

# White Paper

## Interpreting your Choices

A guide to understanding the difference between over-the-phone interpretation providers

**FENTON & KELLER**  
A PROFESSIONAL CORPORATION

# Contents

- Executive Summary .....3
- Introduction .....3
- Employee interpreters and contract interpreters:  
Knowing the differences and understanding the risks .....4
- How retaining independent contractors can hinder  
an interpretation service’s quality and performance .....5
- The potential security threats that contract  
interpreters pose to a service and its clients .....5
- Why hiring employee interpreters makes  
it easier to meet compliance requirements .....5
- How service providers can ensure the security  
and confidentiality of their clients’ information .....6
- The financial repercussions of  
misclassifying interpreters as contractors .....6
- When an interpretation service misclassifies its  
interpreters as contractors, its customers often pay the price .....9
- How a service provider’s use of contract interpreters can  
tarnish your organization’s brand and reputation .....9
- Conclusion .....10
- References .....11
- Appendix A .....19
- Appendix B .....21
- About Fenton & Keller .....26

## Executive Summary

Retaining contract interpreters instead of hiring them as employees can be risky. While there may be certain advantages, the perils are many and are often unforeseen. Companies frequently assume that an independent contractor relationship is a simple agreement between a business and a worker. They could not be more mistaken. Government agencies have laid out strict criteria that define such relationships. And they enforce stiff penalties when those criteria are not met, whether the mistake is intentional or inadvertent. Many companies are facing substantial liability for having classified their workers as contractors, when they should have been classified as employees.

Companies that retain contract interpreters are not the only ones at risk. Any organization that does business with companies that misclassify interpreters as contractors may also be penalized. Due to the growing trend of retaining contractors, the IRS is now subjecting these work relationships, and all parties involved, to increased scrutiny and cracking down on offenders.

The governmental fines and penalties for misclassifying workers are significant. But retaining contract interpreters presents other risks as well. Unlike employees, contract interpreters cannot be screened, controlled, or monitored without risking a finding that they have been misclassified. Without any control over their contract interpreters' daily activities, companies cannot safely guarantee quality of service or customer satisfaction. Additionally, background checks may not be allowed for contractors, meaning that companies cannot ensure the security of their customers' private information.

This white paper addresses these and other issues that deal with the impact of hiring contract interpreters.

## Introduction

Interpretation services are often faced with a staffing dilemma. To meet their growing or fluctuating business demands, they must sometimes choose between hiring interpreters as employees or retaining them as independent contractors. Meanwhile, businesses in need of interpreting services have a similar choice to make. Do they hire a company that employs staff interpreters or opt for one that retains independent contractors?

To an employer, the choice might seem obvious. The primary motivation of many businesses that engage independent contractors is to avoid paying the withholdings and taxes associated with the payment of an employee's wages. Employers, for example, are required to withhold and pay income and unemployment taxes on an employee's wages. They must also withhold and pay Social Security and Medicare taxes. By classifying workers as independent contractors instead of employees, businesses can attempt to dodge these liabilities.

Determining who legally qualifies as an "independent contractor," however, requires a thorough examination of multiple factors. There is a complex set of criteria that must be met in order for an individual to be properly classified as a contractor. And while there are certain advantages to classifying workers as contractors, there are also some significant risks.

Misclassifying workers as independent contractors, when they should be classified as employees, can render employers liable for penalties, fines, unpaid taxes, or worse, even if the misclassification was unintentional. The IRS has recently intensified its efforts to eliminate employment tax violations and penalize violators. And its focus has been trained on businesses that misclassify their workforces. During the course of its investigations, however, the IRS also examines the business partnerships of companies that misclassify their workers. By law, an independent contractor's direct employer is not the only party that can be held liable for these misclassifications. Any company that does business with a service provider that retains contractors is also potentially liable.

Apart from the legal liabilities, retaining independent contractors brings into question such issues as quality control and oversight. There is little control businesses can exercise over contractors without risking misclassification of their workers. Consequently, monitoring worker performance and promising customer satisfaction are extremely difficult at best. Ensuring the security and confidentiality of sensitive and proprietary information is also nearly impossible.

In the discussion that follows, we will take a closer look at why workers are so often misclassified as independent contractors, the factors that go into determining legal contractor status, the issues which organizations that partner with service providers should consider, and the significant consequences of doing business with companies that misclassify workers. The discussion will also show, in convincing detail, why it is prudent in nearly every instance to work with service providers who choose to hire staff interpreters as employees rather than retain contract interpreters.

### Employee interpreters and contract interpreters: Knowing the differences and understanding the risks.

Deciding whether to classify a worker as an independent contractor or an employee is a difficult challenge faced by many businesses. Essentially, an employee is an individual hired to perform specified work, with the employer controlling the means and manner by which the employee executes those duties. An independent contractor, on the other hand, is a worker over whom the business has limited control. In the case of an independent contractor, the business retains the contractor and controls the result of the contractor's work but not the means by which the contractor conducts the work.<sup>i</sup> These distinctions lead to one obvious question—why would a business choose to retain a worker as an independent contractor rather than hire the person as an employee?

There are several reasons. When a business hires an employee, it is legally required to fulfill a number of state and federal obligations. The business must withhold state and federal income taxes from the employee's paycheck. It must keep accurate records of the employee's wages. The employer is required to provide the employee with an itemized wage statement for every pay period.<sup>ii</sup> Also, the business must secure workers' compensation insurance<sup>iii</sup> for the employee, make unemployment and disability insurance contributions, and in some states, pay employee-training taxes.<sup>iv</sup> In addition, if the employee is non-exempt, the business must pay for overtime, and provide meal and rest periods.<sup>v</sup> In some states, such as California, employers are required to reimburse employees all business expenses,<sup>vi</sup> and are legally obligated to pay for missed meal and rest periods.<sup>vii</sup>

In contrast, when an organization hires an independent contractor, it is not subject to any of these obligations. Naturally, over the past several years, this has resulted in an increase in the classification of workers as independent contractors.

Coinciding with this rise in misclassification of workers is a growing tendency within government agencies and the court system to closely scrutinize contractor relationships. The concern is that many of the relationships lack legal basis and are arranged primarily to dodge taxes and other legal requirements. When workers are misclassified as contractors rather than employees, the business that retained them is liable for unpaid taxes, contributions, and wages for up to four years in some states. Even worse, it may be subject to stiff penalties and possibly even face jail time. Few companies and organizations realize that if, for example, they use the services of interpreters that a service provider has misclassified as contractors, they can be considered a joint employer of those workers and thereby be held jointly liable with the service provider.<sup>viii</sup>

In some states, a business or organization that retains an independent contractor is required to file a report with a state agency.<sup>ix</sup> For example, in California, such a report must be filed with its Employment Development Department, which in turn relies on that very information to initiate its misclassification investigations. Consequently, the risk of having the legality of contractor relationships examined is reasonably high. And now, the IRS is entering the picture. In 29 states, including California and New York, the IRS recently signed information-sharing agreements with state labor and work-force agencies in an effort to uncover employment tax avoidance schemes and ensure correct worker classification. Similarly, the Governor of New York recently signed an executive order to facilitate the sharing of information among state agencies. If the New York State workers' compensation board finds that a company is misclassifying its workers, for instance, it can share that information with other agencies like the State Department of Labor.

