



Who Is & Who Isn't an Independent Contractor

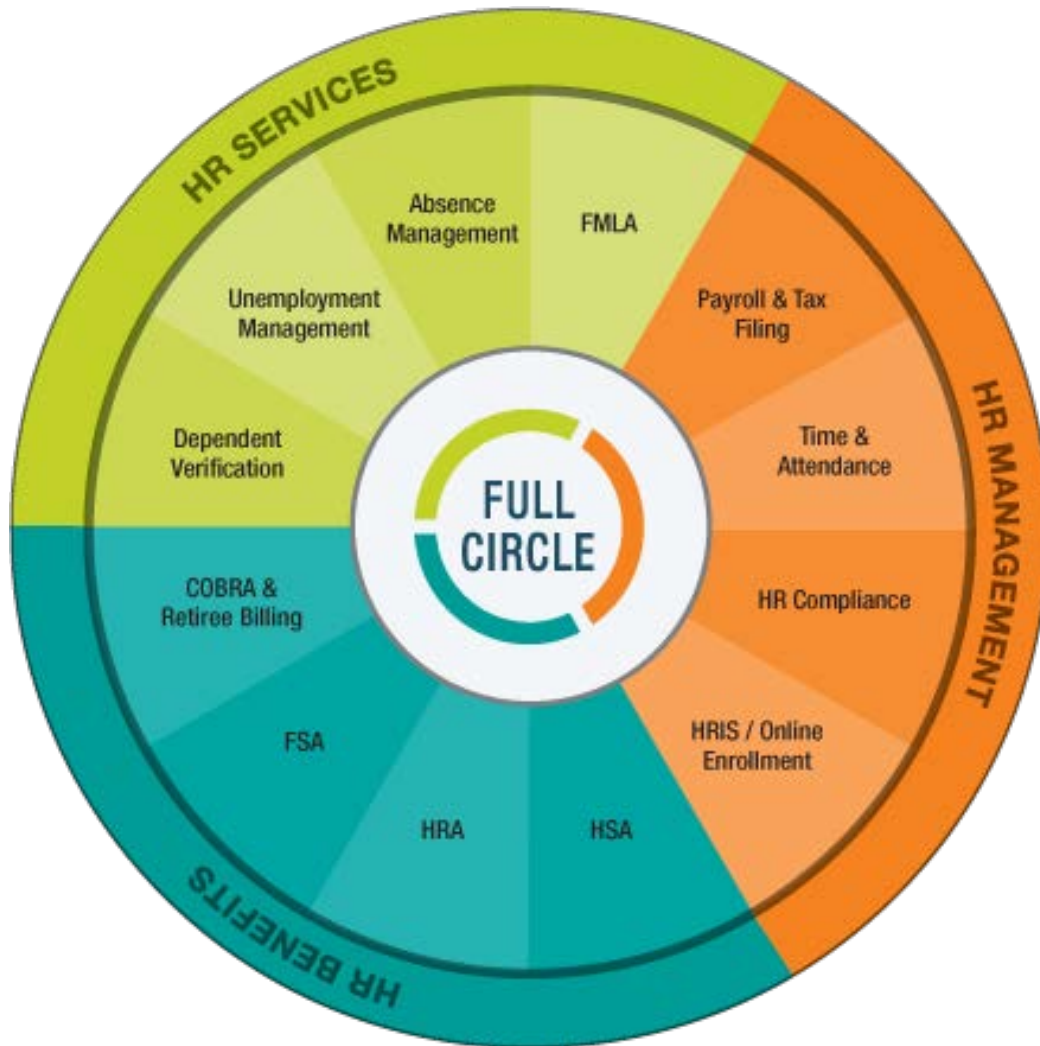
Presented by: Kevin M. McCarthy



- HR Benefits
- HR Management
- HR Services

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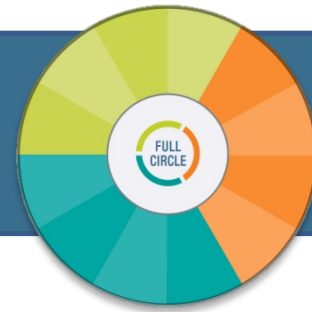
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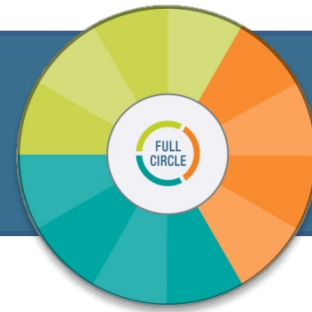


