



Chapter 1

The Regulation of Employment

Employment Law for BUSINESS sixth edition

Dawn D. BENNETT-ALEXANDER and Laura P. HARTMAN

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Introduction to the Regulatory Environment

L01

- Freedom to contract
 - An employee may choose to work or not to work for a given employer
 - An employer may choose to hire or not to hire a given applicant
- Congress passes employment-related laws when it believes that the employee is not on equal footing with the employer
 - Minimum wage
 - Refrain from using certain criteria (race, gender) to arrive at specific employment decisions

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Is Regulation Necessary?

- Executive order 12291
- Proponent view:
 - The market will work to encourage employers' rational, nonbiased behavior
- Opponent view:
 - Discrimination continues because often employers are faced with the choice of two *equally* qualified applicants for a position

1-3

Who is Subject to Regulation?

L02

- Origins in agency law
 - Traditional law of master and servant → law of agency
- Why it is important to determine whether a worker is an employee
 - Independent contractor – Generally, a person who contracts with a principal to perform a task according to his or her own methods, and who is not under the principal’s control regarding physical details of the work

L03

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Who is Subject to Regulation? (continued)

- Employer payroll deductions
 - Employer → responsible for employee deductions
 - Independent contractor → responsible for their own deductions
- Benefits
 - Independent contractor → no access to benefits
- Discrimination and affirmative action
 - Independent contractors generally not protected
- Cost reductions

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The Cost of Mistakes

- If a worker is mistakenly classified as an independent contractor the employer may be liable for violations of:
 - Federal tax laws
 - The National Labor Relations Act of 1935
 - The Fair Labor Standards Act of 1938
 - Employee Retirement Income Security Act
 - Social Security Act
 - State worker’s compensation and unemployment compensation laws
- The fines for each violation are substantial

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Section 530 Independent Contractor Criteria

1. The business must have never treated the worker as an employee for the purposes of employment taxes for any period.
2. All federal tax returns with respect to this worker were filed consistent with the worker being an independent contractor.
3. The company has treated all those in positions substantially similar to that of this worker as independent contractors.
4. The company has a reasonable basis for treating the worker as an independent contractor.

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Who Constitutes an Employer?

- The Civil Rights Act of 1866
- Title VII of the Civil Rights Act of 1964
- Title VI of the Civil Rights Act of 1964
- Age Discrimination in Employment Act of 1967
- Americans with Disabilities Act
- Fair Labor Standards Act
- Rehabilitation Act of 1973

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How do You Determine Whether a Worker is an Employee?

- *Lemmerman v. A.T. Williams Oil Company*
- Congressional definition
 - Employees are those not classified as independent contractors
- House of Representatives definition
 - An employee is one who works for another
- NLRA definition
 - "the term 'employee' shall not include...any individual having the status of an independent contractor
- Common-law agency test
 - The ability to control the manner in which work is performed
- IRS 20-factor analysis
- Economic realities test

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Independent Contractor or Employee?

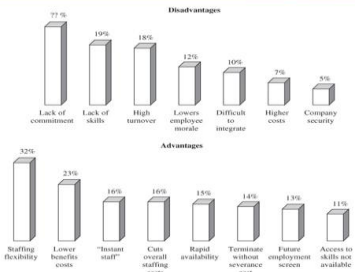
- Behavioral control
 - Instructions
 - Training
- Financial control
 - Significant investment
 - Expenses
 - Opportunity for profit or loss
- Relationship of the parties
 - Employee benefits
 - Written contracts

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Advantages and Disadvantages of Contingent or Temporary Workers

Exhibit 1.5

Contingent Workers



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How do You Determine Whether a Worker is an Employee? (continued)

- Joint employers and staffing firms
 - *Zheng v. Liberty Apparel Co.*
 - Title VII
- Defining "applicant"
 - The employer has acted to fill a particular position.
 - The individual has followed the employer's standard procedures for submitting applications.
 - The individual has indicated an interest in being considered for employment.

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Background—Wrongful Discharge and the Employment-at-Will Doctrine

LO4

- Initially based on the English feudal system
- Evolved into employment-at-will – both parties were free to leave at virtually any time for any reason
- Equal employment opportunity legislation was enacted.
- Unjust dismissal
- Wrongful termination
- Changes in the at-will doctrine vary from state to state

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Exceptions to the At-Will Doctrine

- Discharge is in violation of some recognized public policy
- Employer breaches an implied covenant of good faith and fair dealing
- An implied contract or implied promise to the employee was breached

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Exceptions to the At-Will Doctrine (continued)

- **Violations of public policy** usually arise from the employee being terminated for acts such as:
 - Refusing to violate a criminal statute on behalf of the employer or at the employer’s request
 - Exercising statutory right
 - Fulfilling statutory duty
 - Disclosing violations of statutes by an employer

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Exceptions to the At-Will Doctrine (continued)

- Whistle-blowing
 - Federal Whistleblower Statute
 - Whistleblowers Protection Act
 - State protection
 - Public policy

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Exceptions to the At-Will Doctrine (continued)

L05

- Prima facie case for retaliatory discharge
 - Participation in a protected activity
 - An adverse employment action
 - A causal link between the protected activity and the adverse action

L06

- Constitutional protections

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Exceptions to the At-Will Doctrine (continued)

L07

- Breach of implied covenant of good faith and fair dealing
- Breach of implied contract
 - Implied contract based on employment policy manuals and handbooks
- Exception based on promissory estoppel
- The Worker Adjustment and Retraining Notification Act (WARN)

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Forms of Discharge and Remedies

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- Constructive discharge
- Military leave
- Wrongful discharge based on other tort liability

LO9

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Management Considerations

- A **written document** will help to identify the nature of the association between parties.
- The independent contractor should be paid on the basis of the **nature of the job completed**, rather than the hours worked to complete it.
- **No training** should be offered to an independent contractor.

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Management Considerations (continued)

- Where additional assistance is required, an independent contractor will be made to supply that extra assistance.
- Where the risk of misclassification is great the employer may choose to obtain an **advance ruling** from the IRS.

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Summary

- The distinction between employees and independent contractor is **crucial**.
- Classification of employees may **vary** depending on the statute that is to be applied or on the court in which a given case is scheduled to be heard.
 - The common thread is generally the right of the employer to control the actions of the worker. Where this is present, the worker is likely to be considered an employee.
- An employer is usually thought to be one who employs or uses others to do its work or to work on its behalf.

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Summary (continued)

- When an employer decides to terminate an employee, there is always a **reason** for the termination.
- To ensure that the discharge decision is not wrongful and to protect against a claim of wrongful discharge, employers should establish a **discharge procedure** to be followed in the course of every termination.

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