YOurs, Mine, OURS? Recognizing Joint Employer and Independent Contractor Issues

Employers are increasingly using sub-contractors, temporary staffing, leased employees and independent contractors to supplement or, sometimes, replace their regular workforce.

While use of an alternative workforce can provide employers with “just-in-time” staffing and reduce benefits and payroll costs, use of a contingent workforce is fraught with potential traps and liability to unwary employers.

This paper highlights the “red flag” issues that can lead to joint employer liability and liability for misclassification of independent contractors for your company under federal and state laws.

Joint Employer Issues

I. California Wage-Hour

In Martinez v. Combs (2010) 49 Cal.4th 35, 50 (“Martinez”), the California Supreme Court articulated a three-part test for employer status under California’s wage-hour statutes. Martinez held that one may only be deemed an employer if has: (1) exercised control over the plaintiffs’ hours, wages or working conditions; (2) suffered or permitted plaintiffs to work; or (3) “engaged” plaintiffs thereby creating a common law employment relationship. Martinez’ three-part test was specifically designed to capture situations where more than one entity functions as the employer. For example, the Martinez court observed that the “exercised control over the plaintiffs’ hours, wages or working conditions test” rubric:

has the obvious utility of reaching situations in which multiple entities control different aspects of the employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work.

[MarTinez, 49 Cal.4th at 59 (emphasis added).] Further, if an entity is an employer for payroll tax and other purposes, that does not necessarily mean that it is an employer for California wage-hour purposes:

we reject [the putative employee’s] argument that [the putative employer] acted as his employer because it “performed functions that only employers are permitted to perform.” To the extent the federal laws and regulations cited by [the putative employee] are relevant to the question of who is an “employer,” they are relevant for the income tax.
and payroll tax purposes of the federal government (and, we are willing to accept, for state taxes purposes as well), and do not include language suggesting an employer for such purposes is also an employer for the purposes of the Labor Code wage statutes.


A. Control Over Wages

Relying on Martinez, the Court of Appeal Futrell held that in order to control workers’ wages, an entity must negotiate and set an employee’s rate of pay:

Writing on a clean slate, we conclude that ‘control over wages’ means that a person or entity has the power or authority to negotiate and set an employee’s rate of pay, and not that a person or entity is physically involved in the preparation of an employee’s paycheck.

[Futrell, 190 Cal.App.4th at 1432 (emphasis added).] Put simply, an entity will be deemed an employer for purposes of California wage-hour law if it has the authority to negotiate and set a workers rate of pay.

B. Control Over Hours or Working Conditions

In analyzing whether a putative employer controlled workers’ hours and/or working conditions, Martinez instructed courts to analyze whether the putative employer(s):

- Hired and/or fired the putative employee;
- Trained the putative employee;
- Supervised the employee;
- Determined the putative employee’s rate and/or manner of pay;
- Set the putative employee’s hours and/or work schedules;
- Instructed the putative employee when and where to report to work.
- Instructed the putative employee when to take breaks.

[Martinez, at 72.] As such, while an entity may not set or negotiate a workers rate of pay, it nevertheless may be deemed an employer it engages in any of the above activities vis a vis the putative employee.

C. Suffer or Permit to Work

Both the Martinez and Futrell courts observed that to “suffer or permit” an individual to work is more than just knowing that a worker may perform labor. To suffer or permit requires the ability to prevent a worker from working or to cause a worker to work. [Martinez at 70; Futrell at 1434.] In the context of finding that an entertainment payroll company was not an employer, the Futrell court explained its reasoning:
There is no evidence in the current case Payday allowed Futrell to suffer work, or permitted him to work, because there is no evidence showing Payday had the power to either cause him to work or prevent him from working.

[Futrell at 1434 (emph at added)]. Put simply, this factor rests squarely on whether the putative employer has the power to either cause an employee to work or prevent an employee from working. For example, if a temporary services agency has the unilateral right to pull a temporary worker from a specific assignment, this may militate in favor of making the temporary services agency an employer for wage-hour purposes.

