

Chapter 1

The Regulation of Employment

Introduction to the Regulatory Environment

- Freedom to contract
 - An employee may choose to work or not to work for a given employer.
 - An employer may choose to hire or not to hire a given applicant.
- Congress passes employment-related laws when it believes that the employee is not on equal footing with the employer.

1-2

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Is Regulation Necessary?

- Executive order 12291
- Proponent view:
 - Rational individuals interested in profit maximization will never hesitate to hire the most qualified applicants, regardless of their race or sex.
- Opponent view:
 - Discrimination continues because often employers are faced with the choice of two *equally* qualified applicants for a position.

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Who is Subject to Regulation?

- Origins in agency law
- Why it is important to determine whether a worker is an employee

Independent contractor

Generally, a person who contracts with a principal to perform a task according to her or his own methods, and who is not under the principal's control regarding the physical details of the work.

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Who is Subject to Regulation? (continued)

- Employer payroll deductions
- Benefits
- Discrimination and affirmative action
- Cost reductions

Vicarious liability

The imposition of liability on one party for the wrongs of another. Liability may extend from an employee to the employer on this basis if the employee is acting within the scope of her or his employment at the time the liability arose.

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The Cost of Mistakes

- If a worker is mistakenly classified as an independent contractor the employer may be liable for violations of:
 - Federal tax laws
 - The National Labor Relations Act of 1935
 - The Fair Labor Standards Act of 1938
 - Employee Retirement Income Security Act
 - Social Security Act
 - State worker's compensation and unemployment compensation laws
- The fines for each violation are substantial.

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Section 530 Independent Contractor Criteria

1. The business must have never treated the worker as an employee for the purposes of employment taxes for any period.
2. All federal tax returns with respect to this worker were filed consistent with the worker being an independent contractor.
3. The company has treated all those in positions substantially similar to that of this worker as independent contractors.
4. The company has a reasonable basis for treating the worker as an independent contractor.

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Who Constitutes an Employer?

- The Civil Rights Act of 1866
- Title VII of the Civil Rights Act of 1964
- Title VI of the Civil Rights Act of 1964
- Age Discrimination in Employment Act of 1967
- Americans with Disabilities Act
- Fair Labor Standards Act
- Rehabilitation Act of 1973

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How do You Determine Whether a Worker is an Employee?

- *Lemmerman v. A.T. Williams Oil Company*
- Congressional definition
 - Employees are those not classified as independent contractors
- House of Representatives definition
 - An employee is one who works for another
- NLRA definition
 - “the term ‘employee’ shall not include...any individual having the status of an independent contractor
- Common-law agency test
 - The ability to control the manner in which work is performed

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IRS 20-Factor Analysis

1. Instructions
2. Training
3. Integration
4. Services rendered personally
5. Hiring, supervising, and paying assistants
6. Continuing relationships
7. Set hours of work
8. Full time required
9. Doing work on the employer's premises
10. Order or sequence set

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IRS 20-Factor Analysis (continued)

11. Oral or written reports
12. Furnishing tools and materials
13. Payment by hour, week, or month
14. Payment of business or traveling expenses
15. Significant investment
16. Realization of profit or loss
17. Working for more than one firm at a time
18. Making service available to the general public
19. Right to discharge
20. Right to terminate

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How do You Determine Whether a Worker is an Employee? (continued)

- Economic realities test
 - Degree of control exerted by the alleged employer over the worker
 - The worker's opportunity for profit or loss
 - The worker's investment in the business
 - The permanence of the working relationship
 - The degree of skill required by the worker
 - The extent the work is an integral part of the alleged employer's business

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Independent Contractor or Employee?

