Employment Status

Elizabeth Arnold and Chester Hanvey

This was originally published in Wage and Hour Law: Guide to Methods and Analysis, by Chester Hanvey (Springer, April 2018), chapter 4, pp. 71-105.

4.1 Employment Status

Relationships between "employees" and "employers" have grown increasingly complex in the modern workplace. Due to the numerous variants in relationships between the individuals that perform a service and the organization for whom the service is provided, determining who meets the legal standard of an "employee" has become more and more challenging for companies, enforcement agencies, and the courts.

The meaning of the term "employment" has evolved significantly since the Fair Labor Standards Act (FLSA) originally defined it in 1938. In the current workforce, many workers perform services for multiple companies concurrently. This new workforce of "temporary" workers has been described using many different labels, including "freelancers," "temps," "permatemps," "on-call" workers, "contingent" workers, "on-demand" workers, workers in the "gig economy," and workers in the "shared economy," among others. This workforce is large and growing. A 2015 Government Accountability Office (GAO) study estimated that 7.9% of the employed labor force in 2010 was classified as "contingent workers" and that, depending on how "contingent" worker is defined, the actual percentage could be as small as 5% or as large as 33%.[1] The same report also states that if the definition of contingent workers is expanded to include all individuals who are employed in various types of alternative work arrangements (including independent contractors, self-employed workers, and part-time workers), the percentage of the current work- force made up of contingent workers increases to over 40%. Another study suggested that the entire net employment growth in the US economy from 2005 to 2015 has occurred in alternative work arrangements.[2] More recently, a 2016 McKinsey study showed that 20–30% of the working-age population in the United States and

[1] US Government Accountability Office (2015).

[2] Katz and Krueger (2016).

© Springer International Publishing AG, part of Springer Nature 2018
C. Hanvey, *Wage and Hour Law*, https://doi.org/10.1007/978-3-319-74612-8_4

INTELLIGENCE THAT WORKS

Europe engage in independent work.[3] Other sources indicate that independent contractors alone are expected to represent 40% of the workforce by 2020[4].

The new workforce has created unexpected challenges to well-established assumptions, standards, and laws. According to the former Secretary of Labor Thomas Perez, the "largest question" for the Department of Labor (DOL) under the Trump administration will be how to "ensur[e] a level of workforce protections for participants in the on-demand economy."[5] In his Memorandum to the American People in January 2017, Perez called on the government to enact employment legislation to prepare for the "future of work," stating that, "work arrangements have been undergoing a profound change for decades… in ways that threaten the basic social contract for American workers."[6]

Historically, the majority of the attention on this issue has been devoted to whether workers are employees or independent contractors. One challenge when evaluating the proper status of on-demand workers is determining whether they are in fact "independent contractors." The issue of classification, and claims of misclassification, has spread to almost every industry and sector of the modern workforce, from high tech to entertainment industry performers to workers in the new "gig" economy.

However, in recent years, several other types of nontraditional employment relationships have faced legal scrutiny. These include "joint employment" in which an employee of one company (e.g., subcontractor) is said to be jointly employed by a separate company (e.g., parent company), thus making both companies liable for any wage and hour violations of the subcontractor. Other forms of nonemployment relationships that have been challenged recently include college and minor league athletes, interns, and trainees. In this chapter we provide a background on each of these employment relationships, the legal criteria for classification, and methods for evaluating factors relevant to classification.

4.2 Independent Contractors

The classification of workers as independent contractors has been an area of growing concern for employers and workers in recent years. The DOL has described the misclassification of employees as independent contractors as "one of the most serious problems facing affected workers, employers and the entire economy."[7] While it is difficult to determine exactly how many misclassified workers exist across the country, some studies have found surprisingly high rates. For example, a study of misclassification relating to unemployment compensation commissioned by the

[3] Manyika et al. (2016).

[4] "Twenty Trends" (2010).

[5] Lolito and Schuman (2017).

[6] Perez (2017).

[7] US Department of Labor (n.d.a).

DOL in 2000 found that nearly 30% of audited firms in California and 42% of audited firms in Connecticut were found to have employees misclassified as independent contractors.[8] Given how quickly the workplace has changed since that study was published, it is possible that the current rates of misclassification are even higher. More recently, a 2015 study found that between 10 and 20% of employers misclassify at least one worker.[9] There are currently efforts underway by the Bureau of Labor Statistics to collect updated figures on these measures.[10]

In an effort to reduce misclassification of employees as independent contractors, in 2011 the DOL's Wage and Hour Division began to work with the US Internal Revenue Service (IRS)[11] and 37 states[12] by sharing information and coordinating enforcement. Some of these agreements may also include the cooperation of the Employee Benefits Security Administration, Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs, and the Office of the Solicitor.[13] The DOL was also actively working to reduce the numbers of misclassified employees during the last few years of the Obama administration.[14]

In addition to government enforcement action, private plaintiffs can file lawsuits against employers that they believe have misclassified them as independent contractors. These cases are often brought against well-known companies as class or collective actions with a large number of plaintiffs and can result in large damages or settlements.

Some state workforce and tax agencies have also been increasing their regulatory and enforcement efforts in recent years. Multiple states and cities have passed laws recently that have made it more difficult to classify a worker as an independent contractor and have increased the penalties for violations, including New York, Massachusetts, and Illinois.[15] More specifically, New York passed the "Freelance Isn't Free Act (FIFA)" in November 2016. Under this act, independent contractors need to have written contracts with specific terms, and independent contractors can be awarded double damages for companies not paying on time.[16] Some states have coordinated their enforcement effort among various state agencies. In 2015 at least 21 states had created task forces designed to combat independent contractor misclassification.[17]

[8] Dickinson et al. (2016).

[9] Carre (2015).

[10] In his Cabinet Exit Memo on January 5, 2017, former Labor Secretary Perez stated that "the Bureau of Labor Statistics will conduct a survey on contingent and alternative employment for the first time since 2005 to help us understand how many of America's workers are participating in 'gig work'—that is, nontraditional work arrangements" (Perez, 2017).

[11] US Department of Labor (2011).

[12] US Department of Labor (n.d.a).

[13] US Department of Labor (n.d.a).

[14] US Department of Labor (2016a).

[15] Bartlett and Young (2016).

[16] Fox (2017).

[17] Reibstein (2015); National Employment Law Project (2017).

4.2.1 Implications of Independent Contractor Classification

The classification of a worker as an employee has significant implications for the company, the worker, and the economy. Among these implications is the applicability of wage and hour employee protections granted by FLSA. This is because the FLSA only applies to workers who are classified as "employees."[18] Independent contractors are, by definition, self-employed and therefore not protected by any of the FLSA provisions, including minimum wage and overtime pay. In addition, they do not receive employee benefits such as medical leave or unemployment compensation insurance. Misclassification also results in financial losses to the federal government and state governments in the form of lower tax revenues and fewer contributions to unemployment insurance and workers' compensation funds.[19]

Avoiding the costs associated with these taxes as well as employee benefits can be a significant economic advantage to companies who classify their workers as independent contractors rather than employees. Indeed, according to David Weil, former administrator of the DOL's Wage and Hour Division, "when misclassification is adopted as a business strategy by some companies, it quickly undermines other, more responsible employers who face costs disadvantages arising from compliance with labor standards and responsibilities."[20]

Employers may also see cost savings from the additional flexibility in compensation practices for independent contractors. For example, some independent contractors are paid on a "piece-rate" basis, meaning that time spent on work tasks that do not result in "production" is not paid. A delivery driver, for example, might be paid for each delivery but may not be paid for time spent on nondelivery work, such as loading the vehicle or waiting in traffic between deliveries. In contrast, a driver who holds the same position but is classified as an employee must be paid at least minimum wage for all time worked, even if they are also compensated on a piece-rate basis.[21] The cost savings for a company using an independent contractor compensation model can be significant.

Working with independent contractors also affords companies increased staffing flexibility. When there are changes to the demand for a company's services, increasing or decreasing the number of independent contractors to perform the work is significantly easier than it would be with employees. Hiring employees can involve an investment in recruiting, applicant assessment, and training, whereas an independent contractor typically can be brought on board and deployed rapidly with a smaller investment in preparatory activities. Further, bringing independent contractors in to perform work can be limited to only when they are actually needed. This flexibility allows companies to respond quickly to changes in the market, minimizing the amount they must pay to workers when they are idle.

[18] US Department of Labor (2016b).

[19] US Department of Labor (n.d.a).

[20] Weil (2017).

[21] US Department of Labor (n.d.a).

Employers generally do not reimburse expenses for independent contractors' equipment and tools. The lack of equipment and expense costs could be beneficial to a small company, for example, that lacks the financial resources to purchase equipment necessary for work to be performed. Avoiding these costs can result in financial savings for the employer. Many companies take advantage of this approach according to a 2016 Time Magazine survey of 800 employers which found that more than 80% of companies that use independent contractors reported doing so because they can quickly adjust the size of their workforce, save money on benefits, and tailor the worker to a specific task.[22]

Because of the economic incentives for companies who use contractors, some believe that companies will continue to increase their reliance on independent contractors, despite the risks associated with litigation.[23] Indeed, some studies show that the size of the independent contractor workforce in the USA has increased nearly 25% between 1995 and 2005 and is continuing to grow. [24] Some studies show that many employers plan on using even more contractors in the future.[25] In contrast, other research suggests that while the proportion of independent contractors in California may be growing in some occupations, it is actually declining for others.[26]

While there are clear advantages for companies who work with contractors rather than hiring employees, there are also trade-offs. Most notable are the limits on the amount of control employers can exert over workers. For example, companies are legally prohibited from directly controlling certain aspects of the work that independent contractors perform. In addition, companies are prohibited from providing independent contractors with certain forms of training. These limitations may negatively impact the reliability, consistency, and quality of the services these workers provide, which can be detrimental to the success of some businesses. At MyClean (cleaning service based in New York City), for example, the company attempted to use only contractors to perform its services but quickly discovered that it got better customer ratings if it used permanent staff, according to a 2015 article in *The Economist*.[27]

In addition, there are increasing legal risk of classifying workers as independent contractors as a result of increased government scrutiny of these relationships and enhanced awareness among independent contractors of their rights. The costs associated with litigation in this area can be substantial.

