The Hidden Risks of Hiring Temporary Workers and Independent Contractors

June 17, 2010

PRESENTED BY

JIMMY F. ROBINSON & A. TEVIS MARSHALL
Troutman Sanders LLP
1001 Haxall Point
Richmond, VA 23219
804.697.1200

troutmansanders.com

TROUTMAN SANDERS

Firm Overview

Troutman Sanders LLP is an international law firm with more than 700 lawyers and 15 offices in North America, Europe and Asia. Founded in 1897, the firm's heritage of extensive experience, exceptional responsiveness and an unwavering commitment to service has garnered strong, long-standing relationships with clients across the globe. These clients range from multinational corporations to individual entrepreneurs, federal and state agencies to foreign governments, and non-profit organizations to businesses representing virtually every sector and industry.

Troutman Sanders lawyers provide counsel and advice in practically every aspect of civil and commercial law. With more than 50 practice groups focused on specific aspects of these areas, the firm is defined by its considerable knowledge base and proactive approach to addressing legal and business challenges.

Reputation for Excellence

Consistently listed among the best law firms, recent rankings and achievements for Troutman Sanders include:

- Honored as one of only 30 law firms in The BTI Client Service 30 for best at client service.
- Ranked #75 in the 2008 AmLaw 100 and #56 in the NLJ 250.
- Ranked #1 in 12 Practice Categories in Chambers USA Guide 2008 and received 21 other rankings.

Offices

ATLANTA
404.885.3000

CHICAGO
312.759.1920

HONG KONG
852.2533.7888

LONDON
44.0.20.7038.6650

NEW YORK
212.704.6000

NEWARK
973.645.0772

NORFOLK
757.640.0004

ORANGE COUNTY
949.622.2700

RALEIGH
919.835.4100

RICHMOND
804.697.1200

SAN DIEGO
619.235.4040

SHANGHAI
86.21.6133.8989

TYSONS CORNER
703.734.4334

VIRGINIA BEACH
757.687.7500

WASHINGTON, DC
202.274.2950

troutmansanders.com

Commitment to Diversity

Diversity is an essential part of Troutman Sanders' culture and contributes to the firm's success and ability to grow. Troutman Sanders proudly supports many initiatives that foster an inclusive environment and helps its personnel balance commitments to clients and family.

TROUTMAN SANDERS

Labor & Employment

The Troutman Sanders Labor & Employment Practice Group (L&E Group) consists of more than 30 accomplished attorneys located in our Atlanta, New York, Washington D.C., Richmond, Chicago, Orange County, San Diego, Virginia Beach and Raleigh offices. The L&E Group is fully equipped to provide counsel on virtually any labor and employment law matter, including:

- Defending all types of individual and multi-plaintiff employment cases.
- Defending complex class and collective actions.
- Representing management in union elections, both in certification and decertification petitions.
- Negotiating and administering labor agreements.
- Drafting employment policies, benefits plans, employment agreements and severance plans.
- Conducting preventative training and compliance audits, including supervisory training to prevent union activity, harassment and/or retaliation.

The L&E Group represents clients in federal and state court lawsuits involving claims of discrimination, federal wage and hour claims, and a myriad of state law claims for breach of contract, negligent retention and intentional infliction of emotional distress. The L&E Group also represents companies with respect to restrictive covenants, such as non-competition and non-solicitation agreements. The group frequently advises clients on workplace issues, such as human resources policies and procedures, employee handbooks, executive compensation and incentive pay systems, union avoidance techniques, and collective bargaining agreements.

The depth of knowledge and vast experience that the L&E Group possesses is best signified by its broad array of clients.

- Fortune 100 and Fortune 500 companies
- Consumer products providers
- Network broadcasting companies
- Technology companies
- Power and telephone utility companies
- Public employers
- Retailers
- Entertainment industry entities
- Manufacturers
- National restaurant chains
- Food service suppliers
- Worldwide sports equipment companies

Human Resources Consulting

The L&E Group routinely helps clients manage legal compliance issues. The L&E Group also helps clients identify unforeseen legal risks and avoid undesired litigation costs that can arise from employment actions and decisions.

To effectuate this result, the L&E Group provides clients with proactive human resources consulting that maximizes the effectiveness and defensibility of its employment policies and actions. Our strategic approach reduces the risk of legal challenges to our clients' employment policies and actions. The types of legal/consulting services we provide in this area include:

- Reviewing, designing and drafting employment policies and practices, including customized, state-of-the-art employee handbooks based on methods designed to support business goals, maximize employer flexibility and ensure total legal compliance.
- Designing and implementing employee discipline systems.
- Designing hiring systems which ensure legal compliance and enable companies to attract the highest quality employees.
- Creating compensation systems to reduce costs, increase performance and assist retention of high quality employees.
- Training supervisors/employees on compliance with all federal and state labor and employment laws.
- Providing general employment advice and preventative counseling.
- Conducting or overseeing workplace harassment and misconduct investigations.
- Creating job descriptions, including identifying essential job functions and other employee leave issues.
- Implementing union avoidance strategies.
- Assisting with corporate reorganizations, plant closings and reductions in force, including developing voluntary and involuntary severance plans.
- Preparing affirmative action programs and defending OFCCP Audits.
- Advising on corporate asset protection, including development of policies and agreements that protect against unlawful disclosure or use of confidential information, trade secrets, intellectual property, employee raiding and unfair competition.

Some specific examples of our human resources consulting work include the following:

- Designing, implementing and maintaining a voluntary and involuntary workforce reduction process for companies in the technology, manufacturing and many other industries.
- Designing and drafting a human resources management and compliance system for a national retailer with more than 1,000 locations.
- Designing and drafting the human resources policies and documents for start-up of a $1 billion company.
- Redesigning hiring and internal selection procedures and criteria for an 11,000-employee company.
- Designing, implementing and evaluating group-based incentive pay systems covering more than 50,000 employees for more than a dozen Fortune 500 companies.

- Designing and implementing an essential job functions development process and an ADA compliance program for several nuclear power plants.
- Drafting and negotiating nationwide non-competition and non-disclosure agreements for employees of a paper products supplier and for officers of a leading software developer.
- Drafting affirmative action plans for Fortune 500 client which allowed the company to bid on government contracts.
- Training managers and employees at Fortune 500 clients regarding sexual harassment issues.
- Conducting a workplace violence seminar for employers outlining warning signals of workplace violence and practical tips on how to deal with workplace violence situations.
- Investigating allegations at a national manufacturing company that a senior executive assaulted and sexually harassed a subordinate.
- Advising professional sports teams and a national cinema company on public accommodation compliance issues under the Americans with Disabilities Act, including negotiating with the Department of Justice for the clients on those issues.

Litigation and Dispute Resolution

The L&E Group strives to keep clients out of litigation. However, the L&E Group realizes that some employment disputes arise that can only be resolved through litigation. Once litigation begins, the L&E Group's primary focus is to get the most successful result for the client in the most cost-effective manner possible. To significantly reduce costs normally associated with organizing and pursuing the defense of a case, the L&E Group uses advanced technology like Real-Time transcription, Summation and ProLaw case management software and document scanning. If the case has to go to trial, few, if any, law firms have the jury trial experience that the Troutman Sanders L&E Group's trial attorneys possess.

The unmatched success and experience of the L&E Group's litigation practice is unquestionably our defining trait. The L&E Group regularly represents clients in all facets of employment litigation in both federal and state courts across the nation, including litigation involving all types of unlawful discrimination, wrongful discharge, retaliation, whistleblower claims, federal and state wage and hour laws, collective bargaining agreements, employment contracts, compensation agreements, non-solicitation and non-disclosure agreements, covenants not to compete, and trade secret issues. The L&E Group's record of obtaining summary judgment, directed verdicts and jury verdicts for clients in these cases is unparalleled.

The L&E Group also regularly represents clients in administrative investigations, proceedings and litigation before:

- The Equal Employment Opportunity Commission
- The National Labor Relations Board
- The Department of Labor, including the Wage and Hour Division
- The Department of Justice
- The Office of Federal Contract Compliance Programs

- The Occupational Safety and Health Administration
- The Nuclear Regulatory Commission
- The U.S. Immigration and Naturalization Service

The L&E Group also routinely practices alternative dispute resolution techniques (including mediation, arbitration and mini-trials) and endeavors to use these techniques whenever they serve the best interests of clients. These approaches, just as those related to using technology to manage workflow, can often limit costs to clients.

