MISCLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS: RISKY PRACTICE, COSTLY MISTAKE

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The stakes are high for all the players—workers, employers, and federal and state agencies: The misclassification of workers as independent contractors, rather than as employees, results in a significant loss of revenues to federal, state, and local tax departments, Social Security, Medicare, the unemployment insurance trust funds, and workers compensation funds. More so than ever, as enforcement authorities intensify efforts to "crack down" on the practice of misclassifying workers as independent contractors, the costs of improperly "1099-ing" workers can severely impact a company's financial health. In many cases, worker misclassification occurs hand-in-hand with violations of labor and tax laws, which can lead to the assessment of significant back wages, overtime pay, liquidated damages, tax payments, penalties, and fines. The improper classification of workers can even give rise to criminal liability to company executives.

Not surprisingly, this growing confusion as to who is an employee has spawned a hotbed of litigation, including a number of class action suits, some of which have resulted in massive settlements with some of the country's most prominent and largest employers, such as Federal Express[1] ("FedEx") and United Parcel Service.[2] Recently, such practices have also garnered the attention of state Attorney Generals, some of whom have threatened to take FedEx to court over its treatment of certain drivers as independent contractors rather than as employees. Moreover, at least one state Attorney General has brought criminal charges against business owners for fraudulent acts related to the misclassification of workers. While the risk of litigation and administrative agency investigations was relatively low in years past, the legal landscape today is dramatically different as a result of the economic downturn and the deep cuts in state budgets across the country. Moreover, the plaintiffs' bar has "caught on" to the fact that employers, large and small, are routinely misclassifying workers, often to reduce cost expenditures, and have found this to be a fertile area for class action litigation, with the promise of lucrative paydays. Accordingly, employers should take heed of the legal issues associated with the improper classification of workers, and implement some of the practice pointers discussed below.

In this article, we will discuss the extent of the misclassification problem, the legal obligations of employers to those who have been misclassified, the standards or tests for analyzing worker status, the growing (mis)use of interns and trainees, and the efforts by the federal and state authorities to curb worker misclassification. Notably, one of the few pieces

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of federal legislation introduced by then-Senator Barack Obama was the Independent Contractor Proper Classification Act of 2007 which was recently re-introduced in the Senate. Clearly, in these difficult financial times, this is not an issue that is going away any time soon. There is simply too much money at stake.

I. THE EXTENT AND COST OF MISCLASSIFICATION

For businesses, the cost of misclassifying workers can be extraordinarily high, if not devastating. In November 2008, after five years of litigation and two months of trial, Freedom Communications Inc., which publishes, among others, the Orange County Register, settled for a hefty $42 million with more than 5,000 current and former newspaper carriers.[3] The suit alleged that the newspaper carriers were misclassified as independent contractors and, thus, were denied benefits to which they were entitled as employees under California's Labor Code, such as minimum and overtime wages and proper meal and rest breaks.[4]

In recent years, FedEx has become the poster-child for the perils of worker misclassification. In December 2008, after years of fighting in court, FedEx agreed to pay nearly $27 million, which included roughly $12 million in attorneys' fees, to approximately 200 drivers in California who had been misclassified as independent contractors.[5] A year earlier, in December 2007, the IRS levied $319 million in fines and back taxes, for calendar year 2002 alone, against FedEx for underpayments resulting from the misclassification of delivery drivers as independent contractors in its FedEx Ground unit.[6] After years of fighting with the IRS, the agency reversed its position in October 2009, and advised FedEx that it did not have to pay any assessment of federal employment taxes with respect to its independent contractors subject to the 2002 investigation.[7] Few companies—save for behemoths like FedEx—have the resources to battle with the federal government to reverse findings of employment tax violations, while also litigating on several fronts in civil actions brought by aggrieved workers.[8]

In April 2009, the U.S. Court of Appeals for the D.C. Circuit handed down a significant win to FedEx with respect to its "independent contractor model" and its Home Delivery drivers.[9] Appealing an adverse ruling by the National Labor Relations Board, which had ruled that its drivers were employees and subject to union organizing efforts, FedEx successfully argued that the "somewhat unique" entrepreneurial opportunities of its Home Delivery model supported a finding that its drivers were independent contractors, and not employees.[10] Acknowledging that its "emphasis [was shifting] to entrepreneurialism,"[11] and perhaps slightly away from the traditional common law agency test previously used to resolve issues of employee status, the Court of Appeals, in a 2-1 decision, noted that "there is no shorthand formula or magic phrase that can be applied to find the answer."[12] Nonetheless, the Court opined, it had "considered all the common law factors, and, on balance, [is] compelled to conclude they favor independent contractor status. The ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor of independent contractor status."[13]

While FedEx may have dodged one (or maybe even two) bullet(s) and has had some success in defending its "independent contractor model," its legal woes are far from over. Since the 2008 California settlement, class action suits brought by drivers against FedEx[14] (and other companies) have multiplied across the country. One takeaway here is that just because the IRS went away doesn't mean that the plaintiffs' bar or state governments will shy away from bringing challenges based on other laws. While the IRS has one standard, the definition of "employee" may be different under the myriad other federal or state laws, still leaving FedEx vulnerable to litigation.

Other companies too have been the subject of similar litigation. Just a few months ago, a putative class action was brought against Comcast Corp., the cable services provider, by a former cable installer who alleged that he had been misclassified as an independent contractor.[15] The suit, filed in October 2009 in Massachusetts federal court, also alleged that TriWire Engineering Solutions Inc., the company with whom Comcast contracted to install cable services, had violated the Fair Labor Standards Act ("FLSA") and state wage laws.[16]

As for the national coffer, the Government Accountability Office ("GAO") has estimated that worker misclassification costs the federal treasury $4.7 billion annually in income tax revenues.[17] In California, nearly $7 billion in tax revenues is estimated to have been lost due to misclassification.[18] In 2007, California collected $163.6 million in fines and charges from businesses that had misclassified independent contractors.[19] A joint study conducted by the University of Massachusetts' and Harvard University's Schools of Law and Public Health in 2004 reported that 36,531 employers in Massachusetts misclassified as many as 248,000 workers as independent contractors, which amounted

to $152 million in uncollected income tax revenue and $35.1 million in uncollected unemployment insurance taxes.[20] According to a study conducted by the University of Missouri-Kansas City, Illinois lost an estimated $53.7 million in unemployment insurance taxes and $149 million to $250 million in income tax in 2005.[21]

Worker misclassification is not limited to a few, or specific, industries. In 2005, the Bureau of Labor Statistics reported that there were 10.3 million independent contractors, which represented 7.4% of the workforce.22 The pervasiveness of worker misclassification, and the adverse consequences arising therefrom, has not been fully assessed since the mid-1980s, when the IRS conducted its last comprehensive examination of misclassified workers and its impact on tax revenues. In that study, the IRS estimated that 15% of employers had misclassified 3.4 million workers as independent contractors in tax year 1984.23 In a 2000 U.S. Department of Labor ("DOL") study, researchers estimated that, if only one percent of all employees were misclassified across the country, the underreporting of unemployment taxes would total roughly $200 million each year.24 In order to get a handle on the extent of improper classification, and as discussed later in this article at Section V, the Obama administration is launching, in 2010, a Labor-Treasury Department initiative designed to root out businesses who have engaged in worker misclassification.

II. EMPLOYERS' LEGAL OBLIGATIONS TO WORKERS WHO HAVE BEEN WRONGLY CLASSIFIED

For whatever reason, there has been growing confusion among employers as to who is an employee or a contractor, and even if the worker is correctly classified as an employee, businesses more and more routinely classify employees as exempt from overtime, even when many may not be. Hence, businesses and their human resources departments confront growing liabilities and a host of penalties for employee misclassification. Workers characterized as "employees" are entitled to the benefits and protections of federal and state anti-discrimination laws, employment rights laws, unemployment insurance, and wage and hour laws, to name a few. Conversely, those who are erroneously classified as independent contractors are unjustly deprived of many, if not most, of the protections to which they would be entitled if they were properly classified as employees. By and large, independent contractors fall outside the protective umbrella of anti-discrimination, employment rights, unemployment insurance and wage and hour laws, and may be left without recourse for unlawful conduct in the workplace. Depending on the statute and/or the jurisdiction, however, independent contractors *may,* to a limited extent, be covered under certain anti-discrimination or employment rights laws, but these are rare occurrences.[25]

When an independent contractor is reclassified as an employee, the employer will likely be subject to income tax liability for monies that should have been withheld from the "wages" of the "employee," employer's contributions of social security and federal unemployment taxes, potential overtime pay and other wage claim liability, state unemployment insurance payments, workers' compensation insurance premiums (and potential liability for workplace injuries), and other civil penalties and fines. Further, reclassified workers may be entitled to coverage and benefits under applicable employee benefit plans. On occasion, moreover, a state Attorney General wishing to make a name for him or herself may even seek criminal sanctions against the executives of the business.