Though some contractors pursue litigation to become classified as employees, other contractors prefer the independence associated with working as an independent contractor. Contractors operate as their own independent small business owners, with the freedom to set their own schedule, and control their own work. (i.e., determine how best to execute a task, receive little supervision or direction). This

[22] Steinmetz (2016).

[23] Dishman (2017).

[24] Hathaway and Muro (2016); US Government Accountability Office (2016).

[25] Steinmetz (2016).

[26] Habans (2016).

[27] "The 'On-Demand Economy'" (2015).

degree of flexibility is highly desirable to some workers, and, to many, it outweighs the potential advantages of being classified as an employee. One study reported that the majority of independent workers in the USA and Europe chose to be contractors and are highly satisfied with their working status.[28] However, the same report states that about 30% of the independent contractors who participated in the study in the USA and Europe would prefer traditional employment if they could secure these full-time, single-employer jobs.[29]

Indeed, many of the factors that typically result in worker retention and satisfaction, such as co-worker relationships, job security, engagement with the organization, and promotion opportunities, are typically not available in gig economy jobs. This may be partially to blame for the high turnover found among on-demand workers. Studies show that more than half of workers for companies which rely on online platforms, such as Uber, leave these jobs within 12 months.[30]

While some workers choose to become independent contractors, others may not have a choice. Depending on the industry and the specific situation, some contractors may not be in a position to question how they are classified when starting a new job. Therefore, not all contractors are in the on-demand economy by choice. Regardless of whether the worker has a preference to be an independent contractor, the company for which they provide services determines how to classify its workers, and those classifications must meet certain legal standards. The following section provides background on the legal standards that dictate when a worker can legally be classified as an independent contractor.

4.2.2 Defining an Independent Contractor

To determine whether a worker may be legally classified as an independent contractor, various factors should be considered, and no one factor is dispositive. One challenging aspect of this issue is that the relevant factors to evaluate who is an independent contractor differ across government agencies, courts, and individual cases. For example, the DOL, Internal Revenue Service (IRS), Equal Opportunity Commission (EEOC), National Labor Relations Board (NLRB), and California's Department of Labor Standards Enforcement (DLSE) have each provided their own interpretations of relevant factors. [31] Some of the similarities and differences are illustrated in the Table 4.1 below. In addition, each year, state and federal agencies and courts issue decisions in independent contractor misclassification cases which influence how these factors are evaluated.

A review of Table 4.1 shows that some factors are considered by all of the agencies listed (e.g., integral to the operations of the business, control of how the work

[28] Manyika et al. (2016).

[29] Manyika et al. (2016).

[30] Farrell and Greig (2016).

[31] The DLSE is the California state version of the DOL.

Table 4.1 Comparison of key factors considered in an independent contractor assessment[a]

Factor	DOL (FLSA)	IRS	EEOC	NLRB	DLSE
Does the company provide benefits?	N/A	Yes	Yes	Yes	N/A
Is payment from the company variable and calculated based on job(s)/quantity of work completed?	No	Yes	Yes	Yes	Yes
Does the company control the manner/how the work is performed?	Yes	Yes	Yes	Yes	Yes
Does the company control the sequence of work performed?	N/A	Yes	N/A	Yes	N/A
Does the company control the work schedule?	No	Yes	N/A	Yes	N/A
Is the relationship with the company permanent?	Yes	Yes	Yes	Yes	Yes
Is the worker economically dependent on the company?	Yes	N/A	N/A	N/A	N/A
Is the worker engaged in a distinct occupation or business?	Yes	N/A	Yes	Yes	Yes
Can the worker hire employees?	Yes	Yes	Yes	N/A	Yes
Is the work integral to the operations of the company business?	Yes	Yes	Yes	Yes	Yes
Is the work performed on the company premises?	No	Yes	Yes	Yes	Yes
Does the worker have the opportunity for profit and loss?	Yes	Yes	N/A	Yes	Yes
Does the worker have the ability to work for more than one customer?	Yes	Yes	Yes	Yes	N/A
Does the worker need special skills to perform the work?	Yes	N/A	Yes	Yes	Yes
Does the company supply the tools and equipment needed to perform the work?	Yes	Yes	Yes	Yes	Yes
Does the company provide training?	N/A	Yes	N/A	Yes	N/A
Do the parties believe they are creating an employer-employee relationship?	No	Yes	Yes	Yes	Yes

[a]The information presented in this table is based on an analysis of the language provided by each agency. However, due to the inconsistency in terminology and phrasing used by each agency, some of the categorization shown may be subject to alternative interpretation.
Note. "Yes" indicates that the factor is considered relevant; "N/A" indicates that the factor is not specified as a relevant factor; "No" indicates that the factor is specifically listed as not determinative.

is performed), while others are only considered by half of the agencies (e.g., controls scheduling). This table is a selective illustration of how some relevant factors compare across some agencies and is not intended to be a comprehensive.

Under the FLSA, the term "employ" has been defined broadly as "suffer or permit to work," meaning that the employer directs the work or allows the work to take place. This is a broad definition indicating that most workers should be classified as employees, not independent contractors. At the federal level, the DOL has relied on

a multifactor "economic realities test" that assesses whether a worker is truly in business for himself or herself or is economically dependent on the employer (i.e., independent contractor vs. employee). The DOL has identified a number of factors that are generally considered by most courts when evaluating independent contractor status: [32]

1. The extent to which the work performed is an integral part of the employer's business.
2. Whether the worker exercises managerial skills (i.e., hiring workers or investing in equipment) and, if so, whether those skills affect the worker's opportunity for profit and loss.
3. The relative investments in facilities and equipment by the worker and the employer, such that they appear to be sharing the risk of loss.
4. The worker's skill and initiative such that he or she exercises independent business judgment.
5. The permanency of the worker's relationship with the employer.
6. The nature and degree of control by the employer (including who sets pay amount, work hours, how work is performed, and whether the worker generally works free from control).[33]

While federal agencies (such as the DOL) don't make the law, their opinions and rulings are significant because they are responsible for enforcing the regulations. The DOL is the federal agency tasked with enforcing labor laws throughout the country. It also provides guidance and opinions regarding how those laws should be interpreted and how these interpretations should be prioritized in terms of enforcement. The DOL has a significant impact on employee classification regulations and issues "Administrative Interpretation" (AI) and opinion letters periodically to provide clarity on specific topics. These letters are frequently referenced by courts and agencies. However, AIs can be, and have been, removed at the discretion of the current Labor Secretary.[34]

California is often considered the "bellwether" of employment law activity and trends. Due to the large number of start-ups, as well as California's "employee friendly" legal environment, it is not surprising that California companies have seen significant activity in independent contractor (and gig economy in particular) misclassification cases. To define what constitutes an independent contractor, California courts and agencies, such as the DLSE, have relied upon a "multifactor" test based on a seminal ruling from 1989 in *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations*, which focused on the employer's "right to control" the contractor's work. Specifically, the ruling stated that, "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." The DLSE's interpretation of independent contractor classification is an even more rigorous standard than the

[32] US Department of Labor (2014).

[33] Faulman (2016); Ruckelshaus (2016).

[34] Gurrieri (2017).

DOL's. The standard is not *whether* the control is exercised by the company, but whether there is a *right* to control the worker, even if it is not exercised.

4.2.3 Industries Which Rely on the Independent Contractor Model

In recent years, personal transportation, home services, and other "on-demand" businesses have been the subject of litigation regarding independent contractor misclassification. Company's offering ride-share services such as Uber and Lyft, cleaning services such as Handy and Homejoy, delivery services such as Postmates, TryCaviar, and Amazon Prime Now have all been involved in misclassification litigation.[35]

Some traditional delivery services also rely on a business model utilizing independent contractors. FedEx Ground, for example, used independent contractors at one time and has been the subject of frequent litigation across the country.[36] Companies with similar operating models may also be vulnerable to misclassification claims. For example, the port drayage industry (the movement of cargo containers at US ports) has been experiencing a significant issue with misclassification litigation.[37] A 2014 report by the National Employment Law Project (NELP) found that "49,000 of the nation's 75,000 port truck drivers are misclassified as independent contractors." Similarly, the NELP report found that in California alone, trucking companies are likely liable for nearly one billion dollars in wage and hour violations annually.[38] Misclassification litigation in these industries appears to have been driven by the legal issues raised by the gig economy.

On the other side of the spectrum, many small businesses offering personal care services, such as hair salons, rely on contractors to manage fluctuations in customer demand, appointments, and services. This industry has operated with this independent contractor model for many years without issue. However, there is growing awareness that the current model may not be compliant with today's legal standards or in the best interests of all beauty service professionals.

4.2.4 Inconsistent Court Decisions

A powerful illustration of how variable enforcement is throughout the country can be seen in a review of the FedEx Ground litigation. Throughout the country, FedEx Ground has been hit with lawsuits alleging that it improperly classified its drivers as

[35] Leberstein (2012).

[36] Wood (2015).

[37] Leberstein (2012).

[38] Smith, Marvy, and Zerolnick (2014).

independent contractors. As of 2016, litigation has been filed in at least 20 states across the USA.[39] Some of the cases against FedEx Ground have been going on for many years and involve practices that have since been discontinued. For example, in 2011, FedEx Ground stopped working directly with independent contractors and now contracts with other businesses that employ drivers.[40] Interestingly, this change may have reduced the company's risk of independent contractor misclassification in one sense, but may increase risk related to other employment violations as a joint employer (joint employer concepts discussed below).