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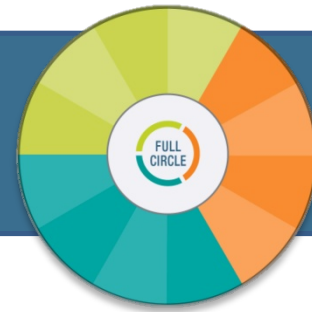
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Misclassification Problem Areas



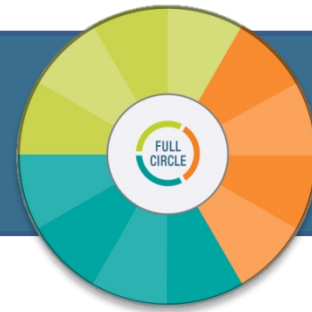
- Misclassification of employees as
 - Independent contractors
 - Interns
- Misclassification of FLSA non-exempt employees as exempt employees

Reasons Government Agencies Are Concerned about Misclassifications



- IRS & State Treasury Departments
 - Early collection of income taxes
- U.S. Department of Labor & State wage & hour agencies
 - Payment of minimum wage and overtime
 - ERISA enforcement (U.S. DOL)
- EEOC & State EEO agencies
 - Anti-discrimination, harassment and retaliation laws

Government Agency Concerns



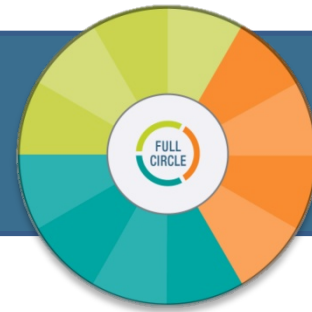
- Homeland Security
 - I-9 obligations
- NLRB
 - Employee protections under the National Labor Relations Act
- State unemployment agencies
 - Unemployment benefit contributions and protections for employees
- State workers' compensation agencies
 - Workers' comp benefits

What Liability Exists for Misclassification?



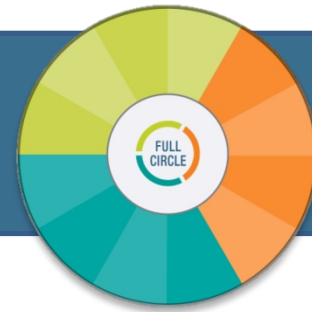
- Liability can be extensive
- IRS
 - \$50 for each W-2 not filled out
 - Penalties of 0.5% of “wages” paid, plus 40% of the FICA taxes not withheld and 100% of the matching FICA taxes the employer should have paid
 - “Failure to pay” tax of 0.5% of the unpaid tax liability per month and 25% of the total tax liability
 - For intentional misclassification, 20% of all wages paid and 100% of the FICA taxes, with criminal penalties of up to \$1,000 for each misclassified worker and 1 year in prison

Liability



- IRS
 - The individual responsible for withholding taxes could be held personally liable in intentional misclassification cases
- Recent DOL settlements and judgments
 - \$1,500,000 judgment for 250 cable installers (overtime)
 - \$560,000 relating to telemarketers (minimum wage and overtime)
 - \$395,000 for construction workers (overtime)
 - \$277,000 assessment for janitorial workers (minimum wage and overtime)

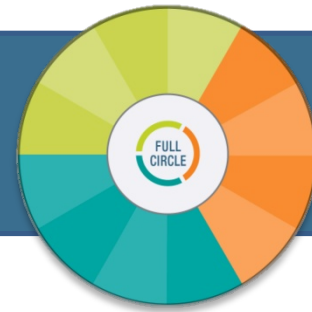
Liability



- State Actions

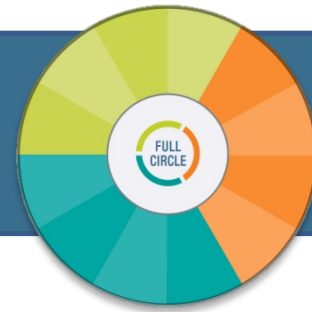
- New York Labor Department in 2014 assessed over \$40,000,000 liability as to 133,000 misclassified workers (unpaid unemployment compensation contributions)
- Illinois in 2013 recovered \$5,100,000 in unemployment compensation contributions from 3,500 employers