Some examples of our litigation practice include the following:

- Winning a jury verdict in favor of a Fortune 500 client on plaintiff's race discrimination and retaliation claims.
- Winning a jury verdict in favor of an employer in a pregnancy discrimination case.
- Winning a directed verdict in favor of Fortune 500 client in Alabama on plaintiff's racially hostile work environment claim.
- Winning a directed verdict in a sex discrimination lawsuit brought by two female over-the-road truck drivers against a large transportation company.
- Winning summary judgment for a silicon water manufacturer in a case where a discharged engineer alleged age, religion and national origin discrimination.
- Winning a directed verdict in favor of a national restaurant company on plaintiff's sexual harassment hostile work environment claim.
- Winning a jury verdict in favor of Fortune 500 client on a plaintiff's retaliation claim.
- Winning a directed verdict on a race discrimination claim for a nationwide chain of movie theaters in Arkansas.
- Obtaining summary judgment in Florida in favor of Fortune 500 client in a four-plaintiff lawsuit alleging hostile work environment, racial harassment and race discrimination in promotions and discipline in a case where the EEOC had issued a cause finding.
- Obtaining summary judgment for Fortune 500 client in a race discrimination case challenging the promotion system at a company facility.
- Obtaining summary judgment for clients against numerous plaintiffs alleging claims of long-standing supervisor and coworker sexual harassment.
- Obtaining summary judgment in an age discrimination claim brought by the human resources manager who was let go in a reduction-in-force by a large manufacturer.
- Obtaining summary judgment for a telecommunications company in a sex discrimination case filed in Florida.
- Winning summary judgment in a case involving allegations of age discrimination and disability discrimination against a Fortune 500 telecommunications company.
- Winning a motion to dismiss a national origin discrimination claim filed against an employer operating a nuclear power plant.

- Successfully obtaining the dismissal of an OSHA citation that alleged willful safety violations and proposed approximately $90,000 penalties against Fortune 500 client.
- Representing a nuclear licensee in successfully defending against claims of retaliation before both the Department of Labor and the Nuclear Regulatory Commission.
- Winning a jury verdict in Virginia in favor of Fortune 500 client in breach of employment contract action brought by its Chief Financial Officer.
- Obtaining judgment in favor of nationwide agricultural business in Virginia in claims of sexual harassment, negligent hiring, and negligent retention.
- Obtaining summary judgment in Virginia in favor of a major Virginia city on claims of national origin discrimination.

Class and Collective Action Litigation

The L&E Group has the expertise, experience and resources to manage large class action, collective action and multiple-plaintiff litigation, including claims related to "pattern and practice" employment discrimination and federal wage and hour violations raised by several dozen plaintiffs to several thousands of plaintiffs.

The L&E Group's successful management and defense of these types of cases for Fortune 500 clients has garnered national recognition. A few recent, notable examples of this success include:

- Defeating motion for class certification in race discrimination case which sought to establish a class of approximately 2,400 employees of Fortune 500 client, then obtaining summary judgment on all remaining individual plaintiffs' claims. The L&E Group successfully represented its client throughout the appellate process, which ultimately ended before the United States Supreme Court.
- Obtaining summary judgment against all named plaintiffs in putative class action brought pursuant to the FLSA and another federal wage and hour statute against Fortune 500 client on behalf of more than 2,000 plaintiffs, thereby eliminating any chance for the class to be certified.
- Obtaining a dismissal of a putative collective action brought by 168 named plaintiffs under the Fair Labor Standards Act alleging entitlement to overtime pay for time spent on call.
- Obtaining dismissal of the class allegations in a series of FLSA collective action cases brought against client that sought to include class of several thousand plaintiffs.
- Obtaining judgment against all named plaintiffs in collective action brought under the ADEA against a major Virginia radio and television broadcasting company.
- Winning a motion to dismiss a class action lawsuit brought by police officers under the Fair Labor Standards Act against a large public employer located in metropolitan Atlanta.
- Obtaining summary judgment against all individual plaintiffs in putative class action filed against Fortune 500 client by establishing that company was not the plaintiffs' joint employer under the Fair Labor Standards Act.
- Obtaining disqualification of "pattern and practice" plaintiffs' statistical expert witness.
- Obtaining court orders limiting the scope of plaintiffs' discovery.
- Successfully managing large discovery databases.

- Successfully negotiating complex settlement agreements and consent decrees.

Traditional Labor Law

The L&E Group has made its mark in the traditional labor law arena. The L&E Group regularly represents management in union elections and leads negotiations in collective bargaining with unions. It also conducts supervisory training to prevent incipient union activity and represents management in arbitrations interpreting aspects of collective bargaining agreements. In addition, the L&E Group manages investigations initiated by various governmental agencies, including the NLRB and the OFCCP.

Some examples of our work in this area include:

- Conducting union avoidance campaigns for dozens of companies, including a campaign in New York for an international entertainment company and campaigns in Los Angeles and Memphis for a security company doing business around the world.
- Negotiating collective bargaining agreement for clients across the nation.
- Handling hundreds of labor arbitration cases for clients throughout the U.S.
- Decertifying two unions in Texas and Delaware for a manufacturer of flexible packaging.
- Defeating union organization attempts for a boat manufacturer in Tennessee and Florida.
- Decertifying a union in Michigan and Wisconsin for a furniture retailer.
- Negotiating subcontracting provisions into collective bargaining agreements after multi-week work stoppages.

In addition to its extensive litigation practice, the L&E Group has vast experience guiding unionized clients through the maze of issues that arise in the labor management relations process. The L&E Group serves as chief labor counsel to various unionized clients, including the Fortune 500 holding corporation of power utility companies located throughout the southeastern United States. In this capacity, the L&E Group is adept at responding to unfair labor practice charges, providing counseling and strategy advice throughout the grievance process, defending management in arbitration proceedings, and defending against suits alleging breach of collective bargaining agreements or seeking to compel arbitration.

Related Practice Groups

Troutman Sanders LLP also has related practice groups which supplement the L&E Group's extensive legal services, including the Compensation and Employee Benefits Group and the Immigration Practice Group.

The Compensation and Employee Benefits Group provides comprehensive legal and consulting advice on the full spectrum of federal laws impacting employee benefit plans, compensation, and privacy issues. The Compensation and Employee Benefits Group also routinely defends clients in both civil and criminal ERISA litigation matters, including claims involving alleged denial of severance, disability, retirement, and health benefits.

The Immigration Practice Group provides a full-service immigration practice, including routinely advising clients on issues related to alien-employees, obtaining temporary work visas for employees to work at client facilities in the United States and around the world, and assisting individuals desiring to obtain permanent residency.

TROUTMAN SANDERS

Jimmy F. Robinson

Troutman Sanders Building
1001 Haxall Point
Richmond, Virginia 23219
804.697.1211 telephone
804.698.6029 facsimile
jimmy.robinson@troutmansanders.com

Jimmy is a partner in the firm's Labor and Employment practice group. His practice focuses on labor and employment law matters, including litigation. In his labor practice, Jimmy represents unionized companies in collective bargaining, and arbitrations, and in National Labor Relations Board matters. His practice includes representation of national and international companies with operations across the United States. He also represents non-unionized employers in the development of strategies designed to help those employers remain non-union by advising them on labor and employee relations through issue assessment, supervisory training, advice and counsel with respect to policy development, and lawful/positive communications; where necessary, he advises and counsels employers during union organizing campaigns.

In employment litigation matters, Jimmy represents employers in a wide variety of employment matters, including defense of wrongful discharge claims; breach of employment contracts; disability, age, race, national origin, religion, gender and other discrimination claims, including claims for sexual harassment; claims for relief under the Family Medical Leave Act and Fair Labor Standards Act; and defamation, among other tort claims arising from the employment relationship. Jimmy also counsels employers concerning personnel policies and workplace issues, including leave, benefits, severance, wage and hour obligations, employee discipline, affirmative action plans and employment discrimination matters.

Jimmy is committed to public service matters. His public interest work is significant and varied, and includes: representation of the indigent in custody and other domestic relations matters; providing pro bono simple wills, advance medical directives and powers of attorney to First Responders through the Virginia State Bar Young Lawyers Conference; and putting on multiple Senior Citizen Seminars over-viewing the pertinent and changing laws and programs affecting senior citizens in Virginia.