The court rulings in the FedEx Ground cases involve complex analyses, and some have been overturned. FedEx Ground drivers in some states (i.e., New Hampshire, Illinois, Kansas, Kentucky, California, and Oregon) have been found to be employees. However, FedEx counsel claimed in 2014 that more than 100 state and federal rulings have confirmed independent contractor status for their drivers.[41]

4.2.5 High-Profile Gig Economy Cases: Lyft and Uber

The two most well-known ride-sharing companies, Lyft and Uber, have both faced legal challenges to their classification of drivers as independent contractors.[42] Litigation has been filed against both companies in many different states across the country (and internationally), all alleging that drivers for these ride-share companies are employees misclassified as independent contractors.[43] To justify classification of drivers as independent contractors, Uber has argued that it is merely a "neutral technology platform" that connects drivers with passengers.[44] Others disagree with this concept, stating that Uber is actually a transportation company that relies on its drivers to provide its riders with its essential services. In *O'Conner v. Uber Technologies*, the court stated that "Uber's drivers provide an 'indispensable service' to Uber" and that "Uber could not be 'Everyone's Private Driver' without the drivers."

In *Cotter v. Lyft*, the judge noted the challenges of applying a "twentieth-century" test used by the California courts to determine employment status, which is "not very helpful to address this twenty-first century problem." It concluded:

> Some factors point in one direction, some point in the other, and some are ambiguous. Perhaps Lyft drivers who work more than a certain number of hours should be employees

[39] Wiessner (2016).

[40] Wiessner (2016).

[41] Kwidzinski and Trimarchi (2014).

[42] Kaufmann (2015).

[43] In July 2016 The Mercury News reported that Uber faced more than 70 cases in US Federal Court alone and had resolved more than 60 others (this does not include state cases), and in the first half of 2016, Lyft faced six lawsuits. Examples of other counties in which Uber is facing litigation include the UK, France, and Brazil (Kendall, 2016).

[44] *Uber v. Berwick*.

> while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide. That is certainly true here.

Lyft and Uber have settled some high-value cases, while others have been dismissed or ordered to arbitration.[45] Lyft reached a $27 million settlement in 2017 with drivers in California.[46] Uber preliminarily reached a settlement in 2016 worth $100 million with drivers in California and Massachusetts; however, the Uber settlement was rejected by the judge.[47] Negotiations in this case are ongoing at the time of publication.[48] Drivers for both companies remain independent contractors, and, due to conflicting rulings in other cases, their status remains uncertain.[49]

Perhaps due to these highly publicized cases and increased governmentenforcement of independent contractor classifications, some companies using an independent contractor model have decided to reclassify their workers as employees.[50] Some well-known gig economy companies that have reclassified their workers include Honor, Instacart, Zirtual, Shyp, Hello Alfred, Munchery, Eden, and Luxe.[51] Other "on-demand" companies hiring employees rather than contractors include a shipping company called Parcel, a laundry service called FlyCleaners, and an office-cleaning service called Managed by Q.[52]

4.2.6 Alternatives to Current Independent Contractor Classification

To help improve compliance with classification issues, several states have passed laws that apply to certain industries and specifically define workers as independent contractors.[53.] At least ten states have now passed these "presumption" laws which provide definitive guidance on classification to employers in sectors with frequent confusion regarding using contractors (e.g., construction, beauty services, transportation).[54] For example, several states have adopted a three-pronged "ABC test." These ABC laws create the presumption that any individual performing services for a company is an employee and require a company to demonstrate that all

[45] Pepper Hamilton, LLP (2017); Rosenblatt (2016); Faulman (2016).

[46] *Cotter v. Lyft*.

[47] *O'Connor v. Uber Technologies, Inc. et al.*

[48] Bayles (2017).

[49] Pepper Hamilton, LLP (2017).

[50] Kapp (2016).

[51] Kamdar (2016); Kosoff (2015a, 2015b); Faulman (2016).

[52] Kessler (2015).

[53] Massey (2017).

[54] Leberstein and Ruckelshaus (2016).

three elements are met. The details of the three elements may vary, and some are limited to specific industries.[55] For example, the three factors as laid out in the Massachusetts (and other) state statutes are (A) that "the individual is free from direction and control," applicable both "under his contract for the performance of service and in fact," (B) that "the service is performed outside the usual course of business of the employer," and (C) that the "individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."[56] Some ABC Tests are limited to specific types of evaluations, such as unemployment compensation decisions, and may not apply in other contexts.[57] Other states may soon be passing similar laws in other industries, such as the home care industry.[58] For example, as of January 2017, 23 states have created specific employment tests that apply only to regulating ride-sharing companies.[59]

Other experts have called for the implementation of "portable" benefits to address the lack of employer benefits received by independent contractors. With this model, workers' benefits are not tied to any particular job or company, meaning that they could work for multiple companies simultaneously and switch employers frequently and retain their benefits.[60]

Alternatively, some experts in the field of labor and employment and company leaders have proposed the creation of a new legal classification for workers which is a cross between an "employee" and an "independent contractor."[61] This new category has been called, by some, the "independent worker."[62] Revisions to US labor and employment law has also been suggested to accommodate the new category. In theory, the independent worker would enjoy both flexibility and greater worker protections. However, other experts state that such a category is unnecessary[63], and data from the US GAO 2015 Report shows that 85% of independent contractors and self-employed are satisfied with their current classification and do not want a change.[64]

[55] For example, some New York and Maryland tests apply only to the construction or landscape industry (Deknate & Hoff-Downing, 2015).

[56] Deknate and Hoff-Downing (2015).

[57] National Employment Law Project (2017).

[58] Ruckelshaus (2016).

[59] National Employment Law Project (2017).

[60] Rolf, Clark, and Bryan (2016).

[61] Harris and Krueger (2015).

[62] Harris and Krueger (2015).

[63] Sachs (2015).

[64] US Government Accountability Office (2015).

4.2.7 What Data Are Required to Evaluate Whether Independent Contractors Are Classified Appropriately?

Given the variety of factors that may contribute to the classification of an independent contractor, it is not surprising that there are multiple methods available to assess these factors (see Table 4.1). Key factors in this evaluation across all agencies and courts include (1) the control the employer exerts over the execution of work, (2) the level of supervision and monitoring, and (3) whether the work performed by the worker is integral to the business operations of the company. Though there is general consensus that these factors are relevant, the weight that a court assigns to these key factors may vary.

It is not generally the role of a consulting or testifying expert to make the ultimate determination regarding whether a worker should be classified as an independent contractor or employee. Rather, the goal of the analysis should be to accurately measure and characterize the relevant factors so that decision-makers (e.g., company leadership, judges, jurors) can make an informed decision about the proper classification of workers.

A critical component of an evaluation of independent contractor status is a measure of the degree of control the company exerts over the worker. The way in which control manifests itself tends to be dependent upon the industry as well as the company. Operationalizing the concept of "control" often requires an in-depth understanding of the company's operations. Some forms of control are more evident, such as how and when the worker is paid. Other forms of control may be subtle or variable and thus require a more detailed inquiry. Similarly, supervision may be reflected in various printed policies but may also manifest in the nature and content of interaction between the worker and the company. Factors such as the frequency and duration of interaction between the worker and the company are often relevant for characterizing the degree to which a worker is supervised. However, the nature of that interaction, such as who initiates contact and the specific information being shared, may provide even more useful information.

To collect relevant data in most organizations, we suggest a comprehensive approach that involves collecting and analyzing data from multiple perspectives and sources: (1) workers, (2) company leadership, (3) employer "points of contact," and (4) secondary sources of data. Collecting data from multiple sources is recommended for two reasons. First, a single source typically does not provide comprehensive information on this issue. That is, workers often lack insight into the company's business strategy. Similarly, company leadership may not have direct knowledge of workers' personal practices. Second, two different sources may perceive the same factor differently. Asking the same questions to multiple groups, for example, enables an assessment of the accuracy of self-reports and may identify areas of disconnect that can be addressed. The sources of data and the information typically gathered from each source are represented in Table 4.2.

Collecting data directly from workers can yield valuable information for assessing employment status. Workers have direct knowledge of their relationship with

Table 4.2 Sources of data collection for independent contractor evaluation

	Source	Information typically collected
1	Workers	Relationship with the employer, aspects of control, personal practices, work environment
2	Company leadership	Business strategy, operating model, company policies, role of workers in the company's business
3	Points of contact	Frequency and duration of interaction with workers, nature of interaction with workers
4	Secondary sources	Company policies and procedures

the company, including the frequency with which they interact with company employees, and the nature of those interactions. They can also report on the degree to which their work activities are controlled by the company and the ways in which this occurs. Workers can also provide information about their personal practices such as whether they concurrently work for other companies, whether they operate as an individual or another entity such as a limited liability corporation (LLC), and what investments they have made in their work (e.g., training, equipment). Workers are also able to provide information about their work environment such as the proportion of time they are in the company's facilities or whether they are using company equipment.

Although workers can provide much of this information through self-report, it is important to keep in mind that they are reporting their perceptions of some fac- tors. For some of the relevant topics, such as relationship with the company or degree of control, it is possible that the worker can misperceive certain aspects of the issue. For example, an employee could report that the company controls their work schedule, when in reality the only control in place is that workers cannot be in the facility outside of business hours. This example highlights three important points: (1) It is important to understand the business operations in order to create appropriate questions to ask, (2) detailed data such as open ended responses or follow-up may be necessary to gain a full understanding of the work and its context, and (3) collecting data from multiple sources may be required to accurately characterize the relationship.

The second source of data useful in the analysis is company leadership. Leadership is likely to provide useful information regarding business strategy, the company's operating model, and how workers are intended to fit into these operations. This information is useful in determining the role of the worker in the business and the extent to which the worker is an integral part of business operations. This is the first factor listed by the DOL and was particularly relevant in the *Uber* litigation.

The third source of data is what we call the employer's "points of contact." These are company employees who directly interact most frequently with workers. Points of contact sometimes work in multiple departments, divisions, and locations within the company. For example, truck drivers may call the logistics department when they are seeking information about a particular delivery or the technology department if they are having problems with their scanner. The frequency and nature of the

interactions may differ, making it important to gather information from as many points of contact as possible. The points of contact are able to provide information about the frequency, duration, and nature of the interaction with the workers along with company policies related to the workers. This information is typically useful because it provides an alternate perspective to the workers' perceptions of the same factors.

