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2019 MANAGING THE GLOBAL WORKFORCE WEBINAR SERIES

EMPLOYEE MISCLASSIFICATION: MANAGING RISKS IN A GLOBAL WORKFORCE

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**EMPLOYEE
MISCLASSIFICATION –
GLOBAL TRENDS**

Global Trends

- It is estimated that there are approximately 49 million freelance contractors in Europe and the United States.
- Independent contractors (ICs) are coming under increasing scrutiny globally.
- Trade unions are sometimes using these misclassification cases for organizing purposes or as part of a corporate campaign
- The approach to determining employment status varies across jurisdictions. For example, the European approach generally focuses on subordination, while the US focus is on control.

Global Employment Status Tests

- **Australia:** employee status test similar to the United Kingdom's multifactorial approach; high misclassification risk with potential liability for unpaid employee entitlements and penalties for noncompliance with statutory obligations
- **France:** contractors are popular method of avoiding restrictive French employment laws; employee status test based predominantly on subordination; liability for unpaid employee entitlements
- **India:** high number of contractors; control and integration test for employee status
- **South Africa:** multifactorial approach to employee status; statutory presumption of employee status in certain circumstances; liability for unpaid employee entitlements and tax

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**EMPLOYEE
MISCLASSIFICATION –
UNITED KINGDOM**

Determining Employment Status: A Holistic Approach

- Broadly, there are **three categories** of individuals under current law:
 1. Employees;
 2. Workers; and
 3. Self-Employed ICs
- Despite codified definitions of “employee” and “worker,” employment status is primarily determined by tests developed by the courts
- It is impossible to set down a clear set of defining criteria against which an individual’s status can be definitely determined—courts adopt a holistic approach
- No one factor is determinative—the matters to be taken into account and the weight to be given to them vary depending on the circumstances
- Labels – the courts look at substance, not form

Factors Indicating Employment Status (I)

Mutuality of Obligations

- The employer is under an obligation to provide the individual with work and the individual is under an obligation to make himself or herself available to do the work
- For example, an employee is required to perform a minimum of 40 hours per week in exchange for an annual salary
- *Gascoigne v. Addison Lee* (2017)



Factors Indicating Employment Status (II)

Personal Service

- The individual is required to personally perform work/services. E.g., an employee has been named in an employment contract and is personally required to attend work.
- *Pimlico Plumbers v. Smith* – usually, there is no right for an employee to appoint a substitute. If there is a right of substitution, it would in most cases be subject to the employer's approval and may only be invoked where the individual is unable, rather than unwilling, to work.

Factors Indicating Employment Status (III)

Level of Control

- The individual is under the control of the employer, which controls what the individual does, how he or she does it, and when he or she does it.
- E.g. employees are subject to disciplinary procedures, and are directed and supervised day to day by a line manager who instructs the employees on how and where to carry out their tasks.

Factors Indicating Employment Status (IV)



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**EMPLOYEE
MISCLASSIFICATION –
UNITED STATES**

Typical Classification Categories

- **Regular Employee:** A person rendering actual service in any business for an employer, whether gratuitously or for wages.
- **IC:** A person who renders services for specified payment or a specified result where the employer exerts control only as to the result of the work, not as to the manner or means by which the result is accomplished.
- **Joint Employee:** An employee deemed to have two (or more) “employers.” Workers typically supplied by employee leasing firms or temporary staffing agencies.

Misclassification

- The potential costs of misclassification—back wages, tax liability, retroactive exposure for employee benefits, unpaid unemployment and workers' compensation insurance contributions, fines, and penalties—continue to present serious risks for employers.
 - Although the law permits the use of ICs, recent legislative and regulatory efforts by both federal and state legislators and regulators have highlighted a growing intolerance for these relationships.
 - Moreover, some courts are conditionally certifying FLSA collective actions and certifying state wage and hour class actions for groups of ICs.

US Department of Labor: Economic Realities Test

- Administrator's Interpretation No. 2015-1
- Created presumption of employment status
 - Focused on "suffer or permit to work"
 - Withdrawn by Trump Administration
- Returned to economic realities test, including requirement of control
- Trump Administration issued its first substantive guidance on ICs in July 2018, [Field Assistance Bulletin No. 2018-4](#), reiterating that an economic reality test dictates whether an employment relationship exists.