Practice Areas
- Labor & Employment

Education
- College of William and Mary (J.D., Thurgood Marshall distinction, 1998)
- Hampton University (B.A., cum laude, 1995)

Work Experience
- Partner, Troutman Sanders, 2009-present
- Associate/Partner, LeClairRyan, 2003-2009
- Associate, Gentry, Locke, Rakes & Moore, 1998-2003

Bar and Court Admissions
- Virginia

Bar Activities and Legal Associations
- Virginia State Bar: Past President, Young Lawyers Conference
- Virginia Association of Defense Attorneys: Past President, Young Lawyers Division
- American Bar Association, Member
- National Bar Association, Member
- Old Dominion Bar Association, Member
- Henrico County Bar Association, Member
- William & Mary School of Law Alumni Board: Member, Board of Directors
- Junior Achievement of Central Virginia, Inc., Board Member
- Oliver White Hill Foundation Inc., Board Member
- Alpha Phi Alpha Fraternity, Inc.

Distinctions
- Listed in Virginia Business magazine's "Legal Elite" in 2006 (Labor and Employment Law), 2007 (Young Lawyer), 2008 (Young Lawyer) 2009 (Young Lawyer)
- Listed in Law and Politics

Jimmy is the former President of the Virginia State Bar, Young Lawyers Conference, and the former President of the Virginia Association of Defense Attorneys, Young Lawyers Division.

magazine's "Virginia Rising Stars"
Super Lawyers 2007 - 2010

Representative Experience
Represented a top 20 North American Refrigerated Warehousing Company in several unfair labor practice claims resulting in a very favorable outcome for the company.

Obtained summary judgment for management company in a case brought by several plaintiffs alleging race discrimination.

After several months of a strike, and lock out and being brought in at the 11th hour, successfully negotiated collective bargaining agreement for global integrated producer of chemicals and advanced materials for a facility that had gone without a contract for 4 years.

Successfully represented the global leader in packaging and packaging solutions for the cosmetic and personal care, healthcare and pharmaceuticals, food and beverage company in a three week unfair labor practice trial before an Administrative Judge from the Department of Labor

Represented a global integrated company operating on five continents in an unfair labor practice matter, resulting in a favorable outcome for the client.

Successfully represented the preferred global leader of advanced energy and operational solutions in union organizing campaign.

Obtained summary judgment for preferred global leader of advanced energy and operational solutions in an unusual Title VII ADA lawsuit in which the plaintiff claimed she was regarded as disabled by the company.

Obtained summary judgment for the world leader in specialty glass and ceramics in a Title VII race discrimination lawsuit.

Obtained summary judgment for the worlds' largest retailer in a Title VII sexual harassment lawsuit.

Successfully mediated a very challenging negligent retention, negligent hiring case for a premier transportation company wherein the client's

damages claimed exceeded 5 million dollars.

Successfully defended a health care provider at trial in a $3 million matter wherein the plaintiff alleged the employer's policies and procedures caused her irreparable harm. After a week long trial, the jury deliberated for less than 2.5 hours and returned a defense verdict.

Successfully defended a health care provider in an unusual matter wherein the plaintiff alleged that the health care provider knew, should have known and should have warned the plaintiff of its employee's previous negative surgical outcomes. No offer was made prior to the trial; the demand by the plaintiff was $600,000. The jury deliberated for less than 2 hours and returned a defense verdict.

Successfully defended a health care provider in a hybrid employment law/medical malpractice matter wherein the plaintiff sued the defendant for 2.5 million dollars alleging that the employer was responsible for the wrongful death of plaintiff's decedent because of the employer's hiring and promotion practices. After a week long trial, the jury deliberated for less than 2 hours and returned a defense verdict.

After three days of trial, successfully argued and had sustained a Motion to Strike for a Healthcare provider in a matter wherein the plaintiff alleged the employer failed to properly staff and train its employees who were the plaintiff's co-workers.

Presentations and Speaking Engagements

Speaker – 2010 William and Mary BLSA Seminar Series – Williamsburg, Virginia, February, 35, 2010. "Employment Law 101 for the Newly Minted Lawyer":

Speaker – 2009 Annual Labor & Employment Seminar Richmond, Virginia, November 2009. " GINA, RESPECT ACT, ENDA, & the New FMLA"

Speaker - 2009 National Employment Law Council Annual Meeting, Miami, FL, May 2009 – "How Newly Proposed Legislation Will Change the World of Labor."

Speaker – 2008 ABA–CLEO/Thurgood Marshall Mid Summer Professional Development Seminar, Chicago IL, June 4, 2008

Speaker – Annual Labor and Employment Law Update, Richmond, Virginia, September 12, 2007

Speaker & Author - Freedom of Expression in the Workplace: Employment Law Seminar Roanoke, Virginia, January 30, 2007

Speaker & Author - Current Trends in the Law – Virginia Judicial Conference, Williamsburg, Virginia, Sept. 26, '06

Speaker & Author - Employment Law Update, Charlottesville, Virginia, May 25, 2006, Boars Head Inn, Charlottesville, Virginia

Speaker – Employment and Legal Issues in Behavioral Health in Virginia, Richmond, Virginia April 8,2005 Wyndham Hotel at Richmond Airport

Speaker - Employment Records Update: Confidentiality, Release of Information, HIPPA: Richmond, Virginia March 3, 2005 Holiday Inn Select Richmond Kroger South

Speaker – Employment Records Update: Confidentiality, Release of Information, HIPPA: Richmond, Virginia March 19, 2004 Wyndham Hotel at Richmond Airport

Speaker & Author - Minorities in the Law, Presented at Law Forums at Virginia Polytechnic University, Blacksburg, Virginia; Hollins University, Roanoke, Virginia and Roanoke College, Salem, Virginia (1999-2002)

Speaker & Author - Finding the Needle in the Hay Stack - The Road to the Smoking Gun Documents, Roanoke, Virginia, May, 2001

Panelist - Legal Liabilities for Board Members of Non-Profit Organizations, Presented at Roanoke's United Way Minority Leadership Enhancement Program, Roanoke, Virginia, (October 2002, 2001, 2000)

Classes and Seminars Taught

Adjunct Professor University of Richmond: 2007- to present. Subjects: Employment Law and Policy; Labor Law; Employment Law for the Human Resource Manager

TROUTMAN SANDERS

Tevis Marshall

Troutman Sanders Building
1001 Haxall Point
Richmond, Virginia 23219
804.697.1284 telephone
804.698.5122 facsimile
tevis.marshall@troutmansanders.com

Representative Experience

Practice in all areas of labor and employment law including Title VII, Employee Retirement Income Security Act of 1974 (ERISA), Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA), Family Medical Leave Act (FMLA), breach of employment contracts, restrictive covenants, wrongful termination, and other general employment litigation in federal and state court.

Employee benefits litigation experience under ERISA and state law.

Commercial litigation experience including breach of fiduciary duty, business conspiracy, breach of contract, covenants not to compete, trade secrets, Fair Credit Reporting Act (FCRA), Truth in Lending Act (TILA), fraud, and tort defense.

General representation of musicians and talent management companies with respect to contract negotiation and intellectual property rights.

