

Independent Contracting

Continuing Legal Risks and the ComplianceHR Solution





Joe Panza

Vice President of Product
Management & Operations
ComplianceHR
panza@compliancehr.com

Introducing the Navigator Suite

ComplianceHR SmartScreen



COVID-19 Screening

Efficiently screens your employees and tracks results as they return to work, while helping you ensure privacy and 50-state compliance.

+ Manage Employees

🔍 Track Results

COVID-19 Resource Center



COVID-19 Resource Center

Quickly delivers answers to the most pressing employment-related COVID-19 topics such as health and safety, leaves of absence and more.

🔍 Use FAQ Rapid Reference

🔍 View Resource Documents

PolicySmart



Be Confident. Stay Compliant.

PolicySmart's simple templates and checklists make it easy to create and maintain your policies. Ensure you never miss an update with our intuitive news and notifications about regulatory changes.

🔍 View Policy Documents

🔍 View Policy News

⚙️ Configure Jurisdictions

Navigator IC



Independent Contractor Assessment

Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws

+ Create New Evaluation

🔍 View Evaluations

▶ IC Agreement

Navigator OT



Exempt Status Assessment

Provides a risk assessment of each applicable exemption, suggestions on how to lower the risk of misclassification, and a summary of the federal and state exemption standards

+ Create New Review

🔍 View Reviews

🔍 View Evaluations

Navigator Leave



Leave Compliance

Generates state and federal compliant forms, and quickly delivers federal and state-specific leave requirements (and paid sick leave or "PSL") through Rapid Reference tools.

+ Create New Form

🔍 View Forms

▶ Use PSL Rapid Reference

▶ Use Rapid Reference

Navigator Pay Practices



Wage and Hour Compliance

Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues

▶ Find Minimum Wage

▶ Use Rapid Reference

Navigator Onboarding



Onboarding Document Production

Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents

+ Create New Document

Try the Navigator Suite Free for 14 Days

The screenshot displays the ComplianceHR Navigator Suite interface. At the top left, the logo "ComplianceHR" is visible. Below it, two user profiles are listed: Joe Panza, Vice President of Product Management & Operations, and Tammy McCutchen, Senior Advisor for Resolution Economics. The main content area, titled "Slides", features a presentation slide about "Independent Contracting" by Littler, with the subtitle "Continuing Legal Risks and the ComplianceHR Solution". The slide includes the Littler logo and the ComplianceHR logo. On the left side, there is a "Q&A (Content & Technical)" section with a text input field labeled "Enter your question" and a "Submit" button. A large red arrow points to the "Submit" button. On the right side, a "Resources" panel lists three items: "Feedback Form", "State-By-State CLE Guide", and "Presentation Materials". At the bottom, a navigation bar contains icons for various features: a download icon, "CLE", "Q&A", a question mark, a list icon, a speaker icon, a calendar icon, and a group icon. The text "POWERED BY ON24" is located in the bottom right corner.





Navigator Independent Contractor

- Determines employee or independent contractor status
- Draws from a proprietary engine of **1,900 reported court decisions** and DOL opinion letters
- Analyzes individual fact patterns under all applicable federal and state regulations
- Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, a summary of applicable laws, and a transcript of questionnaire answers

RISK BY JURISDICTION

This report analyzes both Federal and State laws. The overall result above is the higher risk of the two. Below is a breakdown of each jurisdiction analyzed separately.

Federal

Under the facts provided, it is **moderately likely** that Nicole Smith LLC will be found to be an employee.

Indiana

Under the facts provided, it is **highly likely** that Nicole Smith LLC will be found to be an employee.

You have indicated that Nicole Smith LLC will be working in Indiana. At least one of the "ABC" or similar test, rather than a multi-factor balancing test. Under a traditional ABC test, Nicole Smith LLC would be found to be an employee.

Compliance HR

Your Questionnaire

Please complete the questionnaire below as requested by **Joe Panza**. This questionnaire relates to Abc Inc.'s relationship with **Nicole Smith**.

Your answers are saved automatically as you proceed. You can return to your questionnaire later by using the button on your dashboard.

