



# Contingent Workers & Independent Contractors: Avoiding Misclassification Pitfalls

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# Why are we here?

- Guidelines for making a determination as to whether a worker is an independent contractor or employee
- The potential effect of out-sourcing work to temporary agencies, independent contractors, and staff leasing companies
- Avoiding unforeseen liability when employing contingent workers and independent contracts

# Learning Objective #1:

*Guidelines for making a determination  
as to whether a worker is an independent  
contractor or employee*

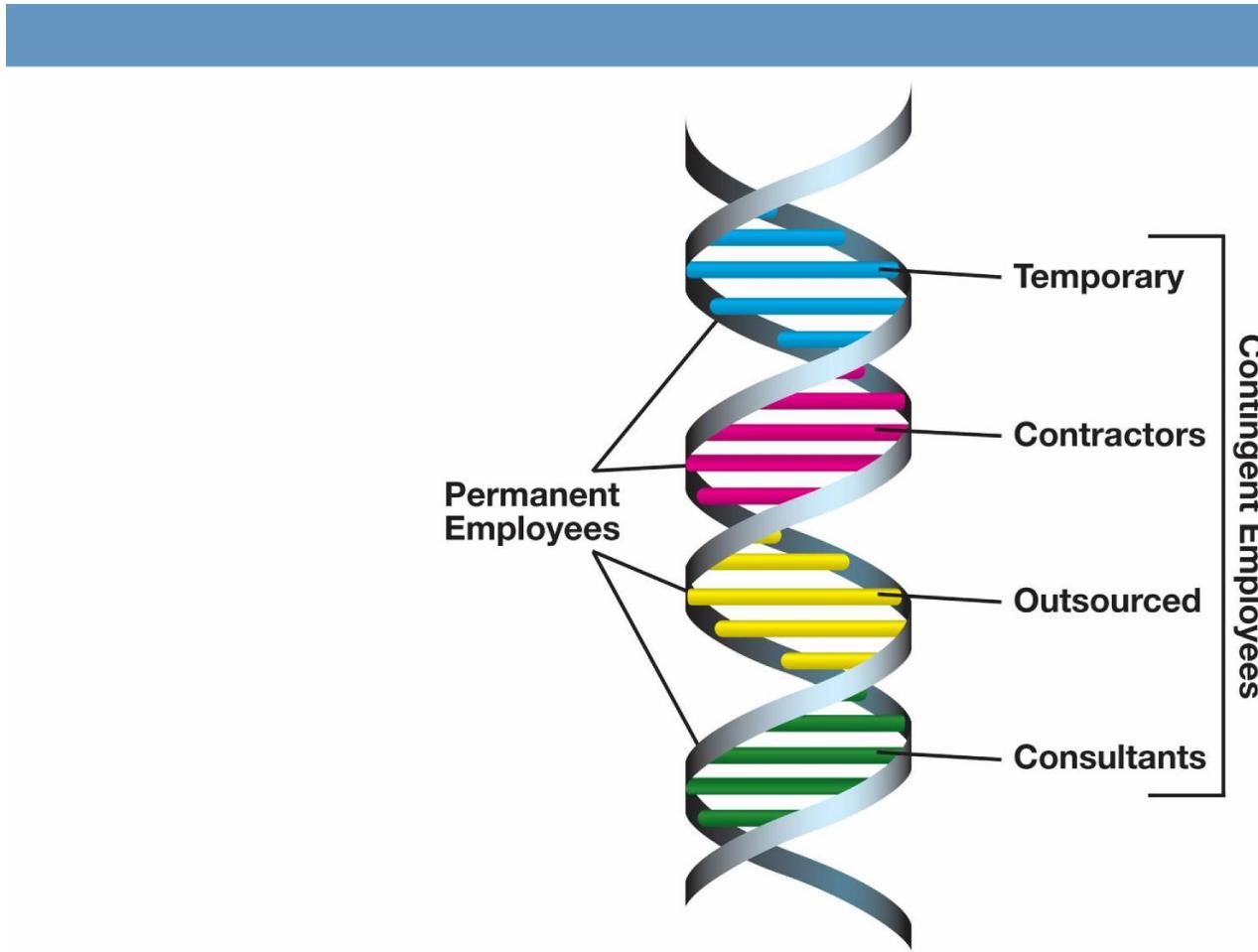


# Independent Contractors, Contingent & Outsourced Workers

- Includes:
  - “Free agents”
  - Independent Contractors
  - Temporary Workers
  - International Workers
  - Suppliers’ Workers



# Composition of the Total Workforce



# Contingent Workers

According to the U.S. Department of Labor, Bureau of Labor Statistics, 5.7 million workers were classified as contingent in February 2005. Contingent work is now present in virtually every sector of the economy.



# Contingent Workers

- More than 25 % of those workers were employed in health services with the next closest sector (professional) making up 18%.
- Healthcare contingent workers, by percentage, make up more than manufacturing, retail, transportation, and hospitality combined.



