

November 1, 2018

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# Independent Contractor or Employee? That is the Question!

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**WILLIAMS PARKER**  

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Welcome

# Profile of Gail E. Farb



**Gail E. Farb** is a Labor and Employment Attorney in the law firm of Williams Parker. She is a past Chair of the Sarasota County Bar Association's Labor and Employment Law Section. Ms. Farb advises employers of all sizes relating to employment and labor law issues such as hiring, discipline, and termination; discrimination; harassment; retaliation; wage and hour law; employee handbooks and policies; and non-compete agreements. She also represents companies in labor and employment litigation in administrative, state, and federal court proceedings. A graduate of Duke University, Ms. Farb received her J.D. degree from Emory University School of Law. She frequently presents seminars and training and has written several articles on labor and employment topics.

# Independent Contractor or Employee? That is the Question!

## Corporate Benefits of Using Independent Contractors

- Not required to withhold taxes or make Social Security and Medicare contributions
- Not required to pay unemployment taxes
- Not required to provide coverage for workers' compensation insurance
- Not required to pay minimum wage or overtime pay



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## Corporate Benefits of Using Independent Contractors (cont'd)

- Employee benefit plans only cover employees, not independent contractors
- Cannot be represented by labor union per federal labor law
- Easier to expand or contract workforces to accommodate workload fluctuations
- Custom and practice in particular industries to use independent contractors



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## **Government Regulators Crack Down on Misclassification**

- Capture lost revenues from failure to withhold taxes
- Ensure protection of workers' rights (i.e., wages, discrimination, retaliation, safety, workers' compensation)
- Foster fair competition among companies



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## Government Agencies' Joint Initiatives Combat Misclassification

- US Department of Labor – Wage and Hour Division's partners:
  - IRS
  - At least 36 states
  - Employee Benefits Security Administration
  - Occupational Safety and Health Administration (OSHA)
  - Office of Federal Contract Compliance Programs (OFCCP)
  - Office of the Solicitor



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## Government Agencies' Joint Initiatives Combat Misclassification (cont'd)

- Share information
- Coordinate enforcement
- Investigate employers with severe and systemic violations
- Past years' industry specific investigations included:
  - Senior living and home health care
  - Hospitality
  - Janitorial
  - Staffing agencies
  - Child care
  - Garment industry
  - Construction
  - Transportation and warehousing
  - Poultry and meat processing
  - Landscaping



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## Costly Consequences of Misclassification

- Back wages
- Liquidated damages
- Civil Penalties
- Criminal Penalties
  - Florida reemployment tax – felony for intentional misclassification
  - IRC - \$1,000 fine/worker and 1 year in prison
  - Corporate and Individual Liability
  - Back taxes
  - IRC willful or nonwillful penalties
  - IRC fines
  - Employee benefit coverage (ERISA and ACA)
  - Collective and class action lawsuits





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## **Tests to answer the question:**

- Internal Revenue Service (IRS)
- U.S. Department of Labor (DOL)
- Florida Reemployment Assistance Program
- Florida Workers' Compensation

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## IRS Test:

- Taxes withheld and unemployment tax paid to employees
- 20-Factor Test no longer used
- Common-Law Rules about degree of control and dependence govern – no single factor is determinative
- Behavioral Control
- Financial Control
- Type of Relationship of the Parties



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## Behavioral Control

- Instructions that the business gives to the worker
  - How, when, and where to do the work
  - What tools and 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



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## Behavioral Control (cont'd)

- Even if no instructions given, right to control how the work results are achieved
- Key consideration is whether the business has retained the right to control details of a worker's performance or has given up that right



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## **Behavioral Control (cont'd)**

- Degree of Instructions – more detailed for employees
- Does evaluation system measure details of how work is performed (like in employment) or just end result (either classification)?
- Does business provide training about required procedures and methods?
- Is training periodic or on-going?
- Independent contractors ordinarily use their own methods

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## Financial Control

- Extent of the worker's investment
- Extent to which the worker has unreimbursed business expenses
- Opportunity for the worker to realize a profit or incur a loss
- Extent to which the worker makes services available to the relevant market
- How the business pays the worker



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## **Type of Relationship**

- Written contracts describing the relationship the parties intended to create
- Whether the business provides the worker with employee-type benefits (i.e., insurance, pension plan, vacation pay, sick pay, disability insurance)
- Permanency of the relationship (Indefinite = EE)
- Extent to which services performed by the worker are a key aspect of the business of the company

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## DOL Test

- In order for FLSA's minimum wage and overtime provisions to apply to a worker, the worker must be an "employee" of the employer
- FLSA defines "employ" as including to "suffer or permit to work"





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## **DOL Test (cont'd)**

- Applying FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees
- Independent contractors are workers with economic independence, who are in business for themselves

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## DOL Test (cont'd)