D. Common Law Employment Relationship

The test for determining whether there is a common law employment relationship is very similar to the test for determining whether an independent contractor is properly classified. [See, Independent Contractor Discussion infra.] Relying on Martinez, the Futrell court observed that: “[t]he essence of the common law test of employment is in the control of the details.” [Futrell, at 1434 (quotations and citations omitted); see also, Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal.App.4th 1, 10 (“The essence of the test is the ‘control of details’—that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work[.]”)] A number of factors can be considered in evaluating this control:

(1) whether the worker is engaged in a distinct occupation or business; (2) whether, considering the kind of occupation and locality, the work is usually done under the alleged employer's direction or without supervision; (3) the skill required; (4) whether the alleged employer or worker supplies the instrumentalities, tools, and place of work; (5) the length of time the services are to be performed; (6) the method of payment, whether by time or by job; (7) whether the work is part of the alleged employer’s regular business; and (8) whether the parties believe they are creating an employer-employee relationship.

[Futrell, at 1434.] While each of these factors is relevant, “[a] finding of the right to control employment requires . . . a comprehensive and immediate level of ‘day-to-day’ authority over employment decisions.” [Vernon v. State (2004) 116 Cal.App.4th 114, 127-128 (“Vernon”).]

Finally, the Court of Appeal in Futrell placed particular emphasis on factor number 7 above. Specifically, Futrell observed that: “[t]he employer . . . is the party who hires the employee and benefits from the employee’s work, and thus it is the employer to whom liability should be affixed for any unpaid wages.” [Futrell, at 1435 (emphasis added).] Thus, under the Futrell analysis, entities such as payroll companies, Professional Employer Organizations and temporary staffing companies who are not in the actual business that the worker is providing services for, may have a strong argument that they are not an employer for wage-hour purposes because they did not benefit from the individual’s work.
II.  CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (“FEHA”)

A.  General Joint Employer Standards

Liability under FEHA “predicates potential liability on the status of the defendant as an ‘employer.’” [Vernon, at p. 123; see also, Gov’t Code § 12940(a) (making it unlawful for an “employer” to engage in unlawful discrimination); Gov’t Code §12926(d) (defining an employer for purposes of FEHA).] FEHA “requires some connection with an employment relationship,” although the connection “need not necessarily be direct.” [Id.] When making this determination, courts consider the “totality of circumstances” of the work relationship with an emphasis on the extent to which the putative employer controls the workers’ performance of employment duties. [Vernon, at p. 124; Rhodes v. Sutter Health (E.D. Cal. 2013) 2013 WL 425404 at * 3-4 (fact that putative employer owned facility where plaintiff worked was insufficient to create joint employer status).]

In turn, the “right to control” a worker for purposes of establishing employment status requires a “comprehensive and immediate level of ‘day-to-day” authority over employment decisions. [Vernon, at p. 127-28.] Put differently, the “right to control” requires “an examination of defendant's role with respect to the right to hire, fire, transfer, promote, discipline, set the terms, conditions and privileges of employment, train and pay the plaintiff.”] [Id. at 128.] Notwithstanding the above, FEHA does contain a rebuttable presumption that any person or entity identified as the employer on the workers’ Federal Form W-2 is an employer for FEHA purposes.

Vernon v. State provides an excellent example of the application of FEHA’s joint employer principles. In Vernon, the plaintiff was a city firefighter. He had a medical condition that was unique to African-Americans and which required him to grow a beard. However, Cal-OSHA regulations required that firefighters wear a respirator and firefighters could not have facial hair to use to respirator. Since the plaintiff refused to shave his facial hair, the city fire department terminated his employment. In turn, the plaintiff filed a lawsuit against both the city fire department and the state of California on the grounds that they were joint employers.