It is also worth noting that a handshake does not define a working relationship. The mere fact that a business and worker entered into and signed an independent contractor agreement is not enough to show that a worker was correctly classified as an independent contractor, even if the worker believes himself or herself to be one.<sup>x</sup> When courts and government agencies investigate the work relationship, they closely examine the level of control that the business had over the worker to determine if, under the law, the individual was correctly classified.<sup>xi</sup>

## How retaining independent contractors can hinder an interpretation service's quality and performance.

An interpretation service is subject to the same rules as any other service provider. When it retains interpreters as contractors rather than hiring them as employees, it cannot set policies, rules, procedures, or instructions that the interpreter must follow. It cannot review or monitor the interpreter's performance. It cannot require the interpreter to attend training. It cannot require the interpreter to take part in meetings on performance issues. And if the interpretation service unilaterally terminates the interpreter, it must pay the individual for services not performed, unless the interpreter is fired for cause.

If the interpretation service were to engage in any of these practices, it would risk liability for misclassifying its workers as contract interpreters rather than employees, and the interpretation service would be held liable for unpaid wages and taxes and subjected to a variety of penalties.

By comparison, if the interpretation service hires employee interpreters, it can control the means and manner in which its interpreters perform their duties without risking liability. An employer can apply written policies and procedures to its employees and enforce them. It can freely regulate the conduct of its employees. It can require employees to attend performance meetings and training sessions. An employer may also supervise the employees, check with clients to inquire about an individual's performance, and address any complaints. And an employer may terminate an employee interpreter without prior notice.<sup>xii</sup>

## The potential security threats that contract interpreters pose to a service and its clients.

When an interpretation service retains independent contractors, it cannot guarantee the security and confidentiality of its client's private information because it cannot exercise control over those contractors. The inability to exercise control means an employer can neither implement nor enforce the necessary security measures that are a standard part of the employer-employee relationship.

A contract interpreter performs duties independent of any policies, rules, or procedures, including those intended to safeguard client information. For example, an interpretation service should not require contract interpreters to sign confidentiality agreements. To do so would imply that the worker is an employee, resulting in liability for misclassification of the worker. It also cannot require contractors to undergo criminal background checks, in part, because doing so would demonstrate a level of control not allowed with contractors. Also, under the laws of various states, criminal background checks are only permitted in very specific employer-employee relationships. As mentioned earlier, if the interpretation service enforces such measures, it risks being held liable for misclassifying its workforce.<sup>xiii</sup>

On the other hand, an interpretation service can require the interpreters it hires as employees to sign confidentiality agreements and, in some circumstances, to undergo background checks. Since confidential information is routinely exchanged during discussions that require an interpreter, it is important for an interpretation service to be able to exercise these security measures and hold interpreters accountable. Having a thoroughly screened interpreter decreases the risk of a leak or theft of private information. It also provides customers with greater confidence in the service they are receiving.

## Why hiring employee interpreters makes it easier to meet compliance requirements.

Under the Sarbanes-Oxley Act (SOX),<sup>xiv</sup> the principal executive or financial officers of a company must certify in each annual or quarterly report filed with the Securities Exchange Commission (SEC) that its financial statements and information are accurate. This includes information regarding an organization's use of service providers. Section 404 of SOX provides that public companies must take responsibility for maintaining an effective system of internal control in addition to reporting on the system's effectiveness.

To comply with SOX, a company must determine which, if any, of its service provider's activities are significant to the company's internal control over financial reporting. Most commonly, those would be service providers that process a business' financial data. A business using a service provider for that purpose would be responsible for assessing the design and operating effectiveness of the service provider's internal controls.

Although it is obvious that a service provider supplying interpreters would not process a business' financial data, the service provider's activities may be significant to a company's financial statements. The misclassification of employees by a service provider can result in significant obligations owed by the service provider to workers, the state, and the federal government. Such misclassifications can also result in civil and criminal liability in the form of penalties and even jail time. If a company is found to be a joint employer with the service provider of those misclassified workers, that company could be held similarly liable. As a result, any certification pursuant to SOX as to the accuracy of a company's financial statements and information would be incorrect since those would not reflect amounts that should have been paid, but were not, to the employee and the state and federal governments. A service provider that correctly classifies its workers as employees, meaning that appropriate amounts are paid to employees and government entities, has the internal controls in place to assure that it is in compliance with SOX as to that service provider. And a company's principal executive or financial officers can comfortably certify the accuracy of its financial statements and information as they are materially affected by their company's relationship with the interpretation service.

If your business is a financial institution, you are subject to the Gramm-Leach Bliley Act (GLB).<sup>xv</sup> The Act requires clear disclosure by all financial institutions of their privacy policy regarding the sharing of non-public personal information with both affiliates and third parties. Financial institutions that use interpreters who have been classified by the interpreting service as independent contractors cannot require an interpreting service to have its interpreters sign a confidentiality agreement without risking liability for misclassification of its interpreters. But financial institutions that use interpreters who have been classified as employees can request that the interpreting services require their interpreters to sign confidentiality agreements, thereby being able to ensure the privacy of non-public personal information to which interpreters become privy in the course of providing their services.

### How service providers can ensure the security and confidentiality of their clients' information.

In order to protect individuals' privacy rights, each state has its own statutes on background checks, fingerprinting, and specific guidelines as to who may legally request such measures. There are circumstances under which employers can obtain background information about individuals for employment purposes. However, the laws of certain states may make it difficult to obtain background information about an individual retained as an independent contractor.

Even if federal law, or state statute, allowed a business to run a background check and obtain fingerprints of a contractor interpreter, doing so would again put the service provider at risk of engaging in a level of control over the worker that would demonstrate that the contractor is actually a misclassified employee.

For example, in California, an investigative consumer report may be obtained on an applicant, prospective volunteer, employee, or volunteer if the information in the report will be used for employment purposes. The employer must first disclose to the individual the nature of the background check, and obtain his or her express written consent to request the report when the background check is performed.<sup>xvi</sup> And the California Penal Code allows an employer to obtain records of all convictions or arrests pending adjudication for an individual who applies for employment or a volunteer position if he or she would have supervisory or disciplinary power over a minor or any person under his or her care, or if the employer is a security organization.<sup>xvii</sup> As you can see, these laws only apply to employees and volunteers, but not to contractors. And the same privacy concerns that were considered in developing these California laws apply in other states. As a result, a business may not be able to get information on the background of independent contractors it retains, making it difficult for the business to make the same assurances to its customers about contractors that it can make about its employees.

Additionally, under the Health Insurance Portability and Accountability Act (HIPAA), a business must safeguard protected health information.<sup>xviii</sup> In the course of their duties, interpreters may have access to such protected health information. If the interpreter is an independent contractor, the business retaining the individual can allow

the contract interpreter to receive the protected health information only if the business receives satisfactory assurances that the contract interpreter will safeguard the information.<sup>xi</sup> The law requires that those assurances be in a contract or written form.<sup>xx</sup> The writing must include very specific provisions, such as that the contract interpreter will, at the termination of the contract, return or destroy all protected health information received.<sup>xxi</sup> However, if the business monitors the contract interpreter to ensure his or her compliance with the provisions of the contract, that may show a level of control over the individual that would indicate that the individual is an employee and not a contractor. On the other hand, if the interpreter is hired as an employee, the business can safely have in place policies and procedures addressing these issues, can require its interpreter employees to comply with them, and can oversee the interpreters to ensure that they are abiding by these policies and procedures.

## The financial repercussions of misclassifying interpreters as contractors.

By misclassifying workers as independent contractors instead of employees, a business avoids financial obligations to its employees and to the state and federal governments. A service provider that is held liable for such a misclassification not only becomes responsible for paying those unpaid amounts, but for associated penalties. Many states have passed laws imposing additional penalties to discourage businesses from engaging in this practice.