Additional data regarding policies and procedures can be gleaned from company documents and materials containing policies and procedures related to topics such as training, compensation, and work guidelines. Electronic data sources, such as communications distributed and collected from workers, may provide some measure of company control. Security video and facility entrance and exit swipe data may be useful for evaluating the work performed, its location, and timing. External sources can also be mined for useful information such as industry norms and standards regarding classification practices. Data collected from these sources can be compared to data collected from employees to determine the degree to which policies are reflected in actual practice.

Data collected from multiple sources can provide a substantial amount of information and a robust perspective on the factors relevant to an independent contractor classification. These data will enable the researcher to characterize many of these factors which can help business leaders determine whether to classify workers as employees or independent contractors or help the court determine whether existing independent contractor classifications are appropriate.

4.3 Joint Employment

Joint employment exists when an employee is "employed" by two or more employers, and both employers are jointly responsible (whether this is explicitly stated or not) to the employee for compliance with employment laws.[65] Joint employment is commonly seen in franchises, companies using staffing agencies, and companies which subcontract activities to vendors. Industries where these business models are common include construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries.[66]

The changing nature of work has also affected joint employment, as many employers today have alternative relationships with their workforce. As a result of these complex relationships, it can be difficult to define the "employer" when evaluating joint employment. Similar to the independent contractor context, there is a lack of clarity and consistency regarding whether an entity is an employer because the factors and interpretations vary by jurisdiction and agency.[67]

[65] US Department of Labor (2016b).

[66] US Department of Labor (2016b).

[67] Jonathan et al. (2017).

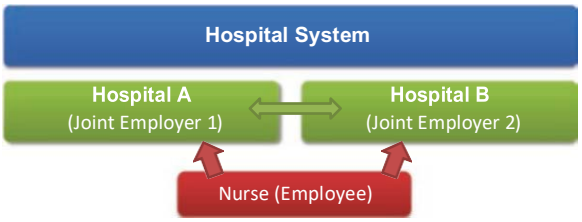

Fig. 4.1 Example of horizontal joint employment

Currently, the DOL states that an employee can be formally employed by one employer (the primary employer) but also effectively employed by another employer (the secondary employer) if that secondary employer exercises sufficient control over the employee's work, among other factors.[68] This means, for example, that a business that uses a staffing agency to staff its store, but controls when, where, and how these individuals work, may be legally classified as a joint employer.

Being classified as a joint employer is significant because it makes both companies responsible for compliance with federal, state, and local labor and employment laws for the "jointly employed" employees.[69] Using a staffing agency as an example, this means that if any employment laws are not followed, such as providing proper meal and rest breaks, both companies may be liable for the violation, even though the workers were employees of the temporary agency through contract.[70] In addition, joint employer liability can involve the FLSA, the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), and others.

Joint employment relationships for purposes of the FLSA have been broadly grouped into two categories by the DOL: horizontal and vertical. Each model is intended to describe a different form of joint employment relationship and each is described separately below.

4.3.1 Horizontal Joint Employment

When an employee has two (or more) technically separate but closely related or associated employers, it is considered a "horizontal joint employment relationship."[71] A common example of horizontal joint employment is when a nurse works for more than one hospital within the same hospital system during the workweek. If these hospitals are closely associated and coordinate regarding staffing and resources, they may be joint employers.[72] Figure 4.1 depicts this type of relationship. The two

[68] Dickinson et al. (2016).
[69] Jonathan et al. (2017).
[70] Dickinson et al. (2016).
[71] US Department of Labor (2016b).
[72] Bartlett and Young (2016).

entities may be technically separate but can be considered joint employers if they are under the same management and ownership, and/or share some other economic ties, are affiliated with or related to each other, jointly coordinate the scheduling of the employee's hours, and both benefit from that employee's work.[73]

Once a horizontal joint employment relationship is established, each of the employers is responsible for complying with all requirements of the FLSA, among other laws. For example, joint employers are responsible for ensuring compliance with minimum wage and meal and rest breaks.[74] This means that if the nurse in Fig. 4.1 works cumulatively more than 40 h for the two hospitals, he or she would be entitled to overtime pay from both.[75]

The DOL lists several factors which should be considered when evaluating a possible horizontal joint employer relationship, including any overlapping officers, directors, executives, or managers, and shared control over operations (e.g., hiring, firing, payroll, advertising, overhead costs), among others.[76]

4.3.2 Vertical Joint Employment

A more common type of joint employment relationship is called "vertical joint employment." A vertical joint employment relationship may exist when a company has contracted for workers who are directly employed by an intermediary company. In a vertical joint employment relationship, the worker is economically dependent on both employers: the intermediary employer (such as a staffing agency) and another employer who engages the intermediary to provide the workers.[77] The workers are employees of the staffing company but may also be joint employees of the company that engaged the staffing company.

Vertical joint employment is common in industries such as agriculture, construction, warehouse, logistics, and hotels.[78] For example, a national cable company may contract with a local business to provide installation services on behalf of the cable company. The installers interface with customers and install the cable company equipment using the cable company programs, but the installers are actually employed by the local installation company. If the installers at the local installation company are not compliant with time clock policies, for example, then both the national cable company and the local installation company could be liable for unpaid overtime. This relationship is depicted in Fig. 4.2.

[73] Weil (2016). We note that this Administrator's Interpretation was withdrawn by the US Department of Labor June 7, 2017. However, some of the information provided in the letter is still useful for understanding potential forms of joint employment.

[74] 29 CFR § 791.2 (a)

[75] Bartlett and Young (2016).

[76] US Department of Labor (2016b).

[77] Weil (2016).

[78] Weil (2016).

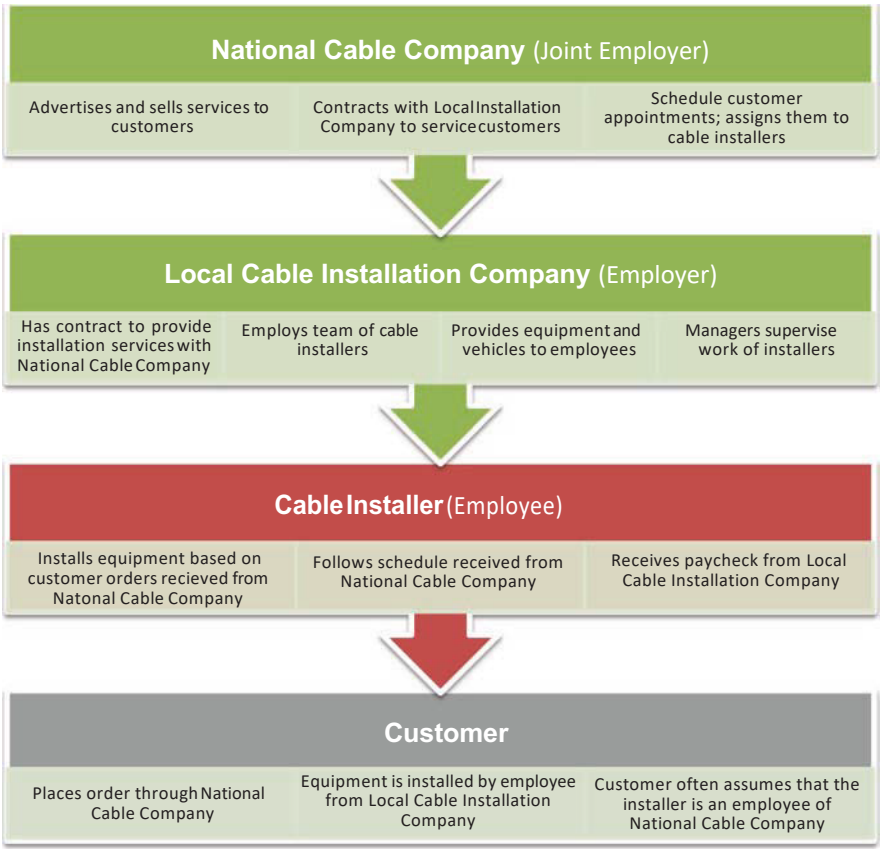

Fig. 4.2 Example of vertical joint employment

The DOL lays out several factors to consider when determining whether a vertical joint employment scenario exists.[79]

- Whether the potential employer directs, controls, or supervises the work performed
- Whether the potential employer controls employment conditions (including the power to hire and fire)
- The permanency and duration of the relationship
- Whether the work is repetitive and rote in nature
- Whether the work is integral to the business of the potential employer
- Whether the work is performed on the potential employer's premises
- Whether the potential employer performs administrative functions commonly performed by employers

[79] US Department of Labor (2016b).

In addition, the DOL also states that when evaluating a potential vertical joint employment relationship, the analysis must examine the "economic realities" of the relationships between the workers and each of the potential employers to determine whether the workers are economically dependent on both potential joint employers. If the employees are economically dependent on both, then both companies are likely employers of the workers.[80] This is in contrast to horizontal joint employment, where the relationship between the potential joint employers is the focus of a compliance evaluation.[81]

4.3.3 Issues for the Franchisee Model

The joint employer issue, and franchises in particular, has been an area of focus recently for the NLRB.[82] The NLRB's position has been that joint employment relationships are established when a company "possesse[s] and/or exercise[s] control over the labor relations policies" of its franchisees. Thus, merely "possessing" control over labor relations policies is sufficient to establish a joint employment relationship.[83]

In recent years there have been several high-profile cases against franchised fast food companies, including McDonald's and Domino's Pizza. [84] In March 2017, one court ruled that McDonald's was not a joint employer of employees from several of its franchises; however, the plaintiffs in this case stated that they would appeal the ruling.[85] Multiple other suits are still active. Similarly, while several cases against Domino's have settled, others are ongoing.[86] The outcomes of these high-profile cases may provide greater clarity regarding franchisor joint employer liability. Given how common the franchise model is, these decisions could have a major impact on fast food restaurant chains around the country. More than 80 percent of McDonald's restaurants around the globe are owned by franchisees, according to the company.[87] And while an NLRB ruling on this issue would not become law, it is significant in that it will likely be used for guidance by courts and lawmakers. It is difficult to predict how upcoming decisions made by the NLRB will impact the franchisor and franchisee relationship.