In making the joint employer inquiry, the Vernon court observed that there is no magic formula for determining joint employer status and that, instead, the “totality of circumstances” must be analyzed. [Id. at 124-25; see also, Bradley v. California Dept. of Corrections and Rehabilitation (2008) 158 Cal.App.4th 1612, 1626.] In turn, the Vernon court observed that the following factors were relevant to the joint employer inquiry:

• Does the putative employer pay salary, benefits or social security taxes?
• Does the putative employer own the equipment necessary to performance of the job?
• The location where the work is performed
• The obligation of the putative employer to train the worker.
• Does the putative employer have the authority to hire, transfer, promote, discipline or discharge the worker?
• Does the putative employer establish work schedules and assignments?
• Does the putative employer have the discretion to determine the amount of compensation earned by the worker?
• The level of skill required of the work performed.
• The extent to which the work is done under the direction of a supervisor.
• Whether the work is part of the defendant's regular business operations.
• The duration of the relationship of the parties, and the duration of the plaintiff's employment

[Id.] However, despite all of the above factors, the “extent of the [putative employer’s] right to control the means and manner of the workers’ performance is the most important.” [Id. at 126.] The Vinson court then determined that the State of California was not a joint employer because it did not:

• Compensate plaintiff.
• Engage plaintiff’s services.
• Hire plaintiff.
• Maintain any personnel records regarding plaintiff.
• Train plaintiff.
• Have authority to discipline, promote, transfer or terminate plaintiff.
• Set plaintiff’s work schedule.
• Determine the specific nature of plaintiff’s daily work.
• Supervise the execution of plaintiff’s work duties.
• Have the means or authority to control the fire department’s allegedly discriminatory practices.

[Vernon, at pp. 131-32; see also, Hall v. Apartment Inv. and Management Co. (N.D. Cal. 2011) 2011 WL 940185 at * 6 (putative employer was not a joint employer where it did not: (1) pay plaintiff; (2) could not discipline, promote, transfer or terminate plaintiff; and (3) did not set plaintiff’s schedule).]

As an additional example, in Jones v. County of Los Angeles (2002) 99 Cal.App.4th 1039 (“Jones”), the plaintiff was a secretary with the Los Angeles Superior Court (“LASC”). She filed a FEHA lawsuit and claimed that both the LASC and the County of Los Angeles (“County”) were her joint employers. In in support of her theory, the plaintiff pointed out that the her paychecks were drawn by the County and that she has the same benefits as County employees. [Jones at p. 1046-47.] However, the Jones court rejected plaintiff’s theory because the LASC controlled every other aspect of the employment relationship. [Id. at 1047 (observing that the LASC “has the exclusive right to control the duties of the employees.”)].

Put simply, the Jones court held that the payment of wages and benefits, by themselves, were insufficient to create joint employer status. While the Jones court did not specifically address FEHA’s presumption vis a vis the provision of IRS Form W-2’s, this case nonetheless
demonstrates how this presumption may be overcome by other facts militating against the existence of an employment relationship.

B. Temporary Workers/Temporary Employment Agencies.

The Court of Appeal in Bradley v. California Dept. of Corrections and Rehabilitation (2008) 158 Cal.App.4th 1612 (“Bradley”) had occasion to apply FEHA in the temporary worker context. In Bradley, the plaintiff worked as a temporary clinical social worker with California Department of Corrections (“CDC”). The CDC obtained the plaintiff’s services pursuant to a contract that CDC had with a nurses’ registry. As a result, plaintiff was not issued a paycheck by the state. Instead, the registry billed CDC for plaintiff’s work and, in turn, issued a paycheck to plaintiff. During plaintiff’s tenure at CDC, she claimed that was subject to unlawful harassment and discrimination. In response, CDC argued that the plaintiff was not a CDC employee for purposes of FEHA.

In determining that the plaintiff as an employee, the Bradley court relied heavily upon the Department of Fair Employment and Housing’s regulations governing temporary service agencies which provides as follows:

An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency may be considered an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

[22 Cal. Code Regs. § 7286.5(b)(5) (emphasis added).] The Bradley court construed this language as allocating liability between a temporary staffing firm and the contracting firm based on who had control over the working conditions at issue. In turn, given that the alleged harassment occurred at the CDC and that the registry played no role in the alleged harassment, the Bradley court held that this regulation allocated employer liability to CDC under FEHA. [Bradley, at 1629.] Further, and similar to the Vernon court, the Bradley also relied on the fact that the CDC’s contract with the registry “grant[ed] all control of the employment relationship to CDC, on the registry.” [Id. at 1628.] In other words, the CDC controlled not just the aspects of the employment relationship relating to plaintiff’s alleged harassment, but also controlled the entire employment relationship.
INDEPENDENT CONTRACTOR ISSUES

