

MEMORANDUM

TO: Brian Begle
FROM: Denis Potvin
DATE: January 28, 2015
RE: Part-time Employees v. Independent Contractors

A. Introduction

The distinction between a part-time employee and an independent contractor can be difficult to discern. It is important to properly distinguish between the two because employees and independent contractors are treated differently for the purposes of liability, taxes, and employment issues. This paper is intended to help the client distinguish between part-time employees and independent contractors how that distinction affects liability, taxation, and employment matters.

B. Who is a part time employee? Who is an independent contractor?

a. The Test

The test applied in most instances is the “hybrid economic realities/common law control test.” In some cases, the common law control test is applied. In order to avoid confusion, apply the “hybrid economic realities/common law control test.”

The “hybrid economic realities/common law control test” has two components: the alleged employer's right to control the employee's conduct, and the economic realities of the relationship. The control component, which is the more important component of the test, focuses on whether the alleged employer has the right to hire, fire, supervise, and set the schedule of the alleged employee. The economic-realities component considers the following factors:

- (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
- (2) the skill required in the particular occupation;

- (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work;
- (4) the length of time during which the individual has worked;
- (5) the method of payment, whether by time or by the job;
- (6) the manner in which the work relationship is terminated; that is, by one or both parties, with or without notice and explanation;
- (7) whether annual leave is afforded;
- (8) whether the work is an integral part of the business of the "employer";
- (9) whether the worker accumulates retirement benefits;
- (10) whether the "employer" pays Social Security taxes; and
- (11) the intention of the parties.

C. Practical Differences

a. Liability

i. Part-time employee

1. Employer's liability to employee

Where there is reason to anticipate, from the character of the services required and the manner of their performance, that some injury may result to an employee, the employer must exercise such care demanded by the relationship as will prevent injury. The age and experience of the employee should be considered in measuring the duty of the employer.

When an employee's injury results from performing the same character of work that employees in that position have always done, an employer is not liable if there is no evidence that the work is unusually precarious. The employer is liable when this duty is breached and the breach is the proximate cause of the damages incurred by the employee; however, the risk of harm must be reasonably foreseeable. Also, there is no duty to protect an intoxicated employee from harm where the employer is not responsible for the intoxication.

Although an employer is not an insurer of the employees' safety at work, an employer owes certain nondelegable and continuous duties to employees, including the

duties to warn about the hazards of employment, to supervise activities, to furnish a reasonably safe workplace, and to furnish reasonably safe instrumentalities with which to work. The employer remains responsible for these nondelegable duties even if they are actually delegated to an employee, no matter how carefully the employee has been selected. Whoever is permitted to exercise the employer's authority is charged with the employer's duty; the employer is responsible for a want of proper caution on the part of the agent as well as for its own personal negligence.

2. Employer's liability to third party

Vicarious Liability

An employer may be vicariously liable for the tortious acts of an employee¹ under the doctrine of respondeat superior, which is a policy doctrine that comes into play following a finding of employee liability. As to vicarious liability, such as the theory of respondeat superior for an employee/employer, there need not be any allegation of negligence on the employer's part because an employer would be responsible for the employees' actions even if the employer were free from fault. The typical respondeat superior claim involves an allegation of negligence on the part of the employee

Negligent Hiring/Supervision

An employer has a duty to adequately hire, train, and supervise employees. Under the common-law doctrine regarding negligent hiring and supervision of employees, an employer's negligent performance of those duties may impose liability on an employer if the complainant's injuries result from the employer's failure to take reasonable precautions to protect the complainant from the misconduct of its employees. An employer can be held directly liable for hiring or retaining an incompetent employee, especially where the occupation at issue could cause hazard to others or requires skilled or experienced persons.

One who retains the services of another has a duty to investigate the background of that individual for fitness for the position, and to remain knowledgeable of that fitness, and is liable if another person is injured in some manner related to the employee's lack of fitness. However, the plaintiff is required to establish not only that the employer was negligent in hiring or supervising the employee but also that the employee committed an actionable tort against the plaintiff

ii. Contractor

1. Employer's liability to independent contractor

Generally, an employer is not responsible for the acts or omissions of its independent contractor or the independent contractor's servants. Moreover, as general rule, an employer of an independent contractor does not have a duty to see to it that the independent contractor performs its work in a safe manner. The rule that a contractee is not answerable for acts of an independent contractor is applicable to municipal corporations.

2. Employer's liability to third party

Because an independent contractor has sole control over the means and methods of the work to be accomplished, the individual or entity that hires the independent contractor is generally not vicariously liable for the tort or negligence of that person. To destroy independent contractor status and render a party liable for the negligent acts of a worker, the person engaging the worker must retain the right to control the details and the manner of performance of the worker's tasks.

However, an employer who is aware that its contractor routinely ignores applicable federal guidelines and standard company policies related to safety may owe a duty to require corrective measures to be taken or to cancel the contract.⁶ Also, where the employer is, by statute or administrative regulation, under a duty to provide specific safeguards for the safety of others, liability ensues to the others for whose protection the duty is imposed for harm caused by the failure of the contractor employed by it to provide the required safeguards,⁷ and where the employer employs an independent contractor to do work involving a special or inherent danger to others, liability ensues for physical harm to persons resulting from the contractor's failure to take reasonable precautions against the danger.

b. Taxation

i. Part-time employee

At the end of the year, employers must prepare and file Form W-2, Wage and Tax Statement to report wages, tips and other compensation paid to an employee.

Federal Income Tax

Employers generally must withhold federal income tax from employees' wages. Employers must deposit their withholdings.

Social Security and Medicare Taxes

Employers generally must withhold part of social security and Medicare taxes from employees' wages and Employers pay a matching amount.

