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The Campaign Against Employee Misclassification

By Bran Noonan

Employee misclassification occurs when an employer improperly categorizes and treats a worker as an “independent contractor” rather than an “employee.” Over the past few years, New York State and the federal government have increasingly extended their efforts to eliminate the misclassification of workers as independent contractors. They have expanded investigative and enforcement initiatives, infused agencies with additional funds, and explored various legislative measures in an effort to protect workers and shore up lost tax revenue. This article traces the recent campaigns against misclassification in both the New York State and federal systems and outlines the law of classification in both jurisdictions.

The Effects of Misclassification

Workers misclassified as independent contractors are denied a wide range of legal safeguards and benefits afforded to those classified as “employees,” such as workers’ compensation benefits, wage and hour protections, unemployment insurance, anti-discrimination protections, and family medical leave benefits. Misclassified workers are also typically locked out of various customary benefits of employment, including vacation, sick leave, retirement, and health care coverage – the latter

two benefits being costs that are shifted onto the worker and, oftentimes, the taxpayer.

For the employer, however, the advantages of misclassifying workers are substantial, making it a dangerously tempting business decision. By categorizing a worker as an independent contractor, employers can avoid paying minimum wage and overtime in accordance with the federal Fair Labor Standards Act and New York State Labor Law, employment insurance taxes, workers’ compensation premiums, and their share of Social Security, Medicare, and federal unemployment taxes, all of which take a significant financial toll not only on workers, but also on government treasuries. Employers are also relieved from liability under anti-discrimination statutes and from vicarious liability for the acts of independent contractors, both of which can add up to substantial financial savings. In addition, employers that misclassify workers can gain a competitive advantage over law-abiding employers, who spend substantial capital on employee expenses and, consequently, can be priced out of the marketplace.

Properly classifying workers, however, can be a rather complicated and involved process; responsible employers can mistakenly misclassify employees on a well-founded belief that the workers are indeed independent

contractors. A major reason for such errors, whether accidental or intentional, is that no uniform definition of “employee” exists among the various state and federal statutes, all of which contain rather broad and indeterminate definitions of the term. Resolving whether a worker is an employee ultimately requires employers to apply various, fact-intensive tests regulatory agencies and the judiciary have devised, depending on which law applies. For instance, the relevant tests differ if a worker is being classified for the purposes of the Fair Labor Standards Act versus the Internal Revenue Code.

Many employers, nevertheless, will not engage in the process of formally classifying a worker, unaware that various classification criteria exist and that the law is far less straightforward than they may have presumed. For example, employers who report wages on a 1099 form, refer to a worker as a consultant or freelancer, or label a worker as an “independent contractor” in a contract, will classify the worker as an independent contractor, even though none of those circumstances serve to automatically brand a worker as an independent contractor.

Regardless of whether misclassification is intentional or accidental, the financial penalties of misclassification can be burdensome. Specifically, employers may be liable for unpaid wages and benefits, back taxes, civil and criminal penalties, and other government penalties. With respect to tax penalties, not only will employers have to pay their share of unpaid taxes, such as Medicare and Social Security, but they might have to pay the employee’s share of unpaid taxes. Moreover, recently there has been a legislative push in New York to create individual liability for officers and directors that commit classification violations.

Given the problems associated with misclassification, particularly the loss of tax revenue, governmental pressure and oversight is not expected to lessen anytime soon. In light of such escalated political pressure and the challenges of accurately classifying employees, employers should be wary of the consequences of misclassification and begin to reevaluate their classification policies and practices to ensure compliance.