Agreement Details

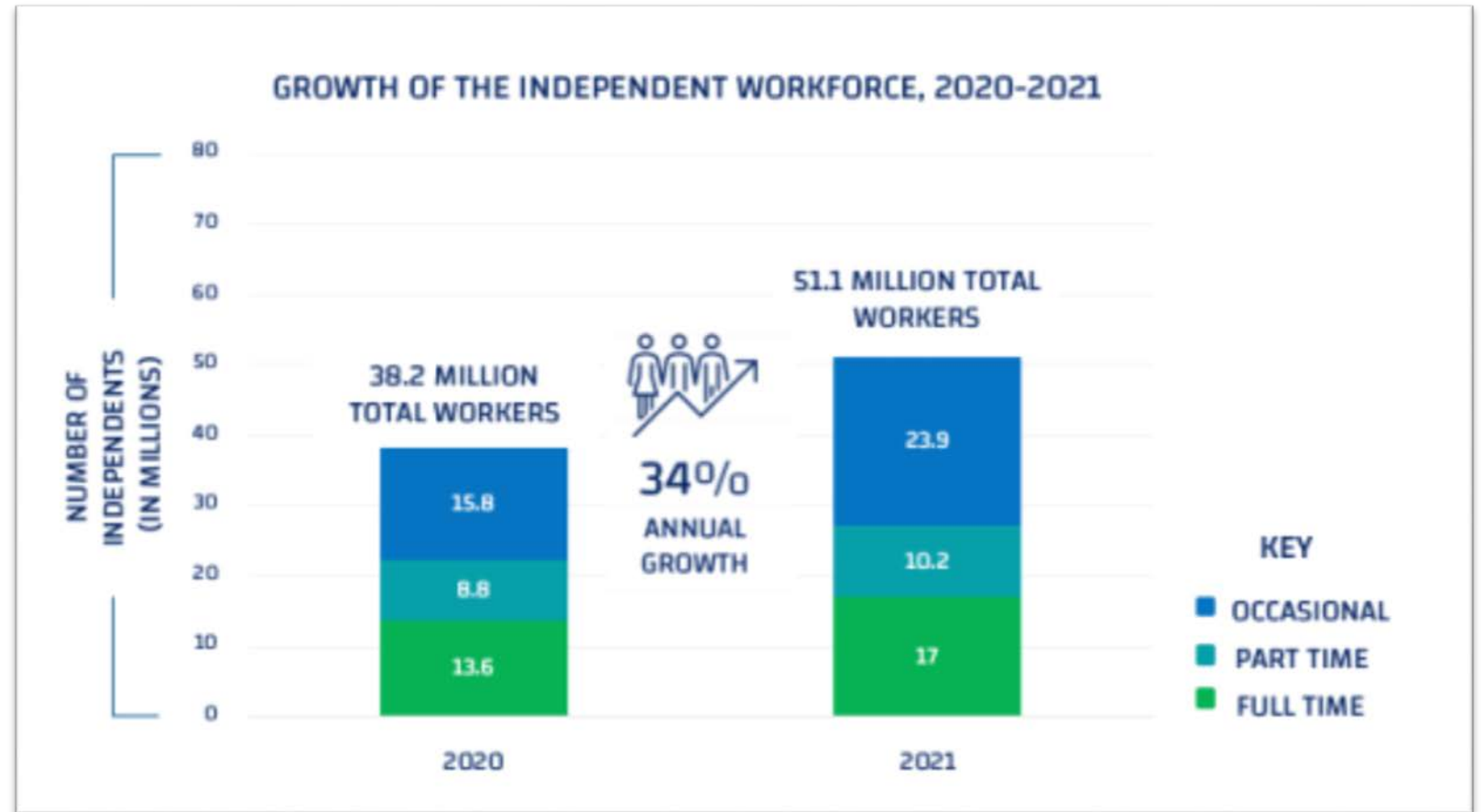
Is Nicole Smith LLC required to personally perform the work?
No, Nicole Smith LLC can hire employees or subcontractors

What applies to Nicole Smith LLC's employees or subcontractors?
Select all that apply
None of the Above

Will Abc Inc. provide Nicole Smith LLC, its employees or its subcontractor's employees with training, supervision, and control?

MBO Partners, 11th Annual Report On State of Independence in America

The number of independent workers rose to 51.1 million in 2021, a 34% increase over 2020



MBO 11th Annual Report On State of Independent in America (August 2021)

About two-thirds (68%) of new independents are Gen Zers (aged 18-25) or Millennials (aged 26-40), compared to only half (50%) of those who have been independent for more than a year.



68%

About two-thirds (68%) of full-time independent workers say that working independently is more secure than having a traditional job.

Many of those quitting full-time work are drawn to independent work by the work/life flexibility, autonomy, and control it provides.