One noted issue in these cases has been the practice of providing technology and other operations tools to franchisees to help them run their business and to facilitate brand consistency. Though there are clear advantages to this practice in terms of

[80] US Department of Labor (2016b).

[81] US Department of Labor (2016b).

[82] NLRB Case No 32-RC-109684.

[83] Lipkin, LaRocca, and Lotito (2015).

[84] Casuga (2016).

[85] *Salazar et al. v. McDonald's Corp. et al.*

[86] New York State Office of the Attorney General (2016).

[87] "Company Overview" (2017).

business performance, these systems and tools may leave the franchisors vulnerable as joint employers due to the potential interpretation of "control" over the franchisee created by providing the franchise with the technology.[88] Legal experts acknowledge that the use of franchisor software by franchises is a significant challenge to compliance.[89] Another consideration is the extent to which the software is customizable by the franchisee.[90] These issues will likely be clarified as new rulings are issued.

4.3.4 What Data Should Be Collected to Evaluate Joint Employment?

Similar to an independent contractor analysis, there is no defined formula to determine whether a company is a joint employer due to inconsistent and changing interpretations of case law and enforcement practices. However, a comprehensive review across the different sources reveals some common themes that provide useful guidance. In many ways an evaluation of joint employment is similar to the evaluation recommended to study independent contractor status. Below, we describe some of the differences.

The factors relevant in an evaluation differ for horizontal and vertical joint employment, so the first step is to determine which model is being tested. Generally, data should be collected from both companies to determine the relationship between them and the role the employees play in the operations of either of the companies' businesses. Analyzing a potential joint employment relationship involves collecting and reviewing a significant amount of information from multiple sources to provide a comprehensive view of the work that employees perform and the relationship between them and the companies involved.

Employees are able to provide information about the nature of the work they are performing and the role each company plays in managing that work. The employee can provide insight into the degree to which tasks are supervised, who is providing that supervision, and the location of where work is performed. Employees may also be able to provide information regarding operational procedures. For example, an employee may know the extent to which two parties coordinate regarding work schedules and staffing. This information could be relevant to evaluating a horizontal joint employment relationship.

Because the economic relationship between entities is a major component of some joint employment analyses, reviewing financial records, legal documents regarding ownership, and operational procedures such as HR, inventory, and customer service may also provide key insight.

---

[88] Dubé (2016).

[89] Casuga (2016).

[90] Casuga (2016).

While the legal status of employees' relationships with franchisors and franchisee is not yet clear, the factors relevant to this unique relationship appear to be primarily focused at the management and operations level. It may therefore be useful to collect specific details regarding where programs and materials used at the franchise came from, such as the POS (point of sale) program, time clock/keeping system, and inventory software. Many franchisors require that their franchises use and maintain systems and materials purchased directly from the franchisor, so collecting this information may be fairly straightforward. Gathering specific information from leadership and/or managers regarding the flexibility given at the restaurant level to modify, customize, or adapt these programs to better fit individual needs may be important.

4.4 Other Non-employee Classifications

In addition to the working relationships already described, there are several other nonemployment relationships that have been subjected to legal scrutiny, including athletes at the minor league or collegiate levels, interns, and trainees. In each of these relationships, the individuals providing services are not employees and therefore are not entitled to minimum wage, overtime, or any other employee protections. In the following sections, we provide an overview of the issues involved in these classifications.

4.4.1 Minor League and Collegiate Athletes

Minor league or collegiate athletes, some of whom are also referred to as "amateurs," play a significant role in the US sports industry. Among this group are university student athletes, minor league players, and Olympic athletes. For some of these athletes, the governing body that oversees competition has strict criteria to define amateur status. The National Collegiate Athletic Association (NCAA), which oversees most college sports, for example, states the following:

> All incoming student athletes must be certified as amateurs. With global recruiting becoming more common, determining the amateur status of prospective student athletes can be challenging. All student athletes, including international students, are required to adhere to NCAA amateurism requirements to remain eligible for intercollegiate competition.

In general, amateurism requirements do not allow:

- Contracts with professional teams
- Salary for participating in athletics
- Prize money above actual and necessary expenses
- Play with professionals
- Tryouts, practice, or competition with a professional team

- Benefits from an agent or prospective agent
- Agreement to be represented by an agent
- Delayed initial full-time collegiate enrollment to participate in organized sports competition[91]

The classification of athletes has received recent media coverage, likely due to increased public awareness regarding various labor laws as well as recent public debate about the potential health consequences of engaging in some sports activities (e.g., concussions). Challenging standard practice, athletes from several organizations have filed litigation claiming that they should be legally classified as employees. Among these lawsuits are NCAA athletes and minor league baseball players in the USA and major junior hockey players in both the USA and Canada. Currently, these athletes are not considered employees and are therefore not subject to any of the same federal and state protections regarding working hours, compensation, or benefits that an employee would receive. It is common for athletes at this level to spend a substantial amount of time on team-related activities which would result in substantial costs for organizations if these athletes were classified as employees and thus entitled to minimum wage, overtime, and benefits.

In addition, if these players were considered employees, the NLRA would become applicable and therefore give the athletes the right to unionize, engage in collective bargaining, and challenge policies that control their behavior and activities.[92] Recent legal challenges regarding the classification of nonprofessional athletes have included lawsuits brought under the FLSA and to the NLRB.[93]

For some classifications, such as independent contractors and interns, the DOL has provided a list of relevant factors that can be used as a "test" to determine whether an individual meets the definition for a specific classification. One of the challenges to studying the employment status of these athletes is that there is no test specifically applicable to this group, making it difficult to determine which factors are relevant.

The primary issue in many of the recent lawsuits appears to be whether time spent on team activities (e.g., practice, workouts, travel, games) should be considered "work" under the FLSA.[94]

Another factor raised in this litigation is determining who *benefits* most from the relationship. Though athletes spend many hours on team activities for little or no direct compensation, some receive nonmonetary rewards such as training, development, or scholarships. Of course, the concept of receiving training, experience, and guidance from experienced professionals for little or no compensation with the hope of securing a professional job in the future is not new. Similar models (such as trainees and apprenticeships described later) have been in place throughout history.

[91] "Amateurism" (n.d.).

[92] Bahmani and Boggs (2016).

[93] For example, see *Dawson v. NCAA.*

[94] For example, see *Berger v. Nat'l Collegiate Athletic Ass'n.*

Another factor frequently raised in this area of litigation is the amount of money made by the teams and/or leagues based on the "work" performed by uncompensated or undercompensated players. Some amateur organizations, such as the NCAA, generate millions of dollars a year in revenue.[95] Meanwhile, many athletes do not. *Business Insider* investigated this issue and reported in 2016 that the 231 NCAA Division I schools with data available generated a total of $9.15 billion in revenue during the 2015 fiscal year from college athletics. That study reported that Texas A&M made the most with $192.6 million in revenue from college athletics, according to the article.[96] An example of the disparity in compensation between coaches and players was highlighted in a July 2016 article in the *Washington Post*, which reported that USA Olympic Swimming Executive Director Chuck Wielgus made $854,000, while the swimmers on the team made $42,000 per year. Similarly, the article stated that USA Olympics Triathlon CEO Rob Urbach makes $362,000 per year, while team triathletes compete receiving between $20,000 and $40,000 annually.[97]

A significant factor relevant to student athletes, and the analysis of classification of NCAA players in particular, is the fact that student athletes are sometimes required to miss classes to attend games.[98] This prioritization raises the question of whether players' relationships with their colleges are primarily educational and beneficial to the students or a financial benefit for the University.[99]

Recent examples of cases include *Berger et al. v. National Collegiate Athletic Association et al.*, in which track and field athletes at the University of Pennsylvania claimed that they should be employees because they did not meet many of the DOL's criteria for unpaid interns. In this case the trial court found that "there is not one set of immutable factors that applies to all interns in all situations, and there is certainly not one test that applies equally to interns and student athletes."

Instead of using the DOL's intern criteria in place at the time, the court applied the economic realities test to examine the relationship between the athletes and the University. This examination included several different factors that together represented the "totality of the circumstances," and the court found that these athletes were not employees under the FLSA. On appeal, the Seventh Circuit upheld the prior ruling, stating in part that "student-athletic 'play' is not 'work,' at least as the term is used in the FLSA."[100] In this decision, the court relied on the DOL's Field Operations Handbook (FOH), which specifies that student athletes are not employees.[101]

---

[95] "Revenue" (n.d.).

[96] Gaines (2016).

[97] Hobson (2016).

[98] Edelman (2014).

[99] For an excellent summary of this issue, the interested reader may review "Gaming the System: The Exemption of Professional Sports Teams from the Fair Labor Standards Act" by Charlotte S. Alexander and Nathaniel Grow (2015).

[100] See ruling in *Berger et al. v. National Collegiate Athletic Association et al*., Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 14-cv-1710.

[101] US Department of Labor (2016c); § 10b24b.

The outcome of *Berger* and others has created a precedent which may be difficult for future NCAA athletes to overcome should they attempt to challenge their non-employment classification. To date, NCAA athletes have not been determined to be employees by any courts or federal agencies.[102]

Another notable case involved minor league baseball players.[103] In this case, a class of thousands of minor league baseball players filed a lawsuit against Major League Baseball (MLB) claiming that they should be employees and therefore should be paid minimum wage and overtime. The class of players was certified as a class in March 2017; however, the MLB was subsequently allowed to appeal the decision in June 2017. [104] The outcome of this case will likely provide important guidance moving forward.