The well-publicized case of *Vizcaino v. Microsoft Corp*. highlights the perils of misclassifying a large contingent of workers.[26] In that case, the court held that the "freelancers" originally hired by Microsoft as contractors met the "common law" definition of "employee" and, thus, were entitled to employee benefits under the company's retirement and employee stock purchase plans—even though the freelancers were hired with the understanding that they would not be eligible for benefits, were paid through the accounts receivable department instead of through Microsoft's payroll, and were paid higher salaries than comparable common law employees.[27] After the court's ruling, Microsoft settled the case for $97 million.[28] The takeaway for employers is that the contract terms or "job profile" are not determinative of classification status. Even if the worker wishes to be considered an independent contractor or a volunteer, the courts or agencies involved will make the classification determination based on the job function and duties actually performed by the worker.

III. VARIOUS DEFINITIONS AND TESTS FOR ANALYZING WORKER STATUS EXACERBATE THE EMPLOYER'S CLASSIFICATION DILEMMA

It is no secret that companies have a financial incentive to misclassify employees as independent contractors. Employers who retain independent contractors are relieved from a whole host of legal and monetary obligations, such as paying Social Security, Medicare, and unemployment taxes, providing workers' compensation coverage, paying minimum and overtime wages, or providing other employee benefits. Nonetheless, the absence of a universal definition

for "employee" or one for "independent contractor" only magnifies the problem. Federal laws, such as the FLSA and the Employee Retirement Income Security Act ("ERISA"), define the term "employee" similarly,[29] but courts use different "tests" under those laws to evaluate the status of a worker. Under Title VII, moreover, an "employee" is "an individual employed by an employer."[30] Such a definition is not really helpful if you are trying to assess whether the worker your business just retained is an "employee" or a "contractor." As the United States Supreme Court put it, Title VII's definition of "employee" is "completely circular and explain(s)[ing] nothing."[31]

A. "Economic Reality" Test

In FLSA cases, courts apply the "economic reality" test.[32] The following factors, based on the Supreme Court's decision in *United States v. Silk,*[33] are examined under the "economic reality" test: (i) degree of control exerted by the alleged employer over the workers; (ii) workers' opportunity for profit or loss and their investment in the business; (iii) degree of skill and independent initiative required to perform the work; (iv) duration of the working relationship; and (v) extent to which the work is an integral part of the employer's business.[34]

The "economic reality" test is based on the "totality of circumstances," and no one factor is dispositive.[35] Thus, if a worker is highly dependent on a putative employer for his economic existence, he will be deemed an employee even if that employer does not fully direct and control the worker.[36]

i. Joint Employer Liability Under the "Economic Reality" Test

In *Barfield v. N.Y. City Health & Hosps. Corp.,* the U.S. Court of Appeals for the Second Circuit ruled that Bellevue Hospital Center ("Bellevue") was a joint employer with three different staffing agencies, all of which separately assigned the plaintiff to work different shifts at Bellevue.[37] Notwithstanding the fact that the three agencies directly employed and paid Ms. Barfield, the Court of Appeals held that Bellevue was liable to her for unpaid overtime compensation under the FLSA.[38] Applying the "economic reality" test, and citing U.S. DOL opinion letters supporting that conclusion, the Court held that Bellevue and the staffing agencies were joint employers of Ms. Barfield because Bellevue exercised "formal and functional" control over her.[39]

B. Common Law or "Right to Control" Test

Courts apply the "right to control" (or "common law agency") test to ERISA cases to decide whether an individual is an employee.[40] In *Community for Creative Non-Violence v. Reid,* the Supreme Court first articulated the following 13 factors, derived from the common law of agency, to determine whether a hired person is an employee: (1) the right to control the manner and means by which the service is rendered; (2) the skill required; (3) the source of instrumentalities and tools; (4) the location of work; (5) the duration of relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of hired party.[41] *Reid* was a case in which an artist and a nonprofit group both claimed copyright ownership of a statue that the latter had commissioned from the artist.[42] Because §101 of the Copyright Act of 1976 provided that work prepared by an employee within the scope of his employment is part of work made for hire, the dispute ultimately turned on whether the artist was an "employee."[43]

In *Nationwide Mutual Insurance v. Darden,* the Supreme Court opined that, in the past, when Congress used the term "employee" without defining it, "we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine."[44] Thus, the Supreme Court held that the term "employee" should be construed "to incorporate the general common law of agency, rather than … the law of any particular State."[45] Citing *Reid,* the *Darden* court declined to apply the broader "economic reality" test and, instead, concluded that the common law test—focusing on who has the right of control—should be used to determine whether an insurance broker was an independent contractor or an employee for purposes of ERISA.[46] The Supreme Court further reiterated that the *Reid* factors are non-exhaustive, and none of the factors alone is dispositive.[47]

Compounding the lack of clarity surrounding the employee-employer relationship, federal and state agencies have developed their own list of "factors" to determine whether an individual is an employee or an independent contractor. For example, the IRS uses the "common law" test[48] (previously known as the IRS "20-factor test"), which focuses on an employer's right to control a worker's task by evaluating three primary factors—behavior control (whether a putative employer has the right to direct or control how the worker does the work),[49] financial control (whether a putative employer has the right to control the business aspects of the

worker's job),[50] and the relationship of the parties (how the parties perceive their relationship).[51] According to a report commissioned by the U.S. DOL, at least four states have adopted the IRS' test, and at least 10 states apply their own factors in analyzing worker status.[52] Similarly, under unemployment insurance laws, many states have also adopted the multi-factor "common law" test.

C. "Hybrid" Test

Under the "hybrid" test, which is generally applied in Title VII cases to determine whether an individual is an employee subject to Title VII,[53] or an independent contractor who is outside the law's protections, most courts examine the economic realities of the employment relationship, but the primary focus is on the employer's right to "control" the manner and means of the worker's performance.[54] Although "control" is the most essential factor in the analysis, it is not dispositive.[55] In addition, courts examine a number of other factors to distinguish an employee from an independent contractor, such as the kind of occupation (whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision), the skill required in the particular occupation, whether annual leave is afforded, and whether the worker accumulates retirement benefits.[56]

Notwithstanding various definitions and tests, courts have made clear that classifying a worker is a very fact-specific analysis, and no single factor or group of factors conclusively defines the employee or independent contractor relationships. Further, the mere statement in an agreement that a worker is operating as an independent contractor is not dispositive, even if the worker accepts such a designation. In general, to be a true independent contractor, one must be free from supervision, direction and control in the performance of his duties. Independent contractors are in business for themselves, offering their services to the general public, and bear the risk of profit or loss from their labor.