Speaking Engagements

Speaker at Troutman Sanders LLP's November 2009 Labor and Employment Seminar - The New Americans With Disabilities Act: The ADA Amendments Act of 2008 (ADAAA) and Notice of Proposed Rulemaking

Speaker at June 2009 seminar provided by the Virginia CLE Foundation - "Employers and Employees: Rights and Responsibilities in 2009 - The Family Medical Leave Act"

Speaker at Troutman Sanders LLP March 2009 Seminar on the New FMLA Regulations - FMLA Certifications For Serious Health Conditions

Practice Areas

- Labor & Employment

Education

- College of William and Mary (J.D., 2004)
- University of Virginia (B.A., 1998)

Work Experience

- Associate, Troutman Sanders LLP, 2006 - Present
- Associate, LeClair Ryan, 2004 - 2006

Bar and Court Admissions

- Virginia
- U.S. District Court for the Eastern District of Virginia
- U.S. District Court for the Western District of Virginia

Bar Activities and Legal Associations

- Richmond Bar Association
- American Bar Association
- Virginia Bar Association

Distinctions

- Member of the Richmond Bar Association Publications Committee, 2006 - present
  Member of the Board of Directors for Human Resources, Inc., 2007 - present
  President of the Board of Directors for Human Resources, Inc. 2009 - present

Speaker at Troutman Sanders LLP's November 2008 Labor and Employment Seminar - The Impact of Recent Changes to the Family Medical Leave Act

Speaker at Troutman Sanders LLP's November 2007 Labor and Employment Seminar - Wage Wars: 2004 Wage and Hour Law and its Impact Three Years Later

Speaker at July 2006 employment law seminar on Pandemic Influenza – Preparing For Avian Bird Flu in the Workplace

Publications

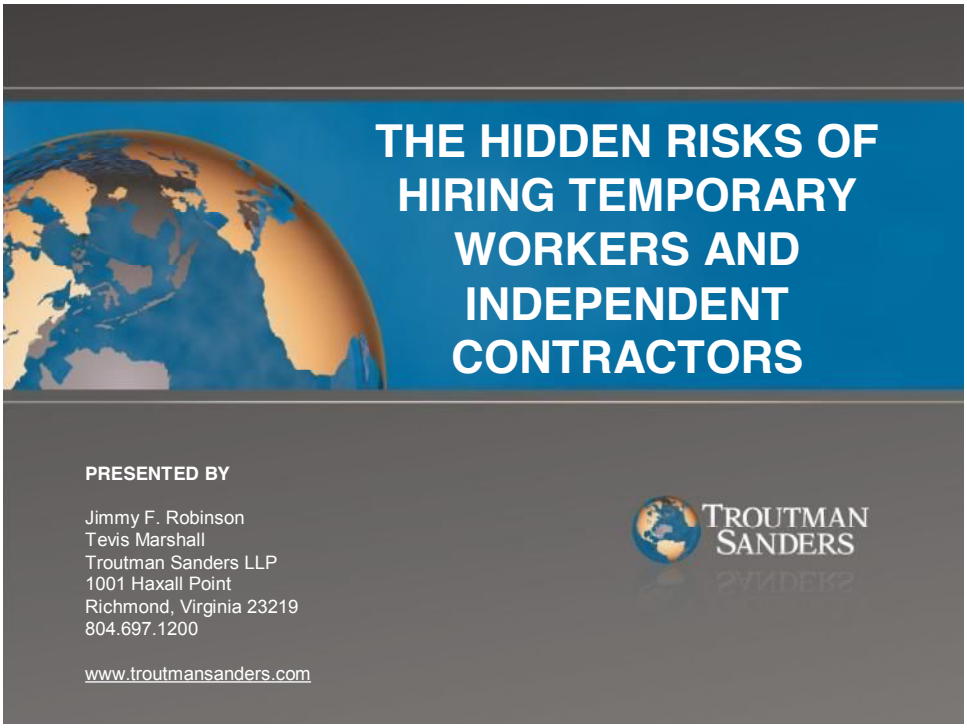
Contributing author to "A Virginia Employer's Guide to Hiring, Firing, and Discipline," published by the Virginia Chamber of Commerce

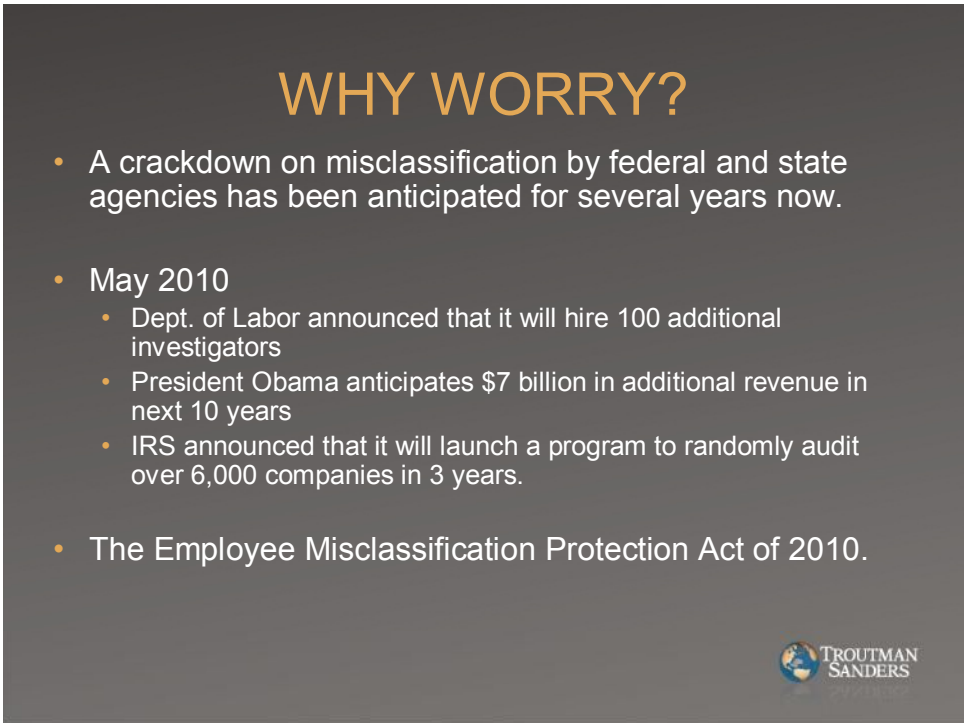
Table of Contents

I. Power Point Presentation

II. IRS Guidance

III. Related Articles


THE HIDDEN RISKS OF HIRING TEMPORARY WORKERS AND INDEPENDENT CONTRACTORS
PRESENTED BY
Jimmy F. Robinson
Tevis Marshall
Troutman Sanders LLP
1001 Haxall Point
Richmond, Virginia 23219
804.697.1200
www.troutmansanders.com
TROUTMAN SANDERS


WHY WORRY?
• A crackdown on misclassification by federal and state agencies has been anticipated for several years now.
• May 2010
• Dept. of Labor announced that it will hire 100 additional investigators
• President Obama anticipates $7 billion in additional revenue in next 10 years
• IRS announced that it will launch a program to randomly audit over 6,000 companies in 3 years.
• The Employee Misclassification Protection Act of 2010.
TROUTMAN SANDERS

OVERVIEW

Temporary Workers –

- The U.S. Department of Labor reported in November 2009 that 44,000 temporary jobs have been added since this time last year.
- Difficult to estimate the total number, but it appears to be growing.

Independent Contractors –

- In 2005, nearly 10.3 million workers (7.4% of the employed workforce) were classified as independent contractors.
- The number of independent contractors who are properly classified is probably far less.

TROUTMAN SANDERS

OVERVIEW

- A study by the U.S. Department of Labor found that between 10% and 30% of the employers audited were found to have misclassified workers.
- The same study reported that in some states, 95% of workers claiming that they were misclassified were reclassified as employees following a review.
- The IRS estimates that it is losing $20 billion a year due to worker misclassification.

TROUTMAN SANDERS

WHAT ARE THE BENEFITS?

- **Temporary Workers** –
  - Uncertain about future growth of company.
  - Training, HR, payroll often handled by the temp agency.
  - Often less expensive than hiring a permanent employee – particularly for a short-term project.
  - Most temps do not receive other employment benefits (i.e., health insurance, pension, paid sick leave, etc.)

TROUTMAN SANDERS

WHAT ARE THE BENEFITS?

- **Independent Contractors** –
  - Unique skills and expertise.
  - Employers do not have to pay or withhold taxes (i.e., FICA, FUTA and Social Security).
  - Exempt from the FLSA's minimum wage and overtime protections.
  - Not covered by workers' compensation.
  - Generally do not receive other employment benefits (i.e., health insurance, pension, paid sick leave, etc.)
  - Independent contractors can't form a union.

TROUTMAN SANDERS

IS THE BENEFIT REALLY WORTH THE RISK??

- Sometimes the use of temporary workers or independent contractors makes good business sense……**BUT**
- The risks of misclassifying workers can prove disastrous.
  - FedEx - $319 million
  - Microsoft - $97 million
  - UPS - $12.8 million

TROUTMAN SANDERS

WHAT IS THE PROPER TEST?

- WHO KNOWS?!
- Complex tests are applied, and are often not applied consistently by courts or government agencies.
- The DOL and IRS each apply their own test, but, to further complicate matters, DOL and IRS typically do not exchange information they obtain during investigations due to certain restrictions in the tax code.

TROUTMAN SANDERS

WHAT IS THE PROPER TEST?

