

COHEN *and* WOLF  
ATTORNEYS AT LAW

BRIDGEPORT | DANBURY | WESTPORT

## WORKER CLASSIFICATION: AVOIDING PITFALLS AND PENALTIES

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**STUART KATZ** is Chair of Cohen and Wolf's Employment & Labor and Litigation & Dispute Resolution practice groups. He represents both individuals and management in the employment law arena in cases involving harassment, discrimination, breach of contract and wage claims. He routinely provides workplace training and guidance regarding personnel policies, handbooks and employee discipline.

Stuart earned his J.D. from Boston University School of Law. He is admitted to practice in Connecticut, U.S. District Court District of Connecticut, U.S. Court of Appeals 2<sup>nd</sup> Circuit, and the U.S. Supreme Court.

## PRESENTER

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### Misclassification types:

Employee v.  
Independent Contractor

Exempt v.  
Non-Exempt Employees

## OVERVIEW

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**BEWARE!**

**INDEPENDENT CONTRACTOR OR EMPLOYEE?**

- Default – worker is employee
- Misclassification has consequences



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**ADVANTAGES AND DISADVANTAGES OF HIRING AN INDEPENDENT CONTRACTOR**

Some Advantages

- Cost Savings
- Staffing Flexibility
- Reduced Tax, Insurance and Legal Exposure

Some Disadvantages

- Less Control of Worker
- Finite Working Relationship
- Firing Depends on the Terms of the Contract



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**INDEPENDENT CONTRACTORS COMMON MISCONCEPTIONS**

- Payment on '1099' Basis
- Working as 'Consultant'
- Has Another Job
- Existence of Independent Contractor Agreement



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**INDEPENDENT CONTRACTORS  
COMMON MISCONCEPTIONS**


**Who Will Know?**

Federal / State Agencies

- IRS / CT Dept. of Revenue Services
- Department of Labor / CT Department of Labor
- EEOC / CHRO
- CT Workers Compensation

How?

- Worker Claim
- Anonymous Tip
- Spontaneous Audit



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**COMPLIANCE CHALLENGES**

- No Uniform Definition of 'Independent Contractor'
- Different Agencies, Different Tests
- Possible to Satisfy One Test, Fail Another
- Worker Prefers Independent Contractor Arrangement



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**COMPLIANCE CHALLENGES**

**Internal Revenue Service (IRS)**

- Control Test: "In any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered."
- Reasonable Basis Test
  1. Behavioral Control
  2. Financial Control
  3. Type of Relationship



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**COMPLIANCE CHALLENGES**

**Behavior Control**

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:

- Exercise of direction over time and place and sequence or means of work;
- Whose instrumentalities (tools or equipment) are used;
- Engagement of other workers;
- Whether specific duties are assigned to a specific worker;
- Instructions that the business gives to the worker;
- Training that the business gives to the worker.



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**COMPLIANCE CHALLENGES**

**Financial Control**

Facts that show whether the business has a right to control the business aspects of the worker's job include:

- Who pays unreimbursed business expenses;
- The extent of the worker's investment in facilities or tools used;
- The extent to which the worker makes the services available to the relevant market;
- How the business pays the worker (salary or wage vs. fee-based);
- The extent to which the worker realizes profit or loss.



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**COMPLIANCE CHALLENGES**

**Relationship Type**

Facts that show the parties' type of relationship include:

- Existence and terms of a written contract;
- Provision of benefits to worker;
- Permanency of relationship;
- Whether the services involved are a regular business activity of the employer.



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**COMPLIANCE CHALLENGES**

**U.S. DEPARTMENT OF LABOR**

Proper classification depends on the totality of the circumstances of the activity or situation, not a specific rule or test. Factors to consider:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.




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**COMPLIANCE CHALLENGES**

**Connecticut Department Labor**

The CT DOL uses the **ABC Test**.  
An individual must meet ALL 3 of these factors to be considered an independent contractor:

- A. The individual must be free from direction and control (work independently) in connection with the performance of the service, both under his or her contract of hire and in fact;
- B. The individual's service must be performed either outside the usual course of business of the employer or outside all the employer's places of business; and
- C. The individual must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service performed.




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**COMPLIANCE CHALLENGES**

**Connecticut Department Labor**

Note...

- Factor A, which incorporates many of the common law factors (used in IRS Test) will **not** be satisfied if the person for whom the service is performed retains the right to exercise direction and control over the service, even when the right is not used.
- An individual who forms a business in response to an offer of work as an independent contractor will **not** meet the "customarily engaged" or the "independently established" criteria of test C.