Similarly, a pending lawsuit in Canada regarding hockey players in the Canadian Hockey League (CHL), which is a premier feeder league into the National Hockey League (NHL). The CHL consists of player's ages 16–20. The players participate in practices, workouts, and play upward of 70 games each 6-month regular season.[105] In exchange for their play, some of these junior league players live with host families, earn minimal pay (i.e., below minimum wage), and accrue a year of college scholarship money for every year they play in the league.[106] The players' have sued the league alleging that they should be considered employees and paid minimum wage.[107] Some of the specific issues evaluated in this case included whether the teams were profitable, the degree of control the team exercised over the players both on and off the ice, and the benefits received by players and the league. In 2017 the case was certified as a class action and remains pending. Though the case is in Canada, the labor laws in Canada are similar to those in the USA, and the outcome in these cases could have an impact on similar athletes in the USA.[108]

4.4.2 Interns

Many students choose to pursue internships as an opportunity to gain real-world work experience. Internships are typically a mix of performing some work for the employer's benefit and receiving valuable training and experience in exchange. Some internships also offer benefits such as academic credits or some compensation.

[102] Football players at Northwestern University also petitioned the NLRB to be employees under the NLRA and therefore able to unionize. A regional director for the NLRB concluded that the player were employees. This ruling was appealed and later dismissed on jurisdictional grounds.

[103] *Senne et al. v. Office of the Commissioner of Baseball*

[104] Rhodes (2017).

[105] Cohen (2015).

[106] Cohen (2015).

[107] For example, see *Walter v Western Hockey League*; *Berg v Ontario Hockey League.*

[108] For purposes of full disclosure, one of the authors of this Chapter (Hanvey) served as a testifying expert in *Berg* and *Walter*.

This relationship can be mutually beneficial but also has the potential to be abused by companies that intentionally misclassify employees as "interns" to minimize or avoid compensating them.[109]

Unlike other non-employee relationships, the DOL has published specific criteria to evaluate whether a worker can be classified as an intern. Arguably, the most important factor is whether the intern or the employer is the primary beneficiary of the relationship. According to the DOL, to qualify as an unpaid internship, the following factors must be evaluated, but no single factor is determinative:[110]

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

If all the above factors are in place, an unpaid intern is not considered an employee for the purposes of the FLSA. However, if any of the factors are not met, the intern would be an employee and entitled to minimum wage and overtime.[111]

One case involving unpaid interns which received extensive coverage in the media is *Glatt v. Fox Searchlight Pictures, Inc*. The case started in February of 2010 when two former interns who had worked in various departments at Fox sued the company claiming that they were essentially being used as free labor to keep costs down. In June 2013, the district court judge ruled that Fox had misclassified the plaintiffs under the FLSA, stating that the plaintiffs' received little educational value from their internships. In the ruling the judge referenced the DOL Fact Sheet but rejected the "primary beneficiary test" (i.e., the intern being the primary beneficiary from the relationship) as being "subjective and unpredictable." Fox appealed the ruling to the Second Circuit.

In July 2015, the Second Circuit vacated the previous ruling, saying the interns were not employees and that a new primary beneficiary test should be applied to

[109] *See, e.g.*, *Cooper v. LAC Basketball Club, Inc.* and *Schumann et al. v. Collier Anesthesia.*

[110] US Department of Labor (2018).

[111] Jackson (2016).

determine employee status. After rejecting the DOL's test, the court applied its own, more "employer friendly" seven factor, primary beneficiary test.[112] The appeals court remanded the case to district court to reach a decision using the new test. In January 2016, the Second Circuit amended its opinion. The court acknowledged that the relationship between interns and employers should not be analyzed in the same way as employer-employee relationships, noting that an intern enters the relationship "with the expectation of receiving educational or vocational benefits," while employees do not.

In July 2016, the plaintiffs asked the Judge to end the suit and asked that he approve payments of $3,500–$7,500 for the named plaintiffs. *Glatt* led to unpaid interns at other major media companies bringing similar class actions that challenged the previously common practice, including interns at NBCUniversal, Viacom, Warner Music Group, and Condé Nast.[113] Each company negotiated multimillion-dollar settlements with their former interns. These companies now compensate their interns or have abandoned their intern programs completely.[114]

4.4.3 Trainees

The Supreme Court has ruled that the FLSA definition of employment (to suffer or permit to work) does not mean that anyone who works "for their own advantage" on the premises of another is an employee.[115] This language is specifically relevant for individuals who are performing work for the purpose of learning a business, such as a trainee . While the accurate classification of a trainee depends upon all of the circumstances surrounding their work activities, the specific criteria to be evaluated is nearly identical to those used for interns prior to January 2018.[116]

4.4.4 What Data Are Needed to Evaluate the Status of These "Other" Categories of Employees?

The data needed to address each of these nonemployment relationships (e.g., amateur athlete, student, intern, trainee) is similar in some respects to independent contractors and joint employers but unique in other respects. To evaluate the status of

[112] Parlo and Shaulson (2015). The factors can be found at: https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2011cv06784/385387/163/

[113] Raymond (2015).

[114] Miller (2016).

[115] *Walling v. Portland Terminal Co. See also,* US Department of Labor (n.d.b).

[116] The same factors apply to students. A detailed list can be found at http://webapps.dol.gov/elaws/whd/flsa/docs/trainees.asp. If all of the criteria used are applicable, the trainees are likely not employees.

interns and trainees, data can be collected from the interns/trainees themselves and from the company. Information regarding the skills, knowledge, and abilities being gained through the work can be gathered by directly from the intern/trainee. In addition, the intern/trainee's understanding regarding compensation and expectations regarding future employment can be self-reported by the intern/trainee. Information regarding the level of supervision by the organization can be collected from both the intern/trainee and from the organization. To determine who is benefiting from the work being performed, an evaluation of the work itself and the impact it has on the organization and others working at the facility is helpful.

Similarly, information can be gathered from the organization's leadership to assess the impact the work has on the organization's objectives. An evaluation of hiring data or interviews with hiring managers/HR can provide information regarding company staffing to determine whether the intern/trainee has displaced employee(s).

Information relevant to determining the employment status of athletes requires data from the players and the organization for which they play. The specific data needed to evaluate the classification of an athlete varies depending on the scenario, which organizations are involved, and the player's current classification (e.g., intern, trainee, student).

Data can be gathered directly from a sample of current players (former players may also be used to supplement the data collection) regarding the nature, frequency, and amount of time spent preparing, training, traveling, and competing in games. Information regarding issues that relate to perception and understanding of the non-employment relationship can be gathered from the players themselves. Data may include topics such as each player's expectation for employment after graduation, each player's understanding of the nature of his or her relationship with the organization, the benefit each player believes he/she is receiving from playing, and the extent to which the organization exerts control over the player both on and off the playing field. If the players have an on-site manager or "coach" from whom they receive direct instructions, he or she may also be a useful source of information.

The organization for which the athletes play can be analyzed to understand its role and relationship with the players. Information regarding other sports or programs and locations the organization runs can also be reviewed. Data can be collected regarding the level of supervision provided, the contracts executed by the players, the expectations communicated to the players, scheduling expectations, and the impact the athlete's playing has on the organization (i.e., does the organiza- tion benefit from the play).

Expectations from the organization regarding schedule, training time, and game times may also be found in hard copy or electronic materials generated by the organization and distributed to players. Review of this material can be informative. Compensation paid by the organization (either monetary or other form) may be collected through the organization's financial data or from the players. Data regarding the number of players who receive professional or other contracts which pay them to play can likely be collected from the organization or other external sources.

An external assessment of other programs and vocational programs offered in the same area of sport can be conducted by reviewing public industry and competitor data available online.

4.5 Recommended Data Collection Methods to Assess Employment Status

The foundations for the methods described in this section can be found in Chap. 2. In the following section, we discuss several components of these methods that are unique to an evaluation of employment status.

4.5.1 Time and Motion Observations

Observations involve systematically recording details about the tasks individuals perform. In the context of an employment classification study, the level of detail that can be collected using this method can be useful for evaluating a variety of relevant factors. For example, an observation captures the amount of time the worker spends interacting with the "points of contact" at the organization (whether they are from a company or a sports coach) as well as the frequency and medium (e.g., email, text, verbal). Further, the nature of interactions with the contacts can be documented. For example, whether a worker is asking for permission or simply providing a status update may be relevant to classification decisions. Evaluating the nature of the interactions is critical to assessing independent decision-making and control exerted by the organization. The absence of frequent interaction with the company can, in itself, be a useful finding.

Observations can also be conducted of employees working at the organization in the "points of contact" positions. As with the observation of the worker, capturing the employer side of any communication with workers can also be informative.

4.5.2 Structured Interviews

Collecting self-report data using an interview format enables information to be collected regarding a broad array of issues which may not be evident through observations alone. An interview method allows the interviewer to ask for additional detail or clarification, as needed, to ensure that responses provide complete and useful information. Interviews with workers usually involve asking detailed questions about a range of issues, such as other sources of income the worker may have, training he/she received, permission required from the organization to perform certain activities, activities which may be prohibited by the organization, individual

decision-making, and the organization's policies regarding the method of executing work. It may also be possible to ask questions about frequency and time spent interacting with the company and with points of contact. Example scenarios and descriptions of typical procedures and activities can be useful ways to illustrate information. Another advantage of the interview format is that it can cover broad time period which can be beneficial in litigation in which a long period of time is relevant to the lawsuit.

A challenge in implementing this method is securing participation from workers. Given his or her non-employee status, he or she may not be willing to contribute the time and effort required to execute this method, and the company typically cannot require the worker to do so.

Interviews with employees, including leadership and points of contact at the relevant organization(s) are often necessary not only to collect key issues relevant to evaluating status but also to provide explanations and detail regarding the organization's operations and programs used at the company which may not be clear or evident to the workers. Evaluating employee status requires an understanding of the role the worker plays in the operations of each company's business. Interviewing multiple parties is preferable to ensure that information is comprehensive.

4.5.3 Survey

Another method which involves collecting self-report information is a survey. Similar to an interview, survey questions can be crafted to collect relevant information regarding a range of topics and can ask participants about a broad time period. However, because the survey completion is unlikely to be monitored, the survey must be designed to be as simple, clear, and short as possible. Therefore, the length of the survey should be limited, and closed-ended questions are frequently used. Although these data can be collected easily and quantitative, this method does not allow for any follow-up or clarification of responses if needed.