Multiple Tests for Determining Worker Status



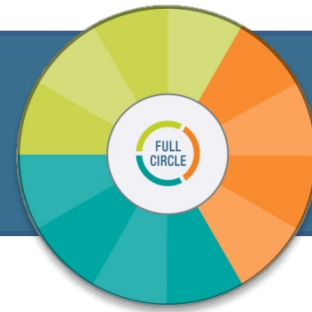
- Economic realities test (DOL)
- Control test (many state agencies)
- Hybrid tests (IRS)
- There is not a uniform test relative to worker status

New DOL Interpretation



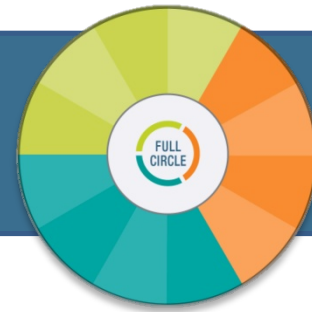
- July 15, 2015 – Administrator’s Interpretation 2015-1
- Economic Realities Test -- “whether the worker is economically dependent on the employer (and thus an employee) or is really in business for himself or herself (and thus an independent contractor)”
- Six factors are to be considered

DOL Factor 1 – Integral Part of the Employer’s Business



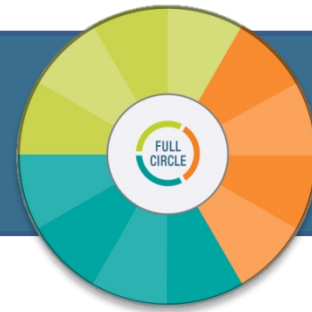
- The extent to which the work performed is an integral part of the employer’s business
 - This is a “compelling factor” to many courts

DOL Factor 2 – Loss or Profit Through Managerial Skill



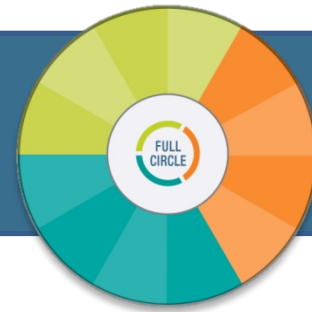
- The worker's opportunity for profit and risk of suffering a loss depending on his/her managerial skill

DOL Factor 3 – Relative Level of Investment



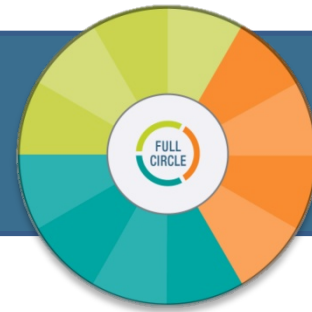
- The relative investments of the employer and the worker
 - A contractor’s investment should not be relatively minor compared with that of the employer

DOL Factor 4 – Special Business Skills & Initiative



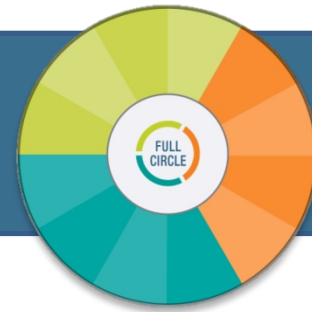
- Whether the work to be performed requires special skills and initiative of a business nature

DOL Factor 5 – Permanency of the Relationship



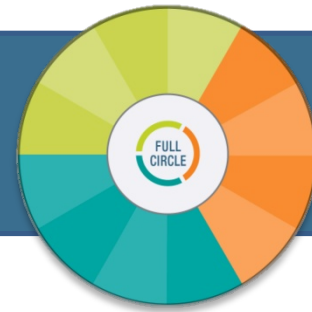
- The permanency of the relationship
 - Contractual relationships tend to be for a fixed period of time or a specific project

DOL Factor 6 – Extent of Control by the Employer



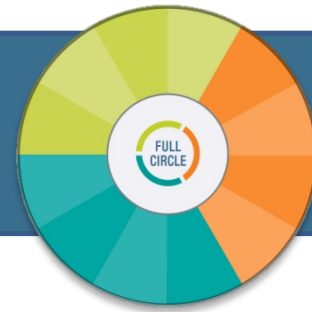
- The degree of control exercised or retained by the employer
 - Not the most significant factor

IRS Test



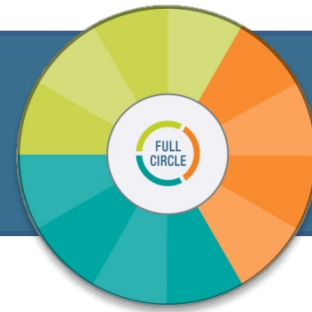
- Formerly used a 20-factor test
- Now uses a 3 or 18 factor test, depending on how you count
 - Focuses on 3 categories of factors
 - Behavioral control
 - Financial control
 - Type of relationship