The New York State Misclassification Landscape

Beginning in 2007, New York State began to pay greater attention to the problem of misclassification. In February of that year, the Cornell University School of Industrial and Labor Relations released a study titled “The Cost of Worker Misclassification in New York State,” which exposed the scope of misclassification in the state and helped jumpstart government action.¹ According to the study, from 2002 through 2005, approximately 10.3% of private-sector workers were considered misclassified as independent contractors. About 14.8% of those misclassified workers were in the construction industry. The study estimated that out of 400,732 employers in audited indus-

tries statewide, an average of 39,587 of those employers misclassified workers during that time period. Along with the study, at the same time, several labor leaders complained that unionized companies were being outbid by competitors that misclassified workers.²

In response, several New York state agencies began to convene and explore how they could coordinate their efforts and resources to crack down on the problem.³ Out of those discussions, on September 5, 2007, then-Governor Eliot Spitzer issued an executive order establishing the Joint Enforcement Task Force on Employee Misclassification (Task Force), assigning the Task Force with the responsibility of “coordinating efforts by appropriate state agencies to ensure that all employers comply with all the State’s employment and tax laws.”⁴ The Task Force created an unprecedented partnership among the Department of Labor, the Department of Taxation and Finance, the Workers’ Compensation Board, the Attorney General’s Office and the New York City Comptroller’s Office in an effort to combine agency resources to develop policy solutions, conduct statewide industry enforcement sweeps, and improve inter-agency data sharing. Inter-agency communication was in fact a significant development in enforcement and deterrence because, previously, agencies did not share information when one agency discovered a misclassification violation. Now, employers that fell under the radar of, say, the state labor department for wage and hour violations could (ideally) no longer rely on agency isolationism and continue misclassifying for tax purposes.

After four months in existence and in accordance with its mandate to report on its findings at the beginning of each year, the Task Force issued its first report in February 2008.⁵ According to the report, from September 1, 2007, through December 31, 2007, the Task Force conducted enforcement sweeps of 117 businesses, primarily in the construction and food service industries, uncovering 2,078 misclassified employees and \$19 million in unreported wages. Out of those employees misclassified, the Task Force determined that 646 of them were owed unpaid wages totaling approximately \$3 million.

Exactly a year later, the Task Force issued a second, more comprehensive report.⁶ This time, with over a year in operation, the Task Force was able to conduct extensive investigations statewide, identifying at least 12,300 cases of employee misclassification and \$157 million in unreported wages, which included at least \$12 million in unpaid wages.

The Task Force took a three-prong coordinated strategic approach to enforcement: (1) joint agency sweeps primarily of the construction industry; (2) “Main Street” sweeps where investigators went door-to-door to commercial and retail business in shopping districts; and (3) enforcement investigations based on complaints and information shared among the agencies. Each enforce-

ment tactic successfully uncovered instances of misclassification for the year 2008. The joint enforcement sweeps uncovered 7,789 misclassified employees out of the 291 business entities investigated. Under the “Main Street” sweeps, the Task Force visited 304 businesses, 67% of which had some violations. Complaints and tips led to 1,118 investigations that exposed 4,564 misclassified workers. In total, the Task Force investigated a wide array of industries, ranging from those where misclassification traditionally is pervasive, such as construction, food service, hospitality, and factories, to smaller retail businesses, such as bars, grocery stores, delis, bakeries, clothing and sneaker stores, travel agencies, nail salons, jewelry stores, hairdressers, mortgage service companies, and nightclubs. Where sweeps uncovered evidence of criminal fraud, the Task Force referred those cases to state prosecutors for criminal prosecution.

Along with enforcement initiatives, the Task Force has recommended legislative prescriptions, such as imposing individual liability for misclassification and adopting what is commonly referred to as the “ABC test” – used among several states – for all the major state laws defining “employee” to ensure a common, uniform approach to classifying workers. While the latter suggestion might help foster stability and predictability, the former could have a significant deterrence impact as it would financially expose officers and directors.

The state Legislature has also entered the fray and responded with proposed legislation. On March 12, 2009, a bill was introduced in the New York State Assembly to amend the state tax, workers’ compensation, and labor laws to include an express definition of “employee,” using the ABC test. According to the test, an employee shall not include a person who (1) is free from control and direction in connection with the performance of the service; (2) performs the service outside the usual course of business of an employer; and (3) is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.⁷ Interestingly, the bill would also empower the New York State Department of Taxation and Finance, as opposed to the state labor department, to act as the sole administrative agency to promulgate rules and regulations defining and determining when a person is deemed an employee.