63%

of workers (up from 59% in 2020) say that working independently was their choice completely



77%

are highly satisfied, the highest level of satisfaction in our 11 years of data



Agenda

- The Attack on Independent Work Continues
- What's New @ DOL
- Navigator IC Refreshed
- Tammy's Danger Signals & Best Practices



Tammy McCutchen

Strategic Adviser,
ComplianceHR

tammy@compliancehr.com

- Former Administrator, US-DOL, Wage & Hour Division
- A leading authority of federal and state wage and hours law
- Primary architect of DOL's overtime exemptions regulations & ComplianceHR's Navigator IC and Navigator OT applications

Answering Your Questions

Q & A Box on your screen
(questions are confidential –
visible to presenters only)



What You'll Receive

1. Full slide presentation (pdf format)
2. Link to recorded audio presentation
3. Your Free Trial!



The Attack on Independent Work Continues

Why is Independent Contracting Under Attack?

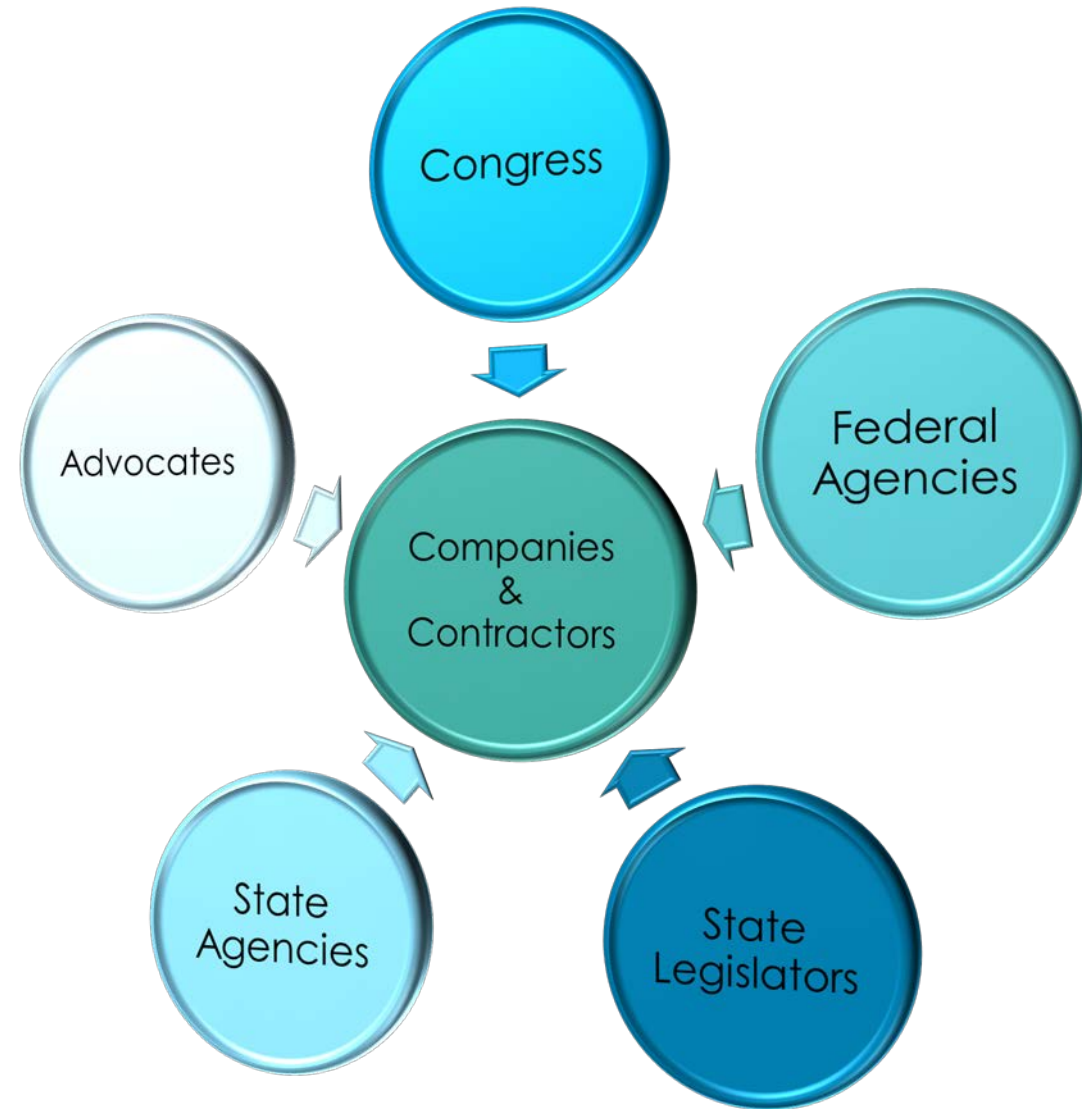
Critical Benefits and Protections Depend on Employment Status