IRS Factor 1 – Behavioral Control



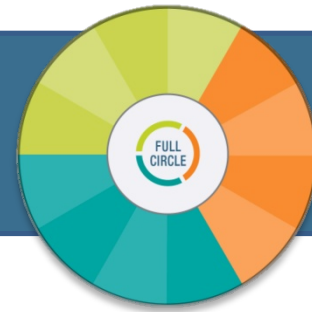
- Type of instructions given
 - When & where to do the work
 - What tools or equipment to use
 - What workers to hire or assist with the work
 - Where to purchase supplies or services
 - What work must be performed by a specific individual
 - What order or sequence to follow when performing the work

IRS Factor 1 – Behavioral Control



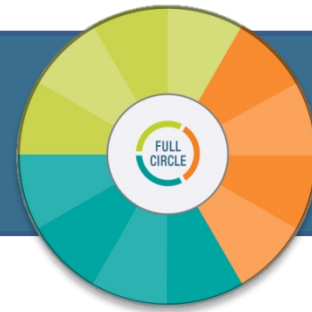
- The degree of instruction exercised by the employer
 - The more instruction that is given, the more likely it is that the worker is an employee
- Evaluation systems
 - If it measures the details of how the work is performed, it points toward employee status
 - If it only measures the end result, it points toward either employee or contractor status

IRS Factor 1 – Behavioral Control



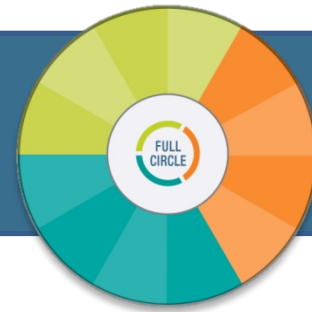
- Training
 - Training on how to do the job is “strong evidence” the worker is an employee
 - Periodic or ongoing training about procedures and methods is “even stronger evidence” of employee status

IRS Factor 2 – Financial Control



- Significant investment
 - Contractors often have significant investments in equipment, depending on the industry
- Unreimbursed expenses
 - Contractors are more likely to have unreimbursed expenses
- Opportunity for profit or loss
 - The possibility of incurring a loss indicates contractor status

IRS Factor 2 – Financial Control



- Services available to the open market
 - Contractors often advertise, maintain a visible business location and are available to work in the relevant market
- Method of Payment
 - Pay based on an hourly, weekly or other period of time indicates employee status
 - Contractors are usually paid a flat fee for a job, although in some industries hourly rates are common

IRS Factor 3 – Type of Relationship



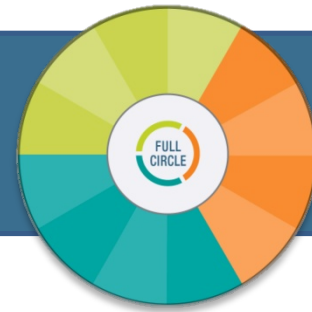
- Written Contracts
 - A contractual statement that the worker is a contractor carries no weight; how the parties actually work together is the relevant consideration
- Employee Benefits
 - Benefits such as insurance, retirement plans, paid vacation and sick days are indicative of employee status
 - The absence of such benefits does not necessarily mean the worker is a contractor

IRS Factor 3 – Type of Relationship



- Permanency of the relationship
 - A relationship for a specific project or period indicates contractor status
 - An indefinite relationship looks more like employment
- Whether the services provided are a key aspect of the business
 - If the worker provides services that are a key aspect of the business, it is more likely the business will retain the right to direct or control the worker's activities, indicating employment status

Actions for Employers to Take



- Evaluate contractor relationships
 - Consider using your employment lawyer to conduct the review
- Modify workers' status as necessary
- Be aware of statutes of limitations on claims
- Periodically conduct updated reviews
- FLSA releases must be approved by DOL or a court to be valid