### Unemployment Insurance

In California, if the Employment Development Department (EDD) determines that a worker has been misclassified as an independent contractor, it will assess the employer for overdue unemployment insurance contributions, training taxes, and disability insurance contributions. In addition, there is the potential for a penalty equal to 10% of the amount of the contributions owed relative to unemployment and disability insurance, as well as 10% interest on the entire amount owed.<sup>xxii</sup>

In Illinois, if an employer is found to have willfully failed to pay any contribution with intent to defraud, it must pay the owed contributions plus a penalty equal to 60% of the amount of the contribution, with the penalty to be no less than \$400.00.<sup>xxiii</sup> Additionally, if an employer willfully refuses or fails to pay any contribution, interest or penalties, after 30 days' written notice, it may be enjoined from operating any business as an employer anywhere in the state of Illinois while the amounts remain unpaid.<sup>xxiv</sup>

Furthermore, the risk of being held liable has increased with the IRS' efforts to crack down on employment tax violations by entering into information-sharing agreements with state labor and work force agencies in states including California and New York.

### Taxes

State income tax withholding amounts will be assessed, unless it can be shown that the income was reported by the workers in question, and that the workers paid all taxes due. This means that the workers must prepare and sign a form attesting that they reported the income they received and paid their taxes, and the employer must then file that form. In addition, failure to make appropriate withholdings for state income tax payments from employee paychecks can result in additional liability.

Under New York law, if an employer required to file the withholding and wage reporting return fails to include required information relating to individual employees, or to include information that is true and correct, and fails to correct the information after notification by the Department of Taxation and Finance for more than 30 days after receiving notice, the employer is subject to various penalties which increase with each occurrence: for the first failure for one reporting period in any eight consecutive reporting periods, up to \$ 1.00 for each such employee; for the second such failure,



up to \$ 5.00 for each such employee; and for the third and subsequent such failures, up to \$ 25.00 for each such employee.<sup>xxv</sup>

In California, such an action is a misdemeanor and, if convicted, an employer may be fined up to \$1,000.00 and/or sentenced to up to one year in prison.<sup>xxvi</sup> In California an intentional failure to make appropriate withholdings is a felony, and if convicted an employer may be fined up to \$20,000.00 and/or sentenced to state prison.<sup>xxvii</sup> A 4-year statute of limitations applies to claims under these California code sections, meaning that up to four years of amounts may be owed.<sup>xxviii</sup>

### Workers' Compensation

Employers who fail to secure workers' compensation insurance for workers who are misclassified as independent contractors are subject to both workers' compensation claims and to civil tort actions by any injured worker. Many states also impose additional penalties.

In California, an employer may be held liable to the worker for an additional penalty of 10% of any workers' compensation benefits recovered by the injured worker,<sup>xxix</sup> may have to pay the employee's attorney's fees,<sup>xxx</sup> and can be held liable for a separate penalty of up to \$100,000.00 payable to the state.<sup>xxxi</sup>

In Illinois, if a misclassification of workers is seen as a false means to obtain workers' compensation insurance at a lower rate, the employer would be guilty of a felony, and would be subject to civil liability in an amount equal to three times the value of the benefits or insurance coverage wrongfully obtained, or twice the value of the benefits or insurance coverage attempted to be obtained, plus attorneys' fees and expenses.<sup>xxxii</sup>

### Wage and Hour Laws

Under wage and hour laws, if a worker is misclassified as an independent contractor, the employer can be held liable for the following, to which varying statutes of limitations apply depending on the state and the violation:<sup>xxxiii</sup>

Unpaid wages (including possible overtime pay and pay for missed meal and rest periods), interest, and waiting time penalties.<sup>xxxiv</sup>

If the employer's payment of workers does not comply with the minimum wage and overtime requirements, the worker can sue under state or federal law. Under federal law, the monetary liability for such a claim would be back pay, interest, liquidated damages in an amount equal to the back pay, attorney's fees and costs, and, if the violation is found to be willful, criminal penalties including fines of up to \$10,000.00 and imprisonment for up to six months upon conviction of a second violation.<sup>xxxv</sup>

Pursuant to Illinois law, if the Director of Labor has demanded, or a court has ordered, an employer to pay wages due to an employee and does not do so within 15 days, the employer is liable for a penalty of 1% per calendar day to the employee for each day of delay in paying the wages, up to an amount equal to twice the sum of unpaid wages due the employee. The employer is also liable to the Department of Labor for 20% of the unpaid wages.<sup>xxxvi</sup>

Under California state law, workers who are not paid minimum wages and/or overtime are entitled to recover not only the unpaid wages, but also, in the case of unpaid minimum wages, liquidated damages equal to the amount of unpaid wages plus interest, and attorneys' fees.<sup>xxxvii</sup>

In California wages are due and payable twice during each calendar month, and if workers who were misclassified as independent contractors were not paid in accordance with that timing, penalties would be imposed in the amount of \$100.00 per worker for any initial



violation, and \$200.00 per worker per pay period for each subsequent violation, plus 25% of the amount unlawfully withheld.<sup>xxxviii</sup>

Similarly, in Illinois, employees must be paid all wages earned at least semi-monthly and no later than 13 days after the end of the pay period when they were earned.<sup>xxxix</sup>

Employers who make lump-sum payments to individuals improperly classified as independent contractors may violate the statutory obligation to provide itemized wage statements to employees each pay period, and/or may violate statutory recordkeeping obligations. Some states impose penalties for these violations. In California, for example, failure to keep and provide accurate records may result in civil penalties in the amount of \$250.00 per employee for the first citation, and \$1,000.00 per employee for each subsequent citation.<sup>xl</sup> And an intentional violation of these requirements is a misdemeanor and if convicted, the employer would be fined up to \$1,000.00 and/or imprisoned for up to one year.<sup>xli</sup>

Under New York law, if an employer does not keep the records required by law, it is guilty of a misdemeanor, and each day's failure to keep the records is considered a separate offense. If the employer has been convicted of such a violation within the preceding five years, and it is convicted for a subsequent violation, it may be fined up to \$10,000.00 plus other fines provided by law.<sup>xlii</sup>

A business that retains an independent contractor is not obligated to reimburse the worker for business expenses. However, in some states, like California, it would be liable for business expenses incurred by the worker if it were determined the individual should have been classified as an employee.<sup>xliii</sup>

If a worker is misclassified as an independent contractor, in some states that individual can sue to recover benefits due under the terms of the employer's benefits plan.<sup>xliv</sup> This could include retroactive entitlement to medical benefits. This would also include all amounts paid by the worker that would otherwise have been covered by various health benefits policies. It may also include retroactive eligibility with respect to a 401(k) or any similar employee benefit plan.

Mischaracterization of an independent contractor can also have employment tax and withholding consequences. If the employer has met applicable reporting requirements and has filed a Form 1099 for the workers it believes to be independent contractors, its income tax withholding is limited to 1.5% of wages, the full employer share of FICA, and 20% of the employee's share of FICA. If the employer has not met all reporting requirements, the obligation increases to 3% of wages and 40% of the employee's share of FICA.<sup>xlv</sup>

### When an interpretation service misclassifies its interpreters as contractors, its customers often pay the price.

A business or organization that uses a service provider that has misclassified its workers can be held liable for the same obligations and penalties as that service provider. This is because the courts and federal and state agencies may consider the interpretation service and the businesses that hire it to be the joint employers of the workers who have been misclassified.