# What is the Difference Between an Employee and an Independent Contractor?

- ***Employee*** - an individual who performs services for you, and who is subject to your control regarding the method and manner in which the work will be performed
- ***Independent Contractor*** - an individual who performs services for you, but you control only the result of the work

# Difference in Benefits

The biggest difference many employers notice is the benefits they must provide.

	Employee	Independent Contractor
Payroll Taxes	Yes	No
Minimum Wage	Yes	No
Overtime	Yes	No
Meal Periods/Rest Breaks	Yes	No
Reimbursement of Expenses	Yes	No
Worker's Compensation	Yes	No
Leave of Absence	Yes	No
Unemployment Insurance	Yes	No
Disability Insurance	Yes	No
Social Security	Yes	No

# Don't fall into a trap...



- The existence of a written agreement purporting to establish an independent contractor relationship is not determinative.
- The fact that a worker is issued a Form 1099 rather than a W-2 form is also not determinative.
- Title VII and Independent Contractors – can you be liable for claims brought by them?

# Learning Objective #2:

*The Potential Effect of Out-Sourcing Work to  
Temp Agencies, Independent Contractors,  
And Staff Leasing Companies*



# What are the advantages and disadvantages of using contingent workers?

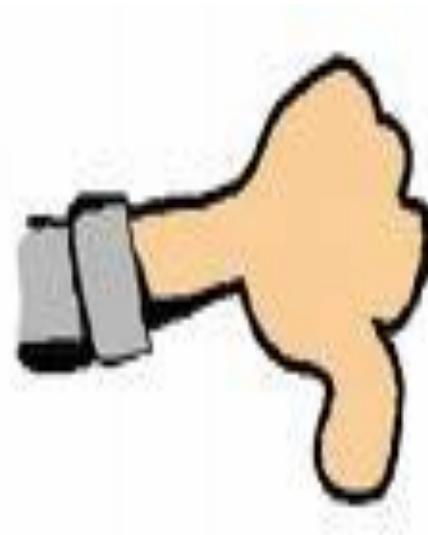
## Advantages:

- ✓ Flexibility in type and amount of labor resources; can address staffing gaps
- ✓ Savings in benefits and taxes
- ✓ Immediate access to expertise not present internally
- ✓ Savings in long-term compensation and costs



# Disadvantages:

- Loyalty to employer/high turnover rate
- Lack of integration into workplace culture
- Cost of training
- May be less familiar with organization's overall structure, policies, practices, and personnel
- Higher risk for work-related injury



# Consequences of Misclassifying Employees and Independent Contractors



# Consequences of Misclassifying Employees and Independent Contractors

- Back taxes
- Interest
- Penalties to the IRS
- Back pay
- Front pay
- Litigation expenses
- Attorney's Fees
- Potential Overtime Claims due to misclassification



# IRS Initiative

- Whistleblower provision- IRC 7623 - the tax code provides for payments to whistleblowers who bring information to the IRS to show that an employer is misclassifying workers as independent contractors
  - ✓ IRC 7623(b) provides for mandatory payments to whistleblowers where the amount recovered by the IRS is over \$2 million
    - The award can range from 15% to 30% of the amount collected from the employer
  - ✓ **A business competitor** can also bring a whistleblower claim, but it would have to have specific information to bring to the IRS
  - ✓ Many cases result from employment tax issues
    - Most cases involve situations where a company treats workers as **independent contractors**, rather than employees, so that the company does not pay its share of payroll taxes



# The Fair Playing Field Act of 2010

- Introduced by Senator John Kerry and Rep. Jim McDermott
  - ❑ Formerly, the Taxpayer Responsibility, Accountability, and Consistency Act of 2009 (H.R. 3408, S. 2882)
    - Languished in committee; took aim at employee misclassification and the section 530 safe harbor
- The Act aims to “close a tax loophole currently allowing businesses to misclassify workers as ‘independent contractors,’ thereby creating an unfair environment for businesses that play by the rules and an unfair environment for workers” by doing the following:

# The Fair Playing Field Act of 2010

- ✓ End the moratorium on IRS guidance addressing worker classification.
- ✓ Amend the provisions of the tax code that provide for reduced penalties for failure to deduct and withhold income taxes and the employee's share of FICA taxes.
- ✓ Require persons who contract independent contractors on a regular and ongoing basis to provide a written statement to each independent contractor of the federal tax obligations of independent contractors, the labor and employment law protections that do not apply to independent contractors, and the right of the independent contractor to seek a status determination from the IRS.
- ✓ Require the Secretary of the Treasury to issue annual reports on worker misclassification.
  - Status: The Senate bill has been referred to the Senate Finance Committee, while the House companion bill has been referred to the House Committee on Ways and Means.

