

# **Worker Classification: Why it Matters and an Update on the Latest Trends**

## Overview

- The Basics of Worker Classification
- The Consequences of Misclassification
- The Latest Developments in Worker Classification Cases and Law

# Basics of Worker Classification



# Basics of Worker Classification

- Defining “employee” vs. “independent contractor”
- Classification depends upon context
- Workers can be employees for one purpose and independent contractors for another purpose

# Employer Responsibilities

- Taxes
- Compliance with State and Federal Labor Laws
- Compliance with ERISA

# Control: The Unifying Principle

- Employees: with respect to the work to be done by the worker, the employer controls both the “what” and the “how”
- Independent Contractors: employers control only the “what” and the “how” remains in the discretion of the independent contractor

# Internal Revenue Service



# IRS Tests for Worker Classification

- The Twenty Factor Test
- Simplified Three Factor Test
  - Behavioral Control
  - Financial Control
  - Type of Relationship





# Fair Labor Standards Act (FLSA)

# Classification Under FLSA

- Economic Realities Test
  - Services are integral part of business
  - Permanency of relationship
  - Nature and degree of control
  - Worker opportunity for profit and loss
  - Initiative, judgment and foresight required
  - Degree of independent business organization

# National Labor Relations Act (NLRA)

## Classification Under NLRA

- “Right to Control” standard weighs a number of factors:
  - Extent of control
  - Skill required
  - Who supplies tools and situs of work
  - Whether work is integral part of business

# Michigan Worker Classification



# Michigan Unemployment

- “Economic Realities Test” weighing:
  - Control
  - Payment of wages
  - Right to hire, fire and discipline
  - Performance of duties as integral part of employer’s business

# Michigan Worker's Disability Compensation Act (MWDCA)

- Utilizes a statutory three-part test which weighs whether:
  - Worker maintains a separate business
  - Worker holds himself or herself out and renders service to the public at large
  - Worker is or is not an employer under MWDCA

# Consequences of Misclassification

- Tax Liabilities
- Wage Claims
- ERISA Exposure
- FMLA Violations
- I-9 Violations





# Latest Developments in Worker Classification Cases

- *Jammal v. American Family Insurance Co.*
- *Hood v. Uber Technologies, Inc.*
- *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*
- *Diva Limousine v. Uber Technologies, Inc.*
- *Q.D.-A, Inc. v. Indiana Dep't Workforce Dev.*

# Department of Labor Opinion Letter

- FLSA2019-6
- “Economic Realities Test” applied to workers like Uber and Lyft drivers results in classification of such workers as independent contractors
- Relationship of “economic independence” rather than “economic dependence”