

# WHO IS YOUR EMPLOYEE? INDEPENDENT CONTRACTORS, INTERNS, AND JOINT EMPLOYERS AFTER MCDONALD'S

**Presented by:**

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# Why?

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- In the last two years, the U.S. Department of Labor's Wage and Hour Division and states have recovered \$18.2 million in back pay for almost 20,000 employees who were wrongly classified as independent contractors.
- U.S. and State Tax Gap, Social Security Funding
- The Agencies are talking to each other

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# The Boston Globe

**New lawsuit claims Uber exploits its drivers**

# Recent Events

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11th Cir.: NLRB properly determined three related entities “single employer” in layoff decision

Ninth Circuit Ruling on Misclassification of Independent Contractors Has Major Ramifications for Employers

## The Franchise System in Peril: Joint Employer Status and the NLRB

WHD signs yet another state agreement to reduce worker misclassification

Oscar De La Renta Latest To Face Wage Action From Interns

MLB Hit With Class Action By Unpaid All-Star Volunteers

'Wendy Williams Show' Interns Hit Lions Gate With Wage Suit

1099ers Exposing Startups, PE Firms To Costly Liability

# Risks

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- Fines under the tax laws for unpaid income taxes and social security (personal liability)
- Unemployment benefits and fines for unpaid taxes to the state
- Liability for failure to obtain workers' compensation coverage
- ERISA obligations for failure to provide employee benefits
- Violation of Federal Employment Authorization Verification requirements

## Risks (cont'd)

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- Violation of Alabama's E-verify requirement
- Liability under the Affordable Care Act for failure to provide insurance or for using independent contractors to avoid the 50 FTE requirement
- Liability for unpaid wages and overtime (personal liability/double damages)
- Violation of record-keeping requirements
- Loss of intellectual property rights
- Unexpected liability to third parties for torts and insurance issues

## Risks (cont'd)

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- Application of federal and state anti-discrimination laws
- Failure to provide required leave under the Family Leave Act or potential multiple violations if independent contractors are used to stay under the 50 employees requirement (personal liability/double damages)
- Breach of contract claims by independent contractors who were not provided the at-will employment disclaimers

# Myths

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1. The worker bears the responsibility for determining whether he or she is an independent contractor.
2. A person who works for more than one employer is an independent contractor.
3. All temporary workers are independent contractors.



# Roadmap

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- What happens if I improperly classify someone as an independent contractor?
- Who qualifies as an independent contractor?
- If I just make this person an independent contractor, I don't have to worry about the Affordable Care Act, right?
- If I sent this person a Form 1099-MISC each year and don't withhold payroll taxes, they're an independent contractor, right?
- How do I make sure I don't improperly classify someone as an independent contractor?



# What is an independent contractor?

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- IRS 20 factor test
- Common law agency test
- Economic realities test
- Hybrid

## What is the “common law” rule?

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- An employer/employee relationship exists if the person contracting for the service has a right to control and direct both the results of the services and means by which those results are achieved.

# IRS 20 Factor Test

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- Instructions
- Training
- Integration
- Services Rendered Personally

# IRS 20 Factor Test

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- Hiring Assistants
- Continuing Relationship
- Set Hours of Work
- Full-Time Availability
- Work Done on Premises

# IRS 20 Factor Test

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- Order or Sequences Set
- Reports
- Payments
- Expenses
- Tools and Materials
- Investment

# IRS 20 Factor Test

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- Profit or Loss
- Works for More than One Person or Firm
- Offers Services to General Public
- Right to Fire
- Right to Quit

# Three Control Areas

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- Behavioral Control
- Financial Control
- Relationship of Parties



## Two Tests

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1. Is the independent contractor doing work he or she previously performed as an employee?
2. Is the independent contractor doing the same work current employees are doing?

# Red Flag Factor

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- Form 1099 to an individual

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**Can I just classify them as  
independent contractors to avoid  
the ACA?**

**No.**

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**Can I just classify them as  
independent contractors to avoid  
liability for Title VII or the FMLA?**

**No.**

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**If I sent this person a Form 1099-MISC each year and don't withhold payroll taxes, they're an independent contractor, right?**

**No.**

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# Nanny or Babysitter

## How to Avoid

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- Have a well-drafted contract.
- Use specific language to convey intent.
- Ask for invoices and an EIN.
- Think about the amount of control you have over that person.
- Hire incorporated corporate entities, not individuals whenever possible.
- Require a business license.

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# Unpaid Interns or Paid Employees?



# The *Black Swan* Meets the 24-Hour News Cycle

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- On June 11, 2013, a federal district court in New York ruled that Fox Searchlight Pictures violated federal wage and hour law when it employed two unpaid interns on the set for the film *Black Swan*.
- The story exploded in the national media, with immediate coverage in industry publications and full-blown national media coverage by the major networks, CNN, FOX, etc.