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## CONSEQUENCES

- **Tax Implications**
  - ✓ Liability for back taxes and withholdings
  - ✓ Penalties/Fines
- **Wage Implications**
  - ✓ Liability for unpaid wages, overtime, benefits
  - ✓ Penalties/Fines
- **Unemployment Implications**
  - ✓ Liability for unpaid unemployment taxes
  - ✓ Penalties/Fines
- **Workers Compensation Implications**
  - ✓ Liability for workers compensation leave benefits and medical expenses.
  - ✓ Penalties/Fines
- **Statutory Coverage**
  - ✓ Liability under anti-discrimination statutes; leave statutes; affordable care; etc.
- **Criminal Liability**
  - ✓ Willful misclassification

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## TAKEAWAY

- Employee Status Is Not Waivable
- No Uniform Test for Independent Contractor Status
- Independent Contractor Effectively In Business For Him/Herself
- Misclassification Can Be Costly
- Scrutinize; Reclassify If Necessary

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## EXEMPT VS. NON-EXEMPT EMPLOYEES

- What does it mean to be exempt or non-exempt?
- Under Federal and State law, some employees are exempt from minimum wage and overtime pay.
- Federal law is the Fair Labor Standards Act (FLSA) which requires that most employees be paid at least federal (or state if higher) minimum wage for all hours worked.
- FLSA also requires overtime pay at not less than 1.5x the regular rate of pay for all hours worked over 40 hours in a workweek.

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### NON-EXEMPT EMPLOYEES

- Non-Exempt employees are eligible for overtime pay at a rate of at least 1.5x regular rate of pay for all hours over 40 hours.
- Non-Exempt employees can be "salaried."



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### EXEMPT EMPLOYEES

- Do not receive overtime pay under the FLSA
- Exempt employees are expected to finish tasks required for their role, whether it takes 30 hours or 50 hours, without any additional pay.
- To be exempt, employee must meet the Salary Basis Test and the Job Classification (or "primary duties") test.



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### EMPLOYER RESPONSIBILITY TO CLASSIFY

- An employer should have a job description for each person on state, not only to comply with FLSA but also for job performance management.
- Job description should include:
  - A brief summary of the primary functions of the role.
  - Core responsibilities of the positions.
- Employers should advise employees of their status



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### EXECUTIVE EXEMPTION

- Employee must be compensated on a salary basis at a rate not less than \$684 per week;
- Primary duty: managing the enterprise or a customarily recognized department or subdivision.
- Must customarily and regularly direct work of at least two or more other full-time employees; and
- Employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.



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### ADMINISTRATIVE EXEMPTION

- Employee must be compensated on a salary or fee basis at a rate not less than \$684 per week;
- Primary duty: the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The exercise of discretion and independent judgment with respect to matters of significance.



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### PROFESSIONAL ("LEARNED") EXEMPTION

- Employee must be compensated on a salary or fee basis at a rate not less than \$684 per week;
- Primary duty: the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.



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### PROFESSIONAL (“CREATIVE”) EXEMPTION

- Employee must be compensated on a salary or fee basis at a rate not less than \$684 per week;
- Primary duty: the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.



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### COMPUTER EMPLOYEE EXEMPTION

- Employee must be compensated on a salary or fee basis at a rate not less than \$684 per week;
- Employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the following duties:
  - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functions specifications;
  - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  - A combination of the aforementioned duties, the performance of which requires the same level of skills.



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### OUTSIDE SALES EXEMPTION

- Primary duty: must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer and
- The employee must be customarily and regularly engaged away from the employer’s place or places of business.



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### RECORDKEEPING FOR ALL EMPLOYEES

- For recordkeeping, employers should maintain records that contain each employee's:
  - Personal information (SSN, home address, job title, etc.)
  - I-9 information
  - W2 withholding information
  - Signed job descriptions
  - Time of day and day of week when work week begins
  - Total wages paid for each pay period
  - All additions and deductions to the employee's pay
  - Date of payment



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### ADDITIONAL RECORDKEEPING FOR NON-EXEMPT EMPLOYEES

- The total hours worked each day
- The basis on which those hours are paid (either hourly or per week)
- Total daily or weekly straight-time earnings
- Total overtime earnings for the work week



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### FAILURE TO COMPLY WITH FLSA

- Employers who fail to comply with the FLSA face harsh penalties including:
  - Backpay; having to pay employees for the overtime they did not previously receive.
  - Fines: \$10,000 fine for each employee violation.
- These penalties are also excluded from insurance coverage.



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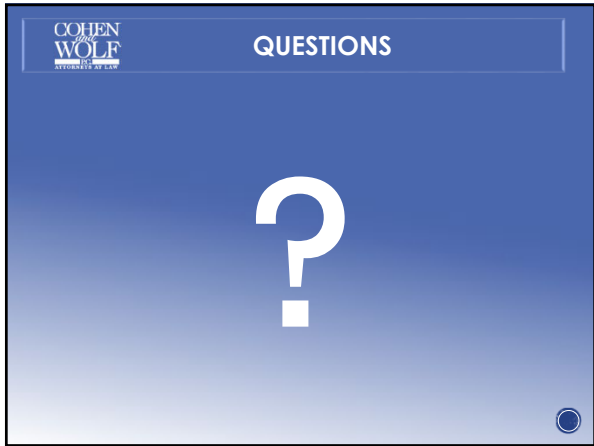
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