- Minimum Wage & Overtime
- Family & Medical Leave
- Workplace Safety
- Civil Rights Protections
- Unemployment Insurance
- Workers Compensation
- Affordable Care Act
- Right to Unionize

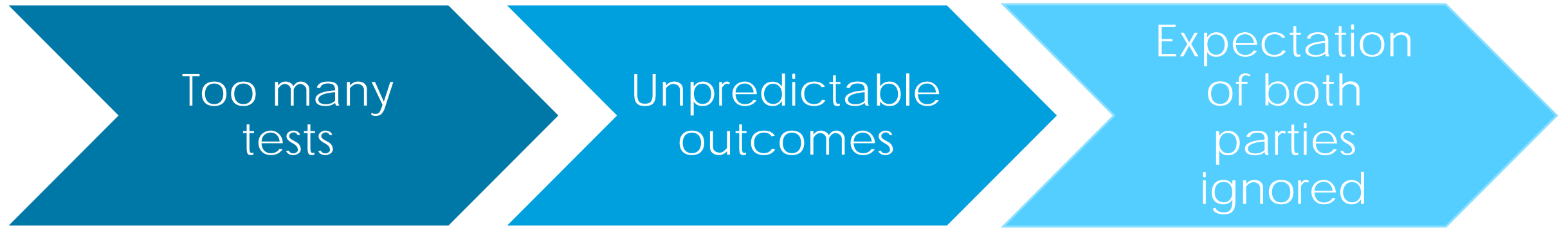


Pressure From All Sides

Congress, state legislators, federal agencies, state agencies, unions, plaintiffs' attorneys and other employee advocates – all remain focused on eliminating independent contracting



The Compliance Challenge



AB5 Still Alive?

AB5

Adopts strict “ABC” test:

- The individual is free from control and direction by contract and in fact
- The service is performed outside the usual course of the company’s business
- The individual is customarily engaged in an independently established trade, occupation, profession or business

Prop 22

App-based drivers may be independent contractors if company does not control schedule or work hours, provides health care subsidies and insurance, and allows drivers to work for others

- Company must conduct criminal background checks and have anti-harassment policies
- Guarantees drivers be paid no less than 120% of minimum wage per hour and payment per mile

Limits of Prop 22

- Applies only to app-based drivers
- Does not change AB5's application to other "gig economy" business or traditional businesses
- Invalidated in August by a CA Superior Court, although appeal is likely



What's New @ DOL

Remember the IC Regulation

Economic reality test:

