for her injuries
 - Irrate about Sally's costly errors, the Big Corp. supervisor terminates Sally over the phone and tells her not to come back to work
- After the Big Corp. supervisor terminated Sally, the supervisor called XYZ to inform the temporary staffing agency of his decision
 - The supervisor requested XYZ to send over another temporary employee
 - The supervisor specifically requested that XYZ send them a younger employee





A Case Study *Cont.*

- After being terminated, Sally sues Big Corp.
 - Sally alleges that she was discriminated against because of her age and also was denied FMLA leave
 - Sally further alleges that Big Corp. failed to pay her overtime for the time worked at home in violation of the FLSA
- Sally also files a worker's compensation claim for her injuries sustained while working at home and also alleges that she was terminated in retaliation for asking questions about filing a worker's compensation claim
 - Is Big Corp. liable to Sally?
 - Is Sally eligible for worker's compensation?
 - What did Big Corp. do correctly?
 - What did Big Corp. do wrong?
 - How can Big Corp. protect itself in the future?





A Case Study *Cont.*

Big Corp.'s liability depends on whether Sally is classified as an employee, an independent contractor, or a temporary employee





Who is an “Employee?”

- Statutory definitions are not helpful: Most commonly, an employee is defined as “an individual employed by an employer”
- Generally, courts look at the “totality of the circumstances” to determine if an individual is an employee
- Courts also use different tests to determine if an individual is an employee





Who is an "Employee?" *Cont.*

Test	Description	Context
Common-Law Test (used by IRS)	Looks at the totality of the circumstances and especially focuses on if the employer has the right to control work process. The common law test focuses on several specific factors. No one factor is dispositive.	Income Tax Withholding ERISA FICA FUTA NLRA





Who is an "Employee?" *Cont.*

Test	Description	Context
Economic Realities Test	Looks at whether the worker is economically dependent on the business to which he renders service or, as a matter of economic fact, was in business for himself.	ADA ADEA FLSA FMLA Title VII



Who is an "Employee?" *Cont.*



Test	Description	Context
Hybrid Test	Looks at employer's right to control means and manner of worker's performance and also looks to other factors: (1) kind of occupation at issue, with reference to whether work usually is done under direction of supervisor or by specialist without supervision; (2) skill required in particular occupation; (3) whether employer or worker furnishes equipment used and place of work; (4) length of time the individual has worked; (5) method of payment, whether by time or by job; (6) manner in which work relationship is terminated; (7) whether annual leave is afforded; (8) whether work is integral part of business of employer; (9) whether worker accumulates retirement benefits; (10) whether employer pays social security taxes; and (11) intention of parties.	ADA ADEA Title VII



Common Law Test

Factor	Likely an employment relationship if:	Likely an independent contractor relationship if:
Control	Employer controls details of the work	Worker controls details of the work
Type of Business	Worker does not have his or her own business separate from the employer's business	Worker has his own business that is separate from the employer's business - worker may compete directly with employer
Supervision	Worker is supervised by employer	Work is done with no supervision
Skill level	Skill level is usually not high or unique	Skill level is specialized, is unique, or requires substantial training





Common Law Test *Cont.*

Factor	Likely an employment relationship if:	Likely an independent contractor relationship if:
Tools and materials	Employer provides equipment, tools, and physical workplace	Worker provides equipment and tools, may provide physical worksite and often works away from employer's physical workplace
Length of Relationship	Worker is employed for a continuous period of time	Worker is employed for a specific project or for limited time
Payment	Worker is paid regularly, with time being the main factor in determining how payment is calculated	Worker is paid by the project





Common Law Test *Cont.*



Factor	Likely an employment relationship if:	Likely an independent contractor relationship if:
Integral Part of Business	Worker performs tasks that are part of employer's regular business	Worker performs tasks outside of the employer's regular business
The Parties' Intentions	The parties intend to create an employer-employee relationship	There is no intention to create an employer-employee relationship. Conversely, the parties also may intend to create an independent contractor relationship
Employment by more than one firm	Worker provides services only to one employer	Worker provides services to more than one business and may even work for the business' competitor



Economic Realities Test

Factor	Likely an employment relationship if:	Likely an independent contractor relationship if:
Integral Part of Business	Worker performs tasks that are part of employer's regular business	Worker performs tasks outside of the employer's regular business
Investment in facilities	Worker does not own the equipment or facilities that he uses	Worker has an ownership interest in the equipment or facilities that he uses
Right to Control	Management has the right to control crucial aspects of the employee's work	Management does not have the right to control crucial aspects of the employee's work





