

# Practical Briefs

Legal Updates for Today's Proactive Manager

VOLUME 1, ISSUE 7

OCTOBER 22, 2009

## EMPLOYEE OR INDEPENDENT CONTRACTOR – DO YOU KNOW THE DIFFERENCE?

UPCOMING  
COMMUNITY EVENTS:

**Armstrong & Desai, LLC**  
**Presents:**  
**"SURVIVAL GUIDE FOR  
THE IMMIGRATION LAW  
JUNGLE"**  
**1.5 Hours of CPE Credit**

Our attorneys will present an immigration and employment law update on **Wednesday, November 4<sup>th</sup> from 11:30 – 1:00**. The complete registration form with more details is available on our website, [www.adgloballaw.com](http://www.adgloballaw.com). We look forward to seeing you there.

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A California cleaning service and its owners were the subjects of a recent investigation led by the U.S. Department of Labor ("DOL") that focused on the company's improper classification of over 380 employees as independent contractors. The DOL claimed the company failed to pay those workers minimum wage and overtime as required under the federal Fair Labor Standards Act. The DOL ordered the company and its owners to pay workers \$3.5 million in back wages plus over \$1 million in liquidated damages.

In another case, FedEx Ground package delivery drivers in Washington were denied similar damages when a court found the workers were independent contractors rather than employees. FedEx maintained that all of its package delivery drivers are contract workers who are their own bosses and are in control of the work they perform, and the contracts between the drivers and FedEx stated that the drivers owned and operated their own businesses "as they chose." The court agreed with FedEx.

So what is the distinction between employees and independent contractors, and why does this matter to your business? The DOL is focused on the distinction between employees and independent contractors, particularly where employers fail to pay workers minimum wage and overtime as a result of their improper classification of workers. Although it may seem financially attractive to classify workers as independent contractors rather than employees to avoid the financial and tax obligations that come with employee classification, if the classification is incorrect, it could end up costing an employer substantial amounts in back wages and other damages.

The IRS applies a multiple factor test to determine whether a worker is an independent contractor, and the test turns on the employer's "right to control". Whether an employer has a "right to control" depends on whether there is behavioral control, financial control, and the nature of relationship between the employer and the worker:

- Behavioral control may exist where a business controls the direction of work through instructions or other types of training. Sufficient behavioral control may be present even where no instructions are given to a worker, if the employer has

the right to control the manner in which the work results are achieved.

- Financial control may exist if a business has direct control over the financial and business aspects of the worker's job. This includes the extent to which the worker has incurred unreimbursed expenses, the worker's investment, the manner in which the business pays the worker, and the extent the worker can realize a profit or loss.

- The type of relationship often turns on whether there is a written contract that describes the relationship the parties intended to create, whether the business provides the worker with an employee-type benefit plan, the permanency of the relationship, and the extent to which the services performed are a key aspect of the regular business of the company.

Generally, if the business has control over the work to be done and how it is done, the workers are likely to be employees. The responsibilities of your company change if the worker is classified as an "employee" rather than an "independent contractor". These responsibilities include:

1. Paying employment taxes;
2. Withholding the employee's portion of income and Social Security taxes from paychecks, keeping accurate records, and holding money "in trust" for the government until tax payments are submitted;
3. Providing workers' compensation and unemployment coverage; and
4. Retaining Forms I-9 and New Hire Reports as required under federal and state employment and immigration laws.

If you have questions, or if you would like assistance in determining the status of your workers, please contact one of our attorneys to discuss further.

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The Rules of Professional Conduct of the various states where our offices are located or our attorneys practice require the following language. FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. Unless otherwise indicated, Texas attorneys are not certified by the Texas Board of Legal Specialization in the areas of practice listed on their profiles.

This newsletter is intended to provide general information only and is not intended to provide legal advice or opinions for any reader's particular situation. Each specific set of facts and circumstances are unique, and the reader should consult his or her legal or tax advisor concerning specific advice for the issues presented in this newsletter.

# **IRS TOUGHENS UP ON HR DEPARTMENTS – IS YOUR COMPANY NEXT?**

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As the IRS increases its auditing efforts to focus on human resource (“HR”) departments, internal audits are becoming more important for companies. These audits focus on complex tax and immigration issues that businesses with foreign workers performing services in the U.S. routinely face.

Particularly, the IRS is focused upon the classification of H-1B workers and other temporary worker classifications and whether employers account for and report compensation paid to these foreign workers. The H-1B classification is the most commonly used temporary work visa, and it mandates that the H-1B worker be employed as an “employee” with all the benefits and rights afforded to the company’s other employees. All wages earned by H-1B employees must be reported on W-2 forms and be subject to withholding of income tax in the same way as U.S. citizens and residents. Employers should be careful to consider the foreign national worker’s tax status when making required withholdings.

So what should your HR department do to prepare for these audits? Review your company’s HR records now to determine if you are running afoul of the tax and immigration

laws with respect to your HR practices. In particular, you should conduct a “preventative” internal audit to confirm that you are:

- Classifying workers properly (as either employees or independent contractors);
- Completing and retaining all required Forms I-9;
- Completing and retaining all required tax documents, including W-4s, W-2s, etc.; and
- Maintaining those records with an accurate and accessible retrieval system.

These IRS audits are just one of the worksite enforcement strategies in place to enforce U.S. immigration laws and to ensure employer compliance. We urge you to contact your legal and tax professionals now to be sure your business has policies and procedures in place to ease the audit process.

If you have questions or need assistance to respond to an IRS audit, please contact one of our attorneys to discuss further.

## ***YP(t) PREMIER EVENT***

Join YP(t) at our Premier Event at Brown’s Corner Dueling Piano Bar & Grill on **October 29<sup>th</sup> at 7:00 p.m.**, if you are between 22 and 40 years old and interested in meeting other young professionals in our area. This night will be about introducing you to YP(t) in a relaxed, fun atmosphere. The first 30 people through the door will receive a FREE t-shirt! We will have several giveaways throughout the night! Dress is casual. Food will be provided and there will be a cash bar available.

To RSVP for this event please send your name to [yptuscaloosa@gmail.com](mailto:yptuscaloosa@gmail.com). To find out more about YP(t), please visit our website at [www.yptuscaloosa.com](http://www.yptuscaloosa.com) or become a fan of YP(t) on Facebook. To get updates on our upcoming events, email [yptuscaloosa@gmail.com](mailto:yptuscaloosa@gmail.com) (type “Subscribe” in the subject line) and follow us on twitter @yptuscaloosa.



**FOR MORE INFORMATION:**

**Visit our website at:**

**[www.adgloballaw.com](http://www.adgloballaw.com)**

## **Proactive Managers— Effective and Practical Workshops for Your Business**

Today’s business owners and managers are faced with difficult decisions on a daily basis, and many of those decisions can have critical financial and legal implications. Business owners and managers often engage their full management team in planning to prevent legal pitfalls. Armstrong & Desai provides practical guidance on a variety of legal issues that can help ease the burden on you and your business. We will accommodate your busy schedule with topic-specific presentations in a variety of available formats, including live seminar or workshop instruction, webinars, audio conferencing, or “on-site” company specific review and discussion. We are also happy to work with you to create a tailored presentation that meets your company’s specific needs. We also routinely present to professional organizations, civic organizations, and other membership clubs upon request.

Please visit our website at [www.adgloballaw.com](http://www.adgloballaw.com) for additional details and a list of workshops and presentations offered.



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