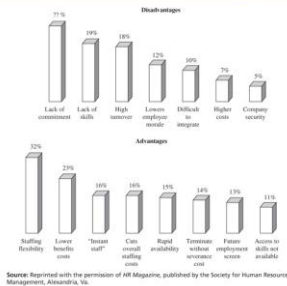
- Behavioral control
 - Instructions
 - Training
- Financial control
 - Significant investment
 - Expenses
 - Opportunity for profit or loss
- Relationship of the parties
 - Employee benefits
 - Written contracts

1-13

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Advantages and Disadvantages of Contingent or Temporary Workers

Exhibit 1.5 Contingent Workers



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How do You Determine Whether a Worker is an Employee? (continued)

- The joint employer
 - *Zheng v. Liberty Apparel Co.*
 - Title VII
- Defining “applicant”
 1. The employer has acted to fill a particular position.
 2. The individual has followed the employer’s standard procedures for submitting applications.
 3. The individual has indicated an interest in being considered for employment.

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At-Will-Employment

At-will-employment

An employment relationship where there is no contractual obligation to remain in the relationship, either party may terminate the relationship at any time, for any reason as long as the reason is not prohibited by law, such as for discriminatory purposes.

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Background of the Employment-at-Will Doctrine

- Initially based on the English feudal system.
- Evolved into employment-at-will – both parties were free to leave at virtually any time for any reason.
- Equal employment opportunity legislation was enacted.

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Background of the Employment-at-Will Doctrine (continued)

- Unjust dismissal
- Wrongful termination
- Changes in the at-will doctrine vary from state to state

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Exceptions to the At-Will Doctrine

- The Worker Adjustment and Retraining Notification Act (WARN Act)
 - Generally requires 60 days’ advance notice of a “plant closing” or “mass layoff” be given to affected employees
- **Violations of public policy** usually arise from the employee being terminated for acts such as:
 - Refusing to violate a criminal statute on behalf of the employer or at the employer’s request
 - Exercising statutory right
 - Fulfilling statutory duty
 - Disclosing violations of statutes by an employer

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Exceptions to the At-Will Doctrine (continued)

- Whistle-blowing
 - Federal Whistleblower Statute
 - Whistleblowers Protection Act
 - State protection
 - Public policy
- Breach of implied covenant of good faith and fair dealing

Covenant of good faith and fair dealing
 Implied contractual obligation to act in good faith in the fulfillment of each party’s contractual duties.

1-20

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Exceptions to the At-Will Doctrine (continued)

- Breach of implied contract
 - Implied contract based on employment policy manuals and handbooks
- Exception based on promissory estoppel

Implied contract
 A contract that is not expressed but instead is created by other words of conduct of the parties involved.

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Introduction to Wrongful Discharge

- Compensatory damages
- Punitive damages
- Constructive discharge
- Retaliatory discharge
 - Protected activity
 - Adverse action
 - Causal connection
- Constitutional protections
- Military leave

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Introduction to Wrongful Discharge (continued)

- Wrongful discharge based on other tort liability
- The “freedom” to contract in the regulatory employment environment
 - Covenants not to compete (“noncompete agreements”)
 - Arbitration agreements in employment contracts

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Management Considerations

- A **written document** will help to identify the nature of the association between parties.
- The independent contractor should be paid on the basis of the **nature of the job completed**, rather than the hours worked to complete it.
- **No training** should be offered to an independent contractor.
- Where additional assistance is required, an independent contractor will be made to supply that extra assistance.
- Where the risk of misclassification is great the employer may choose to obtain an **advance ruling** from the IRS.

1-24

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Summary

- The distinction between employees and independent contractor is **crucial**.
- Classification of employees may **vary** depending on the statute that is to be applied or on the court in which a given case is scheduled to be heard.
 - The common thread is generally the right of the employer to control the actions of the worker. Where this is present, the worker is likely to be considered an employee.
- An employer is usually thought to be one who employs or uses others to do its work or to work on its behalf.
- When an employer decides to terminate an employee, there is always a **reason** for the termination.
- To ensure that the discharge decision is not wrongful and to protect against a claim of wrongful discharge, employers should establish a **discharge procedure** to be followed in the course of every termination.