I. CALIFORNIA EMPLOYMENT TAX

A. Independent Contractor Test

The California Employment Development Department (“EDD”) enforces California employment tax obligations. For employment tax purposes, California had codified the common law test for purposes of determining whether an independent contractor is properly classified. [See, California Unemp. Ins. Code § 606.5(a)(“Whether an individual or entity is the employer of specific employees shall be determined under common law rules applicable in determining the employer-employee relationship . . . .”).] Further, EDD has also promulgated regulations on this issue. [See, 22 Cal. Code Regs. § 4304.] According to EDD’s regulations, “the most important factor is the right of the principal to control the manner and means of accomplishing a desired result. If the principal has the right to control the manner and means of accomplishing the desired result, whether or not that right is exercised, an employer-employee relationship exists.” [Id.] Further, if EDD cannot determine whether the putative employer has the right to control the means and manner of accomplishing the desired result, then its regulations instruct that it analyze the following secondary factors:

- Whether or not the one performing the services is engaged in a separately established occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.
- The skill required in performing the services and accomplishing the desired result.
- Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.
- The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.
- The method of payment, whether by the time, a piece rate, or by the job.
- Whether or not the work is part of the regular business of the principal, or whether the work is not within the regular business of the principal.
- Whether or not the parties believe they are creating the relationship of employer and employee.
- The extent of actual control exercised by the principal over the manner and means of performing the services.
- Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.

[22 Cal. Code Regs. § 4304-1(a).] Moreover, EDD has issued various publications regarding independent contractor classification issues. [See, EDD Employment Determination Guide. (Available at: www.edd.ca.gov/pdf_pub_ctr/de38.pdf); EDD Independent Contractor Misconceptions Handout. (Available at: www.edd.ca.gov/pdf_pub_ctr/de573m.pdf)]
While EDD enforces California employment tax obligations, the California Unemployment Insurance Appeals Board (“CUIAB”) adjudicates employment tax disputes and issues precedential administrative decisions regarding employment tax issues including decisions regarding whether an individual is an employee or independent contractor. The CUIAB’s precedential decisions regarding independent contractor issues may be found at: http://www.cuiab.ca.gov/Board/precedentDecisions/precDecEM.asp.

B. Outline of Potential California Employment Tax Liability for Worker Misclassification

- Employer Contributions/Taxes
  - Unemployment Insurance Contributions: 1.5% to 6.2% on first $7,000 in wages paid to each misclassified worker.
  - Employment Training Tax: 0.1% on first $7,000 in wages paid to each misclassified worker.
- Employee Contributions/Taxes
  - Disability Insurance: 1.0% on first 100,880 in wages paid to each misclassified worker.
  - Unpaid income tax.
- Penalties
  - 10% for not reporting employees to EDD.
  - 10% for “intentional disregard.”
  - 50% for “fraud/intent to evade.”
  - 50% for failing to provide W-2’s.
  - Employer liability for misclassified workers’ unpaid income tax and disability insurance contributions.
  - Individual/corporate officer liability.

II. CALIFORNIA WAGE-HOUR LAW AND WORKERS’ COMPENSATION LAW

A. Independent Contractor Test

The California Division of Labor Standards Enforcement (“DLSE”) enforces California Wage Hour Law and the California Division of Workers Compensation (“DWC”) enforces California workers compensation law. Both California wage-hour law and California workers compensation law utilize the multi-factor test delineated by the California Supreme Court in Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48 Cal. 3d 341 (“Borello”). Further, both DLSE and the DWC start with the presumption that that the all workers are employees. [See, Lab. Code § 3357 (“Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.”)]

Under Borello, “the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” [Id. at 350.] However, Borello also held that secondary factors must also be
analyzed so that the “control” test is not applied in isolation. [Id.] The secondary factors identified by Borello include:

- Right to terminate at-will.
- Whether the person performing services is engaged in an occupation or business distinct from that of the principal.
- The type of occupation, with reference to whether the work is usually done under the direction of a principal or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether or not the work is a part of the regular business of the principal.
- Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work.
- The alleged employee’s investment in the equipment or materials required by his task.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision.
- The alleged employee’s opportunity for profit or loss depending on his managerial skill.
- The length of time for which the services are to be performed.
- The degree of permanence of the working relationship.
- The method of payment, whether by time or by the job.
- Whether or not the parties believe they are creating an employer-employee relationship.