Questions

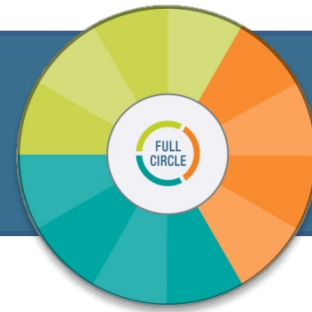


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Contact the Presenter



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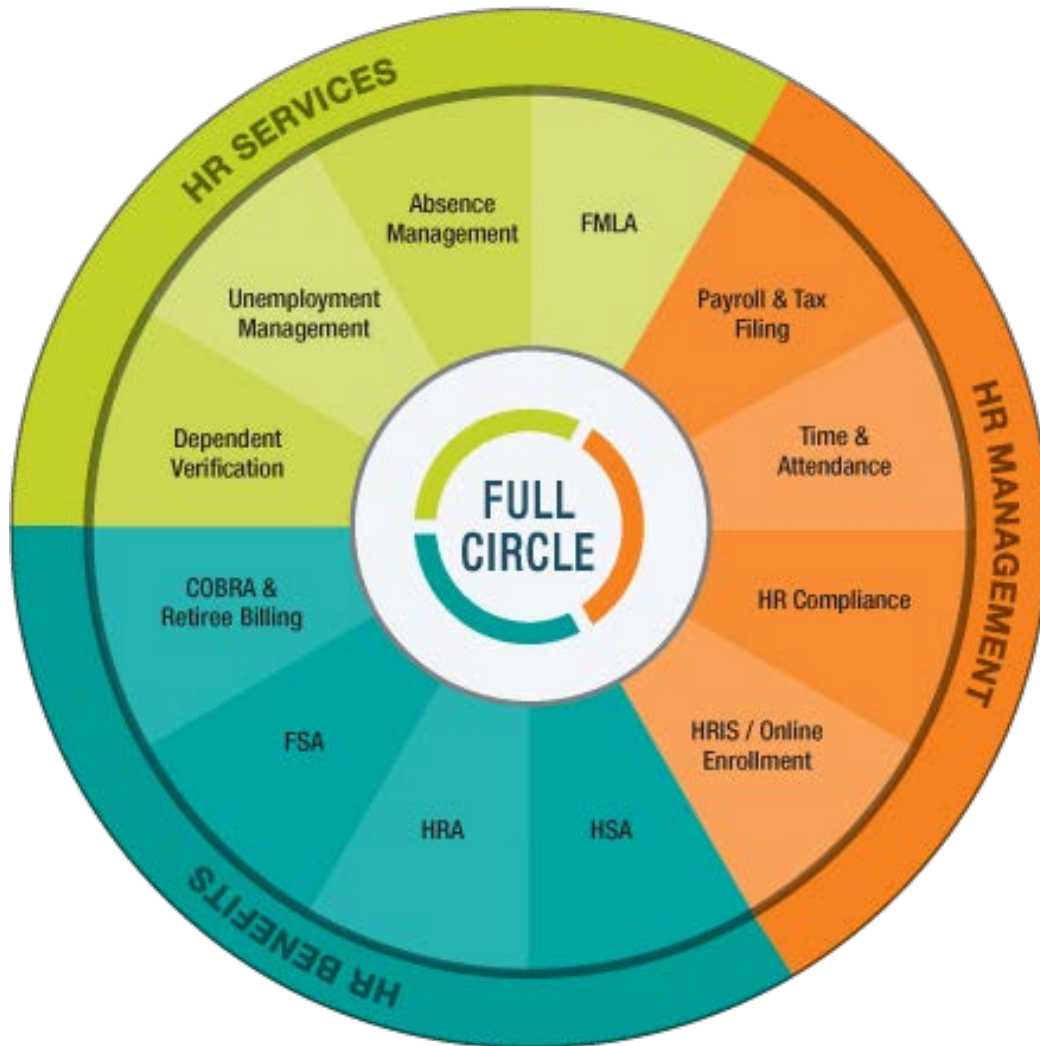
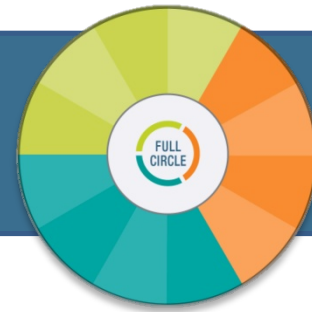
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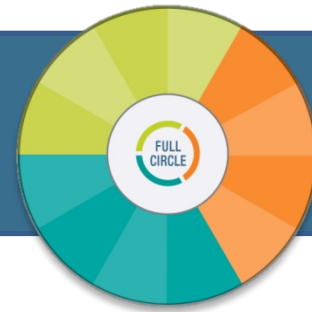
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