In June 2009, three months after the state Assembly bill was presented, a second bill, titled the New York State Construction Fair Play Act (Construction Act), was introduced in the New York State Senate to amend the state labor law to target misclassification in the construction industry, which studies had characterized as rampant.⁸ For instance, one out of every four construction workers is reportedly either misclassified or paid off the books.⁹ Accordingly, the proposed act would create a presumption of employment wherein any person performing ser-

vices for a contractor would be classified as an employee unless the three requirements of the ABC test were satisfied. The bill would also provide workers with notice of their classification status, protect them from retaliation for reporting violations, and impose civil and criminal penalties against employers and individual corporate officers who knowingly allow violations to occur.

While neither of these bills has officially been enacted, both continue to move through required channels toward passage. The first bill was referred to the Labor Committee for review on January 6, 2010. The Construction Act is actually quite close to becoming law, having been approved by both legislative houses in June 2010 and subsequently being delivered to the governor on August 18, 2010, where it awaits executive action.

The Federal Misclassification Landscape

As with New York State, in the past few years, the problem of misclassification has attracted the attention of the federal government. Beginning in 2008, Congress has considered several legislative proposals aimed at combating misclassification. While the proposed bills have either stalled or remain under review, they provide a prelude of legislation that will very likely come to fruition at some point, particularly if the Obama administration remains in office.

In September 2007, several Democratic senators, including then-Senator Barack Obama, introduced a bill to amend the Revenue Act of 1978.¹⁰ Titled the “Independent Contractor Proper Classification Act of 2007,” the proposed amendment sought to (1) require employers to treat workers misclassified as independent contractors as employees for tax purposes upon a determination of the Department of Treasury; (2) repeal the safe harbor defense of “industry practice” as a justification for misclassifying workers; (3) require the Departments of Treasury and Labor to share information on misclassification cases; (4) prohibit retaliation against employees for filing complaints; (5) require employers to provide independent contractors notice of their tax obligations, employment protections unavailable to them, and right to seek a classification determination from the IRS; and (6) maintain a list of all independent contractors hired for a three-year period. The proposed legislation did not provide a definition of the term “employee.” Yet eliminating the industry practice defense for misclassifications would help compel employers to adjust their policies to ensure proper classification. This bill ultimately stalled after being referred to committee.

In May of the next year, another bill was introduced in the U.S. House of Representatives. Known as the Employee Misclassification Prevention Act, this bill would amend the Fair Labor Standards Act with respect to misclassification issues.¹¹ Four months later, Senator Barack Obama and the late Senator Edward Kennedy co-

sponsored the same House bill in the Senate, along with other Democratic senators.¹² Specifically, the acts would require employers to keep records of non-employees' classification status, provide each worker employed with a written notice informing the worker of his or her classification and information as to his or her rights under the law, and provide a special penalty for employers who misclassify. While the acts did not provide an explicit classification test, the record keeping and notice require-

ments would induce employers to engage in a thorough review process of their workforce and ensure proper classification. While these bills eventually stalled after being referred to committees, in April 2010, they were reintroduced in both legislative houses and sent to committee for review.¹³

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In 2009, Congress again attempted to enact misclassification legislation through the tax law. On July 20, 2009, a bill that was introduced the preceding year was again offered in the House. Six months later, on December 15, 2009, Senator John Kerry and other Democratic colleagues introduced the same bill in the Senate for consideration. Those bills, known as the Taxpayer Responsibility, Accountability, and Consistency Act of 2009, seek to amend the Internal Revenue Code of 1986 in connection with the rules relating to independent contractors.¹⁴ Significantly, the bills would narrow the safe harbor protection to exclude the industry standard justification for improper classification and increase penalties for failure to file correct tax returns, similar to the failed Independent Contractor Proper Classification Act of 2007. The bills also would require employment status to be determined under "the usual common law rules," which is a reference to the current control test used to classify workers for federal income tax purposes. Both bills remain active, having advanced to legislative committees for deliberation and revision before potentially proceeding to a general debate.