- U.S. Supreme Court has also held that there is no single rule or test, but has considered the following factors:
  - extent to which services rendered are integral part of employer's business
  - permanency of the relationship
  - nature and degree of control by employer
  - alleged contractor/temp's opportunity for profit or loss
- Court's interpreting the FLSA apply an "economic realities test."
- Typically boils down to the issue of CONTROL.

TROUTMAN SANDERS

WHAT IS THE PROPER TEST?

- IRS 3-part Test:
  - Behavioral Control

    -When, where and how to work. What tools or equipment to use. Where to purchase supplies. What order or sequence to follow. Trained to perform services in a particular manner
  - Financial Control

    -Reimbursement of expenses. Extent of the worker's personal investment. How the business pays the worker. Extent to which worker realizes profit or loss.
  - Type of Relationship

    -Written contracts describing the relationship. Whether the worker receives benefits that other employees receive. Permanency of the relationship.

TROUTMAN SANDERS

WHAT ARE THE RISKS OF MISCLASSIFICATION?

Violators face potential legal exposure:

- Harassment and Discrimination Claims
- Wage and Hour Violations
- Family Medical Leave Act
- Employee Benefits
- Tax Implications
- Criminal penalties

TROUTMAN SANDERS

HARASSMENT AND DISCRIMINATION

- Independent contractors are not covered by most anti-discrimination laws…unless they are improperly classified.
- Temporary workers can create a "joint employer relationship."
  - For purposes of most employment laws, temporary employees will be considered to be employees of both the staffing agency and the employer.

  - **WARNING** - Do NOT rely on a written agreement with a staffing agency which provides that the worker is an employee *of the agency*. Courts will look to the economic realities, not the agreement.

TROUTMAN SANDERS

HARASSMENT AND DISCRIMINATION

- Temporary workers are often dismissed quickly, without the same level of care and caution applied to permanent employees.
- But even in a joint employer relationship, employers must consider:
  - Harassment
  - Discrimination
  - Retaliation
  - Reasonable accommodation for individuals with disabilities
- Don't assume that the staffing agency is taking care of this for your company!

TROUTMAN SANDERS

HARASSMENT AND DISCRIMINATION

- THE SOLUTION?
- Treat your temps the same as your regular employees with respect to federal/state laws:
  - Make clear to your temps that they should report discrimination/harassment.
  - Conduct investigations into allegations of discrimination or harassment.
  - Offer reasonable accommodations for temps with disabilities.
  - Treat all workers consistently.

TROUTMAN SANDERS

WAGE AND HOUR COMPLIANCE

Temporary Employees –

- Non-exempt temporary employees must be paid:
  - Minimum wage ($7.25/ hour)
  - Overtime
- Agreements with staffing agencies should provide that the agency will properly comply with the FLSA.
  - Remember, joint employer = **jointly liable**!!
    - Example – If a staffing agency requires a temp to attend training during non-working hours, your company may be jointly liable for overtime even if it was not aware of the training.
  - Indemnification clause

TROUTMAN SANDERS

WAGE AND HOUR COMPLIANCE

Independent Contractors –

- Independent contractors are not covered by the FLSA.
- Proper classification is critical to avoiding future wage claims.
  - An agreement stating that the worker is being hired solely as an "independent contractor" or "freelancer" is not sufficient.
    - Example – Microsoft had such an agreement, but the court found that the "freelancers" were misclassified because they were treated the same as regular employees. This was a $97 million mistake.

TROUTMAN SANDERS

Family Medical Leave Act

- FMLA applies to "eligible employees":
  - Employed for at least 12 months
  - 1,250 hours of service
- **Scenario #1** - A temp performs services for 8 months and is then hired by the company as a regular employee. When does the employee become eligible for FMLA leave?

» Several courts have held that prior service as a temporary worker must be considered for eligibility purposes. Thus, the employee above could be eligible after 4 months of permanent employment.

TROUTMAN SANDERS

Family Medical Leave Act

- FMLA applies to "covered employers":
  - Must employ 50 or more employees
- **Scenario #2** - A company has had 45 regular employees and 10 temporary workers for the last year. Can the company claim that it is not covered by the FMLA because it only has 45 regular employees?
  - **NO**. Temporary employees count as "employees" for purposes of determining whether a business is covered.
  - Thus, the employer in the above scenario could face liability from its temporary workers, and also from its regular employees for interference with their FMLA rights.

TROUTMAN SANDERS

Family Medical Leave Act

- Other Potential Issues:
  - **Misclassified Contractors** - If a contractor is denied a request for leave that would otherwise be covered by the FMLA, and later proves that she was actually an "employee," the employer may have interfered with FMLA rights.
  - **Approving FMLA Leave and Providing Notice** – Typically, this should be handled by the staffing agency. Make sure that your agreements provides that agency is responsible for approving FMLA leave and giving proper notices.
    - If a temp requests FMLA leave directly from an employer, the request should always be communicated back to the staffing agency.

TROUTMAN SANDERS

EMPLOYEE BENEFITS

- Many employee benefit plans exclude temporary workers.
  - Nothing unlawful about this, but be sure your company manual reflects specific exclusions for temporary and leased workers.
- If workers are misclassified, employers could be required to provide retroactive benefits to affected employees.
  - IRS and DOL have determined on numerous occasions that temporary or leased workers were, in fact, employees that should have been covered under the terms of employer's plans – i.e. Microsoft.

TROUTMAN SANDERS

TAX IMPLICATIONS

- U.S. Government Accountability Office (GAO) has announced a "crackdown" on misclassified independent contractors.
  - Primary targets – construction, janitorial, hotel workers and day labor.
- President Obama's 2010 budget assumes that the federal crackdown will result in $7 billion over 10 years.
- IRS can order employer to pay back taxes, interest and penalties for improperly classified independent contractors
  - Even if the contractor already paid his or her own taxes!
- If an employer engages a temporary staffing agency, it should ensure in writing that the agency will report and pay any resulting employment taxes.

TROUTMAN SANDERS

CRIMINAL PENALTIES

- Many states have enacted laws that impose criminal penalties for improper worker classification.
  - Colorado, Maryland, New York and Massachusetts
- A proposed 2010 Virginia bill contemplated harsh criminal penalties:
  - Intentional misclassification (Class 2 misdemeanor, Class 1 for subsequent offenses)
  - Unintentional misclassification (Class 3 misdemeanor, Class 2 for subsequent offenses)
  - $5,000 penalty per violation

TROUTMAN SANDERS

WARNING SIGNS?

- Watch out for independent contractors who perform the same tasks as your employees
- Watch what your competitors are doing. If they have employees that are performing the same functions as your independent contractors, reconsider whether those workers are properly classified.
- Ensure that your independent contractors have a broad range of autonomy.

TROUTMAN SANDERS

WARNING SIGNS?

- Listen to the concerns of your temporary employees and treat them as if they were regular employees.
- Ensure that your managers have been properly trained on how to treat temporary employees.

TROUTMAN SANDERS

FAQ's

- Can I avoid a workers' compensation or overtime claim if the temporary worker signs an acknowledgement that they are not my employee for any purpose?
- Do I have any obligations if a temporary worker complains of sexual harassment by another temporary worker?
- If a temporary worker complains of discrimination or harassment, can't I just have the staffing agency reassign him to another employer?
- If the agency discriminates, do I have any legal risks?

TROUTMAN SANDERS

WHAT CAN YOU DO TO ENSURE PROPER CLASSIFICATION?

- Conduct regular audits.
- Consider reclassification.
- If in doubt, complete IRS Form SS-8 to request a determination of the status of a worker.
  - But beware of potential risks.
  - No appeal process.
  - May trigger investigation.
  - May trigger individual claims by workers

TROUTMAN SANDERS

QUESTIONS?

IRS Tax Publications

If you are not sure whether you are an employee or an independent contractor, get Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. Publication 15-A, *Employer's Supplemental Tax Guide*, provides additional information on independent contractor status.

IRS Electronic Services

You can download and print IRS publications, forms, and other tax information materials on the Internet at www.irs.gov. You can also call the IRS at 1-800-829-3676 (1-800-TAX-FORM) to order free tax publications and forms.

Publication 1796, *2007 IRS Tax Products CD (Final Release)*, containing current and prior year tax publications and forms, can be purchased from the National Technical Information Service (NTIS). You can order Publication 1796 toll-free by calling 1-877-233-6767 or via the Internet at www.irs.gov/cdorders.