A "joint employer relationship" exists when a service provider and its customer share a worker's services, share control of the worker, or when the service provider acts in the interest of the customer in relation to the employee.<sup>xlvi</sup> If a customer is found to be engaging in a joint employer relationship with the interpretation service, that customer can be subject to the many financial obligations and penalties listed above. It is also possible the customer could face jail time.<sup>xlvii</sup>

For example, Southern California grocery chains Albertson's, Ralph's and Von's settled a class action lawsuit filed by janitors who were misclassified as independent contractors. The janitors used by the grocery chains were employed by various janitorial subcontractors. The subcontractors were retained by a company called Building

One. The janitors claimed they were not paid overtime and filed suit, alleging violation of federal and state laws. The grocery stores were held to be joint employers with the company that retained them because their requests to retain or dismiss individual employees were routinely granted, and because the grocery stores gave the workers specific instructions about work to be performed and dictated when the janitorial work would take place.<sup>xlviii</sup>

The price that a joint employer would have to pay is not just monetary. A service provider that misclassifies its workers to seek a competitive advantage is a provider that makes risky decisions that affect its finances and reputation. Businesses that use these providers open themselves up to the risks involved in dealing with such a vulnerable provider.

### How a service provider's use of contract interpreters can tarnish your organization's brand and reputation.

A company can do unforeseen damage to its business by associating with a service provider that misclassifies its workers as independent contractors rather than employees. As explained above, the legal and financial liabilities are substantial. But there is much more to consider.

Service providers that misclassify their workers in this manner are seen as trying to dodge both ethical and tax obligations. Often, these unfavorable associations affect the companies that associate with such service providers. In some states, the failure to meet the legal obligations owed to workers who should have been classified as employees is viewed as criminal conduct. So, when misclassified workers are denied the protection and benefits of employment laws, and are forced to pay costs employers normally incur, both the providers and their business partners are deemed guilty of exploitation. The public views these service providers, and the companies that use them, as profit-driven businesses with little regard for their obligations to the workforce, the state, and the federal government. Employees and government agencies routinely take their grievances to court, often in the form of a class action against the service provider and the business that used its services. When they do, the large lawsuits almost always make for damaging headlines as seen in recent lawsuits against Fedex Ground Package and Wal Mart.

In a recent California case, three drivers brought a class action against Fedex Ground Package System alleging that the drivers were employees misclassified as independent contractors.<sup>xlix</sup> The drivers claimed that as employees, they were entitled to reimbursement for work-related expenses they incurred as independent contractors. The case went to trial and the drivers were found to be employees. Fedex Ground was ordered to reimburse the drivers approximately \$5 million in expenses, and to pay the drivers' costs and attorneys' fees, which exceeded \$7 million.

In a case pending in New Jersey, a class action was filed by janitors against Wal Mart claiming that because they were misclassified as independent contractors, Wal Mart failed to pay them overtime and the minimum wage.

And in another pending California action, the California State Labor Commissioner and Attorney General filed an action against a Delaware company for several violations, including misclassifying its janitors as independent contractors, allegedly resulting in a failure to pay \$247,000.00 in taxes, Social Security, and Medi-Cal contributions, and millions of dollars in unpaid wages. In an article, the company's conduct was not only described as "gross exploitation of employees" and "unconscionable behavior," but the company was seen as gaining an unfair advantage over its competitors.<sup>1</sup>

Such multimillion-dollar cases almost always generate big headlines. And although the examples mentioned above involve companies misclassifying their own workers, the case involving Albertson's, Von's, and Ralph's is a prime example of how an organization's reputation can be affected simply by dealing with a service provider that misclassifies its workforce. Building One Service Solutions, the service provider that supplied the janitors, remains an obscure, bankrupt entity. But the headlines were about the major grocery chains. And because of their association with Building One, the chains will long be remembered for the exploitation of their workers.

A company's association with a service provider that misclassifies employees could be viewed unfavorably by its customers, shareholders, and the community at large. And any business that benefits financially from such a relationship will likely draw greater scrutiny from the IRS and other government agencies.

## Conclusion

Classifying a worker as an independent contractor so that it holds up to legal scrutiny requires much more than an agreement between a business and a worker. Numerous conditions must be met in order for the classification to be proper. The complex criteria involved make the misclassification of workers as independent contractors a common mistake. And those misclassifications, even if unintentional, have very serious legal, financial, and public relations consequences.

The IRS's recent scrutiny of independent contractor classifications is another reminder to interpretation businesses that they must be 100 percent certain the interpreters they classify as contractors meet all necessary criteria before treating them as such. It also serves as a sober reminder to any company in need of interpretation services of the potential consequences of associating with an interpretation business that misclassifies its workers. Given the significant liability associated with the misclassification of workers, a more judicious policy for any business needing the services of interpreters is to steer clear of interpretation services that use contract interpreters and choose one that employs staff interpreters instead.

Furthermore, an interpretation provider with full-time interpreters can deliver higher quality and better service. Companies that employ staff interpreters have the ability to oversee and to control the manner in which the interpreters perform their duties. Because they are employees, staff interpreters are required to follow internal policies and procedures and can be disciplined for their failure to do so. And their performance as employees can be more closely monitored than if they are contractors. In short, an interpretation business with staff interpreters has the ability to ensure that its service is consistent, competitive, and meets the demanding needs of its customers.

---

## References

<sup>i</sup> The Internal Revenue Service ("IRS") uses a variety of factors to determine whether sufficient control exists to establish an employer-employee relationship, and many federal agencies rely on those IRS factors to determine if a worker is an employee or an independent contractor. Although the IRS previously relied on twenty factors, it has now condensed them into three categories with detail in each – behavioral control, financial control, and type of relationship. Those factors are attached hereto as **Appendix A**.

Additionally, in some states, government agencies set guidelines as well. For example, the California Employment Development Department has a chart of fifteen factors to help businesses determine whether language interpreters are employees or independent contractors. (22 California Code of Regulations §§ 4304-9 et seq.) These factors are essentially the same ones set out by the IRS, and by California court decisions. Attached as **Appendix B** is the California EDD chart showing the list of factors and the weight given to each.

§ 820 Illinois Compiled Statute 405/212 sets forth the conditions when an individual will be considered an independent contractor. It looks at whether the "individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact"; and whether "such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed"; and whether "such individual is engaged in an independently established trade, occupation, profession, or business."

These various factors, including the IRS, California EDD, California court, and Illinois statutory factors, cannot be applied mechanically as separate tests. Instead they are intertwined, and their weight depends upon the particular combination and facts of the case being analyzed. (Nationwide Mut. Ins. Co. v. Darden (1992) 503 U.S. 318, 324; S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48 Cal.3d 341, 350-351.)

<sup>ii</sup> California Labor Code § 226 requires every employer to, semimonthly or at the time of each payment of wages, furnish each of its employees with an accurate itemized statement in writing of the employee's wages with nine required items of information. It also requires an employer to keep records of the information required on the itemized statement, and to afford current and former employees the right to inspect or copy the records pertaining

to that current or former employee upon reasonable request to the employer. It provides that an employee suffering injury as a result of a knowing and intentional failure by an employer to comply with this requirement is entitled to recover the greater of all actual damages or \$50.00 for the initial pay period in which a violation occurs, and \$100.00 per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of \$4,000.00. The employee is also entitled to an award of costs and reasonable attorneys' fees. California Labor Code § 1174 provides that employers must maintain a record showing the names and addresses of all employees, and payroll records showing hours worked and wages paid. If the employer willfully fails to maintain those required records, it shall be subject to a civil penalty of \$500.00. And California Labor Code § 1175 provides that a failure to keep any of the required records is a misdemeanor.

§ 820 Illinois Compiled Statutes 115/10 provides that each employee shall be furnished with an itemized statement of deductions for each pay period.