IV. INTERNS AND "TRAINEES": EMPLOYEES OR NOT?

The same types of legal issues associated with the misclassification of workers are increasingly plaguing companies that "employ" interns and/or trainees. As stated above, the FLSA defines an "employee" as "any individual employed by an employer,"[57] and defines "employ" as "to suffer or permit to work."[58] While the definition of "employ" is very broad, it has certain limitations, as noted by the U.S. Supreme Court in *Walling v. Portland Terminal Co.:*

> The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages…The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage … [these definitions] cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.[59]

Whether interns or trainees are employees for purposes of the FLSA's minimum wage and overtime requirements depends on "all the circumstances surrounding their activities."[60] The U.S. DOL (interpreting the FLSA) has consistently applied a six-factor test in determining whether an employment relationship exists or whether someone is appropriately retained as a trainee or intern and, thus, exempt from federal/state minimum wage laws. The six criteria, derived from the Supreme Court's *Walling* opinion, provide that where training programs are designed to provide students with professional experience in furtherance of their education, and the training is academically oriented for the benefit of the students, the students are not considered employees.[61] Therefore, interns are not considered "employees" under federal law when all six of the following criteria are met: (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; (2) the training is for the benefit of the trainee; (3) the trainees do not displace regular employees, but work under close observation; (4) the employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded; (5) the trainees are not necessarily entitled to a job at the completion of the training period; and (6) the employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.[62]

With unemployment high and "jobs hard to come by," many out-of-work individuals have been willing to provide services as "interns" or volunteers to learn a new skill-set or to "get a foot in the door," anticipating the possibility of employment when the econ-

omy improves. Private and not-for-profit businesses, however, are at risk in retaining individuals as interns or volunteers, without paying them the minimum wage and/or overtime because the U.S. DOL has steadfastly maintained that all six factors must be met for an individual to be deemed a "trainee," and not an employee. Irrespective of how an individual is described—intern, trainee, apprentice, extern or volunteer—the ultimate inquiry, under federal law, is whether s/he is suffered or permitted to work or falls within the six-factor test. While most federal courts have followed the *Walling* principles and the U.S. DOL's six-factor test, it is worth noting that there is judicial precedent for looking at the totality of the circumstances, rather than applying a rigid approach, and examining which party benefits the most from the relationship—the employer or the alleged "intern."[63]

V. FEDERAL AND STATE JOINT COORDINATION EFFORTS TARGET VIOLATORS ASSOCIATED WITH MISCLASSIFICATION

Until recently, federal and state agencies have independently and separately confronted employers that have misclassified their workers as independent contractors. Coordination of information was virtually non-existent. In the past several years, however, greater coordination and collaboration between (and within) federal and state agencies have resulted in the discovery of numerous violations and the assessment and recovery of large sums of tax revenues. In mid-2007, the IRS announced that a major area of emphasis in fiscal year 2008 would be a worker misclassification program. Currently, at least 34 states share the results of employment tax examinations and other misclassification-related audits with the IRS.[64] In November 2009, the IRS announced that it will commence a nationwide audit of 6,000 randomly-selected companies to determine, among other potential tax violations, whether all employment taxes are properly accounted for and paid.[65] This audit—the first Employment Tax National Research Project undertaken by the IRS since 1984—will examine the number of employers that misclassify workers, the number of independent contractors who are misclassified, and the resulting loss on tax revenue.[66] Declaring that "the examinations will be comprehensive in scope," the IRS intends to audit 2,000 employers each year across the next three years.[67] Just recently, moreover, the Obama administration announced that in the proposed federal budget for fiscal year 2011, nearly $25 million has been directed to a worker misclassification initiative to be carried out by the Labor and Treasury Departments to target employers who have improperly classified workers as independent contractors rather than as employees.[68] Reports are that this effort will be used to find an additional 90 wage and hour employees plus another 10 employees who will be assigned to the Solicitor of Labor's office to pursue litigation.[69]

Another example of the increasing prominence that misclassification of workers has garnered, in August 2009, the GAO issued a report titled "Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention" ("2009 GAO Report") —which discussed the extent of worker misclassification, the steps taken thus far by the U.S. DOL and the IRS to ensure compliance with labor and tax laws and regulations, and recommendations for increasing collaboration between those agencies and compliance by businesses with respect to the proper classification of workers.[70] According to the 2009 GAO Report, at least 12 states have some type of agreement with the U.S. DOL to work collaboratively to identify worker misclassification.[71] Additionally, 34 state agencies share information with the IRS on misclassification as part of the IRS's Questionable Employment Tax Practices ("QETP") initiative, which has been in place since 2005 to identify unlawful employment tax practices and to increase voluntary compliance with employment tax rules and regulations.[72] According to the authors of the 2009 GAO Report, IRS employment tax officials believe that the QETP initiative "sends an important message to employers and workers that the IRS and states are working together on compliance issues."

VI. STATES TARGET THE MISCLASSIFICATION PROBLEM: INTERAGENCY TASK FORCES, LEGISLATIVE MEASURES, AND CRIMINAL PROSECUTIONS

A. Multi-Agency Approach of State Task Forces Shows Signs of Success

Within the past few years, interagency and joint "task forces" have been established in a number of states to combat the gaps and deficiencies resulting from uncoordinated investigations and audits. Generally, these task forces have been charged with sharing information between the relevant administrative authorities concerning employers who are suspected of improperly classifying workers, pooling investigative and enforcement resources, developing strategies for systemic investigations of misclassification practices, increasing public

awareness of the harms resulting from worker misclassifications, creating hotlines for the public to report wage violations, and referring cases to prosecuting authorities as appropriate. Designed to strengthen the states' enforcement of laws against employers who misclassify workers as independent contractors, these interagency and joint task forces have made significant headway in ensuring that workers receive the protections and benefits to which they are legally entitled, and that states recover much-needed revenues.

The New York Joint Enforcement Task Force on Employee Misclassification ("NY Task Force"), established in September 2007, is one of a number of task forces that have formed across the country, including Connecticut,[73] Iowa,[74] Maine,[75] Maryland,[76] Massachusetts,[77] Michigan,[78] New Hampshire,[79] Vermont, and Wisconsin. In its 2009 Annual Report, the NY Task Force reported the results of unprecedented coordination between the six agencies involved in the enforcement of workplace-related laws.[80] During the 16 months between its formation and the issuance of the Annual Report, the NY Task Force identified 12,300 instances of worker misclassification and discovered $157 million in unreported wages. Moreover, its multi-agency approach has led to the recovery of $4.8 million in unemployment taxes, more than $12 million in unpaid wages, and more than $1.1 million in workers' compensation fines and penalties.[81]

In June 2009, Massachusetts' Joint Task Force ("JTF") on the Underground Economy and Employee Misclassification issued its annual report.[82] Established in March 2008, the JTF received and investigated 515 complaints during the first year of its formation, which resulted in the recovery of more than $1.4 million in fines, assessments, and penalties.[83] Of those 515 complaints, the state Attorney General's Office ("AGO") investigated 32 cases.[84] During the first year of the JTF, the Massachusetts' AGO initiated four criminal investigations and successfully collected $200,425 in fines from civil citations.[85]

B. State Laws Enacted, Some with Harsh Penalties for Misclassification

Another noteworthy effort has been led by state legislators, who have enacted laws in Colorado, Connecticut, Illinois, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, and New Mexico, to name a few states, to impose harsher penalties associated with, and to curtail the pervasive problem of, worker misclassification. Massachusetts, for example, has on its books one of the strictest laws on the classification of independent contractors. Creating a strong (rebuttable) presumption that a worker is an employee rather than an independent contractor, the Massachusetts Independent Contractor Law ("MICL") places the burden of proving otherwise on the employer.[86] The MICL outlines a rigorous three-part test (also known as the "ABC test"), and requires that *all* of the following factors must be satisfied in order for an individual to be classified other than as an employee: (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; *and* (2) the service is performed outside the usual course of the business of the employer; *and* (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[87]

Under the MICL, the fines for misclassifying a worker can be steep, and may include both civil and criminal penalties.[88] For example, the Attorney General can issue civil citations and institute criminal prosecution for violations, intentional or not, of the MICL.[89] A willful misclassification is punishable by a fine of up to $25,000 or up to one year in jail for the first offense.[90] Even a "mistaken," or a non-willful, violation can result in a penalty of up to $10,000 or six months in jail for the first offense.[91] And, if a plaintiff prevails in an action alleging violation of the MICL, the law provides that he "shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees."[92]

Emphasizing that the "proper classification of individuals in the workplace is of paramount importance to the Commonwealth," the Attorney General issued an advisory providing guidance on the MICL around the same time that Massachusetts' JTF was established.[93] The advisory noted that, if a company is found to have violated the MICL, it may also be liable for penalties and fines resulting from violations of other state laws, such as those that govern minimum wage and overtime, employer recordkeeping requirements, income tax withholding and workers' compensation insurance.[94] Similar to other states' misclassification laws, the penalties associated with the infringement of these additional laws can significantly impact the bottom-line for unsuspecting companies that misclassify their employees.

