

Pitfalls to Avoid in Classifying Employees

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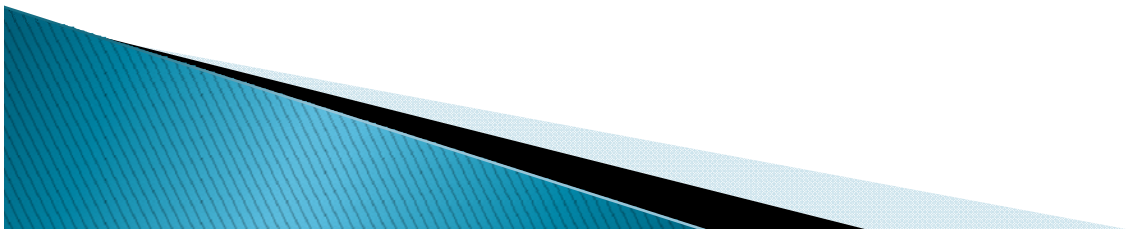
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Independent Contractor or Employee?

Implications of misclassification:

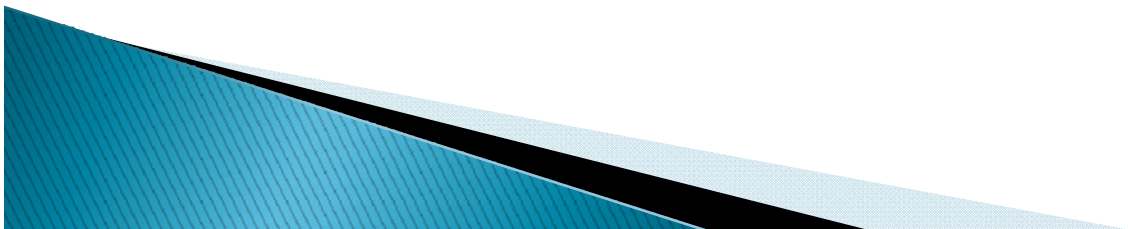
- ▶ Payroll taxes and deductions, along with penalties & interest
- ▶ Back wages, along with penalties & interest
- ▶ Payment of contributions to employer-funded mandates, such as the unemployment insurance fund and workers compensation
- ▶ Liability for anti-competitive conduct, including statutory civil penalties



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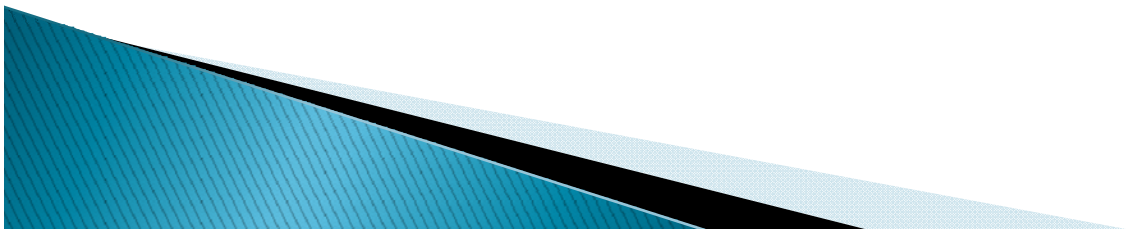
Classification may be addressed when someone raises:

- ▶ A claim under the anti-discrimination laws
- ▶ Liability for injuries caused by the worker's negligence
- ▶ Liability to worker for injuries resulting from company's negligence
- ▶ Eligibility for union membership
- ▶ Eligibility for benefits



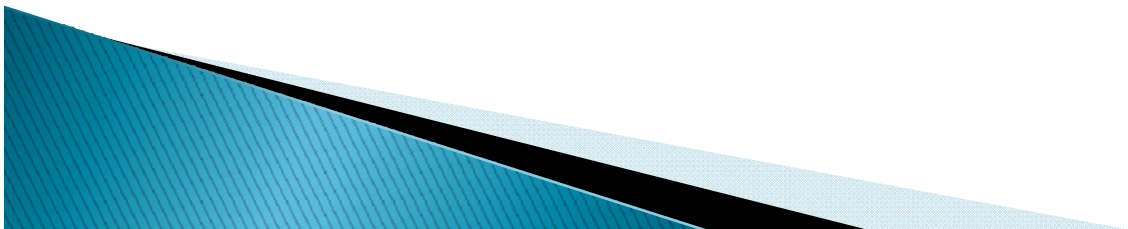
Independent Contractor or Employee?