Call 1-800-829-4933, the Business and Specialty Tax Line, if you have questions related to employment tax issues.

IRS
Department of the Treasury
Internal Revenue Service
www.irs.gov
Publication **1779** (Rev. 8-2008)
Catalog Number 16134L

Independent Contractor

or Employee . . .

Independent Contractor or Employee

Which are you?

For federal tax purposes, this is an important distinction. Worker classification affects how you pay your federal income tax, social security and Medicare taxes, and how you file your tax return. Classification affects your eligibility for employer and social security and Medicare benefits and your tax responsibilities. If you aren't sure of your work status, you should find out ***now****. This brochure can help you.*

The courts have considered many facts in deciding whether a worker is an **independent contractor** or an **employee**. These relevant facts fall into three main categories: *behavioral control; financial control;* and *relationship of the parties*. In each case, it is very important to consider all the facts – no single fact provides the answer. Carefully review the following definitions.

Behavioral Control

These facts show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work. For example:

- **Instructions** – if you receive extensive instructions on how work is to be done, this suggests that you are an employee. Instructions can cover a wide range of topics, for example:
  - how, when, or where to do the work
  - what tools or equipment to use
  - what assistants to hire to help with the work
  - where to purchase supplies and services

  If you receive less extensive instructions about what should be done, but not how it should be done, you may be an **independent contractor**. For instance, instructions about time and place may be less important than directions on how the work is performed.
- **Training** – if the business provides you with training about required procedures and methods, this indicates that the business wants the work done in a certain way, and this suggests that you may be an **employee**.

Financial Control

These facts show whether there is a right to direct or control the business part of the work. For example:

- **Significant Investment** – if you have a significant investment in your work, you may be an **independent contractor**. While there is no precise dollar test, the investment must have substance. However, a significant investment is not necessary to be an **independent contractor**.
- **Expenses** – if you are not reimbursed for some or all business expenses, then you may be an **independent contractor**, especially if your unreimbursed business expenses are high.
- **Opportunity for Profit or Loss** – if you can realize a profit or incur a loss, this suggests that you are in business for yourself and that you may be an **independent contractor**.

Relationship of the Parties

These are facts that illustrate how the business and the worker perceive their relationship. For example:

- Employee Benefits – if you receive benefits, such as insurance, pension, or paid leave, this is an indication that you may be an **employee**. If you do not receive benefits, however, you could be either an **employee** or an **independent contractor**.
- **Written Contracts** – a written contract may show what both you and the business intend. This may be very significant if it is difficult, if not impossible, to determine status based on other facts.

When You Are an *Employee*

- Your employer must withhold income tax and your portion of social security and Medicare taxes. Also, your employer is responsible for paying social security, Medicare, and unemployment (FUTA) taxes on your wages. Your employer must give you a Form W-2, *Wage and Tax Statement*, showing the amount of taxes withheld from your pay.
- You may deduct unreimbursed employee business expenses on Schedule A of your income tax return, but only if you itemize deductions and they total more than two percent of your adjusted gross income.

When You Are an *Independent Contractor*

- The business may be required to give you Form 1099-MISC, *Miscellaneous Income*, to report what it has paid to you.
- You are responsible for paying your own income tax and self-employment tax (Self-Employment Contributions Act – SECA). The business does not withhold taxes from your pay. You may need to make estimated tax payments during the year to cover your tax liabilities.
- You may deduct business expenses on Schedule C of your income tax return.

Form **SS-8**
(Rev. December 2009)
Department of the Treasury
Internal Revenue Service

Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

OMB No. 1545-0004

Name of firm (or person) for whom the worker performed services		Worker's name	
Firm's address (include street address, apt. or suite no., city, state, and ZIP code)		Worker's address (include street address, apt. or suite no., city, state, and ZIP code)	
Trade name		Daytime telephone number ( )	Worker's social security number
Telephone number (include area code) ( )	Firm's employer identification number	Worker's employer identification number (if any)	

Note. If the worker is paid by a firm other than the one listed on this form for these services, enter the name, address, and employer identification number of the payer. ▶

Disclosure of Information

The information provided on Form SS-8 may be disclosed to the firm, worker, or payer named above to assist the IRS in the determination process. For example, if you are a worker, we may disclose the information you provide on Form SS-8 to the firm or payer named above. The information can only be disclosed to assist with the determination process. If you provide incomplete information, we may not be able to process your request. See *Privacy Act and Paperwork Reduction Act Notice* on page 5 for more information. **If you do not want this information disclosed to other parties, do not file Form SS-8.**

Parts I–V. All filers of Form SS-8 must complete all questions in Parts I–IV. Part V must be completed if the worker provides a service directly to customers or is a salesperson. If you cannot answer a question, enter "Unknown" or "Does not apply." If you need more space for a question, attach another sheet with the part and question number clearly identified.

Part I General Information

1 This form is being completed by: ☐ Firm ☐ Worker; for services performed _____ (beginning date) to _____ (ending date).

2 Explain your reason(s) for filing this form (for example, you received a bill from the IRS, you believe you erroneously received a Form 1099 or Form W-2, you are unable to get worker's compensation benefits, or you were audited or are being audited by the IRS).

3 Total number of workers who performed or are performing the same or similar services _____.

4 How did the worker obtain the job? ☐ Application ☐ Bid ☐ Employment Agency ☐ Other (specify) _____

5 Attach copies of all supporting documentation (contracts, invoices, memos, Forms W-2 or Forms 1099-MISC issued or received, IRS closing agreements, IRS rulings, etc.). In addition, please inform us of any current or past litigation concerning the worker's status. If no income reporting forms (Form 1099-MISC or W-2) were furnished to the worker, enter the amount of income earned for the year(s) at issue $ _____.

If both Form W-2 and Form 1099-MISC were issued or received, explain why.

6 Describe the firm's business.

7 Describe the work done by the worker and provide the worker's job title.

8 Explain why you believe the worker is an employee or an independent contractor.

9 Did the worker perform services for the firm in any capacity before providing the services that are the subject of this determination request?
☐ **Yes** ☐ **No** ☐ **N/A**

If "Yes," what were the dates of the prior service?

If "Yes," explain the differences, if any, between the current and prior service.

10 If the work is done under a written agreement between the firm and the worker, attach a copy (preferably signed by both parties). Describe the terms and conditions of the work arrangement.

Part II Behavioral Control

1 What specific training and/or instruction is the worker given by the firm?

2 How does the worker receive work assignments?

3 Who determines the methods by which the assignments are performed?

4 Who is the worker required to contact if problems or complaints arise and who is responsible for their resolution?

5 What types of reports are required from the worker? Attach examples.

6 Describe the worker's daily routine such as, schedule, hours, etc.

7 At what location(s) does the worker perform services (e.g., firm's premises, own shop or office, home, customer's location, etc.)? Indicate the appropriate percentage of time the worker spends in each location, if more than one.

8 Describe any meetings the worker is required to attend and any penalties for not attending (e.g., sales meetings, monthly meetings, staff meetings, etc.).

9 Is the worker required to provide the services personally? ☐ **Yes** ☐ **No**

10 If substitutes or helpers are needed, who hires them?

11 If the worker hires the substitutes or helpers, is approval required? ☐ **Yes** ☐ **No**
If "Yes," by whom?

12 Who pays the substitutes or helpers?

13 Is the worker reimbursed if the worker pays the substitutes or helpers? ☐ **Yes** ☐ **No**
If "Yes," by whom?

Part III Financial Control

1 List the supplies, equipment, materials, and property provided by each party:
The firm
The worker
Other party

2 Does the worker lease equipment? ☐ **Yes** ☐ **No**
If "Yes," what are the terms of the lease? (Attach a copy or explanatory statement.)

3 What expenses are incurred by the worker in the performance of services for the firm?

4 Specify which, if any, expenses are reimbursed by:
The firm
Other party

5 Type of pay the worker receives: ☐ Salary ☐ Commission ☐ Hourly Wage ☐ Piece Work
☐ Lump Sum ☐ Other (specify)
If type of pay is commission, and the firm guarantees a minimum amount of pay, specify amount $ _____ .

6 Is the worker allowed a drawing account for advances? ☐ **Yes** ☐ **No**
If "Yes," how often?
Specify any restrictions.

7 Whom does the customer pay? ☐ Firm ☐ Worker
If worker, does the worker pay the total amount to the firm? ☐ **Yes** ☐ **No** If "No," explain.