New York Labor Law § 195 (Consolidated 2007) provides that employers are required to maintain payroll records showing the hours worked, gross wages, payroll deductions and net wages for each employee and must furnish this information to employees with every payment of wages.

iii While the federal government administers a workers' compensation program for federal and certain other types of employees, each state has its own laws and programs for workers' compensation.

iv Pursuant to California Unemployment Insurance Code §§ 976 and 976.6, an employer must make contributions to the Unemployment Fund for each calendar year with respect to wages paid for employment, and shall pay contributions into the Employment Training Fund. Similarly, in Illinois and New York, employers must make unemployment insurance payments.

v Under Illinois (§ 820 Illinois Compiled Statutes 105/4a) and New York law, an employee who works more than 40 hours in any workweek is entitled to one and one-half times his or her regular rate of pay for those additional hours of work.

Pursuant to Illinois law, an employee who is to work 7-1/2 hours or more must be provided with a 20-minute meal period no later than five hours after beginning work (§ 820 Illinois Compiled Statutes 140/3). And under New York law, employees are allowed varying amounts of time for a meal period depending on the industry in which they work, and the shifts they work. (New York Labor Law § 162 (Consolidated 2007).)

California Labor Code § 510 provides that any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. And any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

California Labor Code § 512 and the California Industrial Welfare Commission Wage Orders provide that an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, unless the total work period per day for the employee is no more than six hours and the meal period is waived by mutual consent of the employer and employee.

The California Wage Orders also provide that every employer shall authorize and permit non-exempt employees to take rest periods of a minimum of ten minutes per four hours.

vi California Labor Code § 2802 provides that an employer shall indemnify its employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer. Any awards for reimbursement of those expenditures shall carry interest at the same rate as judgments in civil actions, and interest shall accrue from the date on which the employee incurred the necessary expenditure or loss.

<sup>vii</sup> California Labor Code § 226.7(b) provides that if an employer fails to provide an employee a meal or rest period pursuant to the Wage Orders, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

<sup>viii</sup> See herein for further information concerning the penalties that can be imposed, and an analysis of the "joint employer" relationship.

<sup>ix</sup> California Senate Bill 542 was introduced and signed into law in the 1999-2000 legislative session to increase child support collection by helping to locate parents who are delinquent in their child support obligations. It took effect January 1, 2001 and gives the California Employment Development Department ("EDD") access to information concerning companies' use of independent contractors. As of that date, all businesses that hire independent contractors that are individuals or sole proprietors must file reports on a Form DE 542 with the EDD within 20 days of paying/contracting for \$600.00 or more in services.

<sup>x</sup> In a California Appellate Court case, JKH Enterprises, Inc. v. Department of Industrial Relations (2006) 142 Cal.App. 4<sup>th</sup> 1046, drivers were told where to pick up packages, filled out "independent contractor profiles," filled out an application in which they acknowledged that they were independent contractors, provided their auto insurance information, drove their own vehicles, paid for their own gas, service and vehicle maintenance, and auto insurance, used their own cell phones, worked for other companies as couriers, received no particular training, were paid twice a month on an hourly basis on regularly scheduled paydays, with no deductions taken, and received 1099's. The court held that the courier service exerted control over the drivers, and that the drivers were employees. The court stated that the functions of the drivers constituted the integral heart of the courier service business. It is noteworthy that the court reached this holding even though the employees believed that they were independent contractors, and used their own equipment (including vehicles), worked for other companies, and received no training.

Factor no. 6 of the California Employment Development Department Factors is "Agency or Principal and Language Interpreter Contract." The guidelines specify that "[t]erminology used in a written agreement is not conclusive of the relationship," and "[w]ritten agreements do not necessarily depict the actual practices of the parties in a relationship. The actual practices of the parties in a relationship are more important than the wording of an agreement in making an employer-employee relationship determination." (See Appendix B at factor no. 6.)

<sup>xi</sup> In the case of interpreters/translators retained by the service provider, it is important to note that situations where the work performed is part of the regular business of the hiring company (i.e., here, the service provider), or is "integrated" into the business operations, indicate an employer-employee relationship. (Internal Revenue Service Ruling (Rev. Rul.) 87-41; Borello supra, 48 Cal.3d at 350-351.) As the IRS explains, "[w]hen the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business." (Rev. Rul. 87-41; see also United States v. Silk (1947) 331 U.S. 704.)

In a decision by the Unemployment Insurance Appeals Board (the "Board"), the Board found that the interpreter was an independent contractor, but one of the bases of that decision was that the interpreter "provided services to one of the [AT&T's] smaller divisions [AT&T Language Line Services] and the interpreter's services were not an essential part of the employer's regular business."

<sup>xii</sup> In Air Couriers International v. Employment Development Department (2007) 150 Cal.App.4<sup>th</sup> 923, another California case, drivers did not sign independent contractor agreements, did not turn down jobs relayed to them by the dispatcher for fear of not getting future jobs, were given pick-up and delivery times and **were terminated if they proved unreliable, were provided with a training video**, were given uniforms and ID badges, worked for the courier service for extended periods, were provided with pagers to respond to dispatchers, provided regular delivery services to the same customers, were paid bi-weekly, were given special logo tape for packages and manifest sheets, and new drivers would ride with more experienced drivers. The courier service sought to require the drivers to meet performance and quality requirements. The court held that the courier services exerted control over the drivers, and that the drivers were therefore employees.



In an IRS case, an interpreter was hired by a software company to translate software manuals into French. The IRS found the interpreter was an independent contractor but, in deciding this, found it important that the interpreter was hired to do a particular job only, did not work on a continuing basis, and performed work that was not an integral part of the software company's business. (IRS Private Ruling 9131025, 1991 PRL LEXIS 995.) Additionally, the IRS noted that the interpreter was not given any instructions on how to do the interpreting and the company "was concerned only with the final product and was not interested in the methods used by the worker to complete the assignment."

In a case before the Oregon Department of Consumer and Business Services Insurance Division concerning Certified Languages International (CLI), which provided language interpretation and translation services, the judge held that the interpreters were employees, relying heavily on a manual that was only provided to the interpreters. The manual included instructions and a code of ethics and, according to the judge, showed CLI's right to direct and control the manner in which the interpreters' language services were provided. The judge also pointed out that CLI procured contracts with clients, selected interpreters to perform the language services, and told the interpreters when and where to provide the service. The individuals were held to be employees even though the decision noted that they were paid an average of \$300.00 per month, and between \$3.00 and \$17,789.00 during any one audit period.

The California EDD has a chart of fifteen factors to help employers determine whether language interpreters are employees or independent contractors. (22 California Code of Regulations § 4304-9, et seq. and Appendix B.) These factors are essentially the same ones set out by the IRS and California court decisions. The ones to which the California EDD gives the greatest weight are: the principal's right to control the interpreter by, for example, supervising the individual or reviewing his or her work performance; whether the principal provides the interpreter with written policies, rules or procedures of conduct; whether the principal requires the interpreter to take training such as continuing education and whether it pays for that training; whether the principal has the right to terminate the interpreter; and whether the interpreter's services are central to delivering the services provided by the business. Additionally, if the interpreter provides services on a continuous basis, the EDD considers that to be strong evidence of employment.

Furthermore, one of the IRS factors that indicates that a business has a right to direct and control how the worker does the task for which the worker is hired is the instructions that the business gives to the workers. An "employee" is generally subject to business instructions about when, where, and how to work, which are the methods that an employer uses to ensure that workers meet its performance and quality requirements.

Under the California EDD factors, the setting of policies, rules or procedures and instructions by the agency or principal or both is an indication of direction and control over the language interpreter's services, showing that the individual is an employee. The California EDD gives this factor great weight in determining if the individual is an employee or independent contractor. Such policies, rules, procedures, or instructions are the method by which a business ensures that a worker meets its performance and quality requirements. Therefore, based on case law, the IRS factors, and the California EDD factors, a business would essentially be unable to ensure that an independent contractor meets the business' performance and quality requirements without risking a finding that it misclassified the employee as an independent contractor.

