

Independent Contractor and Joint Employment Task Force

Employers increasingly turn to agencies, temporary workers, and independent contractors to fulfill their staffing needs, but these relationships can present a myriad of risks. We recognize that representing employers in this area requires a multidisciplinary approach, and, therefore, Morgan Lewis's Independent Contractor and Joint Employment Task Force includes members of our Tax, Labor and Employment, Employee Benefits and Executive Compensation, and Washington Government Relations and Public Policy Practices.

Scope of Practice

The attorneys and other professionals supporting the task force provide the following services to clients:

- Advising on best practices to reduce audit triggers and financial exposure
- Conducting compliance reviews of independent contractor and staffing relationships with multiple goals, such as decreasing potential audits and financial exposure and increasing reliance on statutory and regulatory relief provisions, all while limiting our clients' costs and administrative burdens
- Drafting and revising contracts with employees, independent contractors, and staffing agencies
- Structuring and defending independent contractor relationships and, where warranted, assisting with the reclassification of workers as employees in a manner that reduces potential exposure and liability arising from worker misclassification
- Drafting and amending benefit plans to properly exclude/cover the correct class of workers
- Leading, advising, and assisting in Internal Revenue Service (IRS), U.S. Department of Labor (DOL), and state regulatory audits involving worker classification issues
- Litigating contractor misclassification and joint employment claims
- Providing high-level public policy research, advocacy, and consulting

Our dispute resolution work on behalf of clients begins at the earliest stages of a matter—whether an audit, controversy, administrative proceeding, or litigation—when we help to develop defense strategies, and it continues during all stages of litigation and through administrative appeals of proposed assessments. We favorably settle most assessments, however, at the administrative level. In fact, we resolve most of those matters for our clients with no resulting liability or only a fraction of the liability that our clients expected to pay.

Our clients range from small start-ups and middle-market companies to Fortune 100 companies, and they represent a wide variety of industries, such as financial services, insurance, transportation, pharmaceuticals, retail, and healthcare.

Joint Employment and Contingent Workers Services

- Drafting and revising staffing agency and other contracts that could create joint employment risk
- Auditing potential or existing staffing agencies to assess their ability to fulfill indemnification obligations
- Advising on employee leasing arrangements
- Litigating joint employment matters
- Advising on employee benefits and payroll tax issues arising from joint employment and contingent workers

Contractor Misclassification Services

- Drafting and revising independent contractor agreements to limit risk
- Responding to Form SS-8 filings
- Litigating contractor misclassification matters
- Providing guidance as to professional employer organizations (PEOs), administrative service organizations, and other outsourcing arrangements, including advising on employee benefits plans covering workers of PEOs and payroll taxes
- Mitigating potential liability and consequences for unfair labor practices
- Providing guidance as to temps, perma-temps, and payrolling arrangements
- Advising on Section 530 relief, safe harbors, and compliance
- Counseling on classification settlement program agreements
- Providing advice on authorized agents and common paymasters
- Structuring nontraditional employment relationships to ensure compliance
- Documenting traditional employment relationships
- Assisting with worker reclassification audits

Sample Representations

- Defended two Fortune 100 cable companies against multiple class and collective actions alleging unlawful wage deductions and failure to pay overtime and minimum wage compensation based on joint employment theory. Obtained dismissal on summary judgment in one case, voluntary dismissal with prejudice in several others during discovery (without any settlement), and voluntary dismissal with prejudice (without any settlement) in another on the eve of trial.

- Successfully defended an IRS independent contractor audit seeking to reclassify the bulk of a client's marketing consultants as employees. Prior to retaining Morgan Lewis, the IRS had issued a ruling reclassifying the workers as employees. The client's potential exposure for open tax years was more than \$30 million, but the matter was settled for \$0 for all past years, and the client retained the right to continue treating the consultants as independent contractors for all future years.
- Successfully briefed and settled an IRS reclassification action against a large healthcare provider, a matter which was referred to our practice by a large competing law firm due to our unique experience handling such audits. The potential exposure for past years exceeded \$20 million with far greater prospective exposure. The case was settled at IRS Appeals for \$0 liability for past years and retention of the right to continue treating the healthcare professionals as independent contractors for future years.
- Defended one of the nation's largest baked goods manufacturers in multiple class and collective actions alleging contractor misclassification, some of which have been dismissed with prejudice and none of which have resulted in any liability by judgment or settlement for the employer.
- Conducted audits of joint employment and contractor misclassification risk and provided recommendations to mitigate that risk for various organizations, including a nationwide consumer goods company, a Fortune 500 technology company, a large automobile manufacturer, a large insurance holding company, and an international financial services company.
- Defended a collective action asserting overtime and minimum wage claims against a Fortune 500 food-industry client based on joint employment theory. Settled without any contribution by the client.
- Revised clients' qualified and nonqualified employee benefits plans to reduce the risk of a successful lawsuit by independent contractors seeking coverage retroactively.
- Provided counseling and auditing advice for a significant pharmaceutical and medical device manufacturer and a large housing developer.

Our Independent Contractor and Joint Employment Task Force is dedicated to monitoring and responding to all contingent workforce issues that may currently affect or prospectively interest our clients, including actively tracking legislative action and developments within the IRS, the DOL, and their state counterparts. With forces of change converging on contingent workforce matters, we are dedicated to providing our clients ready access to a practice that has the type of depth, breadth, reputation, and vision to meet not only today's client needs but also tomorrow's challenges and planning opportunities.

We also provide updated briefings and assessments of independent contractor-related legislation being considered by Congress. At the behest of our clients, we develop advocacy campaigns based on substantive subject-matter knowledge and strong public policy capabilities to bring the realities companies face to policymakers in Washington, D.C.

Client Briefings

We offer our clients up-to-date and in-depth learning opportunities on independent contractor matters. Whether through our client-specific webinars or through our frequent LawFlash publications, we strive to provide educational tools geared toward helping clients better understand the nature of the issues at hand and how these issues may affect their business. In the last 12 months alone, we have held six client-facing webinars and countless private client

seminars on independent contractor topics ranging from strategic considerations and hidden liabilities to the perils of misclassification.

Some of our most recent presentations and LawFlash articles include:

- Intern Programs: Emerging Legal Risks for Employers
- New Wave of California Employment Laws Requires Prompt Action
- Independent Contractors: What You Should Know from Inside the Beltway
- New California Law Prescribes Stiff Penalties for Employers' Willful Misclassification of Employees as Independent Contractors
- Pennsylvania Law Provides Stringent Penalties for Misclassification of Construction Workers
- New York Enacts Construction Worker Misclassification Law
- Independent Contractor Relationships and the Perils of Misclassification: What All Employees Should Know

In addition, our attorneys' industry-leading insights on independent contractor issues have been featured in articles published by *Practical Law The Journal*, the American Bar Association, the Professional Liability Underwriting Society, and the Bureau of National Affairs, Inc.