Dynamex Operations West, Inc. v. Superior Court

- Court adopted “suffer and permit” standard, and applied an “ABC” analysis for purposes of California’s wage orders
- Workers are presumed to be employees unless the hiring company can show that the worker:
 - A. Is free from the control and direction of the hirer in the performance of the work, both under the contract for the performance of the work and in fact, *and*
 - B. Performs work that is outside the usual course of the hiring entity’s business, *and*
 - C. Is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed

Problems with the Traditional Tests

- Arcane and ignore emerging economic and technological realities
 - Software platforms present new opportunities, but do not fit traditional employment model
 - Risks of impeding creativity and economic growth using “DOL - employment as broad as possible” concept
- Multiple factor tests/multiple jurisdictions
 - Ambiguity and uncertainty
 - Constant compliance concerns
 - Prohibits availability of uniform/compliant national policies

The Gig Economy

- A gig economy is a market model in which workers contract with organizations for temporary, short-term engagements. Typically, a worker has the ability to pick and choose when he or she will work and how often.
- Types:
 - Personal Services
 - Examples: Uber, Lyft, GrubHub, Handy, Instacart, etc. – intermediary connects consumer with service
 - Goods and impersonal services
 - Examples: AirBnB, Etsy, etc. – intermediary connects buyers and sellers
 - Personal shoppers
 - Secret shoppers
 - Brand ambassadors/social media monitors/moderators

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MISCLASSIFICATION –
GERMANY**

Determining Employment Status (I)

- Employment status relevant to
 - Application of employment laws
 - Mandatory membership in the branches of the German social security system
 - Pension insurance
 - Unemployment insurance
 - Health insurance
 - Nursing care insurance
 - Occupational accidents insurance (workers compensation)
 - Wage tax, VAT
- Affects many service providers, e.g., parcel couriers, IT service providers, hospital doctors, nursing staff

Determining Employment Status (II)

- For employment law purposes
 - Criteria developed by the labor courts, codified in 2017 (Civil Code, Sec. 611a)
 - Key criteria
 - Bound by instructions
 - May relate to contents, performance, time, and location of work
 - Service providers who are not essentially free to determine how to organize their work and their hours of work are regarded as bound by instructions
 - Personal dependence
 - Integration into external work organization
 - To be assessed on the basis of the characteristics of the work to be performed in the individual case
 - All circumstances of the individual case to be taken into account
 - If actual performance indicates employment status, contract language will be disregarded

Determining Employment Status (III)

- For social security purposes
 - Key criteria
 - Work in accordance with instructions
 - Integration into principal's work organization
 - Other criteria (examples)
 - Must services be rendered in person or may they be rendered by a substitute?
 - Does service provider use its own work materials or are they provided by the principal?
 - Does the service provider work for just one or mainly one principal?
 - Does the work to be performed also involve entrepreneurial chances for the service provider, or just risks?
 - All circumstances of the individual case to be taken into account
 - Parties may apply to statutory pension insurance provider to determine whether a service provider has employment status
 - Detailed guidelines for many professions

Determining Employment Status (IV)

- For tax purposes
 - Key criteria
 - Work in accordance with instructions
 - Integration into principal's work organization
 - Entrepreneurial risk
 - All circumstances of the individual case to be taken into account
 - Employer may apply to local tax authority to determine whether a service provider has employment status

Misclassification Risks

- Application of employment laws, e.g. minimum vacation, pay continuation during sickness, termination protection
- Social security contributions
 - Employer contributions going forward (ca. 20% of pay, subject to ceilings)
 - Employer and employee contributions retroactively (ca. 40% of pay, subject to ceilings)
 - Usual limitation-of-action period is four years (30 years if principal willfully did not pay social security contributions)
- Willful nonpayment of social security contributions is a criminal offense
 - Imprisonment of up to three years or a fine (up to 10 years in particularly serious cases)
- Liability for wage tax not withheld
 - Usual limitation of action period is four years (10 years in case of tax evasion)
- VAT paid to misclassified service provider not deductible as business expense

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**EMPLOYEE
MISCLASSIFICATION –
SINGAPORE**

Employee Misclassification in General

- Low incidence of employee misclassification

PARLIAMENT

308 alleged cases of misclassified workers in last 3 years: Zaqy

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160 wrongly classified as self-employed; errant bosses punished with warnings, fees

Types of Employee Misclassification

- Pre-2019:
 - Managers/Executives
 - Employed vs. Self-employed
 - Salaries for work visa quota levels
- April 1, 2019 Employment Act (CAP 91) amendments
- Post-2019:
 - Employed vs. Self-employed
 - Salaries for work visa quota levels
 - Level of work for overtime claims

Reasons for Employee Misclassification (I)

- Non-payment of CPF obligations under the Central Provident Fund Act (CAP 36)
 - Depending on seniority and levels, the CPF Act requires that employers contribute up to 17% additional salary to the CPF.
 - The contributions do not apply to self-employed personnel or ICs
- To bypass minimum protections under the Employment Act (Cap 91)
 - Depending on seniority and levels, the Employment Act grants minimum protections. More acute prior to April 2019 amendments, when employees designated that “Managers” do not receive certain benefits like overtime.