In New Jersey, the Construction Industry Independent Contractor Act ("CIICA") creates a rebuttable presumption that full-time construction workers are employees, and not independent contractors, for purposes of various New Jersey labor and employment-related laws.[95] If a contractor is found to

have violated the CIICA, penalties include suspension of the contractor's registration, a "stop-work" order, and a civil fine of up to $2,500 for the first violation and $5,000 for each subsequent violation.[96] Laws similar to the MICL and the CIICA have been enacted in other states, including Illinois, Washington, and New Hampshire.

C. Criminal Prosecutions Related to Misclassification of Workers

In March 2009, New York's Attorney General Andrew M. Cuomo announced the first arrest stemming from a NY Task Force "sweep."[97] Charged with several felonies and misdemeanors in criminal court, the owner of a well-known bakery in Bronx, New York, allegedly violated labor laws by, among others, failing to pay unemployment insurance taxes and failing to pay over $350,000 in wages.[98] According to the complaint filed, the bakery owner failed to pay the minimum wage to at least 25 workers, while requiring them to work up to 80 hours a week with no overtime pay.[99]

In a second arrest, Attorney General Cuomo charged a Bronx-based gas station owner with failure to pay more than $225,000 in wages, failure to pay into the state's unemployment insurance system, and failure to cover workers with workers' compensation insurance.[100] The complaint, filed in criminal court, alleged that the gas station owner paid his employees as little as $4.00 per hour for working 12-hour days, with no overtime, and failed to secure workers' compensation insurance for his employees, which is a felony offense in New York.[101]

D. Attorneys General Threaten to take FedEx to Court

In the latest chapter of the FedEx saga, Attorneys General from eight states sent a joint letter in June 2009 to FedEx Ground expressing concerns that its drivers may be misclassified as independent contractors, rather than employees.[102] In forming a "working group," the eight Attorneys General recognized "that efficiencies … for the states will best be served [by] work[ing] together," and urged FedEx to examine and change its business model to ensure that its workers are classified properly.[103] Additionally, the letter made clear that the Attorneys General intended to address issues related to "making the states whole for past practices."[104]

More recently, in October 2009, the Attorneys General of New York, Montana, and New Jersey advised FedEx by letter that they intended to bring litigation against its Ground unit in order "to remedy labor law violations resulting from FedEx's continued misclassification of its drivers as independent contractors rather than employees."[105] Because of the extent of control FedEx was purportedly exercising over its drivers—*i.e.,* drivers' uniforms are mandated by FedEx, down to the colors of their socks, and the performance of their tasks is directed and supervised by FedEx—the Attorneys General concluded that the drivers were employees under relevant state laws.[106]

VII. REVIVAL OF FEDERAL LEGISLATION AIMED AT WORKER MISCLASSIFICATION AND ATTENDANT EMPLOYMENT TAX ABUSES

In December 2009, Senator John Kerry, D-Mass, introduced a bill to close a "loophole" (or "safe harbor") created by Section 530 of the Revenue Act of 1978, which permits a business to treat a worker as an "independent contractor" for employment tax purposes, regardless of the worker's true status under the common law test, where the business had a reasonable basis for its treatment based on longstanding industry practice, judicial precedent, or prior IRS audits.[107] If enacted, the Taxpayer Responsibility, Accountability and Consistency Act of 2009 ("TRACA") would, among other things, change the safe harbor provision to minimize abuses and require companies that pay more than $600 a year to providers of property and services to file an information report with each provider *and* with the IRS.[108] The TRACA bill is currently before the Senate Committee on Finance,[109] and is a revival of a similar bill, which was introduced in 2007 by then-Senator Barack Obama, along with Senators Dick Durbin, Edward Kennedy, and Patty Murray.[110] The 2007 bill, known as the Independent Contractor Proper Classification Act of 2007, was also designed to close the Section 530 loophole and increase penalties for misclassification, but did not progress beyond committee deliberation.[111]

VIII. WHAT STEPS SHOULD EMPLOYERS TAKE?

While the line between an employee and an independent contractor is sometimes difficult to discern, the widespread use and growth of the independent contractor or consultant designation throughout American business has now raised so many questions as to its legitimacy, that it has invited the attention of governmental agencies (at all levels) and from the plaintiffs' bar. What is crystal clear is that legal challenges by governmental agencies seeking to recoup lost tax revenues arising from improper classifications, and lawsuits filed by workers who allege they have been misclassified, are here to stay. There is simply too much money on the table for the federal and state governments and for the plaintiffs' bar to walk away. If anything, the stakes are likely to increase with increased efforts and coordination by the federal and state authorities to root out em-

ployers who have improperly classified workers.

Firms with potential worker status issues should bear in mind the larger ramifications, as one dispute often spurs another. Thus, a seemingly innocuous investigation by a state's unemployment insurance division, resulting in a determination that a class of workers has been improperly classified, can give rise to audits by federal and state tax departments seeking to claim back taxes, penalties, and fines. It may also trigger individual and/or class action litigation, not to mention the possibility of criminal sanctions. And as FedEx's settlement with its California drivers in December 2008 demonstrates, attorneys' fees in connection with such challenges can be sizeable. Employers would be wise to consider the following practice pointers concerning the classification of workers:

1. Evaluate the classification status of workers carefully at the outset of the work relationship to determine whether a worker is an independent contractor or an employee. Concomitantly, if you inherit a large number of independent contractors on your company's 1099 payroll, be suspicious, and inquire when was the last time the business conducted a classification audit. Similarly, if you determine the workers are employees, don't simply assume they should be designated exempt from overtime based on the employee's compensation, job title, or because the work is important to your organization. The FLSA has specific standards set forth in regulations and a body of Opinion Letters for classifying employees as exempt or non-exempt and these should be consulted;
2. Communicate to the worker clearly at the start of the retention that s/he is an independent contractor and the terms and conditions of the relationship, assuming you conclude the worker falls within one of the standards or tests for contractor status that we discussed earlier;
3. Become familiar with case law applicable to relevant occupations and/or industries, which may provide helpful guidance when determining a worker's classification status (as certain occupations and/or industries have been the subject of repeated litigation). This recommendation is true whether the worker is classified by you as an independent contractor or as an employee;
4. Note that certain actions are inconsistent with classifying workers as independent contractors (*e.g.*, an independent contractor should not be considered or addressed as an employee, usually does not fill out an employment application, is not subject to a "probationary period", and should not have supervisory responsibilities over employees. Nor is it a good idea for a department manager to assign, direct, appraise and/or provide merit increases to independent contractors);
5. Be mindful of the factors used by the IRS (or other federal agencies) and state enforcement agencies when drafting independent contractor agreements, and incorporate as many factors as practicable into the agreements;
6. Review the eligibility provisions of all employee benefit plans to determine whether they properly exclude certain categories of workers to whom the employer does not wish to provide benefits through inclusion of so-called "Microsoft" protective language;
7. If any of your independent contractors have been retained for more than a year, be suspicious and conduct an audit. The longer the term of the relationship, the more likely it is that agencies or courts will view this worker is an employee; and
8. Consult counsel when in doubt.