Along with pursuing legislative renovations, the federal government has also sought to increase enforcement efforts. In an attempt to reenergize the U.S. Department of Labor, on February 2, 2010, the Obama administration requested an additional \$25 million in its projected 2011 budget to go toward the creation of what it termed the Misclassification Initiative. The proposed initiative's sole mission would be to "target misclassification with 100 additional enforcement personnel and competitive grants to boost states' incentives and capacity to address th[e] problem."¹⁵ While the initiative intends to spread

Classifying Workers Under Federal Law

across all industries, the Department of Labor has made it a point to target industries where misclassification pervades, such as construction, child care, home health care, grocery stores, landscaping, janitorial services, and business services.¹⁶ While the initiative is a year away from starting, the federal government has clearly had the issue of misclassification in its sights for several years, continuing to make it a top priority, particularly given the urgent need to increase government revenue streams.

Under federal law, employers must actively and preemptively classify a worker for federal tax and wage purposes, both of which fall under separate laws that have distinctive classification tests. While overlap exists in the application of both tests, an employee could technically be classified as an independent contractor under the tax law and an employee under the wage and hour law. What this means is that employers cannot simply rely on the advice of an accountant or a determination from the Internal Revenue Service (IRS) when classifying an employee under federal laws. Rather, they need to ensure that their policies and procedures incorporate all federal, and state, tests when making classification decisions.

Federal law requires an employer to withhold an "employee's" federal income tax and to pay its share of an employee's Social Security, Medicare, and federal unemployment taxes. To determine whether a worker is an employee for federal tax purposes, Congress adopted "the usual common law rules"¹⁷ – that is, the rules of the conventional master-servant relationship under agency principles – to determine an individual's employment status. This focuses on whether the employer has the *right to control* the employee, not whether the employer actually controls the worker.

To help employers evaluate the existence of control, in 1987, the IRS promulgated a list of 20 factors grouped together from various court decisions.¹⁸ But because the IRS did not advise what weight to give each factor, their application often led to inconsistent results. Eventually, in 1996, the IRS reorganized the list into three presumably more manageable categories: (1) behavioral control; (2) financial control; and (3) the relationship.¹⁹ Under "behavioral control," the IRS looks at the means and details of the work, such as the degree of instruction, supervision, evaluation, and training. The next category focuses on "financial control," which examines whether the business has the right to control the economic aspects of the worker's activities. For instance, does the worker

pay for advertising and business expenses, make significant investments in the business, and share in the profits or losses? The third “relationship” category looks at how the parties perceive their relationship, including the existence of employee benefits and the permanency of the relationship. Notwithstanding the three categories, employers and the IRS continue to use the 20 factors as tools of reference when examining the categories.

The other key federal law that requires employers to prospectively classify their workforce is the Fair Labor Standards Act (FLSA), which provides “employees” with two major wages and hour protections: the right to (1) minimum wage and (2) overtime for hours worked in excess of 40 hours a week. The FLSA neither points

The FLSA recognizes that workers may be employees of two or more employers, entitling them to wage and hour protections from their joint employers. To determine the existence of a joint employment relationship, in *Carter v. Dutchess Community College*, the Second Circuit adopted four factors from a Ninth Circuit decision, which asks whether the employer (1) has the power to hire and fire the workers, (2) supervises and controls the workers’ schedule or condition of employment, (3) determines the rate and method of payment, and (4) maintains employment records.²⁶ These factors are generally applied where the purported joint employer exercises formal control over the worker, which is not mandatory to establish an employment relationship for FLSA purposes. Due to

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to an area of law, such as the common law, to define “employee,” as the Internal Revenue Code does, nor provides an operable definition of the term for classification purposes. Rather, the statute defines “employee” as “any individual employed by an employer,” a fairly broad and circular definition.²⁰ Yet in developing a classification test, courts have been struck by the statutory definition of the term “employ,” which means “to suffer or permit to work,”²¹ viewing it as intending to “stretch[] the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law purposes”²² because of the remedial purposes of the statute.²³

Accordingly, due to the societal goals of the FLSA and the restrictive scope of the common law agency test, the U.S. Supreme Court adopted the “economic reality” test in 1947 to determine the status of a worker, which remains the guiding approach today.²⁴ Under the test, courts will generally consider the following five factors that the Court set forth in *United States v. Silk*, a New Deal-era case: (1) the degree of control exercised; (2) the workers’ opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the relationship; and (5) the extent to which the work is an integral part of the employer’s business.²⁵ Courts do not focus on the factors in isolation or limit themselves to only those factors, but rather examine the totality of the circumstances.