- ▶ Test applied by IRS is based on principles of “agency” – is the worker serving as an agent of the company?
- ▶ Multi-factored test – under current law, no one factor dominates over the others; balancing test employed or “totality of the circumstances.”



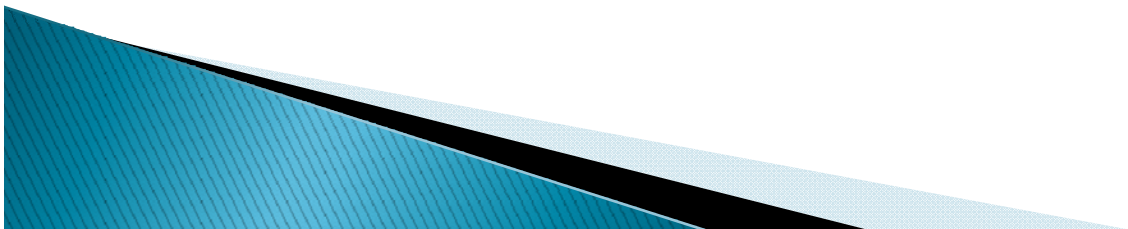
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- ▶ The IRS has divided the factors into three categories:
 - 1) Behavioral: Does the company control or have the right to control what the worker does and how the worker does the job?
 - 2) Financial: Are the business aspects of the worker's job controlled by the company?
 - 3) Type of Relationship: Are there written contracts or employee-type benefits? Will the relationship continue and is the work performed a key aspect of the business?



Independent Contractor or Employee?

- ▶ Best practices:
 - Apply the factors rigorously and recommend that the employer make changes in the relationship with the worker to ensure that the balancing test favors the employer's classification decision.
 - Use written agreements with independent contractors.
 - Employers must be consistent in their classification decisions.



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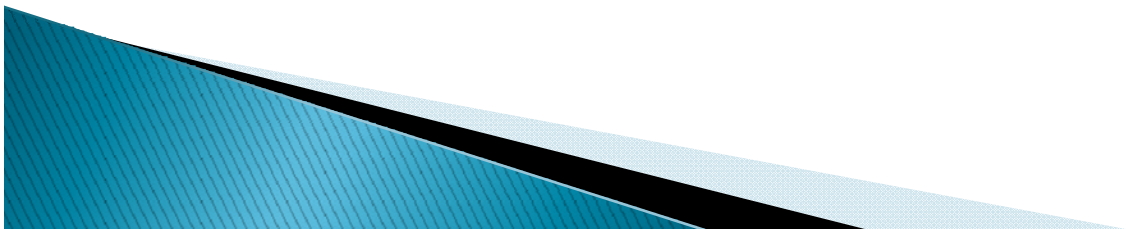
- ▶ The case of the claims adjuster:
 - Sheryl Want worked for American Risk Ins. Co. for less than 3 months handling claims for property damages made by homeowners following Hurricane Ike. She brought suit under the FLSA for overtime.
 - She paid for her own state license.
 - She worked with little supervision.
 - She set her own hours.
 - She was free to work for other insurance companies.
 - She was paid on a hourly basis.
 - She knew her position was temporary and that ARI considered her an independent contractor.