A survey administration typically requires less time and fewer resources than observations and interviews and can be administered to a larger group of people. The method therefore results in a larger and potentially more varied dataset. However, asking company leadership and subject matter experts to complete a survey may not be desirable due to the sensitive nature of some of the questions. In addition, because independent contractor participants are unlikely to be compensated for this time, response rates from this group may be low.

4.5.4 Hybrid Approach

Some studies benefit from using a "hybrid approach," which involves using multiple data collection methods. Given the range of participants and topics relevant to an employment relationship analysis, it may make sense to combine approaches.

For example, a study that includes observations of workers, and interviews with subject matter experts can result in a comprehensive dataset which includes information from multiple perspectives. The approach must be customized to fit each unique situation. The method(s) selected should be driven by the nature of the information being collected.

4.6 Conclusion

This chapter has provided an overview of some of the current legal landscape in the workplace related to employment status. While some of the issues presented are applicable to a relatively narrow range of people (e.g., amateur athletes, interns), others have broad implications which impact many different industries (e.g., independent contractor misclassification). Our goal was to introduce these concepts and provide suggestions on how to utilize well-established research methods to generate data and information relevant to these classification issues.

While the facts and guidelines presented in this chapter are current at the time of writing, we recognize that the landscape in employment law is always shifting. Because of this, we have suggested flexible research methods which collect data relevant to the key questions which are unlikely to change based on political or legal trends.

References

Alexander, C. S., & Grow, N. (2015). Gaming the system: The exemption of professional sports teams from the Fair Labor Standards Act. *UC Davis Law Review, 49*, 123–181. Retrieved from https://lawreview.law.ucdavis.edu/issues/49/1/Articles/49-1_Alexander_Grow.pdf

Amateurism. (n.d.). Retrieved from NCAA website: http://www.ncaa.org/amateurism

Bahmani, S., & Boggs, S. P. (2016, December 22). Reigniting the debate over student- athletes as employees. *Law360*. Retrieved from https://www.law360.com/articles/869195/ reigniting-the-debate-over-student-athletes-as-employees

Bartlett, B., & Young, K. (2016, January 20). *WHD issues another momentous interpretation, mapping joint employer status on horizontal and vertical planes. [Web log post]*. Retrieved from Seyfarth Shaw Wage and Hour Litigation Blog: http://www.wagehourlitigation.com/ joint-employment/another-momentous-ai/

Bayles, C. (2017, March 23). Uber, drivers play 'Hopscotch,' and 9th Circ. Not amused. *Law360.* Retrieved from https://www.law360.com/articles/905384/ uber-drivers-play-hopscotch-and-9th-circ-not-amused

Carre, F. (2015). *(In)dependent contractor misclassification* (Briefing Paper No. 403). Retrieved from The Economic Policy Institute website: http://www.epi.org/publication/ independent-contractor-misclassification/

Casuga, J. B. (2016, November 30). Franchise technology may tip scales in joint employer cases. *Bloomberg Labor & Employment.* Retrieved from https://www.bna.com/ franchise-technology-may-n73014447847/

References

Cohen, J. (2015, March 13). The fight to keep junior hockey players from getting paid. Washington's junior hockey teams are turning to the government as a way to get out of paying players who are mobilizing against them. *Vice*. Retrieved from https://sports.vice.com/en_us/article/the-fight-to-keep-junior-hockey-players-from-getting-paid

Company Overview and Segment Information. (2017). Retrieved from http://corporate.mcdonalds.com/mcd/investors/company-overview/company-overview-segment-information.html

Deknate, A., & Hoff-Downing, L. (2015). ABC on the books and in the courts: An analysis of recent independent contractor and misclassification statutes. *University of Pennsylvania Journal of Law and Social Change*, 18(1).

Dickinson, J. G., De Haro, H. D., Gottlieb, B., Doyle, J. D., Hewitt, D. J., Matura, M., et al. (2016). *"Independent contractors" and contingent workers under the NLRA: Whose employees are they anyway?* Presented at the annual labor and employment law conference of american bar association section of labor and employment law, Chicago, IL.

Dishman, L. (2017, January 5). How the gig economy will change in 2017. *Fast Company*. Retrieved from https://www.fastcompany.com/3066905/how-the-gig-economy-will-change-in-2017

Dubé, L. E. (2016, October 14). McDonald's labor board deal may speed joint employer ruling. *Bloomberg Labor & Employment.* Retrieved from https://www.bna.com/ mcdonalds-labor-board-n57982078619/

Edelman, M. (2014, January 30). 21 reasons why student-athletes are employees and should be allowed to unionize. *Forbes*. Retrieved from https://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/#3baa33fe8d05

Farrell, D., & Greig, F. (2016). *The online platform economy. Has growth peaked?* Retrieved from JP Morgan Chase & Co. website: https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-online-platform-econ-brief.pdf

Faulman, S. (2016, April). *Worker vulnerability in the "gig economy"*. Paper presented at the annual conference of the american bar association. Washington, DC. Retrieved from http://www.americanbar.org/content/dam/aba/events/labor_law/2016/04/tech/papers/gig_economy_faulman.authcheckdam.pdf

Fox, K. (2017, June 8). Gig economy, independent contractors, and new york law. *The National Law Review.* Retrieved from https://www.natlawreview.com/article/ gig-economy-independent-contractors-and-new-york-law

Gaines, C. (2016, October 14). The difference in how much money schools make off of college sports is jarring, and it is the biggest obstacle to paying athletes. *Business Insider*. Retrieved from http://www.businessinsider.com/ncaa-schools-college-sports-revenue-2016-10

Gurrieri, V. (2017, June 7). DOL Yanks Obama-Era Joint Employer, classification guidance. *Law360.* Retrieved from https://www.law360.com/employment/articles/932130

Habans, R. (2016). *Is California's gig economy growing? Exploring Trends in Independent Contracting*. Retrieved from UCLA Institute for Research on Labor and Employment website: http://irle.ucla.edu/old/publications/documents/Habans_IndependentContractor.pdf

Harris, S. D., & Krueger, A. B. (2015, December). *A proposal for modernizing labor laws for twenty-first-century work: The "independent worker"* (Discussion Paper 2015-10). Retrieved from the Hamilton Project website: http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf

Hathaway, I. & Muro, M. (2016, October 13). Tracking the gig economy: New num- bers. *The Brookings Institution*. Retrieved from https://www.brookings.edu/research/ tracking-the-gig-economy-new-numbers/

Hobson, W. (2016, July 30). Olympic executives cash in on a 'Movement' that keeps athletes poor. *The Washington Post*. Retrieved from https://www.washingtonpost.com/sports/olympics/olympic-executives-cash-in-on-a-movement-that-keeps-athletes-poor/2016/07/30/ed18c206-5346-11e6-88eb-7dda4e2f2aec_story.html?utm_term=.cad26a7c0990

Jackson, C. D. (2016, November). *Who is an employer? Expansive considerations of coverage*. Presentation at the annual labor and employment law section conference of the american

bar association. Chicago, IL. Retrieved from https://www.americanbar.org/content/dam/aba/events/labor_law/2016/11/annual/papers/57d.authcheckdam.pdf

Jonathan, M. L., McRee, E. B., Armistead, K. T., Werntz, A., Woods, A., & Couzo, V. (2017, March 28). Joint employment relationships: Best practices and risks. *Law360.* Retrieved from https://www.law360.com/articles/906291/joint-employment-relationships-best-practices-and-risks

Kamdar, A. (2016, February 19). Why some gig economy startups are reclassifying workers as employees. *OnLabor Workers, Unions, Politics*. Retrieved from https://onlabor.org/2016/02/19/why-some-gig-economy-startups-are-reclassifying-workers-as-employees/

Kapp, D. (2016, May). Uber's worst nightmare. *San Francisco Magazine*. Retrieved from https://modernluxury.com/san-francisco/story/ubers-worst-nightmare

Katz, L. F., & Krueger, A. B. (2016). *The rise and nature of alternative work arrangements in the United States, 1995–2015*. Retrieved from https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_april_26_2016.pdf

Kaufmann, A. (2015, November). *Current implications of the fissured workplace: A compendium of significant litigation and NLRB developments*. Presented at the annual section of labor and employment law conference of the american bar association. Chicago, IL.

Kendall, M. (2016, July 4). Uber battling more than 70 lawsuits in federal courts. *The Mercury News*. Retrieved from http://www.mercurynews.com/2016/07/04/ uber-battling-more-than-70-lawsuits-in-federal-courts/

Kessler, S. (2015, February 17). The gig economy won't last because it's being sued to death. *Fast Company.* Retrieved from https://www.fastcompany.com/3042248/ the-gig-economy-wont-last-because-its-being-sued-to-death

Kosoff, M. (2015a, June 22). $2 billion grocery delivery startup Instacart is reclassifying some of its workers as employees. *Business Insider*. Retrieved from http://www.businessinsider.com/why-instacart-is-reclassifing-some-of-its-workers-as-employees-2015-6

Kosoff, M. (2015b, July 19). Uber's nightmare scenario: Here's what a huge, expensive pain it would be to turn thousands of drivers into employees. *Business Insider.* Retrieved from http://www.businessinsider.com/what-it-would-take-for-uber-to-reclassify-all-its-drivers-2015-7

Kwidzinski, A., & Trimarchi, M. (2014, September 11). Rulings raise issues for employers of independent contractors. Bloomberg *HR & Payroll Resource Center.* Retrieved from https://www.bna.com/rulings-raise-issues-n17179894760/

Leberstein, S. (2012, August). *Independent contractor misclassification imposes huge costs on workers and federal and state treasuries*. Retrieved from National Employment Law Project website: http://nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf

Leberstein, S., & Ruckelshaus, C. (2016, May). *Independent contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it.* Retrieved from National Employment Law Project website: http://www.nelp.org/content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf

Lipkin, H. A., LaRocca, D. R., & Lotito, M. J. (2015, January 21). Expert analysis: NLRB joint employer redefinition threatens franchises. *Law360.* Retrieved from https://www.law360.com/articles/613307/nlrb-joint-employer-redefinition-threatens-franchises