An employee is economically dependent on an employer for work

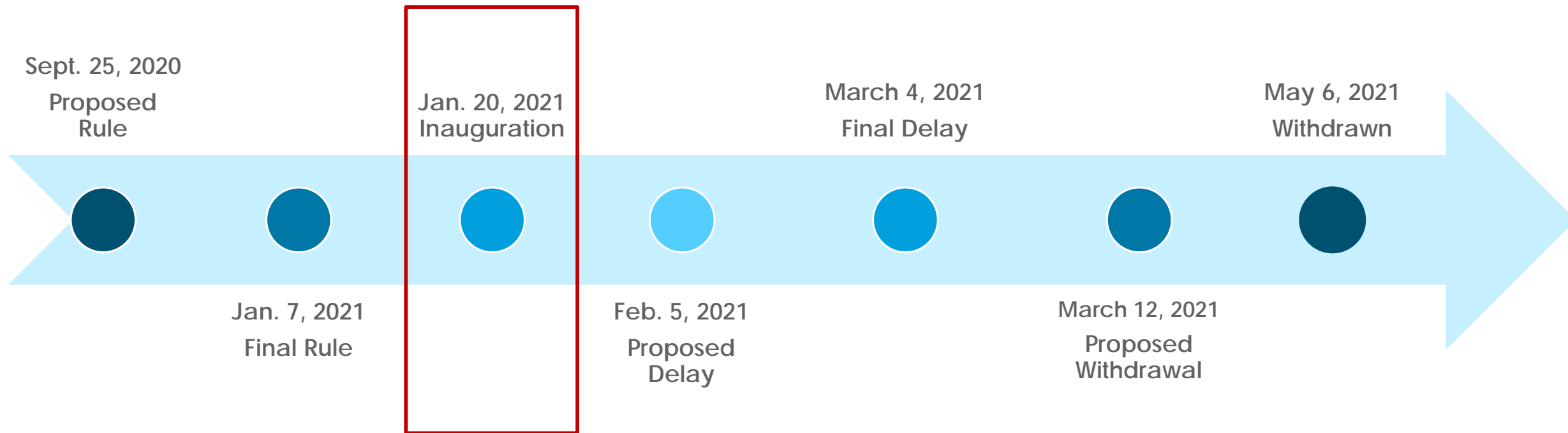
Core Factors

1. The nature and degree of control over the work; and
2. The worker's opportunity for profit or loss based on initiative and/or investment

Guidepost factors

- The amount of skill required for the work
- The degree of permanence of the working relationship
- Whether the work is part of an integrated unit of production

The Death of a Regulation



The Death of a Regulation?

May 6, 2021
Withdrawn

May 13, 2021
Lawsuit Filed

Case 1:21-cv-00130-MAC Document 6 Filed 05/13/21 Page 1 of 35 PageID #: 37

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION

COALITION FOR WORKFORCE
INNOVATION, ASSOCIATED
BUILDERS AND CONTRACTORS OF
SOUTHEAST TEXAS; ASSOCIATED
BUILDERS AND CONTRACTORS,
INC., AND FINANCIAL SERVICES
INSTITUTE, INC.

Plaintiffs

vs.

MARTY WALSH, SECRETARY OF
LABOR, UNITED STATES
DEPARTMENT OF LABOR, in his
official capacity; JESSICA LOOMAN,
PRINCIPAL DEPUTY
ADMINISTRATOR, U.S.
WAGE AND HOUR, in her
official capacity, and UNITED STATES
DEPARTMENT OF LABOR,

Defendants.

PLAINTIFFS' AMENDED COMPLAINT

1. Plaintiffs COALITION
ASSOCIATED BUILDERS AND
ASSOCIATED BUILDERS
SERVICES INSTITUTE,
undersigned counsel, for
follows:

¹ This Amended Complaint is filed pursuant to Rule 15 of the Federal Rules of Civil Procedure, as a matter of course, prior to service of a responsive pleading is served.

CASE NO. 21-CV- 00130

Case 1:21-cv-00130-MAC Document 6 Filed 05/13/21 Page 2 of 35 PageID #: 38

NATURE OF THE ACTION

2. Plaintiffs bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. Plaintiffs are challenging a final rule promulgated by the United States Department of Labor ("Department") on March 4, 2021 entitled, "Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date," (hereafter the "Delay Rule"), 86 Fed. Reg. 12,535 (Mar. 4, 2021), which purported to postpone the effective date of a final rule titled "Independent Contractor Status Under the Fair Labor Standards Act" ("Independent Contractor Rule"), 86 Fed. Reg. 1,168 (Jan. 7, 2021). In addition, this amended complaint challenges a newly issued Final Rule purporting to withdraw the (improperly) delayed Independent Contractor Rule, 86 Fed. Reg. 24,303 (May 6, 2021) (the "Withdrawal Rule").

3. As further explained below, the Delay Rule was issued arbitrarily, capriciously, and contrary to procedures required by law, because the Department failed to (1) provide a meaningful comment period before enacting the Delay Rule; or (2) offer substantive justification for enacting the Delay Rule. The Department enacted the Delay Rule following a comment period of only nineteen days, during which the Department considered only comments discussing postponing the Independent Contractor Rule's effective date. See 86 Fed. Reg. 12,535. The minimal justification that the Department provided for enacting the Delay Rule mischaracterized the Independent Contractor Rule as adopting a "new legal standard" (see 86 Fed. Reg. 12,535), when in reality, the Independent Contractor Rule only sought to provide clearer guidance to the regulated community as to the relative importance of the various factors comprising the long-standing

- 2 -

Now What?

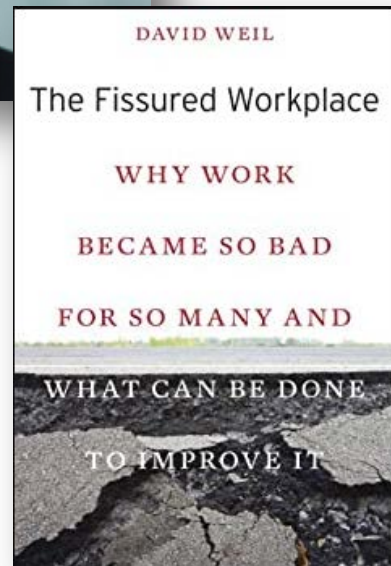
The IC regulation was withdrawn but not replaced

Leaving us only with sub-regulatory “guidance” from DOL and thousands of judicial decisions, often inconsistent

Many tests, many factors, no clear answers



He's Back?!