In fact, the Second Circuit has devised two additional sets of factors, in addition to the *Silk* factors, that are typically used in cases involving joint employment issues.

the expansive nature of the economic reality test, in the absence of formal control, the Second Circuit devised a list of six factors in *Zheng v. Liberty Apparel Co.*²⁷ to establish what it termed “functional control” in joint employment relationships. Under the six factors, courts are instructed to look at whether a unit of subcontractors, for example, acted as an employee, such as whether the unit worked on the contractor’s premises, was subject to supervision, worked exclusively for the contractor, and shifted as a unit from one contractor to another.

Regardless of the number of factors applied, courts have consistently stressed that “[t]he ultimate concern” under the economic reality test is the dependence of the employee on the employer – that is, “whether, as a matter of economic reality, the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.”²⁸ Factors merely serve as “tools to be used to gauge the degree of dependence of the alleged employees on the business with which they are connected.”²⁹

Accordingly, in theory, the ultimate paradigm and objective of the control and economic reality tests differ considerably. One test looks for the existence of control, while the other test is interested in the existence of worker dependence. In fact, under the economic reality test, courts can devise sets of factors that allow for an expansive definition of “employee.” Yet in application, the two tests can operate quite similarly and focus on the same facts. For instance, in an FLSA case, the Second Circuit focused on nurses’ opportunity for profit and loss, their investment in the business, whether they were supervised, and the permanence of their relationship, all facts

from the *Silk* factors that the IRS would take into account. Part of this overlap is due to the fact that the concepts of control and dependence are not mutually exclusively and unrelated. Generally speaking, those who depend on another are often subject to some degree of control.

Classifying Workers Under New York State Law

The law of classification in New York State is relatively straightforward. Despite pending legislation that may institute the ABC test for classifying employees, New York state courts have generally adopted a single common law test for determining an employee's status in various actions, such as unemployment insurance violations, unpaid wages claims under Article 6 of the state Labor Law, state anti-discrimination violations, and vicarious liability claims, which presumably provides a uniform approach to classification.³⁰ Specifically, in applying the common law approach to determining if an employer-employee relationship exists, New York courts have focused on whether "the evidence demonstrates that the employer exercises control over the result produced *or* the means used to achieve the result."³¹

The New York Court of Appeals has indicated that "control over the means is the more important factor to be considered."³² As a result, "[m]inimal or incidental control over one's work product with the employer's direct supervision or input over the means used to complete it is insufficient to establish a traditional employment relationship."³³ For instance, providing an employee instruction as to what to wear and what products to promote is not evidence of control significant enough to transform a worker into an employee.³⁴ In fact, courts have acknowledged that the "requirement that work be done properly is a condition just as readily required of any independent contractor"³⁵ and is viewed as "a necessarily wise business decision."³⁶ While state agencies, such as the state labor department, have issued guidelines for classifying workers, the guidance consists of a collection of relevant factors that extend from the case law.³⁷

Indeed, in 2003, the New York Court of Appeals set forth the following list of factors in *Bynog v. Cipriani Group, Inc.* to help assess the degree of control under Article 6 of the Labor Law: (1) did the worker work at his or her own convenience; (2) was the worker free to engage in other employment; (3) did the worker receive fringe benefits; (4) was the worker on the employer's payroll; and (5) was the worker on a fixed schedule.³⁸ Despite the application of the factors to an Article 6 claim, the Court acknowledged that the factors are applicable to other claims with classification issues, such as vicarious liability actions.