<sup>xiii</sup> See the explanation above at endnote xii. As in the case of a business seeking to control an individual's performance, if a business requires workers to sign confidentiality agreements or undergo background checks, it is requiring the workers to follow policies, rules, procedures and/or instructions, showing direction and control over the workers which indicates that they are employees and not independent contractors.

<sup>xiv</sup> The Sarbanes-Oxley Act, also known as the Public Company Accounting Reform and Investor Protection Act of 2002, is a United States federal law enacted on July 30, 2002 in response to a number of major corporate and accounting scandals. The Act requires public companies to develop practices involving corporate governance and financial reporting with the goal of restoring the public trust in the capital markets.

<sup>xv</sup> The Gramm-Leach-Bliley Act (15 United States Code Subchapter 1, sections 6801 through 6809) regulates the sharing of personal information about individuals who obtain financial products or services from financial

institutions. It attempts to inform individuals about the privacy policies and practices of financial institutions, so that consumers can use that information to make choices about financial institutions with whom they wish to do business. The law gives consumers limited control - via opt-out - over how financial institutions use and share the consumers' personal information.

<sup>xvi</sup> California Civil Code § 1786.12(d)(1) states that “[a]n investigative consumer reporting agency shall only furnish an investigative consumer report under the following circumstances: (a) In response to the order of a court having jurisdiction to issue the order; (b) In compliance with a lawful subpoena issued by a court of competent jurisdiction; (c) In accordance with the written instructions of the consumer to whom it relates; **(d) To a person that it has reason to believe: (1) Intends to use the information for employment purposes; or (2) Intends to use the information serving as a factor in determining a consumer’s eligibility for insurance or the rate for any insurance; or (3) Intends to use the information in connection with a determination of the consumer’s eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider the applicant’s financial responsibility or status; or (4) Intends to use the information in connection with an order of a court of competent jurisdiction to provide support where the imposition or enforcement of the order involves the consumer; or (5) Intends to use the information in connection with the hiring of a dwelling unit, as defined in subdivision (c) of Section 1940.**” [Emphasis added.] The person procuring or causing the report to be made must provide a “clear and conspicuous disclosure in writing to the consumer at any time before the report is procured or caused to be made in a document that consists solely of the disclosure,” and the consumer must authorize in writing the procurement of the report. (California Civil Code §§ 1786.16(a)(2)(B) and (C).) The person procuring or causing the report to be made must have a permissible purpose as defined in Section 1786.12. (California Civil Code § 1786.16(a)(2)(A).)

<sup>xvii</sup> California Penal Code § 11105.3(a) provides that a “human resource agency or an employer may request from the Department of Justice records of all convictions or any arrest pending adjudication involving the offenses specified in subdivision (a) of Section 15660 of the Welfare and Institutions Code of a person who applies for a license, employment, or volunteer position, in which he or she would have supervisory or disciplinary power over a minor or any person under his or her care.” The offenses specified in California Welfare and Institutions Code § 15660 are conviction of a violation or attempted violation of Section 243.4 of the Penal Code, a sex offense against a minor, or of any felony which requires registration pursuant to Section 290 of the Penal Code, or conviction or incarceration within the last 10 years as the result of committing a violation or attempted violation of Section 273a, 273d, or subdivision (a) or (b) of Section 368, of the Penal Code, or as the result of committing a theft, robbery, burglary, or any felony.

California Penal Code §11105.4 provides that a contract or proprietary security organization may request any criminal history information concerning its prospective employees that may be furnished pursuant to subdivision (n) of Section 11105. A “contract security organization” is defined as a person, business, or organization licensed to provide services as a private patrol operator. A “proprietary security organization” is defined as an organization within a business entity that has the primary responsibility of protecting the employees and property of its employer, and which allocates a substantial part of its annual budget to providing security and protective services for its employer, including providing qualifying and in-service training to members of the organization. Subdivision (n) of Section 11105 applies whenever state or federal summary criminal history information that is to be used for employment, licensing, or certification purposes, is furnished by the Department of Justice as the result of an application by an authorized agency, organization, or individual pursuant to various sections of the California Penal Code.

<sup>xviii</sup> “Protected health information” means “individually identifiable health information” that is transmitted by electronic media, maintained in electronic media, or transmitted or maintained in any other form or medium. (45 Code of Federal Regulations § 160.103 (emphasis added).)

<sup>xix</sup> 45 Code of Federal Regulations § 160.103 provides that a “business associate” is a person who “(ii) [p]rovides, other than in the capacity of a member of the workforce of such covered entity, legal, actuarial, accounting, consulting, data aggregation . . . , management, administrative, accreditation, or financial services to or for such covered entity, or to or for an organized health care arrangement in which the covered entity participates, where the provision of the service involves the disclosure of individually identifiable health information from such covered



entity or arrangement, or from another business associate of such covered entity or arrangement, to the person.” A “covered entity” means a health plan, health care clearinghouse, or health care provider who transmits any health information in electronic form in connection with a transaction covered by the subchapter on “Administrative Data Standards and Related Requirements.” (45 Code of Federal Regulations § 160.103.)

45 Code of Federal Regulations § 164.502(e)(1) provides that “(i) [a] covered entity may disclose protected health information to a business associate and may allow a business associate to create or receive protected health information on its behalf, if the covered entity obtains satisfactory assurance that the business associate will appropriately safeguard the information.”

xx Pursuant to 45 Code of Federal Regulations § 164.502(e)(2), “[a] covered entity must document the satisfactory assurances required by paragraph (e)(1) of this section through a written contract or other written agreement or arrangement with the business associate that meets the applicable requirements of § 164.504(e).”

xxi A contract between a covered entity and a business associate must “(i) Establish the permitted and required uses and disclosures of such information by the business associate . . . (ii) Provide that the business associate will: (A) Not use or further disclose the information other than as permitted or required by the contract or as required by law; (B) Use appropriate safeguards to prevent use or disclosure of the information other than as provided for by its contract; (C) Report to the covered entity any use or disclosure of the information not provided for by its contract of which it becomes aware; (D) Ensure that any agents, including a subcontractor, to whom it provides protected health information received from, or created or received by the business associate on behalf of, the covered entity agrees to the same restrictions and conditions that apply to the business associate with respect to such information; (E) Make available protected health information . . . ; (F) Make available protected health information for amendment and incorporate any amendments to protected health information . . . ; (G) Make available the information required to provide an accounting of disclosures . . . ; (H) Make its internal practices, books, and records relating to the use and disclosure of protected health information received from, or created or received by the business associate on behalf of, the covered entity available to the Secretary for purposes of determining the covered entity’s compliance with this subpart; and (I) At termination of the contract, if feasible, return or destroy all protected health information received from, or created or received by the business associate on behalf of, the covered entity that the business associate still maintains in any form and retain no copies of such information or, if such return or destruction is not feasible, extend the protections of the contract to the information and limit further uses and disclosures to those purposes that make the return or destruction of the information infeasible.” (45 Code of Federal Regulations § 164.504(e)(2).)

xxii California Unemployment Insurance Code §§ 1112(a), 1113.

xxiii § 820 Illinois Compiled Statutes 405/1402.

xxiv § 820 Illinois Compiled Statutes 405/2404.

xxv 20 New York Codes, Rules and Regulations 174.2(h).

xxvi California Unemployment Insurance Code § 2118.

xxvii California Unemployment Insurance Code § 2118.5.

xxviii California Unemployment Insurance Code § 2125.

xxix California Labor Code § 4554.

xxx California Labor Code § 4555.

xxxi California Labor Code § 129.5 (e).

xxxii § 820 Illinois Compiled Statutes 305/25.5.