Lolito, M. J. & Schuman, I. (2017, January 6). *Department of labor's exit memoran- dum calls for changes to address gig economy employment [web log post]*. Retrieved from Littler News & Analysis: https://www.littler.com/publication-press/publication/ department-labors-exit-memorandum-calls-changes-address-gig-economy

Manyika, J., Lund, S., Bughin, J., Robinson, K. Mischke, J., & Mahajan, D. (2016, October). Independent work: Choice, necessity, and the gig economy. *McKinsey Global Institute.* Retrieved from https://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy

Massey, H. J. (2017, March 10). *Independent contractor standards uncertain despite new administration. [Web log post]*. Retrieved from Seyfarth Shaw Wage and Hour Litigation Blog: http://www.wagehourlitigation.com/independent-contractors/independent-contractor-standards-uncertain-despite-new-administration/

References

Miller, D. (2016, July 12). Fox unpaid intern case is drawing to a close with proposed settlement. *Los Angeles Times.* Retrieved from http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-fox-interns-legal-case-20160712-snap-story.html

National Employment Law Project. (2017, January). *State legislatures and agencies can better protect on-demand and other contingent workers in their labor laws [policy brief]*. Retrieved from http://www.nelp.org/publication/the-on-demand-economy-state-labor-protections

New York State Office of the Attorney General. (2016). *A.G. Schneiderman announces lawsuit seeking to hold domino's and its franchisees liable for sys- temic wage theft [press release]*. Retrieved from https://ag.ny.gov/press-release/ ag-schneiderman-announces-lawsuit-seeking-hold-dominos-and-its-franchisees-liable

Parlo, C. A. & Shaulson, S. S. (2015, July 7). *Second circuit establishes new test for unpaid intern claims*. Retrieved from Morgan Lewis Lawflash: https://www.morganlewis.com/pubs/ second-circuit-establishes-new-test-for-unpaid-intern-claims

Pepper Hamilton, LLP. (2017). March 2017 independent contractor misclassification and compliance news update. *JDSupra*. Retrieved from http://www.jdsupra.com/legalnews/march-2017-independent-contractor-18490/

Perez, T. E. (2017). *Department of labor: Memorandum to the American people [cabinet exit memo]*. Retrieved from https://www.dol.gov/sites/default/files/dol-exit-memo.pdf

Raymond, N. (2015, June 10). Warner Music to pay $4.2 million to end intern wage lawsuit. *Reuters*. Retrieved from https://www.reuters.com/article/us-warnermusic-lawsuit-interns/warner-music-to-pay-4-2-million-to-end-intern-wage-lawsuit-idUSKBN0OQ2KC20150610

Reibstein, R. (2015). *2015 White Paper "Independent contractor misclassification: How companies can minimize the risk". [Web log post]*. Retrieved from Independent Contractor Misclassification and Compliance: https://independentcontractorcompliance.com/legal-resources/white-paper/

Revenue. (n.d.). Retrieved from NCAA website: http://www.ncaa.org/about/resources/finances/revenue

Rhodes, A. (2017, June 14). 9th circ. OKs MLB appeal in minor leaguer wage action. *Law360*. Retrieved from https://www.law360.com/articles/934647

Rolf, D., Clark, S., & Bryan, C. (2016). *Portable benefits in the 21st century. Future of work initiative*. Retrieved from the Aspen Institute website: https://dorutodpt4twd.cloudfront.net/content/uploads/2016/07/Portable_Benefits_final2.pdf

Rosenblatt, J. (2016, June 23). Lyft's $27 million accord with drivers wins court approval. *Bloomberg Technology*. Retrieved from https://www.bloomberg.com/news/articles/2016-06-23/lyft-s-27-million-settlement-with-drivers-wins-court-approval

Ruckelshaus, C. (2016, May). *Independent contractor vs. employee: Why misclassification matters and what we can do to stop it* (Policy Brief). Retrieved from National Employment Law Project website: http://www.nelp.org/publication/independent-contractor-vs-employee/

Sachs, B. (2015, December 8). Do we need an "independent worker" category? *OnLabor Workers, Unions, Politics.* Retrieved from https://onlabor.org/2015/12/08/ do-we-need-an-independent-worker-category/

Smith, R., Marvy, P. A., & Zerolnick, J. (2014, February). *The big rig overhaul restoring middle-class jobs at American's ports through labor law enforcement*. Retrieved from https://changetowinn.app.box.com/s/2kgbbx5e4f9wok50gl5z

Steinmetz, K. (2015, June 17). Why the California ruling on Uber should frighten the sharing economy. *Time Magazine.* Retrieved from http://time.com/3924941/ uber-california-labor-commission-ruling/

Steinmetz, K. (2016, June 30). The gig economy: TIME survey explores historic shift. Exclusive survey: The future of work in America. *Time Magazine*. Retrieved from http://time.com/4388733/gig-economy-uber-lyft-employment-survey/

The 'On-Demand Economy' Is Reshaping Companies And Careers. (2015, January 4). *The Economist*. Retrieved from http://www.businessinsider.com/the-on-demand-economy- is-reshaping-companies-and-careers-2015-1

Twenty Trends that Will Shape the Next Decade. (2010, October). *Intuit 2020 Report.* Retrieved from https://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf

U.S. Department of Labor. (2011). *Labor secretary, IRS commissioner sign memorandum of understanding to improve agencies' coordination on employee misclassification compliance and education (Release Number: 11-1373-NAT) [News Release]*. Retrieved from https://www.dol.gov/opa/media/press/whd/WHD20111373.htm

U.S. Department of Labor. (2014). *Fact sheet #13: Am I an employee? Employment relationship under the Fair Labor Standards Act (FLSA)*. Retrieved from https://www.dol.gov/whd/regs/compliance/whdfs13.pdf

U.S. Department of Labor. (2016a). *Fiscal year 2017 Department of Labor Budget in Brief*. Retrieved from http://www.dol.gov/sites/default/files/documents/general/budget/FY2017BIB_0.pdf

U.S. Department of Labor. (2016b). Fact sheet #35: Joint employment under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Retrieved from https://www.dol.gov/whd/regs/compliance/whdfs35.htm

U.S. Department of Labor. (2016c). FLSA coverage: employment relationship, statutory exclusions, geographical limits. In *Field operations handbook*. Retrieved from https://www.dol.gov/whd/FOH/FOH_Ch10.pdf

U.S. Department of Labor. (2018). *Fact sheet #71: Internship programs under the Fair Labor Standards Act*. Retrieved from https://www.dol.gov/whd/regs/compliance/whdfs71.htm

U.S. Department of Labor. (n.d.-a). *Misclassification of employees as independent contractors*. Retrieved from https://www.dol.gov/whd/workers/misclassification/

U.S. Department of Labor. (n.d.-b). *Fair Labor Standards Act advisor: School-to-Work*. Retrieved from http://webapps.dol.gov/elaws/whd/flsa/scope/ee15astw.asp

U.S. Government Accountability Office. (2015). *Contingent workforce: Size, characteristics, earnings, and benefits (GAO-15-168R)*. Retrieved from https://www.gao.gov/assets/670/669766.pdf

U.S. Government Accountability Office. (2016). *Employment arrangements: Improved outreach could help ensure proper worker classification (GAO-06-656)*. Retrieved from http://www.gao.gov/new.items/d06656.pdf

Weil, D. (2016). *Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Privacy Act* (Administrator's Interpretation 2016-1). Retrieved from U.S. Department of Labor website. [This Administrator's Interpretation was withdrawn by the U.S. Department of Labor June 7, 2017].

Weil, D. (2017). Lots of employees get misclassified as contractors. Here's why it matters. *Harvard Business Review*. Retrieved from https://hbr.org/2017/07/ lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters

Wiessner, D. (2016, June 16). FedEx to settle driver lawsuits in 20 states for $240 million. *Reuters*. Retrieved from http://www.reuters.com/article/us-fedex-settlement-idUSKCN0Z229Q

Wood, R. W. (2015, June 16). FedEx settles independent contractor mislabeling case for $228 million. *Forbes*. Retrieved from http://www.forbes.com/sites/robertwood/2015/06/16/ fedex-settles-driver-mislabeling-case-for-228-million/#48256e315f5a

Court Cases

Berg v Ontario Hockey League, Court File No. CV-14-514423, Ontario Superior Court (Canada).

Berger v. Nat'l Collegiate Athletic Ass'n, Case No.:14-cv-1710, Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division (2016).

Borello & Sons, Inc. v. Dept. of Indus. Relations, 48 Cal. 3d 341, 350 (1989).

Cooper v. LAC Basketball Club, Inc., Case No. 2:14-cv-04445 (C.D. Cal. June 10, 2014).

References

Cotter et al. v. Lyft, Inc., Case No. 13-cv-04065-VC. (N.D. Cal. 2016).
Dawson v. NCAA, Case No. 0:17-cv-15973 (N.D. Cal. 2017).
Glatt et al. v. Fox Searchlight Pictures Inc., Case No. 1:11-cv-06784, (S.D. N.Y. 2015).
NLRB Case No 32-RC-109684.
O'Connor, et al., v Uber Technologies, Inc., et al., Case No. 13-cv-03826-EMC (N.D. Cal.).
Salazar et. al., v. McDonald's Corp. et al, Case No.: 3:2014cv02096, (N.D. Cal. 2014).
Schumann et al v. Collier Anesthesia, P.A. et al, Case No. 2:2012cv00347 (M.D. Fla. 2017).
Senne et al v. Office of the Commissioner of Baseball, et al, Case No. 3:2014cv00608, (N.D. Cal. 2014).
Uber v. Berwick, Labor Comm'n Case No. 11-46739 EK (June 3, 2015), Super. Ct. Case No. CGC-15-546378.
Walling v. Portland Terminal Co., Case No.: 330 U.S. 148 (1947).
Walter v. Western Hockey League, et al., Court File No. 1401-11912, Court of Queen's Bench of Alberta (Canada).