Economic Realities Test *Cont.*

Factor	Likely an employment relationship if:	Likely an independent contractor relationship if:
Risk of Loss	Worker does not bear the risk of loss and also cannot make a profit	Worker bears the risk of loss, but stands to make a profit on the job
Skill Required	No unique training or skill is required	The work requires unique training or skill
Continuing Relationship	Worker has an extended relationship with the business	Work relationship is for a specific purpose such as for one project



The Hybrid Test

Like the above tests, the Hybrid test looks at such factors as the type of occupation at issue, the skill involved, whether the worker is integral to the employer's business, who provides the equipment, the length of employment, the intention of the parties, and the method of payment. It also examines:

Factor	Likely an employment relationship if:	Likely an independent contractor relationship if:
Termination of working relationship	The employer and the worker can both terminate the relationship at will	The parties have contractual obligations in the event of termination
Annual Leave and Retirement Benefits	The employee is entitled to annual leave and retirement benefits	The worker is not entitled to annual leave or retirement benefits
Tax Treatment	Employer pays all payroll taxes as well as social security, FUTA, FICA and worker's compensation premiums	Employer does not pay any work related taxes





Employees vs. Independent Contractors

Employee	Independent Contractor
Employer pays federal income tax, Social Security, and Medicare taxes	Independent contractor pays self-employment tax
Employer pays Federal Unemployment Tax (FUTA)	N/A
Pay overtime (unless employee is exempt under FLSA)	Not entitled to overtime
Protected by anti-discrimination laws (Title VII, ADA, ADEA)	Not protected by anti-discrimination laws
Entitled to worker's compensation	Not entitled to worker's compensation





Risks of Misclassifying an Employee

- Employers who misclassify workers as independent contractors can end up with substantial tax bills
 - They can also face penalties for failing to pay employment taxes and for failing to file required tax forms
- There is currently a bill in congress – the Taxpayer Responsibility, Accountability, and Consistency Act of 2009 (H.R. 3408)
 - Would make it more difficult for employers to avoid employment tax liability if they have misclassified a worker as an independent contractor and that significantly increases employer penalties in the event of the misclassification
- Employers also can face heavy regulatory fines from the Department of Labor for employee misclassification





Tips to Avoid Employee Misclassification

- Talk with your workers about your expectations for the job
 - Let them know that they are independent contractors
- Have a specific independent contractor agreement for the worker to sign
- Make sure the independent contractor agreement covers: key points of compensation, benefits, work hours, location of work, equipment, control, risk of loss, and rights regarding termination





Tips to Avoid Employee Misclassification *Cont.*

- Do not have your employees supervise the independent contractor
- Do not have independent contractors performing the same job functions as your employees
- When in doubt, seek a ruling from the IRS by filling out Form SS-8 Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding
 - Be aware that it may take up to six months to get a determination





Temporary Employees





Risks of Hiring Temporary Employees

- Liability for sexual harassment and discrimination
- Compliance with wage and hour laws
- FMLA problems
- Employee benefits
- Liability as a joint employer





Temporary Employees

- Temporary employees have most of the same rights as “regular” employees
- If you utilize temporary employees on a regular basis, make sure your employee policies or employee manuals reflect that discrimination, sexual or racial harassment, and retaliation policies apply to temporary employees
- When paying temporary employees, make sure all applicable federal and state wage and hour statutes are complied with
 - Unless the employee is exempt, temporary workers are entitled to minimum wage and overtime at one and one half times their regular rate for all hours worked over forty in a week





Temporary Employees *Cont.*

- A temporary employee is eligible for FMLA leave if:
 1. The employee has worked for you for at least 12 months; and
 2. The employee has at least 1250 hours of service in the preceding 12 month period
- Be aware that if a temporary employee becomes a permanent employee, time served as a temporary employee will count towards calculating whether the employee is eligible for FMLA leave time
- Also, temporary employees must be counted to determine if an employer has enough “employees” to be covered by the FMLA