- Supreme Court - no single rule or test for determining whether an individual is an employee or independent contractor for purposes of the FLSA
- The totality of the working relationship is determinative - all facts relevant to relationship between worker and employer must be considered



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## **DOL Test (cont'd)**

- Factors generally considered:
  - Extent to which the services performed are an integral part of company's business
  - Permanency of worker's relationship with company
  - Relative investments in facilities and equipment by worker and company
  - Nature and degree of control by company
  - Worker's opportunity for profit and loss
  - Amount of initiative, judgment, or foresight in open market competition with others required for success of worker
  - Degree of independent business organization and operation

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## **DOL Test (cont'd)**

- Immaterial factors:
  - Place where work is performed
  - Whether worker signed an agreement stating that worker is an independent contractor
  - Whether worker has incorporated a business and/or is licensed by a state/local government agency
  - Supreme Court has held that employee status is not determined by the time or mode of pay

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## Reemployment Assistance f/k/a Unemployment

- Employers must include all employees on their *Employer's Quarterly Report* (Form RT-6)
- Misclassification of workers affects claims for reemployment assistance benefits
- Intentional misclassification of a worker is a felony
- Florida Reemployment Assistance Program Law



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## **Reemployment Assistance f/k/a Unemployment (cont'd)**

- Common Law Rules:
  - Extent of control which the business may exercise over details of the work
  - Whether worker is engaged in a distinct occupation or business
  - Whether work done in a certain locality is usually done under direction of employer or by a specialist without supervision
  - Skill required in particular occupation
  - Whether employer or worker supplies instrumentalities (equipment, vehicle, materials), tools, and place of work for person doing the work

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## **Reemployment Assistance f/k/a Unemployment (cont'd)**

- Common Law Rules (cont'd):
  - Length of time the person is engaged
  - Method of payment, whether by the time or by the job
  - Whether the work is a part of the regular business of employer
  - Whether the parties believe they are creating the relationship of employer and employee
  - Whether the hiring party is or is not a business

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## **Reemployment Assistance f/k/a Unemployment (cont'd)**

- State of Florida's common law criteria are similar to, but independent of, the IRS's criteria for determining independent contract status



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## Workers' Compensation

- Fla. Stat. § 440.02(15) – “Employee” means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.



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## Workers' Compensation (cont'd)

- For Independent Contractor (outside of construction), at least four of the following criteria must be met:
  - Maintains a separate business with his/her own work facility, truck, equipment, materials, or similar accommodations
  - Holds or has applied for a FEIN, unless a sole proprietor who is not required to obtain one
  - Receives compensation for services rendered or work performed and such compensation is paid to a business rather than an individual

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## **Workers' Compensation (cont'd)**

- Independent Contractor Criteria (cont'd)
  - Maintains one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation
  - Performs work or is able to perform work for any entity in addition to or besides employer at his/her own election without necessity of completing an employment application or process
  - Receives compensation for work or services rendered on a competitive-bid basis or completion of task or set of tasks as defined by a contractual agreement, unless such agreement expressly states that an employment relationship exists

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## Workers' Compensation (cont'd)

- If four of the criteria listed do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying any of the following conditions:



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## **Workers' Compensation (cont'd)**

- Performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work
- Incurs the principal expenses related to the service or work that person performs or agrees to perform
- Responsible for the satisfactory completion of the work or services the person performs or agrees to perform

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## **Workers' Compensation (cont'd)**

- Receives compensation for work or services performed for a commission or a per-job basis and not on any other basis
- May realize a profit or suffer a loss in connection with performing work or services
- Has continuing or recurring business liabilities or obligations
- The success or failure of the person's business depends on the relationship of business receipts to expenditures

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## Let's Apply the Tests (example 1)

- A person currently employed in Maintenance agrees to work weekends painting the wall around the apartment community, which is not part of the regular Maintenance duties and during days/hours not usually scheduled. The person does not have a painting business and does not carry any insurance regarding performing such services.
- Explain why the person should be treated as an employee or an independent contractor for the painting services.

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## Let's Apply the Tests (example 2)

- A Janitorial employee has a relative to agrees to clean the clubhouse each Sunday. The relative does not have a cleaning business and does not carry any insurance regarding performing such services. The Community Association Manager sets the time and days on which the cleaning will be performed, and has disciplined the relative.
- Explain why the relative should be treated as an employee or an independent contractor.



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## Watch Out for Other Wage Issues

- Discussion of wages, hours, terms and conditions of employment
- Managers are not always exempt from overtime
- Duties rule, not job descriptions
- Other than outside sales and certain computer employees, all white collar exempt employees are salaried, but not all salaried employees are exempt from overtime



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## **Watch Out for Other Wage Issues (cont'd)**

- Tip credits, tip pools, and cash payments
- Dual position employees
- Automatic meal break deductions

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