For workers' compensation issues, New York state courts have taken a somewhat different approach, devising two separate tests to determine whether a worker is an employee: the common law "control" test, and the rel-

ative nature of work test.³⁹ Under the control test, courts evaluate four factors, which fall in line with conventional agency law principles: (1) right to control; (2) method of payment; (3) extent the entity furnishes equipment; and (4) the entity's right to discharge.⁴⁰ In contrast, the second test focuses on factors such as the character of the work, the difference in the work from the entity's work, permanence of the relationship, and the importance of the work in connection with the entity's overall business.⁴¹ Despite the two tests, the trend over the past few decades has been to combine the factors of both tests.⁴² In fact, the state Workers' Compensation Board advises parties in its agency publications to apply factors that actually are a combination of those from both tests.⁴³ Interestingly, the ABC test, which is pending before the state Legislature, actually functions somewhat as a combination of these two tests because it concentrates on control and the nature of the work performed.

Finally, unlike federal case law, there is a surprising dearth of cases addressing classification issues under the state overtime and minimum wage laws. The few cases that do tackle the issue of misclassification analyze the claims under Article 6 of the New York Labor Law, which is not necessarily the correct provision.⁴⁴ While Article 6 governs the payment of wages, such as improper wage deductions, and authorizes a claim for unpaid wages, Article 19 of the Labor Law and its accompanying regulation control the state minimum wage and overtime laws. Parties that commence claims for minimum wage and overtime violations will typically do so under Article 19 as opposed to Article 6.⁴⁵ Whether or not a misclassification issue arising in a minimum wage or overtime claim should technically be analyzed under Article 6 case law is likely immaterial since a state court would presumably apply the same control test it uses for Article 6 and other state employee classification claims to a wage and hour claim commenced under Article 19 and the state regulation.

Conclusion

The efforts of New York State and the federal governments over the past few years should make employers think more carefully before classifying an individual as an independent contractor. While the various classification tests all slightly differ and make classification a challenge, the common thread among them is control. Without some degree of control, it will be difficult to establish that a worker is an employee for any purpose. Nevertheless, employers that fail to properly classify employees, even if accidentally, can face stiff financial penalties. If the campaign against misclassification continues, and there is no reason to believe it will fade, the public will become more aware of the issue, emboldening workers to complain about and expose classification violations. Moreover, employers will progressively be

unable to rely on those industries with a penchant for misclassification to monopolize the resources of state and federal enforcement agencies. With this in mind, employers should carefully update their classification policies to ensure employees are properly classified. ■

1. Linda H. Donahue, James R. Lamare, Fred B. Kotler, J.D., *The Cost of Worker Misclassification in New York State*, Cornell University, ILR School, at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009&context=reports>.
2. See Steven Greenhouse, *Dozens of Companies Underpay or Misreport Workers*, *State Says*, N.Y. Times (Feb. 12, 2008).
3. See Report of the Joint Enforcement Task Force on Employee Misclassification, February 1, 2008, at 9, at <http://www.labor.state.ny.gov/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf>.
4. N.Y. Exec. Order No. 17 (Sept. 5, 2007).
5. Report of the Joint Enforcement Task Force on Employee Misclassification, February 1, 2008 at <http://www.labor.state.ny.gov/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf>.
6. Annual Report of Joint Enforcement Task Force on Employee Misclassification, February 1, 2009, at http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification_TaskForce_AnnualRpt_2008.pdf.
7. N.Y.S. A.06793 (2009).
8. See N.Y. State Construction Fair Play Act, N.Y.S. S.5847 (2009). Another Construction Act was introduced in the State Senate under Bill number S.6194 on September 25, 2009, which appears to have been combined with Bill number S.5847. The State Assembly also introduced the Construction Act under Bill number A.8237-A on May 11, 2009.
9. See N.Y. State Construction Fair Play Act, N.Y.S. S.5847 (2009).
10. See S.2044, 110th Cong. (2007).
11. See H.R. 6111, 110th Cong. (2008).
12. See S.3648, 110th Cong. (2008).
13. See H.R. 5107, 111th Cong. (2010) and S. 3254, 111th Cong. (2010).
14. See H.R. 3408, 111th Cong. (2009) and S. 2882, 111th Cong. (2009).
15. Press Release, U.S. Dep't of Labor, Secretary Hilda L. Solis Presents U.S. Department of Labor Budget Request for Fiscal Year 2011 (Feb. 1, 2010).
16. *Budget in Brief*, U.S. Dep't of Labor (Feb. 1, 2010).
17. 26 U.S.C. § 3121(d)(2).
18. *Independent Contractor or Employee? Training Manual*, U.S. Dep't of the Treasury, Oct. 30, 1996.
19. *Id.*
20. 29 U.S.C. § 203(e)(1).
21. 29 U.S.C. § 203(g).

22. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).
23. *Brock v. Superior Care Inc.*, 840 F.2d 1054 (2d. Cir. 1988).
24. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *U.S. v. Silk*, 331 U.S. 704 (1947).
25. See *Superior Care*, 840 F.2d at 1058 (citing *Silk*, 331 U.S. at 1045).
26. 735 F.2d 8, 12 (2d Cir. 1984).
27. 355 F.3d 61 (2d Cir. 2003).
28. *Superior Care*, 840 F.2d at 1059.
29. *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987).
30. *In re Hertz Corp.*, 2 N.Y.3d. 733, 778 N.Y.S.2d 743 (2004) (unemployment insurance); *Scott v. Mass. Mutual Life Ins. Co.*, 86 N.Y.2d 429, 633 N.Y.S.2d 754 (1995) (N.Y. State Human Rights Law); *Koren v. Zazo*, 262 A.D.2d 287, 691 N.Y.S.2d 549 (2d Dep't 1999) (vicariously liability); *Bynog v. Cipriani Group, Inc.*, 1 N.Y.3d 193, 770 N.Y.S.2d 692 (2003) (unpaid wages under Article 6); *Pachter v. Berbard Hodes Group, Inc.*, 10 N.Y.3d 609, 861 N.Y.S.2d 246 (2008) (unpaid wage under Article 6).
31. *In re Ted Is Back Corp.*, 64 N.Y.2d 725, 485 N.Y.S.2d 742 (1984) (emphasis added).
32. *Id.*
33. *Scott*, 86 N.Y.2d 429 (1995).
34. See, e.g., *Hertz Corp.*, 2 N.Y.3d 733.
35. *Id.* (quoting *In re Werner*, 210 A.D.2d 526, 619 N.Y.S.2d 379 (3d Dep't 1994)).
36. *Ted Is Back Corp.*, 64 N.Y.2d 725.
37. See *Independent Contractors*, NYS Dep't of Labor, www.labor.state.ny.us/ui/dande/ic.shtm; N.Y. State Dep't of Taxation & Finance http://www.tax.state.ny.us/pdf/2006/wt/nys50_506.pdf.
38. 1 N.Y.3d 193.
39. *Commissioner of the State Ins. Fund v. Lindenhurst Green & White Corp.*, 101 A.D.2d 730, 475 N.Y.S.2d 42 (1st Dep't 1984).
40. *Id.*
41. *Id.*
42. *Lindenhurst Green & White Corp.*, 101 A.D.2d 730; *Brown v. City of Rome*, 66 A.D.3d 1092, 887 N.Y.S.2d 279 (3d Dep't 2009).
43. See N.Y. State Workers' Compensation Board, "Who Is an Employee Under the Workers' Compensation Law" at www.wcb.state.ny.us/content/main/Employers/Coverage_wc/emp_empDefinition.jsp.
44. See *Gagen v. Kipany Prods., Ltd.*, 27 A.D.3d 1042, 812 N.Y.S.2d 689 (3d Dep't 2006).
45. See, e.g., *Faculty Student Ass'n of State Univ. of Oneonta v. Ross*, 54 N.Y.2d 460, 446 N.Y.S.2d 205 (1981); *Garcia v. Heady*, 46 A.D.3d 1088, 847 N.Y.S.2d 303 (3d Dep't 2007); *Anderson v. Ikon Office Solutions, Inc.*, 38 A.D.3d 317, 833 N.Y.S.2d 1 (1st Dep't 2007); *Edwards v. Jet Blue Airways Corp.*, 21 Misc. 3d 1107(A), 2008 WL 4482409 (Sup. Ct., Kings Co. 2008).