8 Does the firm carry worker's compensation insurance on the worker? ☐ **Yes** ☐ **No**

9 What economic loss or financial risk, if any, can the worker incur beyond the normal loss of salary (e.g., loss or damage of equipment, material, etc.)?

Part IV Relationship of the Worker and Firm

1 List the benefits available to the worker (e.g., paid vacations, sick pay, pensions, bonuses, paid holidays, personal days, insurance benefits).

2 Can the relationship be terminated by either party without incurring liability or penalty? ☐ Yes ☐ No
If "No," explain your answer.

3 Did the worker perform similar services for others during the same time period? ☐ Yes ☐ No
If "Yes," is the worker required to get approval from the firm? ☐ Yes ☐ No

4 Describe any agreements prohibiting competition between the worker and the firm while the worker is performing services or during any later period. Attach any available documentation.

5 Is the worker a member of a union? ☐ Yes ☐ No

6 What type of advertising, if any, does the worker do (e.g., a business listing in a directory, business cards, etc.)? Provide copies, if applicable.

7 If the worker assembles or processes a product at home, who provides the materials and instructions or pattern?

8 What does the worker do with the finished product (e.g., return it to the firm, provide it to another party, or sell it)?

9 How does the firm represent the worker to its customers (e.g., employee, partner, representative, or contractor)?

10 If the worker no longer performs services for the firm, how did the relationship end (e.g., worker quit or was fired, job completed, contract ended, firm or worker went out of business)?

Part V For Service Providers or Salespersons. Complete this part if the worker provided a service directly to customers or is a salesperson.

1 What are the worker's responsibilities in soliciting new customers?

2 Who provides the worker with leads to prospective customers?

3 Describe any reporting requirements pertaining to the leads.

4 What terms and conditions of sale, if any, are required by the firm?

5 Are orders submitted to and subject to approval by the firm? ☐ Yes ☐ No

6 Who determines the worker's territory?

7 Did the worker pay for the privilege of serving customers on the route or in the territory? ☐ Yes ☐ No
If "Yes," whom did the worker pay?
If "Yes," how much did the worker pay? $ _____

8 Where does the worker sell the product (e.g., in a home, retail establishment, etc.)?

9 List the product and/or services distributed by the worker (e.g., meat, vegetables, fruit, bakery products, beverages, or laundry or dry cleaning services). If more than one type of product and/or service is distributed, specify the principal one.

10 Does the worker sell life insurance full time? ☐ Yes ☐ No

11 Does the worker sell other types of insurance for the firm? ☐ Yes ☐ No
If "Yes," enter the percentage of the worker's total working time spent in selling other types of insurance _____%

12 If the worker solicits orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments, enter the percentage of the worker's time spent in the solicitation _____%

13 Is the merchandise purchased by the customers for resale or use in their business operations? ☐ Yes ☐ No
Describe the merchandise and state whether it is equipment installed on the customers' premises.

Sign Here

Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.

▶ _____ Title ▶ _____ Date ▶ _____
Type or print name below signature.

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose

Firms and workers file Form SS-8 to request a determination of the status of a worker for purposes of federal employment taxes and income tax withholding.

A Form SS-8 determination may be requested only in order to resolve federal tax matters. If Form SS-8 is submitted for a tax year for which the statute of limitations on the tax return has expired, a determination letter will not be issued. The statute of limitations expires 3 years from the due date of the tax return or the date filed, whichever is later.

The IRS does not issue a determination letter for proposed transactions or on hypothetical situations. We may, however, issue an information letter when it is considered appropriate.

Definition

Firm. For the purposes of this form, the term "firm" means any individual, business enterprise, organization, state, or other entity for which a worker has performed services. The firm may or may not have paid the worker directly for these services.

If the firm was not responsible for payment for services, be sure to enter the name, address, and employer identification number of the payer on the first page of Form SS-8, below the identifying information for the firm and the worker.

The SS-8 Determination Process

The IRS will acknowledge the receipt of your Form SS-8. Because there are usually two (or more) parties who could be affected by a determination of employment status, the IRS attempts to get information from all parties involved by sending those parties blank Forms SS-8 for completion. Some or all of the information provided on this Form SS-8 may be shared with the other parties listed on page 1. The case will be assigned to a technician who will review the facts, apply the law, and render a decision. The technician may ask for additional information from the requestor, from other involved parties, or from third parties that could help clarify the work relationship before rendering a decision. The IRS will generally issue a formal determination to the firm or payer (if that is a different entity), and will send a copy to the worker. A determination letter applies only to a worker (or a class of workers) requesting it, and the decision is binding on the IRS. In certain cases, a formal determination will not be issued. Instead, an information letter may be issued. Although an information letter is advisory only and is not binding on the IRS, it may be used to assist the worker to fulfill his or her federal tax obligations.

Neither the SS-8 determination process nor the review of any records in connection with the determination constitutes an examination (audit) of any federal tax return. If the periods under consideration have previously been examined, the SS-8 determination process will not constitute a reexamination under IRS reopening procedures. Because this is not an examination of any federal tax return, the appeal rights available in connection with an examination do not apply to an SS-8 determination. However, if you disagree with a determination and you have additional information concerning the work relationship that you believe was not previously considered, you may request that the determining office reconsider the determination.

Completing Form SS-8

Answer all questions as completely as possible. Attach additional sheets if you need more space. Provide information for all years the worker provided services for the firm. Determinations are based on the entire relationship between the firm and the worker. Also indicate if there were any significant changes in the work relationship over the service term.

Additional copies of this form may be obtained by calling 1-800-TAX-FORM (1-800-829-3676) or from the IRS website at *www.irs.gov.*

Fee

There is no fee for requesting an SS-8 determination letter.

Signature

Form SS-8 must be signed and dated by the taxpayer. A stamped signature will not be accepted.

The person who signs for a corporation must be an officer of the corporation who has personal knowledge of the facts. If the corporation is a member of an affiliated group filing a consolidated return, it must be signed by an officer of the common parent of the group.

The person signing for a trust, partnership, or limited liability company must be, respectively, a trustee, general partner, or member-manager who has personal knowledge of the facts.

Where To File

Send the completed Form SS-8 to the address listed below for the firm's location. However, only for cases involving federal agencies, send Form SS-8 to the Internal Revenue Service, Attn: CC:CORP:T:C, Ben Franklin Station, P.O. Box 7604, Washington, DC 20044.

Firm's location:	Send to:
Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming, American Samoa, Guam, Puerto Rico, U.S. Virgin Islands	Internal Revenue Service SS-8 Determinations P.O. Box 630 Stop 631 Holtsville, NY 11742-0630
Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, all other locations not listed	Internal Revenue Service SS-8 Determinations 40 Lakemont Road Newport, VT 05855-1555

Instructions for Workers

If you are requesting a determination for more than one firm, complete a separate Form SS-8 for each firm.

Form SS-8 is not a claim for refund of social security and Medicare taxes or federal income tax withholding.

If the IRS determines that you are an employee, you are responsible for filing an amended return for any corrections related to this decision. A determination that a worker is an employee does not necessarily reduce any current or prior tax liability. For more information, call 1-800-829-1040.

Time for filing a claim for refund. Generally, you must file your claim for a credit or refund within 3 years from the date your original return was filed or within 2 years from the date the tax was paid, whichever is later.

Filing Form SS-8 does not prevent the expiration of the time in which a claim for a refund must be filed. If you are concerned about a refund, and the statute of limitations for filing a claim for refund for the year(s) at issue has not yet expired, you should file Form 1040X, Amended U.S. Individual Income Tax Return, to protect your statute of limitations. File a separate Form 1040X for each year.

On the Form 1040X you file, do not complete lines 1 through 24 on the form. Write "Protective Claim" at the top of the form, sign and date it. In addition, you should enter the following statement in Part II, Explanation of Changes: "Filed Form SS-8 with the Internal Revenue Service Office in (Holtsville, NY; Newport, VT; or Washington, DC; as appropriate). By filing this protective claim, I reserve the right to file a claim for any refund that may be due after a determination of my employment tax status has been completed."

Filing Form SS-8 does not alter the requirement to timely file an income tax return. Do not delay filing your tax return in anticipation of an answer to your SS-8 request. In addition, if applicable, do not delay in responding to a request for payment while waiting for a determination of your worker status.