[Id. at 350-51 & 354-355.]

The DLSE views independent contractor misclassification as a high priority enforcement issue. Among other things, DLSE has entered into an agreement with the US Department of Labor to coordinate enforcement efforts on this issue. [See, MOU between IRS and California Labor and Workforce Development Agency regarding Independent Contractor Misclassifications. (Available at: http://www.dol.gov/whd/workers/MOU/ca.pdf). Further, both the DLSE and the State Compensation Insurance Fund (“SCIF”) have issued publications on the independent contractor issue warning employers regarding the potential pitfalls of misclassification. [See, DLSE: Independent Contractors (Available at: http://www.dir.ca.gov/dlse/IndependentContractors.pdf); DLSE: Frequently Asked Questions-Independent Contractors. (Available at: http://www.dir.ca.gov/dlse/FAQ_IndependentContractor.htm); California State Compensation Insurance Fund “Independent Contractor vs. Employee” Handout. (Available at: www.statefundca.com/pdf/e10210.pdf).

B. Outline of Potential California Wage-Hour Liability for Worker Misclassification

- Wage-hour class action lawsuits
- Unreimbursed business expenses
  - All expenses incurred during the course and scope of workers providing services must be reimbursed.
• Mileage, tools, uniform, travel etc.
• Overtime premiums
  o 1.5 times regular rate for all hours worked over 8 per day, in excess of 40 in a week and the first 8 hour worked on the seventh consecutive day of work.
  o 2 times regular rate for all hours in excess of 12 in one day or in excess of 8 on the seventh consecutive day of work.
• Meal and rest period premiums
• Derivative civil penalties
  o Waiting time penalties.
  o Paystub penalties.
• $5,000 to $15,000 penalty for each “willful” misclassification
• $15,000 to $25,000 for each “pattern and practice” misclassification
• Misclassified workers’ attorneys’ fees and costs

C. Outline of Potential Workers Compensation Liability for Worker Misclassification

• Personal injury lawsuits for workplace injuries alleged suffered by misclassified workers.
• Unpaid workers compensation insurance premiums.
• Penalty that equals twice the amount of unpaid workers compensation premium or $1,500 penalty per misclassified worker-whichever is greater.
• Shutdown of business.

III. FEDERAL EMPLOYMENT TAX (INTERNAL REVENUE CODE)

A. Independent Contractor Test

The Internal Revenue Service (“IRS”) analyzes three groups of factors in analyzing whether an individual is properly classified as an independent contractor: (1) Behavioral Control; (2) Financial Control and (3) the Type of Relationship.

Under the Behavioral Control rubric, the IRS looks at the types of instructions given to the independent contractor. For example, does the company or the worker decide:

• When and where to do the work.
• What tools or equipment to use.
• What workers to hire or to assist with the work.
• Where to purchase supplies and services.
• What work must be performed by a specified individual.
• What order or sequence to follow when performing the work.

Supplemental Tax Guide at pp. 7-10 (“Publication 15-A”) (Available at: www.irs.gov/pub/irs-pdf/p15a.pdf); see also, IRS Form SS-8: Employee versus Independent Contractor Determination. (Available at: www.irs.gov/pub/irs-pdf/fss8.pdf.) The IRS also analyzes the degree of instructions given (i.e. the more detailed the level of instructions, the more likely that the IRS will determine that an employment relationship exists and vice versa. [IRS Manual at p. 2-10.] With respect to the Financial Control rubric, the IRS reviews the following factors:

- Does the worker have a significant investment in the equipment, tools or supplies he or she uses?
- Does the worker have unreimbursed business expenses?
- Does the worker have the opportunity for profit or loss?
- Does the worker make his or her services available to other companies on the open market?
- Is the worker guaranteed a regular wage (hourly or weekly) or is the worker paid by the job?

