

# The Legal Issues Regarding Independent Contractors

*Harbor Truckers for a Sustainable Future  
Long Beach, California – May 25, 2010*



**Presenter:** Robert R. Roginson, Partner

aa/r/r

Atkinson, Andelson  
Loya, Ruud & Romo  
A Professional Law Corporation

# Benefits of the Independent Contractor Relationship.

- Cost savings
  - No payment for Social Security, Medicare, unemployment taxes, Worker's Compensation, and other mandatory employee contributions
  - No payment for vacation or other leaves, medical or life insurance, and retirement benefits
  - Administrative savings
- Minimize risk of wrongful terminations actions, discrimination actions, etc.
- Inapplicability of labor laws like FLSA, NLRA, and state wage and hour laws
- More competitive

# Consequences of Misclassification

- 1 Liability for Minimum Wages and Overtime and other wage and hour obligations, e.g. meal and rest periods, record keeping.
- 2 Penalties for failure to carry Workers' Compensation
- 3 Tax consequences and sanctions for failure to withhold employee payroll taxes
- 4 Employee benefits

# Employee Misclassification

## Legislative and Regulatory Efforts

- ✓ In February, 2010, IRS launched a Nationwide Misclassification Audit Campaign
- ✓ In March 2010, Department of Labor requested \$25 M for a multi-agency Employee Misclassification Initiative
- ✓ Employee Misclassification Prevention Act introduced in Congress.

# Employee Misclassification

## State and Federal Regulatory Enforcement

- ✓ IRS
- ✓ United States Department of Labor
- ✓ California Employment Development Department (EDD)
- ✓ California Division of Labor Standards Enforcement

# Employee Misclassification

## Representative and Class Action Litigation

- ✓ Several industries are being targeted
  - ✓ Courier industry
  - ✓ Trucking industry
  - ✓ Construction industry
  - ✓ Computer software industry
  - ✓ Cable installers

# How Do I Know If A Worker is Properly Classified?

Different government agencies and jurisdictions apply different tests to determine whether a worker is an employee or an independent contractor.

# How Do I Know If A Worker is Properly Classified?

## United States Department of Labor (the Economic Realities Test)

1. Degree to which the worker's work is controlled by the organization;
2. Worker's investment in facilities and equipment, if any;
3. Worker's opportunities for profit or loss, if any;
4. Amount of any initiative, judgment, or foresight this person uses in open-market competition;
5. Permanency of the relationship; and
6. Whether and to what extent the worker's work is an integral part of the organization's business or activities.

# How Do I Know If A Worker is Properly Classified?

## California Division of Labor Standards Enforcement

- An individual will be considered an employee where the employer exercises all necessary control by direct or indirect means over the work details of the individual.

*(S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989 48 Cal.3d 341))*

# How Do I Know If A Worker is Properly Classified?

Contractual language alone is not determinative of an independent contractor relationship.

# How Do I Know If A Worker is Properly Classified?

There is no single definitive factor in determining whether an individual is an independent contractor or an employee for purposes of wage and hour laws.

# Some Significant Factors and Considerations

- In what ways and to what extent does the organization control the workers?
- Are the workers providing services that are an integral part of the regular business of the company?
- Is the relationship between the company and the worker effectively permanent or is it for a specified duration?
- What opportunities for profit and risk of loss do the worker's bear?
- Does the company and worker believe they are creating an independent contractor relationship?

Question & Answer  
Session

# Thank You

For questions or comments, please contact:

{ Robert R. Roginson }  
{ (562) 653-3200 }  
{ rroginson@aalrr.com }

**aalrr**

Atkinson, Andelson  
Loya, Ruud & Romo

A Professional Law Corporation