NOTES

1. *See* Estrada v. FedEx Ground Package System, Inc., 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327, 154 Lab. Cas. (CCH) P 60485 (2d Dist. 2007); Shannon Henson, *FedEx to Cough Up $27M in Calif. Driver Case,* Dec. 8, 2008, *available at* http://www.law360.com/articles/79406 (last visited on Jan. 29, 2009).
2. *See* Labrie v. UPS Supply Chain Solutions, Inc., 2009 WL 723599 (N.D. Cal. 2009); Joyce E. Cutler, *UPS Settles Wage and Hour Lawsuit Over Driver Classification for $12.8 Million, available at* http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=15827634&vname=dlrnotallissues&fn=15827634&jd=a0c1p9q9m7&split=0 (last visited on Jan. 29, 2009).
3. *Gonzalez v. Freedom Commc'ns Inc.,* No. 03CC08756 (Cal. App. Dep't Super. Ct. Orange County), Notice of Class Action Settlement, *available at* http://orangecountyregistersettlement.com/pdf/Gonzalez%20v%20Orange%20County%20Register_Notice_v1.pdf (last visited on Jan. 28, 2010); *see also* Kathleen Dunham, *Combating the Underground Economy,* LAWDRAGON, *available at* http://www.lawdragon.com/index.php/newdragon/fullstory/combating_the_underground_economy/ (last visited on Jan. 29, 2010).
4. *See Gonzalez v. Freedom Commc'ns Inc.,* No. 03CC08756 (Cal. App. Dep't Super. Ct. Orange County), Notice of Class Action Settlement, *available at* http://orangecountyregistersettlement.com/pdf/Gonzalez%20v%20Orange%20County%20Register_Notice_v1.pdf (last visited on Jan. 28, 2010); *see also* Kathleen Dunham, *Combating the Underground Economy,* LAWDRAGON, *available at* http://www.lawdragon.com/index.php/newdragon/fullstory/combating_the_

underground_economy/ (last visited on Jan. 29, 2010).

5. *See* Shannon Henson, *FedEx to Cough Up $27M in Calif. Driver Case,* Dec. 8, 2008, *available at* http://www.law360.com/articles/79406 (last visited on Jan. 29, 2009).
6. *IRS says Fedex owes $319 mln in back taxes-filing,* Dec. 21, 2007, REUTERS, http://www.reuters.com/article/idUSN2129616020071224 (last visited on Jan. 29, 2010).
7. FedEx says IRS drops Ground contractors from 2002 tax audit, REUTERS, Oct. 30, 2009, available at http://www.forbes.com/feeds/afx/2009/10/30/afx7069959.html (last visited on Jan. 29, 2010); *see also* IRS Says No Taxes in 2002 Due For FedEx Ground Independent Contractors, 211 Daily Lab. Rep. (BNA) A-3 (Nov. 4, 2009).
8. In November 2009, FedEx announced that the IRS had determined that no assessments would be due in connection with FedEx's independent contractors for tax years 2004 through 2006. *See* Aarthi Sivaraman, *FedEx says IRS drops Ground assessment for 2004-6,* REUTERS, Nov. 10, 2009, *available at* http://www.reuters.com/article/idUSN1032269220091110 (last visited on Jan. 29, 2010).
9. *See* FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 157 Lab. Cas. (CCH) P 11217 (D.C. Cir. 2009).
10. *See* FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 501, 186 L.R.R.M. (BNA) 2292, 157 Lab. Cas. (CCH) P 11217 (D.C. Cir. 2009).
11. *See* FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 501, 186 L.R.R.M. (BNA) 2292, 157 Lab. Cas. (CCH) P 11217 (D.C. Cir. 2009) (citation and internal quotation omitted).
12. *See* FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 496, 186 L.R.R.M. (BNA) 2292, 157 Lab. Cas. (CCH) P 11217 (D.C. Cir. 2009) (citation and internal quotation omitted).
13. *See* FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 504, 186 L.R.R.M. (BNA) 2292, 157 Lab. Cas. (CCH) P 11217 (D.C. Cir. 2009).
14. In March 2008, Judge Robert L. Miller of the District Court for the Northern District of Indiana, South Bend Division, granted motions for class certification in cases involving drivers in 18 states, including Florida, New York and New Jersey. In re Fedex Ground Package System, Inc. Employment Practices Litigation, 2008 WL 2756381 (N.D. Ind. 2008). This past summer, Judge Miller granted class certification motions on behalf of plaintiffs in 5 more states, including Arizona, Georgia, and North Carolina; In re FedEx Ground Package System, Inc., Employment Practices Litigation, 15 Wage & Hour Cas. 2d (BNA) 161, 2009 WL 2242231 (N.D. Ind. 2009). Partial class certification was granted for plaintiffs in Louisiana and Oregon. *See id. See also* Erin Marie Daly, *Class List Expanded in FedEx Drivers MDL,* July 28, 2009, *available at* http://www.law360.com/articles/113531 (last visited on Jan. 29, 2010).
15. The action is captioned *Fritz Elienberg v. Comcast Corp. et al.,* Case No. 09-11653, pending in the U.S. District Court for the District of Massachusetts.
16. Mike Cherney, *Suit Says Comcast Misclassified Workers,* LAW360 (Oct. 2, 2009), *available at* http://www.law360.com/articles/125983 (last visited on Jan. 29, 2010).
17. *Rep. McDermott Leads Legislative Drive to End Misclassification of Workers,* Apr. 15, 2008, *available at* http://www.house.gov/mcdermott/pr080415.shtml (last visited on Jan. 29, 2010).
18. *See* Linda H. Donahue, James Ryan Lamare, and Fred B. Kotler, J.D., *The Cost of Worker Misclassification in New York State,* Cornell University ILR School, Research Studies and Reports, 2007, at 11, *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009&context=reports (last visited on Feb. 4, 2010) (*citing* Jerome Horton, California State Assembly Member, 51st Assembly District, recorded interview within *1099 Misclassification: It's Time to Play by the Rules,* video stream currently available at http://www.mosaicprint.com/client_preview/1099/index.html#) (last visited on Jan. 29, 2010).
19. Cyndia Zwahlen, *Scrutiny Over Workers Status,* L.A. TIMES, April 21, 2008, *available at* http://articles.latimes.com/2008/apr/21/business/fi-smallbiz21 (last visited on Jan. 29, 2010).
20. Diane E. Lewis, *Study: Many Mass. Workers Misclassified,* THE BOSTON GLOBE, Dec. 13, 2004, *available at* http://www.boston.com/business/articles/2004/12/13/study_many_mass_workers_misclassified/ (last visited on Dec. 21, 2009).
21. Michael P. Kelsay, James I. Sturgeon, Kelly D. Pinkham, *The Economic Costs of Employee Misclassification in the State of Illinois* (Dep't of Econs.: Univ. of Mo.-Kansas City, Dec. 6, 2006), *available at* http://www.faircontracting.org/NAFCnewsite/prevailingwage/pdf/Illinois_Misclassification_Study.pdf (last visited on Jan. 29, 2010).
22. *Contingent and Alternative Employment Arrangements February 2005,* U.S. Dept. of Labor, Bureau of Labor Statistics, July 27, 2005, *available at* http://www.bls.gov/news.release/conemp.nr0.htm (last visited on Jan. 29, 2010).
23. Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, United States Gov't Accountability Office Report of Congressional Requestors, Aug. 2009, at 10, available at http://www.gao.gov/new.items/d09717.pdf (last visited on Dec. 21, 2009) (hereinafter referred to as "Employee Misclassification").
24. Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, United States Gov't Accountability Office Report of Congressional Requestors, Aug. 2009, at 12, available at http://www.gao.gov/new.items/d09717.pdf (last visited on Dec. 21, 2009) (hereinafter referred to as "Employee Misclassification").
25. Recently, in Fleming v. Yuma Regional Medical Center, 587 F.3d 938, 22 A.D. Cas. (BNA) 1033 (9th Cir. 2009), the Ninth Circuit Court of Appeals reversed the lower court's ruling and held that the Rehabilitation Act, unlike the Americans with Disabilities Act ("ADA"), protects independent contractors as well as employees. Section 504 of the Rehabilitation Act creates a private right of action for individuals who have been discriminated, based on disability, "by any program or activity receiving federal financial assistance, including employment discrimination in such programs." Fleming v. Yuma Regional Medical Center, 587 F.3d 938, 940, 22 A.D. Cas. (BNA) 1033 (9th Cir. 2009) (citations omitted). As amended, §504(d) of the Rehabilitation Act provides that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act … as such sections relate to employment." Fleming v. Yuma Regional Medical Center, 587 F.3d 938, 940, 22 A.D. Cas. (BNA) 1033 (9th Cir. 2009) (citations omitted). Although an issue of first impression for the Ninth Circuit, the Sixth and Eighth Circuits have previously held that §504 incorporates the ADA's employer-employee relationship requirement, *see* Hiler v. Brown, 177 F.3d 542, 9 A.D. Cas. (BNA) 628, 1999 FED App. 0179P (6th Cir. 1999) and Wojewski v. Rapid City Regional Hosp., Inc., 450 F.3d 338, 17 A.D. Cas. (BNA) 1761 (8th Cir. 2006), while the Tenth Circuit has ruled that independent contractors are covered under the Rehabilitation Act, *see* Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 13 A.D. Cas. (BNA) 481 (10th Cir. 2002).
26. Vizcaino v. Microsoft Corp., 97 F.3d 1187, 20 Employee Benefits Cas. (BNA) 1873, Unempl. Ins. Rep. (CCH) P 15588B, 96-2 U.S. Tax Cas. (CCH) P 50533, 78 A.F.T.R.2d 96-6690 (9th Cir. 1996), reh'g en banc granted, opinion withdrawn by, 105 F.3d 1334 (9th Cir. 1997) and on reh'g en banc, 120 F.3d 1006, 21 Employee Benefits Cas. (BNA)

1273, 97-2 U.S. Tax Cas. (CCH) P 50572, 80 A.F.T.R.2d 97-5594 (9th Cir. 1997).