<sup>xxxiii</sup> Under California law, a one-year statute of limitations applies where a violation calls for penalties, and unless otherwise specified in a statute, a three-year statute of limitations applies to an action upon a liability created by statute. (California Code of Civil Procedure § 338.) If the claim is for unfair competition, i.e., the business misclassified its workers to avoid federal and state obligations, thereby increasing its advantage in the market, a four-year statute of limitations applies. (California Business and Professions Code § 17200.)

<sup>xxxiv</sup> Under California law, specifically Labor Code § 226.7(b), if an employer fails to provide an employee a meal or rest period pursuant to the Industrial Welfare Commission Wage Orders, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

California Labor Code § 203 provides that if an employer "willfully fails to pay, without abatement or reduction . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days."

<sup>xxxv</sup> 29 United States Code § 201 et seq.

<sup>xxxvi</sup> § 820 Illinois Compiled Statutes 115/14.

<sup>xxxvii</sup> California Labor Code §§ 1193.6, 1194, 1194.2.

<sup>xxxviii</sup> California Labor Code § 210.

<sup>xxxix</sup> § 820 Illinois Compiled Statutes 115/4.

<sup>xl</sup> California Labor Code § 226.3.

<sup>xli</sup> California Labor Code § 226.6.

<sup>xlii</sup> New York Labor Law § 662 (Consolidated 2007).

<sup>xliii</sup> California Labor Code § 2802 provides that an employer shall indemnify its employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer.

<sup>xliv</sup> Employee Retirement Income Security Act §502(a) (1) (b), 29 United States Code §1132 (a) (1)(B).

<sup>xlv</sup> Internal Revenue Code § 3509 (26 United States Code § 3509)

<sup>xlvi</sup> See Chao v. A-One Med. Services (2003) 346 F.3d 908, 917; Moreau v. Air France (2003) 343 F.3d 1179; and 29 Code Of Federal Regulations §791.2(b).

<sup>xlvii</sup> A lawsuit against Network Omni illustrates the very real potential for significant exposure as a result of a class action lawsuit brought by misclassified independent contractors. Notably, as per the complaint on file, the complaining parties are or were "employees" of Network Omni, but Network Omni failed to follow the wage and hour rules noted above. The resulting complaint contains thirteen causes of action and seeks damages related to failing to pay wages for all hours worked, overtime, penalties for missed meal and break periods, reimbursement of business expenses, punitive damages and attorney's fees. These same causes of action are available to misclassified independent contractors, and subject the employer of those independent contractors to even greater risk because in most cases adequate records are not available to disprove the misclassified contractor's claims.

<sup>xlviii</sup> Flores, et al. v. Albertson's, Inc., et al. (2003) 2003 U.S. Dist. LEXIS 26857.

<sup>xlix</sup> Estrada v. Fedex Ground Package System, Inc. (2007) 154 Cal.App.4th 1.

---

<sup>1</sup>On December 19, 2007, California Labor Commissioner Angela Bradstreet and Attorney General Edmund G. Brown, Jr. took legal action against Excell Cleaning & Building Services, Inc. and MO Restaurant Cleaning of California, Inc. for failing to pay approximately 300 California janitorial workers proper wages and engaging in unfair business practices. The two companies had contracts to provide janitorial services at various restaurants in Los Angeles, San Diego, and Orange counties.

## Appendix A

The IRS factors are:

**Behavioral 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:

- Instructions that the business gives to the workers. An employee is generally subject to the business instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work:
  - When and where to do the work.
  - What tools or equipment to use.
  - What workers to hire to assist with the work.
  - Where to purchase supplies and services.
  - What work must be performed by a specified individual.
  - What order or sequence to follow.

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a workers' performance or instead has given up that right.

- Training that the business gives to the worker. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

**Financial control.** Facts that show whether the business has a right to control the business aspects of the workers' job include:

- The extent to which the worker has unreimbursed business expenses. Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services that they perform for their business.
- The extent of the workers' investment. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.
- The extent to which the worker makes his or her services available to the relevant market. An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.
- How the business pays the worker. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is

---

usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.

- The extent to which the worker can realize a profit or loss. An independent contractor can make a profit or loss.

**Type of relationship.** Facts that show the parties' type of relationship include:

- Written contracts describing the relationship the parties intended to create.
- Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.
- The permanency of the relationship. If you engage a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that your intent was to create an employer-employee relationship.
- The extent to which services performed by the worker are a key aspect of the regular business of the company. If a worker provides services that are a key aspect of your regular business activity, it is more likely that you will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

## Appendix B

## California Employment Development Department

## Table of Determination Factors – Language Interpreters

FACTORS	EVIDENCE OF EMPLOYEE	EVIDENCE OF INDEPENDENT CONTRACTOR	WEIGHT
(1) Policies, Rules or Procedures of Conduct	Set by the agency or principal or both, as evidenced by written or verbal task descriptions, dress code, absence/vacation policies, requiring appointment books, etc.	Language interpreter performs his or her services independent of any policies, rules or procedures of conduct set by the agency or principal or both.	The setting of policies, rules or procedures and instructions by the agency or principal or both is an indication of direction and control over the language interpreter's services and carries great weight.
(2) Supervision on the Job	The agency or principal or both supervise the language interpreter, such as requiring the language interpreter to personally confirm all appointments with the agency's clients, arrive early for appointments, reviews the work performance as to how the language interpreter conducts himself or herself on the job, etc. Client complaints about language interpreter's services are directed to the agency for resolution. Agency checks with clients to determine whether language interpreter's services were satisfactory.	Details of work not supervised by agency or principal. Client and language interpreter resolve client complaints. No reviews of work performance.	To the extent that the agency or principal or both exercise control over the services through supervision, it is evidence that the agency or principal or both have the right to control the services, and that this right to control the services is complete and authoritative. This right to control (whether or not exercised) carries the greatest weight in making an employer-employee relationship determination.
(3) Training	Agency or principal or both instruct the language interpreter on details of the job, how to prepare invoices, on the policies, rules or procedures of conduct, etc. Agency or principal or both require the language interpreter to take training (e.g., classes for continuing education, certification, attending seminars, etc.) The required training is paid for by the agency or principal or both.	Training is not required by the agency or principal or both. Language interpreter seeks training (e.g., classes for continuing education, certification, attending seminars, etc.) on his or her own. Language interpreter pays for his or her own training.	Training given by the agency or principal or both that includes instructions about how to perform the services, a dress code, client relations, etc., infers that the agency or principal or both have the right to control the services and carries great weight. Where the agency or principal or both require attendance at training or pay for training, it is an indication of direction and control over the language interpreter's services and carries great weight.