Federal Unemployment (FUTA) Tax

Employers report and pay FUTA tax separately from Federal Income tax, and social security and Medicare taxes. Employers pay FUTA tax only from their own funds. **Employees do not pay this tax or have it withheld from their pay.**

ii. Contractor

Form W-9

If you have made the determination that the person you are paying is an independent contractor, the first step is to have the contractor complete Form W-9 Request for Taxpayer Identification Number and Certification. This form can be used to request the correct name and Tax Payer Identification Number, or TIN, of the worker. A TIN may be either a Social Security Number (SSN), or an Employer Identification Number (EIN). The W-9 should be kept in your files for four years for future reference in case of any questions from the worker or the IRS.

Form 1099-MISC

Form 1099-MISC is most commonly used by payers to report payments made in the course of a trade or business to others for services.

If you paid someone who is not your employee, such as a subcontractor, attorney or accountant \$600 or more for services provided during the year, a Form 1099-MISC needs to be completed, and a copy of 1099-MISC must be provided to the independent contractor by January 31 of the year following payment. You must also send a copy of this form to the IRS by February 28.

Also note that independent contractors may have their own employees or may hire other independent contractors (subcontractors). In either case, they should be aware of their tax responsibilities, including filing and reporting requirements, for these workers.

c. Employment Issues

i. Part-time employee

Compensation

Under the Texas Minimum Wage Act, an employer must pay to each employee the federal minimum wage. Employers must give employees written earnings statements. An employer in violation of the act is liable to the affected employee in the amount of the unpaid wages plus an additional equal amount as liquidated damages, as well as reasonable fees and costs.

Unemployment Compensation

Under the Texas Unemployment Compensation Act, the general definition of "employment" means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the Texas Workforce Commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact. Unemployment compensation benefits are due discharged employees unless a statutory exception to benefits is met, and statutory exceptions to compensation are to be construed narrowly

Discrimination

Texas statutes provide for the execution of the federal Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 and for securing freedom from discrimination in employment for all persons, including those with disabilities, in order to protect their personal dignity, make available their full productive capacities, avoid domestic strife and unrest, preserve public safety, health, and general welfare, and promote their interests, rights and privileges. An employer commits an unlawful employment practice by failing to hire, discharging or otherwise discriminating against, or limiting, segregating or classifying an employee or employment applicant because of race, color, disability, religion, sex, national origin, or age.

ii. Contactor

Compensation

The fact that a worker is paid by the job may be evidence that he or she is an independent contractor. If the worker is paid on monthly or biweekly basis then he/she may be characterized as an employee regardless of what the employer believes the status of the worker to be. When in doubt characterize as an employee.

Unemployment Compensation

Independent contractors are not eligible for unemployment compensation. The Unemployment Compensation Act defines employment as a service performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance is free from control or direction under the contract and in fact. The burden may be on the employer to demonstrate that the worker is not an independent contractor.

Discrimination

There are important protections available to employees but not to **independent contractors**, such as:

- — Texas Whistleblower Law protections.
- — Protection from discrimination provided by Title VII, the Age Discrimination in Employment Act and other federal laws.
- — Protection from discrimination provided by the Texas Commission on Human Rights Act and other state laws.
- — Unemployment insurance.
- — Fair Labor Standards Act overtime and minimum wage requirements.
- — leave under the Family and Medical Leave Act.

D. What are the ramifications of making a mischaracterizing one or the other?

a. Liability

Employees who have been characterized as an independent contractor will be subject to the right of control test. If the independent contractor is found to be an employee, the Employer may be held liable for the acts of the employee towards third parties and owes a high standard of care to that employee.

Rule of thumb: Contract with independent contractors to make the relationship clear to a potential third party.

b. Taxation

Consequences of Treating an Employee as an Independent Contractor

If an employer classifies an employee as an independent contractor and has no reasonable basis for doing so, the employer may be held liable for employment taxes for that worker.

Relief Provisions

If the employer has a reasonable basis for not treating a worker as an employee, it may be relieved from having to pay employment taxes for that worker. To get this relief, the Employer must file all required federal information returns on a basis consistent with your treatment of the worker. The employer must not have treated any worker holding a substantially similar position as an employee for any periods beginning after 1977.

Rule of Thumb: when in doubt characterize the worker as an employee.

c. Employment

Discrimination

The Commission on Human Rights Act establishes a comprehensive administrative review system, under which the exhaustion of administrative remedies is a mandatory prerequisite to filing a civil action. The Commission on Human Rights, on a determination by a majority of the commissioners, may bring a civil action against an employer if it determines there is reasonable cause to believe that the employer engaged in an unlawful employment practice and conciliation has been unsuccessful; the complainant may intervene. A complainant who receives notice that the complaint has not been dismissed or resolved may make a written request to the commission for a written notice of a right to file a civil action; failure to issue this notice of right to file does not affect the complainant's right to bring a civil action.

Rule of Thumb: Do not engage in discriminatory practices.

Unemployment Compensation

The burden of proof is on the employer to show that the services in question were not employment, once it is shown that the services were performed for any type of remuneration.

Rule of Thumb: when in doubt characterize the worker as an employee.

E. Conclusion

In characterizing an individual as a part-time employee or independent contractor, it is important that the employer be clear from the outset of the relationship and consistent with its practices in the past. In the event this relationship has not been clearly defined, the employer should look to the control test and how it has treated employees and independent contractors in the past. For liability purposes the employer should memorialize an independent contractor relationship to avoid any confusion. With respect to employment and taxation issues, the employer should err on the side of caution. If there is doubt about the status of the relationship, the individual should be characterized as an employee.