27. Vizcaino v. Microsoft Corp., 97 F.3d 1187, 20 Employee Benefits Cas. (BNA) 1873, Unempl. Ins. Rep. (CCH) P 15588B, 96-2 U.S. Tax Cas. (CCH) P 50533, 78 A.F.T.R.2d 96-6690 (9th Cir. 1996), reh'g en banc granted, opinion withdrawn by, 105 F.3d 1334 (9th Cir. 1997) and on reh'g en banc, 120 F.3d 1006, 1008-1010, 21 Employee Benefits Cas. (BNA) 1273, 97-2 U.S. Tax Cas. (CCH) P 50572, 80 A.F.T.R.2d 97-5594 (9th Cir. 1997).
28. Bill Virgin, *Microsoft Settles 'Permatemp' Suits,* SEATTLE PI BUSINESS, Dec. 13, 2000, *available at* http://www.seattlepi.com/business/micr13.shtml (last visited on Jan. 29, 2010).
29. The FLSA defines an "employee" as "any individual employed by an employer," 29 U.S.C.A. §203(e)(1) (2009), and defines "employ" as "to suffer or permit to work," 29 U.S.C.A. §203(d) (2009). For purposes of ERISA, an "employee" is defined as "any individual employed by an employer." 29 U.S.C.A. §1002(6) (2009).
30. 42 U.S.C.A. §2000e(f).
31. *See* Clackamas Gastroenterology Associates, P. C. v. Wells, 538 U.S. 440, 444, 23 S. Ct. 1673, 155 L. Ed. 2d 615, 14 A.D. Cas. (BNA) 289 (2003).
32. *See, e.g.,* Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28, 33, 81 S. Ct. 933, 6 L. Ed. 2d 100 (1961) (citing *United States v. Silk* and adopting the "economic reality" standard in FLSA cases).
33. *Silk* involved a question of employment status under the Social Security Act ("SSA"). However, because the FLSA and the SSA have similar social welfare purposes, the findings in *Silk* have been applied in FLSA cases. *See, e.g.,* Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28, 33, 81 S. Ct. 933, 6 L. Ed. 2d 100 (1961).
34. *See* U.S. v. Silk, 1947-2 C.B. 167, 331 U.S. 704, 716, 67 S. Ct. 1463, 91 L. Ed. 1757, 35 A.F.T.R. (P-H) P 1174 (1947).
35. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947).
36. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947).
37. Barfield v. New York City Health and Hospitals Corp., 537 F.3d 132, 13 Wage & Hour Cas. 2d (BNA) 1721, 156 Lab. Cas. (CCH) P 35463 (2d Cir. 2008).
38. Barfield v. New York City Health and Hospitals Corp., 537 F.3d 132, 13 Wage & Hour Cas. 2d (BNA) 1721, 156 Lab. Cas. (CCH) P 35463 (2d Cir. 2008).
39. *See* Barfield v. New York City Health and Hospitals Corp., 537 F.3d 132, 144-146, 13 Wage & Hour Cas. 2d (BNA) 1721, 156 Lab. Cas. (CCH) P 35463 (2d Cir. 2008).
40. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 321, 323, 112 S. Ct. 1344, 117 L. Ed. 2d 581, 14 Employee Benefits Cas. (BNA) 2625 (1992).
41. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811, 16 Media L. Rep. (BNA) 1769, 10 U.S.P.Q.2d 1985 (1989).
42. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752, 109 S. Ct. 2166, 104 L. Ed. 2d 811, 16 Media L. Rep. (BNA) 1769, 10 U.S.P.Q.2d 1985 (1989).
43. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737, 751-752, 109 S. Ct. 2166, 104 L. Ed. 2d 811, 16 Media L. Rep. (BNA) 1769, 10 U.S.P.Q.2d 1985 (1989).
44. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-324, 112 S. Ct. 1344, 117 L. Ed. 2d 581, 14 Employee Benefits Cas. (BNA) 2625 (1992).
45. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323, n. 3, 112 S. Ct. 1344, 117 L. Ed. 2d 581, 14 Employee Benefits Cas. (BNA) 2625 (1992) (citation omitted).
46. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-324, 112 S. Ct. 1344, 117 L. Ed. 2d 581, 14 Employee Benefits Cas. (BNA) 2625 (1992).
47. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-324, 112 S. Ct. 1344, 117 L. Ed. 2d 581, 14 Employee Benefits Cas. (BNA) 2625 (1992).
48. *See Independent Contractor or Employee,* IRS Publication 1779, *available at* http://www.irs.gov/pub/irs-pdf/p1779.pdf (last visited on Jan. 29, 2010).
49. Examples of the factors related to behavioral control are: whether the worker must comply with instructions of the business as to when, where and how to perform services; whether the business trains the worker; whether the worker must render services personally; whether the business hires, supervises or pays individuals assisting the worker; whether the business determines the worker's hours; whether the worker must perform his or her services on the business's premises; and whether the business furnishes the worker's tools, materials and other equipment. *See Employer's Supplemental Tax Guide,* IRS Publication 15-A, *available at* http://www.irs.gov/pub/irs-pdf/p15a.pdf , p. 6 (last visited on Jan. 29, 2010).
50. Some of the factors related to financial control are: whether the business pays the worker's business or travel expenses; whether the worker has a significant investment in the business; whether the worker has a risk of economic loss or opportunity for profit; and whether the worker performs services for more than one business. *See Employer's Supplemental Tax Guide,* IRS Publication 15-A, *available at* http://www.irs.gov/pub/irs-pdf/p15a.pdf , p. 6 (last visited on Jan. 29, 2010).
51. Factors showing how the business and the worker perceive their relationship include: whether the worker makes his services available to the general public; whether the business has the right to discharge the worker; and whether the worker has the right to terminate his relationship with the business. *See id.*
52. Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, United States Gov't Accountability Office Report of Congressional Requestors, Aug. 2009, at 21, available at http://www.gao.gov/new.items/d09717.pdf (last visited on Dec. 21, 2009) (hereinafter referred to as "Employee Misclassification").
53. A minority of courts, such as those in the Sixth Circuit, have applied the "economic reality" test to determine whether an individual is an independent contractor or an employee under Title VII. *See, e.g.,* Eyerman v. Mary Kay Cosmetics, Inc., 967 F.2d 213, 218, 59 Fair Empl. Prac. Cas. (BNA) 67, 59 Empl. Prac. Dec. (CCH) P 41532, 22 Fed. R. Serv. 3d 768 (6th Cir. 1992) ("independent contractors would be covered by Title VII if, under an economic realities test, they are susceptible to the types of discrimination Title VII meant to [protect]") (citation and internal quotations omitted).
54. *See* Speen v. Crown Clothing Corp., 102 F.3d 625, 630, 20 Employee Benefits Cas. (BNA) 2800, 73 Fair Empl. Prac. Cas. (BNA) 347, 70 Empl. Prac. Dec. (CCH) P 44606 (1st Cir. 1996), as amended, (Jan. 22, 1997); E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32, 35, 32 Fair Empl. Prac. Cas. (BNA) 682, 32 Empl. Prac. Dec. (CCH) P 33755 (3d Cir. 1983).
55. E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32, 37, 32 Fair Empl. Prac. Cas. (BNA) 682, 32 Empl. Prac. Dec. (CCH) P 33755 (3d Cir. 1983).
56. E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32, 32 Fair Empl. Prac. Cas. (BNA) 682, 32 Empl. Prac. Dec. (CCH) P 33755 (3d Cir. 1983).
57. 29 U.S.C.A. §203(e)(1) (2009).
58. 29 U.S.C.A. §203(d) (2009).
59. 330 U.S. 148, 152 (1947).
60. *See FLSA Coverage—Employment Relationship, Statutory Exclusions, Geographical Limits,* DOL, Wage & Hour Division, Field Operations Handbook, Oct. 20, 1993, §10b11, *available at* http://www.dol.gov/whd/FOH/FOH_Ch10.pdf (last visited on Jan. 29, 2010); *see also* FLSA2006-12, April 6, 2006, *available at* http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.htm (last visited on Jan. 29, 2010); FLSA2004-16, Oct. 19, 2004 , *available*