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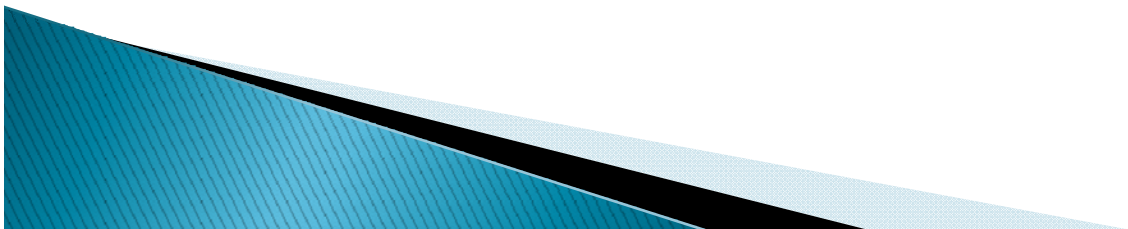
- ▶ The Fifth Circuit affirmed the U.S. District Court's conclusion that Ms. Want was an independent contractor. Thus, her claim for overtime pay was denied.

Talbert v. Am. Risk Ins. Co., 405 F. App'x 848 (5th Cir. 2010).



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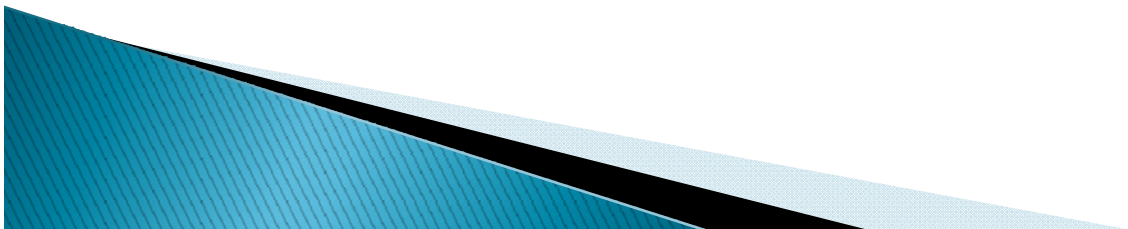
- ▶ Victoria Torley was employed by Georgia Community Care Solutions and provided services to a related entity, CSS Healthcare Services. She was fired after encouraging the CSS workforce to establish a collective bargaining unit. She claimed an unfair labor practice.



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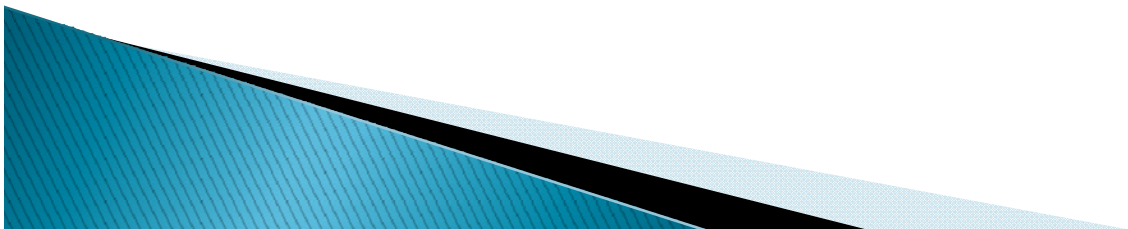
- ▶ The Eleventh Circuit affirmed the determination by the NLRB that Ms. Torley was an employee.

NLRB V. CSS Healthcare Servs., Inc., No. 10–13736, 2011 U.S. App. LEXIS 6577 (11th Cir. Mar. 30, 2011).



Independent Contractor or Employee?

- ▶ Five exotic dancers brought a wage and hour action against the owners of “The House,” a gentlemen’s club in Washington, D.C.
 - Degree of control – favored employee status.
 - Opportunity for profit or loss and Investment in the business – favored employee status.
 - Degree of skill and independent initiative required – favored employee status.
 - Permanence or duration of the working relationship – favored independent contractor status.
 - Integral part of the employer's business – favored employee status.



Independent Contractor or Employee?

- ▶ Dancers were found to be employees, and thus were owed minimum wage, overtime pay, etc.

Thompson v. Linda & A., Inc., No. 09-1942 (BAH), 2011 U.S. Dist. LEXIS 46078 (D.D.C. Apr. 29, 2011).