Temporary Employees *Cont.*

- Although the temporary staffing agency has the primary responsibility to administer FMLA for temporary employees, a prudent HR professional should seek assurances from the temporary staffing agency that FMLA requirements have been followed
- Once the temporary employee returns from FMLA leave, he is entitled to be reinstated in the same position or an equivalent position with equivalent pay and benefits
 - Be prepared to cooperate with the temporary staffing agency to ensure that this FMLA requirement is fulfilled





Temporary Employees *Cont.*

- In addition to concerns about complying with discrimination laws and wage and hour laws, it is prudent that you ensure temporary staffing agencies perform any necessary background or criminal checks on temporary employees
 - Make sure the temporary staffing agency is complying with the Fair Credit Reporting Act in performing these checks
- It is also important to ensure that the temporary staffing agency is complying with immigration laws





Temporary Employees *Cont.*

- There is no requirement that you provide benefits for your temporary employees
- However, it is prudent for any benefit plan – pension, health, welfare, fringe benefits - to contain a specific, explicit exclusion for those temporary employees





Temporary Employees *Cont.*

- When hiring temporary employees, there is a risk that you will be held jointly liable with the temporary staffing agency
 - As a joint employer, you may be held liable for the temporary staffing agency's actions
- The best way to combat this situation is to enter into a contract with the temporary staffing agency which enumerates both parties rights should a lawsuit arise
 - This contract should include who pays for legal fees in the event of a lawsuit, who is responsible for the temporary employee's various taxes, who determines the temporary employee's time off, who is responsible for various federal and state regulatory compliance, etc.
 - All parties will benefit by considering such issues before complications arise





Tips to Avoid Trouble with Temporary Employees

- Do not train your temporary employees
 - Have the temporary staffing agency train the employees
- Do not negotiate directly with the temporary employee over work hours and pay rate
 - Ideally, you should have a written contract with the temporary staffing agency
 - Based on this contract, the temporary staffing agency should set pay for the temporary employees
 - The temporary staffing agency should also control pay raises





Tips to Avoid Trouble with Temporary Employees *Cont.*

- Temporary employees should request any vacation time or personal time off with the temporary staffing agency
- If you experience trouble with the temporary employee, contact the temporary staffing agency and have them speak with the temporary employee
- Do not routinely include temporary employees in your company's employee functions
 - Do not present awards to temporary employees
 - If you wish to recognize temporary employees, involve the temporary staffing agency and make sure such recognition comes from the temporary staffing agency





Tips to Avoid Trouble with Temporary Employees *Cont.*

- Business cards, nameplates, and employee badges should clearly show that the temporary employee is temporary and not a “regular” employee
- Managers should refer temporary employee complaints to the temporary staffing agency
 - The temporary staffing agency and your HR department can work together to resolve the issue
- Do not terminate a temporary employee directly
 - Contact the temporary staffing agency





Tips to Avoid Trouble with Temporary Employees *Cont.*

- Most importantly, treat temporary employees with respect
- Temporary employees are people too, not easily replaceable commodities
- Do not be hasty in seeking to replace a temporary employee who makes a complaint
- You will reduce your chances of a lawsuit if you treat temporary employees fairly





Employees Working from Home





Employees Working from Home

- You may still be liable for worker's compensation claims if your employee is injured while working at home
- Even if your employees are working from home, you still retain some responsibility for providing a safe work space
- Problems arising from having your employees working from home include:
 - Presence of young children or pets
 - Unsafe equipment
 - Poor lighting
 - Lack of security
 - Poor ergonomics





Employees Working from Home *Cont.*

- One way to ensure that your employees have a safe work space is to contract with them about your expectations
- This contract should include some type of section for home safety
 - This section could be a checklist that the employee fills out affirming that the work space is safe and equipment is suitable and in good repair
 - Pictures of the work space would also suffice





Employees Working from Home *Cont.*

- Consider your insurance needs
 - Commercial liability insurance agreements may not typically cover accidents that happen while your employees are working from home
 - Check to ensure you are properly covered in the event of an accident