at http://www.dol.gov/whd/opinion/FLSA/2004/2004_10_19_16_FLSA_PreemploymentTraining.pdf (last visited on Jan. 29, 2010).

61. *See FLSA Coverage—Employment Relationship, Statutory Exclusions, Geographical Limits,* DOL, Wage & Hour Division, Field Operations Handbook, Oct. 20, 1993, §10b11, *available at* http://www.dol.gov/whd/FOH/FOH_Ch10.pdf (last visited on Jan. 29, 2010); *see also* FLSA2006-12, April 6, 2006, *available at* http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.htm (last visited on Jan. 29, 2010); FLSA2004-16, Oct. 19, 2004 , *available at* http://www.dol.gov/whd/opinion/FLSA/2004/2004_10_19_16_FLSA_PreemploymentTraining.pdf (last visited on Jan. 29, 2010).
62. *See FLSA Coverage—Employment Relationship, Statutory Exclusions, Geographical Limits,* DOL, Wage & Hour Division, Field Operations Handbook, Oct. 20, 1993, §10b11, *available at* http://www.dol.gov/whd/FOH/FOH_Ch10.pdf (last visited on Jan. 29, 2010); *see also* FLSA2006-12, April 6, 2006, *available at* http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.htm (last visited on Jan. 29, 2010); FLSA2004-16, Oct. 19, 2004 , *available at* http://www.dol.gov/whd/opinion/FLSA/2004/2004_10_19_16_FLSA_PreemploymentTraining.pdf (last visited on Jan. 29, 2010).
63. *See* Reich v. Parker Fire Protection Dist., Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1027, 1 Wage & Hour Cas. 2d (BNA) 748, 125 Lab. Cas. (CCH) P 35832 (10th Cir. 1993).
64. Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, United States Gov't Accountability Office Report of Congressional Requestors, Aug. 2009, at 21, available at http://www.gao.gov/new.items/d09717.pdf (last visited on Dec. 21, 2009) (hereinafter referred to as "Employee Misclassification").
65. Ryan J. Donmoyer, *IRS to Audit 6,000 Companies to Test Employment Tax Compliance,* Sept. 18, 2009, *available at* http://www.bloomberg.com/apps/news?pid=20601103&sid=anpR2t09GIeU (last visited on Jan. 29, 2010).
66. *IRS Will Begin Employment Tax Research Study in February 2010,* Headliner Volume 280, November 9, 2009, *available at* http://www.irs.gov/businesses/small/article/0,,id=215350,00.html (last visited on Jan. 29, 2010).
67. *IRS Will Begin Employment Tax Research Study in February 2010,* Headliner Volume 280, November 9, 2009, *available at* http://www.irs.gov/businesses/small/article/0,,id=215350,00.html (last visited on Jan. 29, 2010).
68. Abigail Rubenstein, Obama Allots $25M For DOL To Fight Misclassification, available at http://www.law360.com/articles/146861 (last visited on Feb. 5, 2010); DOL Requests $117 Billion for FY 2011, Including $14 Billion in Discretionary Funding, 20 Daily Lab. Rep. (BNA) AA 2 (Feb. 2, 2010).
69. Abigail Rubenstein, Obama Allots $25M For DOL To Fight Misclassification, available at http://www.law360.com/articles/146861 (last visited on Feb. 5, 2010); DOL Requests $117 Billion for FY 2011, Including $14 Billion in Discretionary Funding, 20 Daily Lab. Rep. (BNA) AA 2 (Feb. 2, 2010).
70. Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, United States Gov't Accountability Office Report of Congressional Requestors, Aug. 2009, at 21, available at http://www.gao.gov/new.items/d09717.pdf (last visited on Dec. 21, 2009) (hereinafter referred to as "Employee Misclassification").
71. Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, United States Gov't Accountability Office Report of Congressional Requestors, Aug. 2009, at 29, available at http://www.gao.gov/new.items/d09717.pdf (last visited on Dec. 21, 2009) (hereinafter referred to as "Employee Misclassification").
72. See Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, United States Gov't Accountability Office Report of Congressional Requestors, Aug. 2009, at 30-31, available at http://www.gao.gov/new.items/d09717.pdf (last visited on Dec. 21, 2009) (hereinafter referred to as "Employee Misclassification"); see also Information of the Questionable Employment Tax Memorandum of Understanding, IRS. Gov Newsroom, Nov. 2007, available at http://www.irs.gov/newsroom/article/0,,id=175455,00.html (last visited on Jan. 29, 2010).
73. Diane Weaver Dunne, *State Recommits To Fighting Shadow Labor,* Hartford Business Journal Online, Oct. 19, 2009, *available at</> http://www.hartfordbusiness.com/news10616.html# (last visited on Jan. 29, 2010).*
74. *Misclassification Task Force Report to Governor Chet Culver, State of Iowa, Findings and Recommendations,* Dec. 17, 2008, *available at* http://www.iowaworkforce.org/misclassification/MisClassificationFinal.pdf (last visited on Jan. 29, 2010).
75. *Worker Misclassification Task Force,* Maine Dept. of Labor, Jan. 14, 2009, *available at* http://www.maine.gov/labor/misclass/index.shtml (last visited on Jan. 29, 2010).
76. *The Joint Enforcement Task Force on Workplace Fraud, Executive Order,* The State of Maryland Executive Department, Jan. 1, 2009, *available at* http://www.gov.state.md.us/executiveorders/01.01.2009%2009.pdf (last visited on Jan. 29, 2010).
77. Establishing a Joint Enforcement Task Force on the Underground Economy and Employee Misclassification, Executive Order No. 499, Mar. 12, 2008, available at http://www.mass.gov/Agov3/docs/Executive%20Orders/executive_order_499.pdf (last visited on Jan. 29, 2010).
78. *Employee Misclassification Task Force,* Dep't of Energy Labor & Economic Growth, *available at* http://www.michigan.gov/dleg/0,1607,7-154-11122-211291—,00.html (last visited on Jan. 29, 2010).
79. *Task Force For The Misclassification of NH Workers, available at* http://www.nh.gov/nhworkers/ (last visited on Jan. 29, 2010).
80. *Annual Report of the Joint Enforcement Task Force on Employee Misclassification,* Feb. 1, 2009, at 3, *available at* http://www.labor.state.ny.us/agencyinfo/PDFs/Misclassification_TaskForce_AnnualRpt_2008.pdf (last visited on Jan. 29, 2010) (hereinafter referred to as "*Annual Report of the Joint Enforcement Taskforce*").
81. *Annual Report of the Joint Enforcement Task Force on Employee Misclassification,* Feb. 1, 2009, at 3, *available at* http://www.labor.state.ny.us/agencyinfo/PDFs/Misclassification_TaskForce_AnnualRpt_2008.pdf (last visited on Jan. 29, 2010) (hereinafter referred to as "*Annual Report of the Joint Enforcement Taskforce*").
82. Commonwealth of Massachusetts Joint Task Force on the Underground Economy and Employee Misclassification—Annual Report, June 2009, available at http://www.mass.gov/Elwd/docs/dia/task_force/ar_09.pdf (last visited on Jan. 29, 2010).
83. Commonwealth of Massachusetts Joint Task Force on the Underground Economy and Employee Misclassification—Annual Report, June 2009, at 3, 5, available at http://www.mass.gov/Elwd/docs/dia/task_force/ar_09.pdf (last visited on Jan. 29, 2010).
84. Commonwealth of Massachusetts Joint Task Force on the Underground Economy and Employee Misclassification—Annual Report, June 2009, at 3, available at http://www.mass.gov/Elwd/docs/dia/task_force/ar_09.pdf (last visited on Jan. 29, 2010).
85. Commonwealth of Massachusetts Joint Task Force on the Underground Economy and Employee Misclassification—Annual Report, June 2009, at 3, available at http://www.mass.gov/Elwd/docs/dia/task_force/ar_09.pdf (last visited on Jan. 29, 2010).
86. MASS. GEN. LAWS ch. 149, §148B (2004).
87. MASS. GEN. LAWS ch. 149, §148B (2004).
88. MASS. GEN. LAWS ch. 149, §27© (2004).