FACTORS	EVIDENCE OF EMPLOYEE	EVIDENCE OF INDEPENDENT CONTRACTOR	WEIGHT
(4) Meetings	Agency or principal or both conduct meetings and language interpreter's attendance is required or expected. The language interpreter's time is paid for.	Agency or principal does not hold required meetings. Attendance is not mandatory and nonattendance is viewed without negative consequence. Time at meetings is not paid for or meetings are not held.	The act of holding informational meetings, by itself, is not a strong indication of employment. However, if by intent or in fact the purpose of the meeting is to convey policies, rules or procedures or instructions to do the work, it implies that the agency or principal or both want the services performed in a particular method or manner which indicates direction and control over the language interpreter's services, this would carry great weight. The meetings referred to in this factor are not meetings or conferences where the language interpreter is assigned to perform interpreting services.
(5) Reports	Agency requires language interpreter to report by telephone upon job completion, cancellations, no-shows, etc. Agency or principal or both give the language interpreter instructions when cancellations or no-shows occur.	Reports are not required.	Reporting requirements are an extension of the factor "supervision" and would be given medium to great weight depending on the purpose and content of the reports (verbal or written). Reports that are used to monitor the language interpreter's performance are considered controls by the agency or principal or both over the manner and means of the work. However, reports, whether verbal or written, of an invoice nature to determine payment to the language interpreter and/or billings to an agency or principal or both would be neutral.
(6) Agency or Principal and Language Interpreter Contract	Agreement between the agency or principal or both and the language interpreter gives the agency or principal or both the right to direct and control the manner and means of the services. Agreement contemplates that the language interpreter will perform the services personally.	Agreement between the agency or principal or both and the language interpreter does not give the agency or principal or both the right to direct and control the manner and means of the services. The agreement does not require the services to be performed personally by the language interpreter.	Terminology used in a written agreement is not conclusive of the relationship, but is evidence of the relationship intended. Written agreements do not necessarily depict the actual practices of the parties in a relationship. The actual practices of the parties in a relationship are more important than the wording of an agreement in making an employer-employee relationship determination. An agreement in which the agency or principal or both expresses only an interest in the end result and abandons the right to control the details (manner and means) of the services is evidence of independence.



FACTORS	EVIDENCE OF EMPLOYEE	EVIDENCE OF INDEPENDENT CONTRACTOR	WEIGHT
(7) Termination	Both the agency or principal and the language interpreter have the right to terminate the relationship at will without prior notice and without any further contractual liability (except for services already performed).	By agreement or practice, the agency or principal is required to pay for services not performed, if the agency or principal unilaterally terminates the relationship, other than for cause. By agreement or practice, makes the language interpreter liable for damages if the language interpreter fails to complete the terms of the agreement.	The right to terminate conveys an inherent power of the agency or principal over the language interpreter. The right to terminate at will, without cause, is strong evidence of employment. If the services being performed by the language interpreter are on a continuous basis it would give the appearance of the agency or principal having the right to terminate the services at will by not using the language interpreter's services anymore.
(8) Engagement in a Distinct Business	<p>The language interpreter does not operate his or her own business. Services performed are a direct and essential part of the agency's or principal's business.</p> <p>The language interpreter does not advertise his or her services to the general public as a separate business. The language interpreter performs services under the agency's or principal's trade name (provides business card of the agency, etc.). The language interpreter performs services for one or a few agency(s) or principal(s) or both. The language interpreter receives payment for services from the agency or principal whether client pays or not. Billings and collections are handled by the agency or principal. The language interpreter does not have an entrepreneurial risk of loss.</p>	<p>The language interpreter operates an independent business separate from that of the agency or principal.</p> <p>The language interpreter has a business telephone directory listing, advertises under own trade name, has a business license where required, files a Federal Form 1040 Schedule C as an independent business, and has an investment in facilities or equipment. The language interpreter provides services to numerous agencies or principals or both. The language interpreter does not receive payment for services from the agency or principal if the client does not pay. The language interpreter assumes an entrepreneurial risk of loss.</p>	If the language interpreter has established a separate business, distinct from that of the agency or principal, and the services are performed in the furtherance of that separate business, great weight would be given toward independence.
(9) Required Skill of the Language Interpreter	<p>In this particular industry, both employees and independent contractors are highly skilled in interpreting/translating one or more languages, whether or not the work requires certification.</p> <p>Therefore, in this industry, this factor is neutral.</p>		Level of skill, by itself, generally does not weigh heavily. However, a high level of technical skill will weigh more heavily when combined with other factors such as separate and distinct business. A low level of technical skills weighs in favor of employment, since as skill level declines, the language interpreter has less room to exercise the discretion necessary for independence.

FACTORS	EVIDENCE OF EMPLOYEE	EVIDENCE OF INDEPENDENT CONTRACTOR	WEIGHT
(10) Duration of Services	The language interpreter performs services on a continuous basis.	The language interpreter provides services on a sporadic, per job basis.	This factor, by itself, is not controlling. Independent contractors usually perform work on a job basis for shorter, designated periods of time. Employment is usually of open-ended duration. A long series of short term assignments from a single agency or principal will tend to show continuity and employment. If the language interpreter's services are performed on a continuing basis it would be evidence of employment, especially if the services are a regular part of the agency's or principal's business. The time of performing the service may result in strong evidence of employment if the performance occurs during regular intervals at regular times.
(11) Whether the Agency or Principal of the Language Interpreter Supplies the Instrumentalities, Tools, and Place of Work	The agency or principal provides the language interpreter with office space, desk, chair(s), telephone, support services, forms, supplies, and business cards.	The language interpreter pays for his or her own office, equipment, support services, forms, supplies, and business cards.	If the language interpreter has established his or her own office, and pays all the expenses connected with that separate office, there is a strong indication of independence. On the other hand, if the language interpreter generally works out of the agency's or principal's office where all necessities are provided and paid for by the agency or principal, then there is a strong indication of an employment relationship.
(12) Custom in Industry and Location	Agencies or principals treat their language interpreters as employees.	Language interpreters typically operate their own separately established businesses.	This factor, by itself, is not controlling. This is because each determination must stand on its own facts regarding the agency's or principal's right to direct and control. Industry custom merely gives an inference or direction to the determination.
(13) Method of Payment	Payment by time period (hour, week, month, etc.) or piece rate. Payments made at regular intervals. Compensation set by the agency or principal. Expenses are reimbursed or benefits furnished or both.	No benefits are provided. Language interpreter pays for his or her own expenses. Fee for services negotiated per job.	This factor, by itself, is not controlling. It is only an indication of the type of relationship. This is because a language interpreter may be paid solely by the job, but the controls are sufficient to create an employer-employee relationship.
(14) Belief of Parties	All parties believe the relationship is one of employment.	All parties agree that the relationship is one of independence.	This factor, by itself, is not controlling. The belief of parties only infers the relationship intended.

FACTORS	EVIDENCE OF EMPLOYEE	EVIDENCE OF INDEPENDENT CONTRACTOR	WEIGHT
(15) Part of Regular Business of Agency or Principal	The language interpreter's services are an integral part of the agency's or principal's business activities. The language interpreter's activities are central to delivering the services provided by the business.	The language interpreter's services are only supportive of the business activities, purpose and are not an integral part of the agency's or principal's business activities.	This factor is given medium to great weight. The presumption is that if the language interpreter's services are an integral (regular, normal, central) part of the agency's or principal's business, then the agency or principal by business necessity needs to maintain control over the language interpreter's services.

---

## FENTON & KELLER

A PROFESSIONAL CORPORATION

For over fifty years, the attorneys at Fenton & Keller have been meeting the changing legal needs of regional, state, national, and international clients throughout the Monterey Bay, California, and beyond. The firm has earned a reputation for energy, integrity, and cost effective delivery of legal services. Its skilled and experienced attorneys partner with its private and public sector clients to achieve practical solutions to even the most complex legal challenges.

The attorneys at Fenton & Keller practice law in a wide variety of areas including compliance, counseling, and litigation in the field of employment law. Its employment law attorneys serve privately and publicly held business entities of all sizes, as well as partnerships and individuals. Its clients include manufacturers, high-technology companies, agricultural companies, non-profits, public entities, financial institutions, hospitals, and other healthcare providers. The attorneys at Fenton & Keller have successfully handled hundreds of wrongful termination, discrimination, and harassment matters in both federal and state courts for private and public employers. In addition to litigation, its attorneys help prevent lawsuits by providing ongoing legal advice on issues such as wage and hour law, hiring and termination, discrimination and harassment, workplace privacy issues, and compliance with the diverse state and federal laws governing employment in California.