

## DOL AND INDEPENDENT CONTRACTORS: PING PONG ON THE POTOMAC

Presented by:

**William S. Myers**

*Member*

Eckert Seamans Cherin & Mellott, LLC  
600 Grant Street, 44<sup>th</sup> Floor  
Pittsburgh, PA 15219

412.566.1938

wmyers@eckertseamans.com





## **Business Context – Why Does It Matter (or does is)?**

- Misunderstanding Abounds – Myth of the IC, CTC, 1099
- Growing pressure for IC's – especially staffing, high-tech, gig workers
- Difficult to Create, More Difficult to Enforce
- Special Problem of State Laws Trying to Ban IC's
- High Dollar Returns for Plaintiff Lawyers
- High Incidence of Collective Claims

## **Legal Context – What Laws Are Affected (and not)?**

- Fair Labor Standards Act (FLSA)
  - Minimum wage, overtime premiums
- Family and Medical Leave Act (FMLA)
  - Family leave, medical leave
- Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA)
  - Agricultural Employers, Associations, Contractors
  - Migrant Agricultural Workers
  - Seasonal Agricultural Workers

## Legal Context – What Laws Are Affected? (cont'd)

- What is NOT Included (directly)?
  - Federal Title VII, ADA, ADEA, GINA, ERISA, MSHA, OSHA, NLRA, RLA, USERRA, WARN, IRC, others
  - State and Local Laws on minimum wage, overtime, meal and rest breaks, paid and unpaid leave, discrimination, retaliation, specialized IC laws
- Statutory Framework – Congress says:
  - **Employee** is “any individual employed by an employer”
  - **Employer** is one “acting in the interest of an employer ... to an employee”
  - The first thing you learn in law school ... never define a term using that term.

## The New Standard – What is it (and is it new)?

- Remember – It is a *Proposed* Standard
- Ultimate Inquiry – “Economic Reality”
  - In business for himself, or economically dependent?
  - Supreme Court has said “economic reality” consistently since 1947
- Five + Factors (2 Core, 3 Other, plus “Additional”)
  - Nature and degree of control over the work – Core Factor
  - Individual’s opportunity for profit or loss – Core Factor
  - Amount of skill required for the work – Other Factor
  - Degree of permanence of the working relationship – Other Factor
  - Whether the work is part of an integrated unit of production – Other Factor
  - Additional factors – Wild Card of “Relevance” to economic reality
- Competing to Be the Last to Say the Same Thing a Different Way?

## How to Manage the Chaos – Create Your Own Clarity

- Manage the Workplace
- Manage the Worker Relationship – With Everyone
- Avoid Independent Contractors – Except When You Cannot
- When Using Independent Contractors:
  - Develop clear criteria and apply consistently
  - Maintain clear segregation between EE's and IC's
  - Use individual entity as IC and employer
  - Use clear and detailed ICA – With Individuals and Entities
  - ✓ This is a seminar in itself

## Wrap-Up and Questions

- Business Context
  - Growing demand
  - Rampant misunderstanding
  - Difficult planning, compliance
  - Attractive target for lawyers
- Legal Context
  - FLSA, FMLA, MSAWPA
  - Lots of federal laws excluded
  - Watch for contrary and conflicting state laws
- Manage the Chaos – Avoid IC's or Create Your Own Clarity