Reasons for Employee Misclassification (II)

- Work Visa Quotas
 - Singapore has certain ratios for citizen/residents vs. foreigners
 - Misclassification on salary and seniority levels common in order to get pass quotas

Penalties and Exposure

- Criminal and administrative
 - Investigations by Ministry of Manpower
 - Fines/imprisonment for breaches of the CPF Act
 - Administrative penalties, including being blacklisted
- Civil
 - Usually commenced as part of or at same time as MOM complaint for overtime pay
 - No class action precedent

Recent Case

- *Jurong Country Club v. Public Prosecutor* (2019) SGHC 150
 - Issue was whether the Country Club misclassified a gym instructor working on its premises and denied him CPF payments.
 - Court reiterated the test of what is an employee, relying mainly on English decisions.

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PRACTICAL RECOMMENDATIONS

Practical Tips for Engaging Self-Employed Contractors (I)

- Document the relationship **in writing**
- Only engage individuals via **an agency or a company**, not directly
- If possible, there should be **no obligation** on the company to provide work and no obligation on the individual to carry out the work
- If possible, include an unfettered right for the individual to **substitute** someone else to carry out the work
- **Reduce restrictions** on how, when, and where the services are provided
- **Avoid** exclusivity clauses and post-termination restrictive covenants
- **Consistency of communications:** ensure that communications to the world do not conflict with self-employed status

Practical Tips for Engaging Self-Employed Contractors (II)

- Engage individual to carry out **particular tasks or projects**
- Determine individual's fees by reference to **a daily/hourly rate or a project fee** if possible
- **Do not** provide employee benefits
- Ensure individual provides **own tools and bears own expenses**
- Require individual's employer to **indemnify** the company for income tax and employment tax liabilities, including penalties and interest
- Contractors should be **distinguished from employees**, and it will generally not be appropriate to invite contractors to employee events
- Training, appraisals and discipline should be provided by the **contractor's employer**, not the organization

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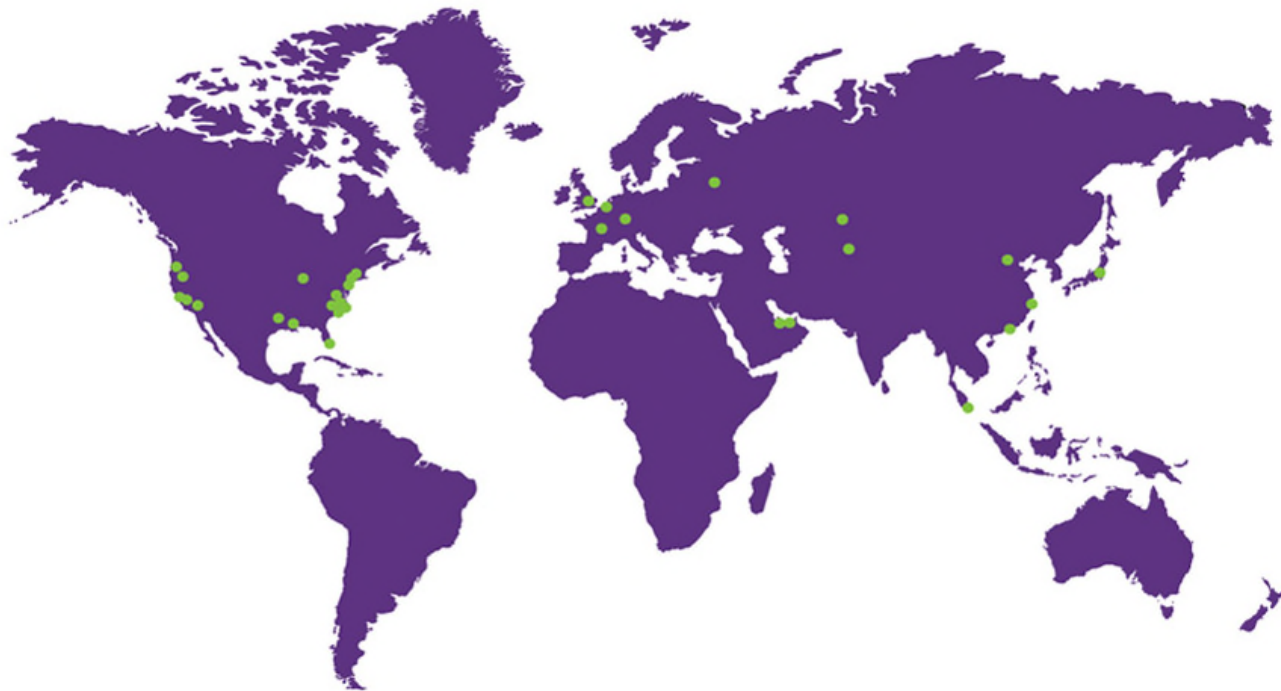
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