- David Weil was confirmed as Wage & Hour Administration in 2014, just a two months after publishing *The Fissured Workplace*, blaming contracting for lower wage growth, deteriorating labor conditions, and wage violations
- He focused DOL enforcement on “misclassification”
- Currently Dean & Professor, Heller School of Social Policy and Management, Brandeis University
- Senate HELP Committee deadlocked on Weil’s confirmation

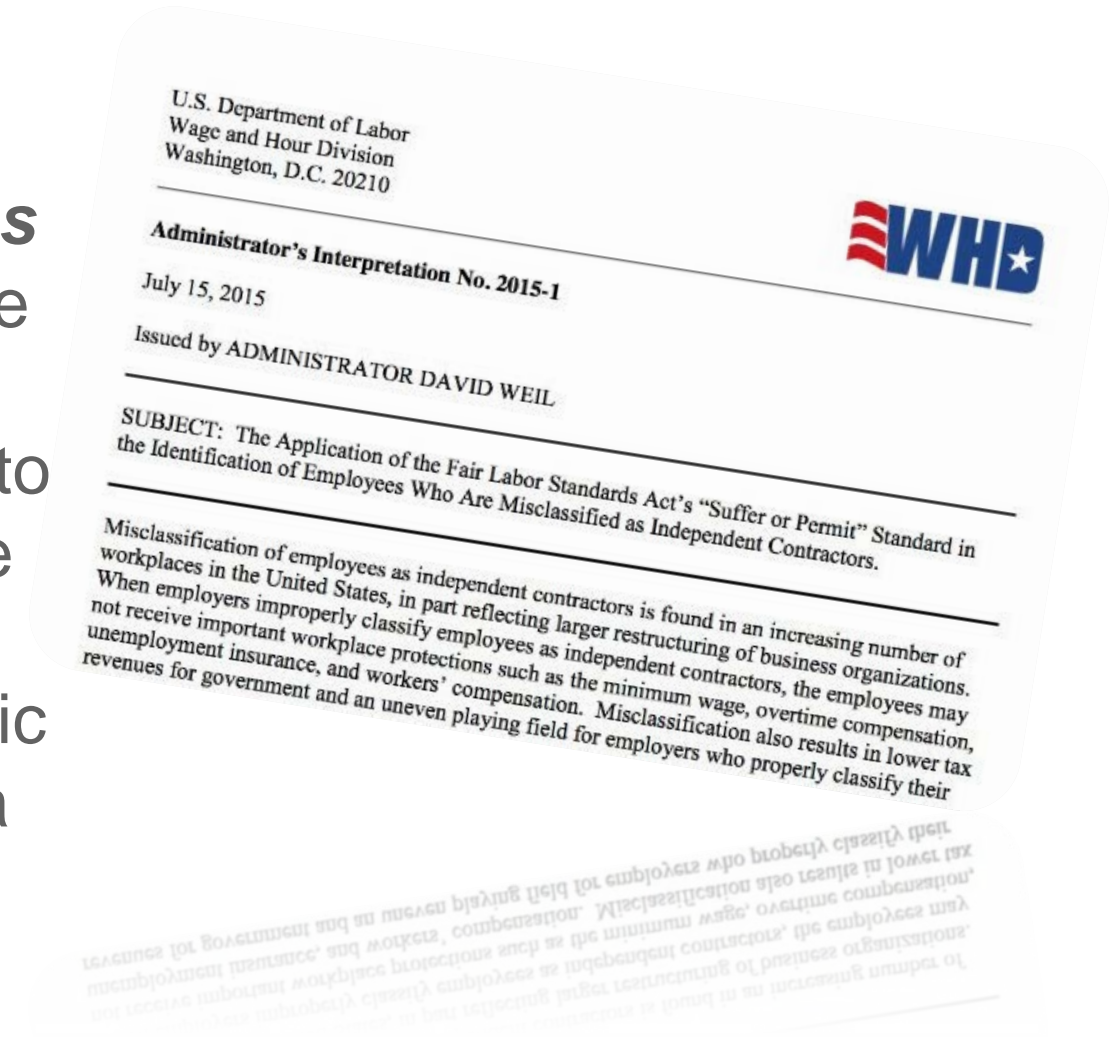
Back to the Future?