Instructions for Firms

If a **worker** has requested a determination of his or her status while working for you, you will receive a request from the IRS to complete a Form SS-8. In cases of this type, the IRS usually gives each party an opportunity to present a statement of the facts because any decision will affect the employment tax status of the parties. Failure to respond to this request will not prevent the IRS from issuing a determination letter based on the information he or she has made available so that the worker may fulfill his or her federal tax obligations. However, the information that you provide is extremely valuable in determining the status of the worker.

If you are requesting a determination for a particular class of worker, complete the form for one individual who is representative of the class of workers whose status is in question. If you want a written determination for more than one class of workers, complete a separate Form SS-8 for one worker from each class whose status is typical of that class. A written determination for any worker will apply to other workers of the same class if the facts are not materially different for these workers. Please provide a list of names and addresses of all workers potentially affected by this determination.

If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker under section 530 of the 1978 Revenue Act. However, this relief provision cannot be considered in conjunction with a Form SS-8 determination because the determination does not constitute an examination of any tax return. For more information regarding section 530 of the 1978 Revenue Act and to determine if you qualify for relief under this section, you may visit the IRS website at *www.irs.gov*.

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. This information will be used to determine the employment status of the worker(s) described on the form. Subtitle C, Employment Taxes, of the Internal Revenue Code imposes employment taxes on wages. Sections 3121(d), 3306(a), and 3401(c) and (d) and the related regulations define employee and employer for purposes of employment taxes imposed under Subtitle C. Section 6001 authorizes the IRS to request information needed to determine if a worker(s) or firm is subject to these taxes. Section 6109 requires you to provide your taxpayer identification number. Neither workers nor firms are required to request a status determination, but if you choose to do so, you must provide the information requested on this form. Failure to provide the requested information may prevent us from making a status determination. If any worker or the firm has requested a status determination and you are being asked to provide information for use in that determination, you are not required to provide the requested information. However, failure to provide such information will prevent the IRS from considering it in making the status determination. Providing false or fraudulent information may subject you to penalties. Routine uses of this information include providing it to the Department of Justice for use in civil and criminal litigation, to the Social Security Administration for the administration of social security programs, and to cities, states, and the District of Columbia for the administration of their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. We may provide this information to the affected worker(s), the firm, or payer as part of the status determination process.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: Recordkeeping, 22 hrs.; Learning about the law or the form, 47 min.; and Preparing and sending the form to the IRS, 1 hr., 11 min. If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the tax form to this address. Instead, see *Where To File* on page 4.

The Risks of Worker Misclassification – Employees v. Independent Contractors

April 25, 2008

Tevis Marshall
D. Eugene "Gene" Webb, Jr.

If your company employs independent contractors, now is the time to take a close look at whether those workers are properly classified. The U.S. Department of Labor recently announced that it will focus on employers who have misclassified employees as independent contractors as one of its top five priorities during 2008. In a December 2007 report, the DOL's wage-and-hour division stated that it intends to target primarily low-wage industries, such as construction, janitorial, hotel and motel, and day labor, in which it is most likely to find minimum wage and overtime violations as a result of employers' misclassifications.

What Are The Risks Of Misclassification?

The DOL has long recognized that employers have an incentive to classify workers as independent contractors rather than employees. For instance, independent contractors pay their own taxes and are exempt from the FLSA's minimum wage and overtime protections. Also, independent contractors are not covered by workers' compensation provided by the hiring company and generally do not receive other employment benefits including health insurance, pension, paid sick leave, vacation and stock options. The risk of misclassifying workers can prove disastrous. Not only can the DOL collect benefits that were improperly withheld from misclassified employees, but the IRS can require you to pay all back withholding taxes plus interest and penalties even if the misclassified independent contractors have already paid their income taxes. Finally, once your independent contractors learn of an investigation, you may end up facing a class action lawsuit.

What Are The Warning Signs That I Have Misclassified An Independent Contractor?

Watch out for independent contractors who perform the same tasks as your employees. If they routinely perform tasks that are done primarily by your employees, you may have misclassified those workers. In addition, some independent contractors are hired for one purpose, but later assume new or additional tasks as the company grows. Thus, depending on the direction your company takes, an independent contractor one year may not be an independent contractor the next. Also, keep a close watch on your competitors. If your independent contractors are performing tasks that are typically done by employees in other similar businesses, you may want to reconsider whether those workers are properly classified. Finally, independent contractors should have a broad range of autonomy in executing their jobs. If an independent contractor is not allowed to select his or her own tools, hire additional personnel to complete tasks, or even perform tasks for another employer, this should also trigger a closer review.

The Crackdown Continues on Worker Misclassification – Employees v. Independent Contractors

December 2, 2009

Tevis Marshall
David E. Constine III

For nearly two years now the U.S. Department of Labor (DOL) has made the proper classification of employees and independent contractors one of its top priorities. In August of this year, the U.S. Government Accountability Office (GAO) (also known as "the investigative arm of Congress") joined the fight and issued a detailed report designed to detect and prevent improper employee misclassification. The GAO's report recognizes that when employers improperly classify workers as independent contractors instead of employees, those workers do not receive protections and benefits to which they are entitled, and the employer may fail to pay some taxes they would otherwise be required to pay. In 2005, nearly 10.3 million workers (or 7.4% of the employed workforce) were classified as independent contractors, although it is not clear just how many of these workers were misclassified.

How Do You Know If Your Workers Have Been Misclassified?

So, how do you know if your workers have been misclassified? As the saying goes, this is easier said than done. The tests used to determine whether a worker is an independent contractor or an employee are complex and often differ among jurisdictions as well as government agencies. For instance, the Internal Revenue Service (IRS) has developed a "20-Factor Test" for determining a worker's proper status, yet the DOL applies its own test when conducting a classification audit. To further complicate matters, the DOL and IRS typically do not exchange the information they obtain during misclassification investigations due, in part, to certain restrictions in the tax code on the IRS's ability to share such information with other federal agencies. The U.S. Supreme Court has also held that there is no single rule or test for determining independent contractor or employee status, but has considered the following factors to be significant:

· The extent to which the services rendered are an integral part of the principal's business;

· The permanency of the relationship;

· The amount of the alleged contractor's investment in facilities and equipment;

· The nature and degree of control by the principal;

· The alleged contractor's opportunities for profit and loss; and

· The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

While laws and agencies vary in their definitions of the conditions that make a worker an employee, in general, a person is considered an employee if he or she is subject to another's right to control the manner and means of performing the work. By comparison, independent contractors are not subject to control over the manner in which they perform their services.

Why Is Proper Classification So Important?

If you thought proper classification of workers was an issue that could be put off until another year, you should reconsider. For starters, as previously mentioned, the DOL and IRS are in the midst of a misclassification crackdown. If the DOL or IRS launches an investigation of your company and determines that certain workers have been misclassified, the financial consequences could be quite significant. On the one hand, the DOL could collect back benefits that were improperly withheld from misclassified employees. On the other hand, the IRS could require you to pay all back withholding taxes plus interest and penalties even if the misclassified contractors have already paid their income taxes. Not to mention that once your independent contractors learn they have been potentially misclassified through any government investigation, you may end up facing an expensive and highly publicized class action lawsuit.

In addition, several states, including Colorado, Maryland, New York and Massachusetts, have recently enacted laws that impose harsh penalties for misclassification. It is also possible that Congress may consider new federal legislation for employee misclassification since President Obama sponsored the Independent Contractor Proper Classification Act of 2007 (S. 2044) when he was a member of the Senate.

The following results from investigations and lawsuits over the last two years illustrate just how financially detrimental worker misclassification could be to a company:

· The state of Illinois settled a misclassification suit with five construction companies which required all five companies to pay more than $70,000 and forbade the companies from bidding for construction projects with public bodies for the next four years.

· After five years of litigation, *The Orange County Register* in California agreed to pay $22 million to settle a suit involving the misclassification of workers as independent contractors.

· The DOL ordered three construction companies to pay $491,100 in back wages and damages to 99 employees who were misclassified as independent contractors in addition to another $108,900 in civil fines.

· A prominent shipping company settled a series of class action lawsuits filed across the country alleging working misclassification for $27 million. Before that, the IRS had ordered it to pay $319 million in back taxes and penalties.

These settlements and lawsuits, as well as the emphasis being placed on this issue by the DOL and IRS, demonstrate why proper worker classification should be a crucial component for any company that currently employs independent contractors.