

WELCOME

2021 Employment Law Annual Update

9:30 AM – 10:30 AM

**The Gig Economy – Independent Contractor or
Employee and Why it Matters**

Speakers: Tawny Alvarez; Emily Coombs

The Gig Economy – Independent Contractor or Employee and Why it Matters

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Tawny Alvarez

talvarez@verrill-law.com

207-253-4522

Emily Coombs

ecoombs@verrill-law.com

207-253-4468

Agenda: What Will You Take Away?

- Why the question of employee or independent contractor matters?
- Federal standards and administration changes and the effect it will have moving forward
- Maine Standard
- Massachusetts Standard
- Connecticut Standard

Why the Classification Matters

- It is not enough to have a contract that says someone is an independent contractor. Courts and administrative agencies consider other factors that may override a written agreement between a business and a worker.
- If working with ICs:
 - Employers can avoid tax payments and insurance obligations on behalf of employees
 - Employers may avoid liability under certain employment laws (ex. Title VII, ADEA, ADA)
 - Federal and state wage and hour concerns (minimum wage, overtime)
 - Worker's compensation (what happens when an injury occurs)
 - General liability/ability to bind

Federal Standard

- Depends on the Risk
 - FLSA: Economic Realities Test
 - *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947)
 - 6 factor test
 - IRS: Control Test
 - Behavioral control, financial control, the type of relationship
- Jurisdiction specific
 - 1st Cir. (Massachusetts, Maine)
 - 2nd Cir. (Connecticut, New York)

Proposed Trump Administration Federal Standard

- Proposed rule was issued by the DOL on September 22, 2020, final rule was published January 6, 2021, and was scheduled to take effect March 8, 2021
- Rule reduced the Economic Realities Test to two core factors:
 - The nature and degree of the worker's control over the work
 - The worker's opportunity for profit or loss
- Three other factors traditionally associated with the Economic Realities Test—the amount of skill required, degree of permanence of the employment relationship, and whether the work is part of the company's production process—played lesser roles under this new rule

Biden Administration Action

- On January 20, 2021, a regulatory freeze went into effect. Subsequently, the DOL proposed a delay of the effective date until May 7, 2021. The public comment period on the proposed delay is open until February 24, 2021
- The Biden Administration has voiced support of an ABC Test and the Protecting the Right to Organize (PRO) Act
 - **A:** The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
 - **B:** The worker performs tasks that are outside the usual course of the hiring entity's business.
 - **C:** The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

Federal Standard Moving Forward

- New administration will not enact former administration's rule
- PRO Act Implications
- Continue to monitor DOL for updates on President Biden's proposed course of action

Maine: 26 M.R.S.A. § 1043(11)(E)

- **Step 1:** Does the individual have the right to control the means and progress of the work, except as to the final results?
 - No? STOP. The individual is an employee.
- **Step 2:** Is the individual customarily engaged in an independently established trade, occupation, profession or business?
 - No? STOP. The individual is an employee.
- **Step 3:** Does the individual have the opportunity for profit and loss as a result of the services being performed for the other individual/entity?
 - No? STOP. The individual is an employee.
- **Step 4:** Does the individual hire and pay his or her assistants (if any) and to the extent that these assistants are employees, supervise the details of their work?
 - No? STOP. The individual is an employee.
- **Step 5:** Does the individual hire and pay his or her assistants (if any) and to the extent these assistants are employees, supervise the details of their work?
 - No? STOP. The individual is an employee.
 - If Yes – Consult additional 3 elements (see attached guide).

Maine Remedies

- There is no safe harbor provision under Maine law that protects employers who unintentionally misclassify workers as independent contractors
- Employers who fail to pay wages are liable for:
 - \$100-\$500 fine per each violation
 - Unpaid wages
 - Liquidated damages equal to the amount of unpaid wages
 - Court costs
 - Attorneys' fees
 - Injunctive relief 26 M.R.S.A. §§ 602 and 670

Massachusetts Standard

- Massachusetts applies different tests to determine if the worker is an IC or an employee
 - State wage and hour law
 - One of the strictest tests in the nation
 - Employer must show worker is free from control and direction in his work, work performed is outside the usual course of the employer's business, worker is customarily engaged in an independently established business, occupation, trade or profession of the same nature as that involved in the service performed
 - Unemployment insurance law
 - ABC Test
 - Workers' Compensation
 - 12 Factor Test
 - Tax Laws
 - 20 Factor test from Internal Revenue Code

Massachusetts Remedies

- No safe harbor is available to employers
- A private right of civil action is available to employees who can recover for unpaid wages, injunctive relief, and triple the amount of damages. *Rosnov v. Molloy*, 952 N.E.2d 901, 907 (Mass. 2011)
M.G.L. c. 151, § 20
- Criminal penalties may be imposed, as well. For a first willful offense, a fine of up to \$25,000 or imprisonment for up to a year, or both. For a subsequent willful offense, a fine of up to \$50,000 or imprisonment for up to two years, or both. M.G.L. c. 149, § 27C(a)

Connecticut Standard

- Common Law Test
 - Right to control test: behavioral control, financial control, relationship between the parties
 - Similar to worker's compensation in CT. *Doe v. Yale Univ.*, 748 A.2d 834, 858 (Conn. 2000)
- Unemployment
 - ABC Test Conn. Gen. Stat. Ann. § 31-222(a)(1)(B)(ii) :
 - **A:** Free from control or direction in performing his services,
 - **B:** Performs his services outside the usual course of the employer's business or the employer's places of business, and
 - **C:** Is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service being provided

Connecticut Remedies

- No safe harbor provision available to employers
- Connecticut Wage Payment Law provides a private right of action if employer fails to pay required wages. This may result in...
 - Double the wages owed plus costs and attorneys' fees OR
 - Wages plus costs and attorneys' fees if the employer proves it had a good faith belief for the underpayment Conn. Gen. Stat. Ann. § 31-72
- Criminal penalties may include fines between \$2,000 and \$5,000 and may face up to 5 years in prison for each offense if the total amount of unpaid wages owed to an employee exceeds \$2,000 Conn. Gen. Stat. Ann. § 53a-35a(8).
- Employees can also file with the CT DOL who can assess penalties of \$300 for each wage and hour violation. Conn. Gen. Stat. Ann. § 31-69a(a)

Terms in an Independent Contractor Contract

- Define the relationship as that of an independent contractor
- No assignment clause
- Require that the IC be insured (workers comp and other forms of insurance)
- Indemnification
- Termination provisions regarding days' notice or end date of agreement
- Be Careful: some non-poaching language could violate state laws. 26 MRSA §599-B (Maine)

Action Steps

- Review existing worker classifications and ensure they comply with state and federal law
- Train managers and employees who work with independent contractors on worker classification issues to ensure practices reflect the independent contractor classification
- Draft agreements that document the independent contractor distinction

Thank You!

Check for real-time updates on Verrill's Taking Care of HR Blog!

<https://www.verrill-law.com/taking-care-of-hr-business/>

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