Administrator Weil, DOL Blog, July 15, 2015

“Misclassified employees are often denied access to the critical benefits and protections they are entitled. Misclassification also generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers’ compensation funds. It forces workers to pay the entirety of their payroll (FICA) tax. It also tips the scales against all employers who play by the rules and undermines the economy.”

Back to the Future?

“In sum, *most workers are employees* under the FLSA’s broad definitions. The very broad definition of employment under the FLSA as “to suffer or permit to work” and the Act’s intended expansive coverage for workers must be considered when applying the economic realities factors to determine whether a worker is an employee or an independent contractor.”



New @ DOL



A new
misclassification
website



Fact Sheet #13
(from 2008) is
back



Enforcement
refocus

A New Website:

dol.gov/agencies/whd/flsa/misclassification

WHD > Wages and the Fair Labor Standards Act > Misclassification of Employees as Independent Contractors > Myths About Misclassification

Myths About Misclassification

Misclassification of employees as independent contractors is a serious problem our country is facing. Here we dispel some of the pervasive myths about misclassification. Select the images below for information dispelling each myth.



Myth 1: If I am an independent contractor under one law, I am an independent contractor under other laws.



Myth 2: If I am classified as an independent contractor, I am not eligible for unemployment insurance (UI).



Myth 3: I received a 1099 tax form from my employer, and this makes me an independent contractor.



Myth 4: It does not make a difference if I am classified as an independent contractor or an employee.

GET THE FACTS ON MISCLASSIFICATION

UNDER THE FAIR LABOR STANDARDS ACT Employee or Independent Contractor?

The Fair Labor Standards Act (FLSA) provides minimum wage and overtime pay protections to nearly all workers in the U.S. Some employers incorrectly treat workers who are employees under this federal law as independent contractors. We call that "misclassification." If you are misclassified as an independent contractor, your employer may try to deny you benefits and protections to which you are legally entitled.

Please refer to **Fact Sheet 13** for more information on the factors used to determine whether you're an employee or an independent contractor.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

1-866-4US-WAGE
dol.gov/whd



Receiving a 1099 does not make you an independent contractor under the FLSA.



Even if you are an independent contractor under another law (for example, tax law or state law), you may still be an employee under the FLSA.



Signing an independent contractor agreement does not make you an independent contractor under the FLSA.



Having an employee identification number (EIN) or paperwork stating that you are performing services as a Limited Liability Company (LLC) or other business entity does not make you an independent contractor under the FLSA.



Employers may not misclassify an employee for any reason, even if the employee agrees.



You are not an independent contractor under the FLSA merely because you work offsite or from home with some flexibility over work hours.



Whether you are paid by cash or by check, on the books or off, you may still be an employee under the FLSA.



"Common industry practice" is not an excuse to misclassify you under the FLSA.

Fact Sheet #13

U.S. Department of Labor
Wage and Hour Division



Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the [FLSA](#).

Characteristics

An employment relationship under the FLSA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act. In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

- 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.

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

Requirements

When it has been determined that an employer-employee relationship does exist, and the employee is engaged in work that is subject to the Act, it is required that the employee be paid at least the Federal minimum wage of \$5.85 per hour effective July 24, 2007; \$6.55 per hour effective July 24, 2008; and \$7.25 per hour effective July 24, 2009, and in most cases [overtime](#) at time and one-half his/her regular rate of pay for all [hours worked](#) in excess of 40 per week. The Act also has youth employment provisions which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements.

FS 13

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.

Enforcement Refocus

News Release

PEARL SECURITY COMPANY PAYS \$18K IN BACK WAGES TO 43 WORKERS TO RESOLVE OVERTIME VIOLATIONS FOUND IN US DEPARTMENT OF LABOR INVESTIGATION

Bullock Investigation Security LLC misclassified employees as independent contractors

PEARL, MS – Security contractors instead of liability for back wage

An investigation by the of Pearl misclassified v hours that they worke their regular rates for

To resolve this [Fair Lab](#)

News Release

US DEPARTMENT OF LABOR RECOVERS \$99K IN WAGES FOR 25 HOUSTON CONCRETE MASONRY WORKERS AFTER FINDING FAIR LABOR STANDARDS ACT VIOLATIONS

All About Concrete LLC of Tomball misclassified workers, failed to pay overtime

HOUSTON – In Houston's hot housing market, con In return, workers expect to be paid for all their ha contractor failed to keep, a U.S. Department of Lab The department's [Wage and Hour Division](#) determi company misclassified some workers as independ paid these workers a flat rate or salary for all the h bonuses in the overtime rate. Investigators also fo the hours these employees worked and, as a result week.