# Litigation

- FedEx Ground
  - California drivers settle for \$26.8 million
  - Consolidation of 30 state class actions seeking wages, unemployment and workers' compensation benefits, income tax withholdings and retirement contributions, and other employee benefits.
- Many others large and small



# Staffing Agencies: Risks

- Use of staffing agencies may avoid or minimize some employment law risks, but it does not eliminate all
- Primary risk flows from joint employer status
- Joint employer risk varies by statute and jurisdiction



# Staffing Agencies: Risks

As a user of labor supplied by a staffing agency, do you...

- ✓ Determine job qualifications?
- ✓ Schedule work?
- ✓ Supervise work?
- ✓ Retain authority to hire, fire, and discipline?
- ✓ Maintain employment records?
- ✓ Promulgate and enforce work rules?

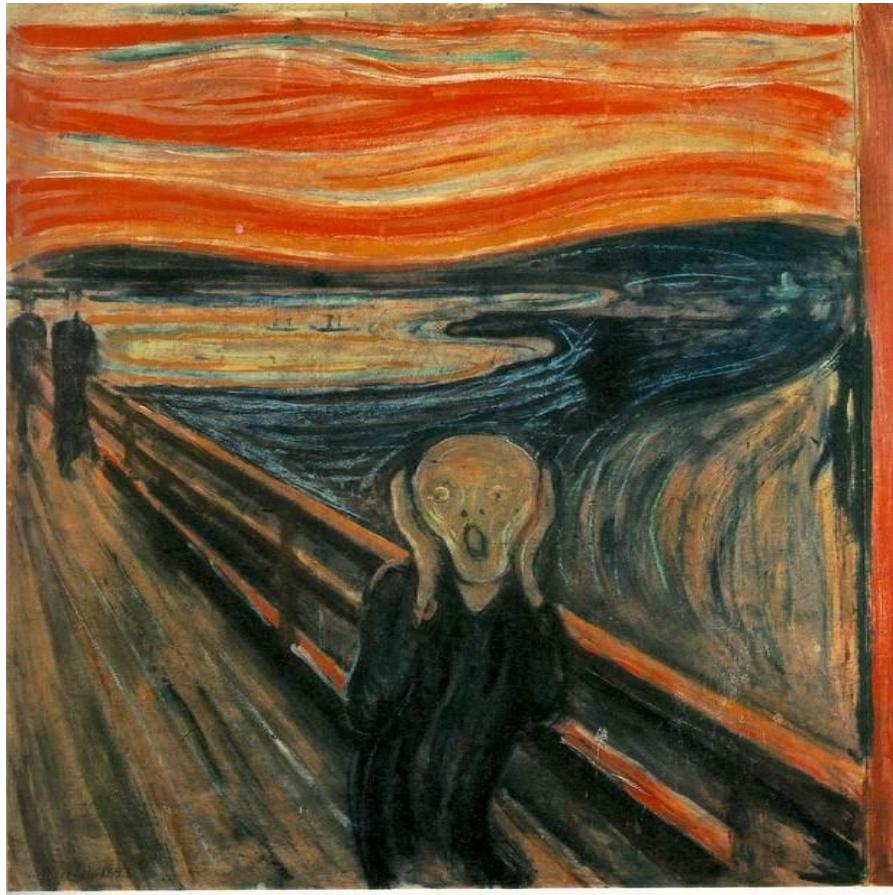
...then you may be a joint employer for purposes of employment law compliance

# Staffing Agencies: Risks

- FLSA: Each employer may be jointly and independently liable
- FMLA: Supplier primarily responsible for compliance, but user also liable for some purposes and temporary employees are counted toward coverage concerning both employers
- Title VII and similar statutes: Potentially liable for discrimination, and interfering with employment with supplying agency



# Criminal Liability for Employers of Illegal Workers



The Scream, Edward Munch, 1893

# Enforcement Trends

- Obama administration promises a focus on work-site enforcement
- “remove incentives to enter the country illegally by cracking down on employers who hire undocumented immigrants.”



# Learning Objective #3:

*Avoiding unforeseen liability when employing contingent workers and independent contracts*



# Who Regulates the Classification of Workers?

- State and Federal agencies both regulate the determination of independent contractor status
  - For example, the U.S. Department of Labor (DOL) enforces its rules under the Fair Labor Standards Act (FLSA)
  - Georgia Department of Labor
  - Georgia Worker's Compensation Laws
- Internal Revenue Service (IRS) – regulates income and employment taxes on the federal level
- Labor Issues - Recent decisions of the National Labor Relations Board (NLRB) have allowed temporary employees working side by side with permanent employees in a union setting to become part of the same collective bargaining units as regular employees. One such decision even applied to temporary workers supplied by a temporary agency.

# Tips to Avoid Misclassification Problems

- ☒ Review independent contractor agreements
- ☒ Make sure independent contractors have the right to control the manner and means of accomplishing their work as well as the appropriate tools and opportunity for profit/loss
- ☒ Ensure that employees' labels or titles are consistent with their actual work experience
- ☒ Require temporary employees or independent works to apply for each new project or assignment
- ☒ Review your policies and procedures and make sure there are truly differences between employees and independent contractors





Questions?