[IRS Manual at p. 2-16; Publication 15-A at pp. 7-10; see also IRS Form SS-8: Employee versus Independent Contractor Determination. (Available at: www.irs.gov/pub/irs-pdf/fss8.pdf.)]

Under the “Type of Relationship” rubric the IRS looks at the following factors:

- Is there a written contract?
- Does the worker receive benefits such as health insurance, vacation and sick days?
- Is the relationship expected to continue indefinitely rather than for a specific period or project?
- Are the services provided a key aspect of the company’s business?

[IRS Manual at p. 2-22; Publication 15-A at pp. 7-10; see also, IRS Form SS-8: Employee versus Independent Contractor Determination. (Available at: www.irs.gov/pub/irs-pdf/fss8.pdf.)]

B. Outline of Potential Federal Employment Tax Liability for Worker Misclassification

- Employer Contributions/Taxes
  - FICA/Social Security: 6.2% of first $113,700 in wages for each misclassified worker.
  - Medicare: 1.45% on all wages paid to each misclassified worker.
  - FUTA tax.
    - Effective rate of 1.5% on first $7000 in wages paid to each misclassified worker.
    - In normal times, effective FUTA rate is 0.6%.
    - Starting in 2011, USDOL began lowering Nevada employers’ FUTA credit by 0.3% annually to pay back Nevada’s approximately $600 million loan balance.
  - Affordable Care Act Employer Shared Responsibility Payment (ESRP)
    - IRS to enforce and collect ESRP.
Employers with 50 full-time employee/50 full-time equivalents must either offer “affordable health coverage that provides a minimum level of coverage” or be subject to the ESRP.

Although mandate does not go into effect until 2014, employers must rely on 2013 data to determine whether they meet the 50 employee/FTE threshold.

ESRP Formula: (Number of Full time employees/FTE’s -30) x $2,000.

Full-time employee = individual employed on average at least 30 hours per week.

IRS’s proposed regulations define employee under the common law standard.

Reclassification of workers from Independent Contractor to employees may retroactively subject employers to ESRP.

- Employee Contributions/Taxes
  - FICA/Social Security: 6.2% of first $113,700 in wages for each misclassified worker.
  - Medicare: 1.45% on all wages paid to each misclassified worker.
  - Additional Medicare Tax: additional 0.9% on all wages paid in excess of $200,000 to each misclassified worker.

- Penalties
  - Personal Liability (“Trust Fund Recovery Penalty”)
    - Misclassified workers’ unpaid personal income tax.
    - Misclassified workers’ unpaid FICA tax.
    - Misclassified workers’ unpaid Medicare and Additional Medicare tax.
  - 20% for negligence or substantial understatement
  - 75% penalty for fraud.
  - $100 per employee penalty for not providing W-2’s.
  - 25% penalty for failing to file employment tax return.
  - 15% penalty for untimely employment tax deposits.

III. FEDERAL WAGE-HOUR (FAIR LABOR STANDARDS ACT)

A. Independent Contractor Test

The US Department of Labor is responsible for enforcing the Fair Labor Standards Act (“FLSA”). In determining whether a worker is an employee for independent contractor under the FLSA, the USDOL analyzes the following factors:

- 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.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.
The USDOL views independent contractor misclassification as key enforcement target. In 2010, the USDOL instituted its “Misclassification Initiative” which was launched under the auspices of Vice President Biden’s Middle Class Task Force. To this end, USDOL has entered into cooperation/information sharing agreements with various other enforcement agencies including both the IRS and the DLSE. [See, MOU Between the IRS and USDOL regarding Independent Contractor Misclassifications. (Available at: www.dol.gov/whd/regs/compliance/whdfs13.pdf); MOU between IRS and California Labor and Workforce Development Agency regarding Independent Contractor Misclassifications. (Available at: http://www.dol.gov/whd/regs/compliance/whdfs13.pdf).

B. Outline of Potential FLSA Liability for Worker Misclassification

- Wage-hour collective and class action lawsuits.
- Unpaid minimum wage.
- Unpaid overtime: 1.5 times regular rate for all hours worked in excess of 40 per week.
- Liquidated damages = twice the amount of unpaid wages.
- Misclassified workers’ attorneys’ fees and costs.