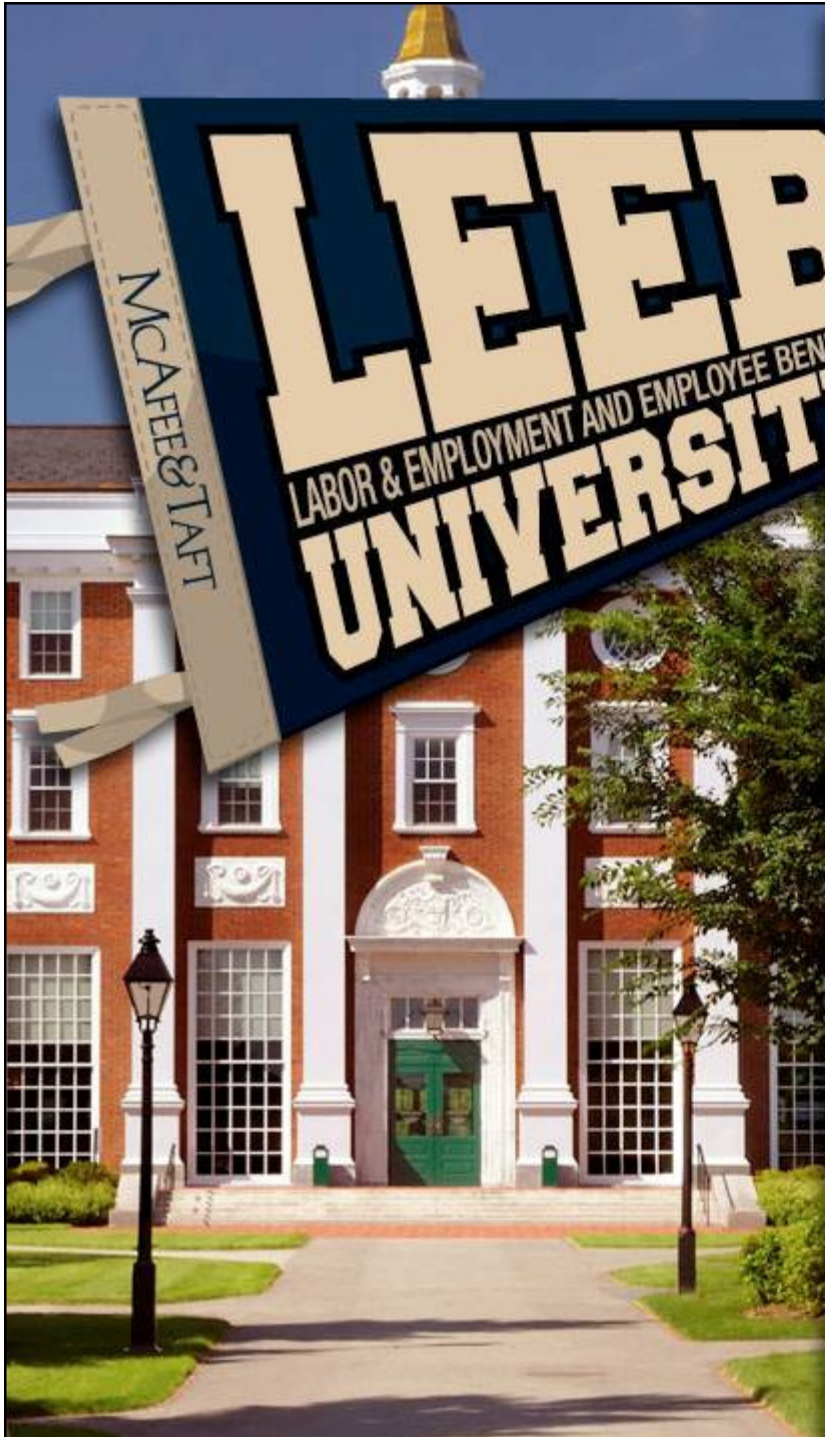




Employees Working from Home *Cont.*

- Be aware of FLSA claims
 - Have a policy that regulates your employees working at home to ensure that they are accurately documenting all time worked
- If your employees are hourly, implement policies and procedures so that they cannot work off the clock
- To ensure compliance with company policies, maintain excellent communication with your employees working from home





A dark blue pennant graphic with a white border. On the left, a white ribbon-like banner contains the text "MCAFFEE & TAFT" in black, oriented vertically. The main body of the pennant features the word "LEEB" in large, bold, white, block letters. Below "LEEB" is the text "LABOR & EMPLOYMENT AND EMPLOYEE BENEFITS" in smaller white letters. At the bottom of the pennant, the word "UNIVERSITY" is written in large, bold, white, block letters. To the right of the text is a circular white seal containing a shield with a book, a lamp, and a laurel wreath, surrounded by stars.

Questions?