89. *See* MASS. GEN. LAWS ch. 149, §27©(b)(1) (2004).
90. *See* MASS. GEN. LAWS ch. 149, §27©(a)(1) (2004).
91. *See* MASS. GEN. LAWS ch. 149, §27©(a)(2) (2004).
92. *See* MASS. GEN. LAWS ch. 149, §150 (2004).
93. *An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B, 2008/1, available at* http://www.mass.gov/Cago/docs/Workplace/independent_contractor_advisory.pdf (last visited on Jan. 29, 2010).
94. *See An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B, 2008/1, available at* http://www.mass.gov/Cago/docs/Workplace/independent_contractor_advisory.pdf (last visited on Jan. 29, 2010).
95. *See* P.L. 2007, c.114, codified at N.J.S. 34:20-1 to 34:20-11.
96. *See* P.L. 2007, c.114, codified at N.J.S. 34:20-1 to 34:20-11.
97. Annual Report of the Joint Enforcement Task Force, at 5.
98. Attorney General Cuomo Announces Arrests of Owner of Arthur Ave Baker and Owner of Bronx-Based Gas Station for Ripping Off Workers and Defrauding State, Office of the Attorney General Media Center, Mar. 26, 2009, available at http://www.oag.state.ny.us/media_center/2009/mar/mar26a_09.html (last visited on Jan. 29, 2010).
99. See Attorney General Cuomo Announces Arrests of Owner of Arthur Ave Baker and Owner of Bronx-Based Gas Station for Ripping Off Workers and Defrauding State, Office of the Attorney General Media Center, Mar. 26, 2009, available at http://www.oag.state.ny.us/media_center/2009/mar/mar26a_09.html (last visited on Jan. 29, 2010).
100. See Attorney General Cuomo Announces Arrests of Owner of Arthur Ave Baker and Owner of Bronx-Based Gas Station for Ripping Off Workers and Defrauding State, Office of the Attorney General Media Center, Mar. 26, 2009, available at http://www.oag.state.ny.us/media_center/2009/mar/mar26a_09.html (last visited on Jan. 29, 2010).
101. See Attorney General Cuomo Announces Arrests of Owner of Arthur Ave Baker and Owner of Bronx-Based Gas Station for Ripping Off Workers and Defrauding State, Office of the Attorney General Media Center, Mar. 26, 2009, available at http://www.oag.state.ny.us/media_center/2009/mar/mar26a_09.html (last visited on Jan. 29, 2010).
102. *Available at* http://www.ohioattorneygeneral.gov/Briefing-Room/News-Releases/June-2009/AGs-Ask-FedEx-Ground-to-Resolve-Employee-Classific/Letter-to-FedEx (last visited on Jan. 29, 2010); *see also AGs Ask FedEx Ground to Resolve Employee Classification Issues,* Ohio Attorney General News Releases, June 25, 2009, *available at* http://www.ohioattorneygeneral.gov/Briefing-Room/News-Releases/June-2009/AGs-Ask-FedEx-Ground-to-Resolve-Employee-Classific (last visited on Jan. 29, 2010). The letter was signed by Attorneys General of Iowa, Kentucky, Missouri, Montana, New Jersey, Ohio, Rhode Island, and Vermont.
103. *Available at* http://www.ohioattorneygeneral.gov/Briefing-Room/News-Releases/June-2009/AGs-Ask-FedEx-Ground-to-Resolve-Employee-Classific/Letter-to-FedEx (last visited on Jan. 29, 2010); *see also AGs Ask FedEx Ground to Resolve Employee Classification Issues,* Ohio Attorney General News Releases, June 25, 2009, *available at* http://www.ohioattorneygeneral.gov/Briefing-Room/News-Releases/June-2009/AGs-Ask-FedEx-Ground-to-Resolve-Employee-Classific (last visited on Jan. 29, 2010). The letter was signed by Attorneys General of Iowa, Kentucky, Missouri, Montana, New Jersey, Ohio, Rhode Island, and Vermont.
104. *Available at* http://www.ohioattorneygeneral.gov/Briefing-Room/News-Releases/June-2009/AGs-Ask-FedEx-Ground-to-Resolve-Employee-Classific/Letter-to-FedEx (last visited on Jan. 29, 2010); *see also AGs Ask FedEx Ground to Resolve Employee Classification Issues,* Ohio Attorney General News Releases, June 25, 2009, *available at* http://www.ohioattorneygeneral.gov/Briefing-Room/News-Releases/June-2009/AGs-Ask-FedEx-Ground-to-Resolve-Employee-Classific (last visited on Jan. 29, 2010). The letter was signed by Attorneys General of Iowa, Kentucky, Missouri, Montana, New Jersey, Ohio, Rhode Island, and Vermont.
105. Attorneys General Cuomo, Bullock and Milgram Announce Intent to Sue FedEx Ground Over Violations of State Labor Laws—Fed Ex Ground Improperly Classifies Drivers as Independent Contractors, Denying Their Benefits and Crucial Protections Under New York, Montana and New Jersey Law, Office of the Attorney General Media Center, Oct. 20, 2009, available at http://www.oag.state.ny.us/media_center/2009/oct/oct20a_09.html (last visited on Jan. 29, 2010).
106. Attorneys General Cuomo, Bullock and Milgram Announce Intent to Sue FedEx Ground Over Violations of State Labor Laws—Fed Ex Ground Improperly Classifies Drivers as Independent Contractors, Denying Their Benefits and Crucial Protections Under New York, Montana and New Jersey Law, Office of the Attorney General Media Center, Oct. 20, 2009, available at http://www.oag.state.ny.us/media_center/2009/oct/oct20a_09.html (last visited on Jan. 29, 2010).
107. *See* Jocelyn Allison, *Bill Takes on Independent Contractor Classification,* Dec. 16, 2009, *available at* http://employment.law360.com/articles/139776 (last visited on Jan. 29, 2010).
108. *See* Jocelyn Allison, *Bill Takes on Independent Contractor Classification,* Dec. 16, 2009, *available at* http://employment.law360.com/articles/139776 (last visited on Jan. 29, 2010); *see also Kerry Fights to Protect Workers,* Senator John Kerry-Newsroom, Dec. 15, 2009, *available at* http://kerry.senate.gov/cfm/record.cfm?id=320795 (last visited on Jan. 29, 2010).
109. *Taxpayer Responsibility Accountability, and Consistency Act of 2009,* S. 2882, 111th Cong. 2009, *available at* http://www.govtrack.us/congress/bill.xpd?bill=s111-2882 (last visited on Jan. 29, 2010).
110. *Kerry Fights to Protect Workers,* Senator John Kerry-Newsroom, Dec. 15, 2009, *available at* http://kerry.senate.gov/cfm/record.cfm?id=320795 (last visited on Jan. 29, 2010).
111. *Independent Contractor Proper Classification Act of 2007,* S-20444IS, 110th Congress (1st Session), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s110-2044 (last visited on Jan. 29, 2010). A similar bill (H.R. 6111) was also introduced in the House in May 2008, but would take a more aggressive approach, *available at* http://www.opencongress.org/bill/110-h6111/show (last visited on Jan. 29, 2010).