## The Story Has a Life of Its Own ...

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- Today, a Google search for news stories about unpaid interns returns over 3,000 hits.
- The story has even devolved into a feud between FOX News and the NY Times:

“NY Times Still Crusading Against Unpaid Interns  
While It Keeps Using Unpaid Interns”  
Fox News (Blog) - March 16, 2014

## The Lawsuits Keep Coming

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- In January 2014, a New York federal district judge approved a class action settlement in which Elite Model Management agreed to pay \$450,000 to settle a class action filed by a former Fashion Week intern
- The settlement fund was created to pay more than 100 former interns between \$700 and \$1,750 each for the time that Elite employed them without pay

## So Why All The Noise?

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- Unpaid interns are common in TV and movie production companies, sports franchises, the music business, the fashion industry, etc.
- Many employers are not in compliance
- More plaintiffs' lawyers are taking wage & hour cases than ever before

## So Why All The Noise? (Cont.)

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- Millennials are under-employed, angry and plugged-in



## Lawyers Are Poised to Take Advantage ...

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- Google the words “unpaid internship” and the first result is: <http://www.unpaidinternslawsuit.com/>, a website hosted by a plaintiffs’ law firm:

Unpaid interns are becoming the modern-day equivalent of entry-level employees, except that employers are not paying them for the many hours they work. The practice of classifying employees as “interns” to avoid paying wages runs afoul of federal and state wage and hour laws, which require employers to pay all workers whom they “suffer or permit” the minimum wage and overtime. Employers’ failure to compensate interns for their work, and the prevalence of the practice nationwide, curtails opportunities for employment, fosters class divisions between those who can afford to work for no wage and those who cannot, and indirectly contributes to rising unemployment.

## The U.S. DOL's Six-Part Test:

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1. The internship is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff ...;

## The U.S. DOL's Six-Part Test (cont'd):

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4. The employer derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impaired;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand the intern is not entitled to wages for the time spent in the internship.



## The U.S. DOL's Six-Part Test (cont'd)

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- The DOL test applies to all for-profit employers (government employers and non-profit, charitable organizations are exempt)
- A for-profit company's unpaid internship program must comply with all 6 prongs of the DOL test
- The DOL test is nothing new: The 6-part test is derived from a SCOTUS opinion from 1947, *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947)

## **NLRB General Counsel Office: McDonald's, USA, LLC and Its Franchisees Are Joint Employers**

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- The General Counsel of the National Labor Relations Board has authorized complaints against McDonald's, USA, LLC (McDonald's) and various of its franchisees in 43 cases for alleged violations of the National Labor Relations Act.
- The Office of Public Affairs also has announced that McDonald's will be named in these cases as a joint employer along with the franchisees of the restaurants where the complaints arose.
- If the complaints are pursued successfully to their conclusion with judicial determination of employer liability, McDonald's could be liable for the management decisions of the franchisees of these restaurants.

# NLRB General Counsel Attempts to Change the Standard

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- Employers share or codetermine those matters governing the essential terms and conditions of employment
- The alleged joint employer meaningfully influences matters relating to the employment relationship such as hiring, firing, supervision or direction
- Whether control over employment matters is direct and immediate

# New Proposed Standard

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- All that is needed is direct, indirect or the potential for control over employment matters
- Based on the commercial relationship does the alleged joint employer have sufficient influence over the working conditions of the other entity's employees

# Not Just a Franchise Issue

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- Staffing Agencies
- Parent/Subsidiary
- Subcontractors

# Steps To Avoid Joint Employer Claims

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## 1. Review the Deal (franchisor, vendor, subcontractor)

- Comb over agreements for overly broad statements of its ability to control the day-to-day business of the contractor, which could draw scrutiny from the NLRB or the courts, according to Evans.
- General clauses describing an ability to supervise operations could end up being used by plaintiffs to create an argument of joint employer liability and through affirmative statements disavowing control over employment matters.
- Need to make it clear in documentation that you are not involved in any way and have no right to be involved in the personnel decisions or in the direction of the workforce.
- Also may want to consider including indemnity provisions in the agreements to make it explicit that the contractor assumes all responsibility with respect to employment liabilities.

## Steps To Avoid Joint Employer Claims (cont'd)

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### 2. Examine the Relationship

- Need to make sure you follow through with what you say in the contract.
- Keep the level of control over employment and labor relations to a minimum.
- Free to have a say over trademark and copyright issues, advertising, and quality control.

## Steps To Avoid Joint Employer Claims (cont'd)

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### 3. Consider Employee Handbook Practices

- Imposing a personnel handbook on another's employees, could come back to haunt you.
- Contractors may want to revise employee handbooks to include specific provisions stating that the worker is an employee of the contractor only, and that the franchisor/parent/general contractor does not exercise control over the employee's performance of duties, scheduling of hours or other conditions of employment.
- An employee handbook that recites the absence of a relationship with the non-employee and an employee acknowledgement can help stack things in your favor.



## Steps To Avoid Joint Employer Claims (cont'd)

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### **4. Keep a Distance From Contractor's Workers**

- Limit interactions with a contractor's employees and concentrate on working with the owner.
- Directions or suggestions should be given directly to the owner and not to its employees.

## Steps To Avoid Joint Employer Claims (cont'd)

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- 5. No Involvement in Paying any Salary or Withholding or Providing Benefits or Insurance for Workers Employed by a Contractor.**
  - Such as workers' compensation or unemployment.

## Steps To Avoid Joint Employer Claims (cont'd)

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- 6. Do Not Provide Employee Training Materials to Contractors.**
  - Do not provide training materials that cover Human Resources functions.

## Steps To Avoid Joint Employer Claims (cont'd)

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### 7. Avoid HR Issues with Contractor's Employees

- Do my agreements allow for the removal of any of the contractors, managers or staff?
- Do my standard materials provided to the contractor include an employee handbook or work rules that cover discrimination, harassment or compliance with any state or federal labor laws?

## Steps To Avoid Joint Employer Claims (cont'd)

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### **8. Avoid Assessment of Contractor's Employees**

- When I conduct a site inspection of my contractor, does the evaluation include assessment or the quality of employee conduct?