The division recovered \$99,321 in back wages for 2

News Release

US DEPARTMENT OF LABOR FINDS CHICAGO TOWING COMPANY DENIES MINIMUM WAGE, OVERTIME TO EMPLOYEES MISCLASSIFIED AS INDEPENDENT CONTRACTORS

Court orders ACD Emergency Road Services to pay \$166K to 56 workers

CHICAGO – The operators of a Chicago towing compa pay dozens of its workers legally for the hours they w U.S. Department of Labor [Wage and Hour Division](#) inv the [Fair Labor Standards Act](#) after it misclassified hou and subsequently failed to pay them minimum wage

News Release

US DEPARTMENT OF LABOR RECOVERS MORE THAN \$235K IN BACK WAGES FOR 131 WORKERS OF GEORGIA HOME HEALTHCARE SERVICE

Employees misclassified as independent contractors led to overtime violations

ATLANTA – Home care aides tend to the needs of people when they are most vulnerable, often putting their own health at risk. A [U.S. Department of Labor](#) investigation found that an Atlanta-area home care service failed to pay these essential workers the overtime they earned and are legally due.

The department's [Wage and Hour Division](#) determined Able Mabel Assisted In-Home Care Services Inc. – operating as Able Mabel Home Care – misclassified home health care aides as independent contractors and failed to pay them overtime when they worked over 40 hours in a week, a violation of the [Fair Labor Standards Act](#). The investigation revealed that the employer paid the misclassified workers their straight-time rate of pay for each hour they worked.

As a result, the division has recovered \$235,501 in back wages for 131 workers.

Navigator IC Refreshed

User Feedback

ComplianceHR

ComplianceHR.com

Meet the Suite

Contact Us

How are we doing?

On a scale of 0-10 how likely are you to recommend ComplianceHR to a colleague? (0 being not likely at all and 10 being very likely)

☐ 0

☐ 1

☐ 2

☐ 3

☐ 4

☐ 5

☐ 6

☐ 7

☐ 8

How can we improve ComplianceHR?

ANSWER

Continue to make improvements to the Navigator OT like doing for Navigator IC to make the surveys more user friendly such as including information on the reasons for the questions. For example, referencing the Federal or state exemption the question falls under - Executive, Administrative, etc. Cut down on the duplicate questions such as the questions asked to set up the report and then when the report questionnaire is launched - there are questions about the state and salary in two places


It would be nice to have a central search where a client's city and state (and/or county) is entered and it produces all relevant information regarding state/local laws, which would normally only be discovered by going to each tile on the dashboard and searching (i.e. - Leave Laws, Minimum Wage, COVID Developments, State Specific Policies. As an HR Professional acquiring clients in various states, or having existing clients expand into different states, it would really improve response in terms of speed and thoroughness.

My company operates in almost all 50 states. It would be extremely helpful to be able to see a topic for ALL states or to be able to select a group of states. Example, "final pay" rule for EACH of 50 states in a spreadsheet. Or, maybe the various links to the regulation in a spreadsheet.

The requirements for forms and compliance related to the background checks are not clear or helpful. Several template forms are thrown at us without explanation, and with your organization supposedly disavowing responsibility for compliance. I would hope that is, in part, what we would be paying you for to assist with. When I called and spoke with a team member and otherwise review the website, I have been unable to fully determine what each criminal or other check may involve, which makes it very difficult for us to assess and determine what compliance / forms may be required.

If we can change/update emails there are often times when I was sent an invalid email that I need to update. I would have to cancel the questionnaire, have support send me the manager answers and plug in the answers and resend to the IC. Also have free fields so the manager or IC can explain something, I often times have to call the manager or IC for clarification, everyone perceives the questions differently this would help

Let's Take a Look

 Compliance **HR**

Your Questionnaire

Please complete the questionnaire below as requested by **Joe Panza**. This questionnaire relates to **Abc Inc.**'s relationship with **Nicole Smith**.

Your answers are saved automatically as you proceed. You can return to your questionnaire later by using the button on your dashboard.

Agreement Details

Is Nicole Smith LLC required to personally perform the work?

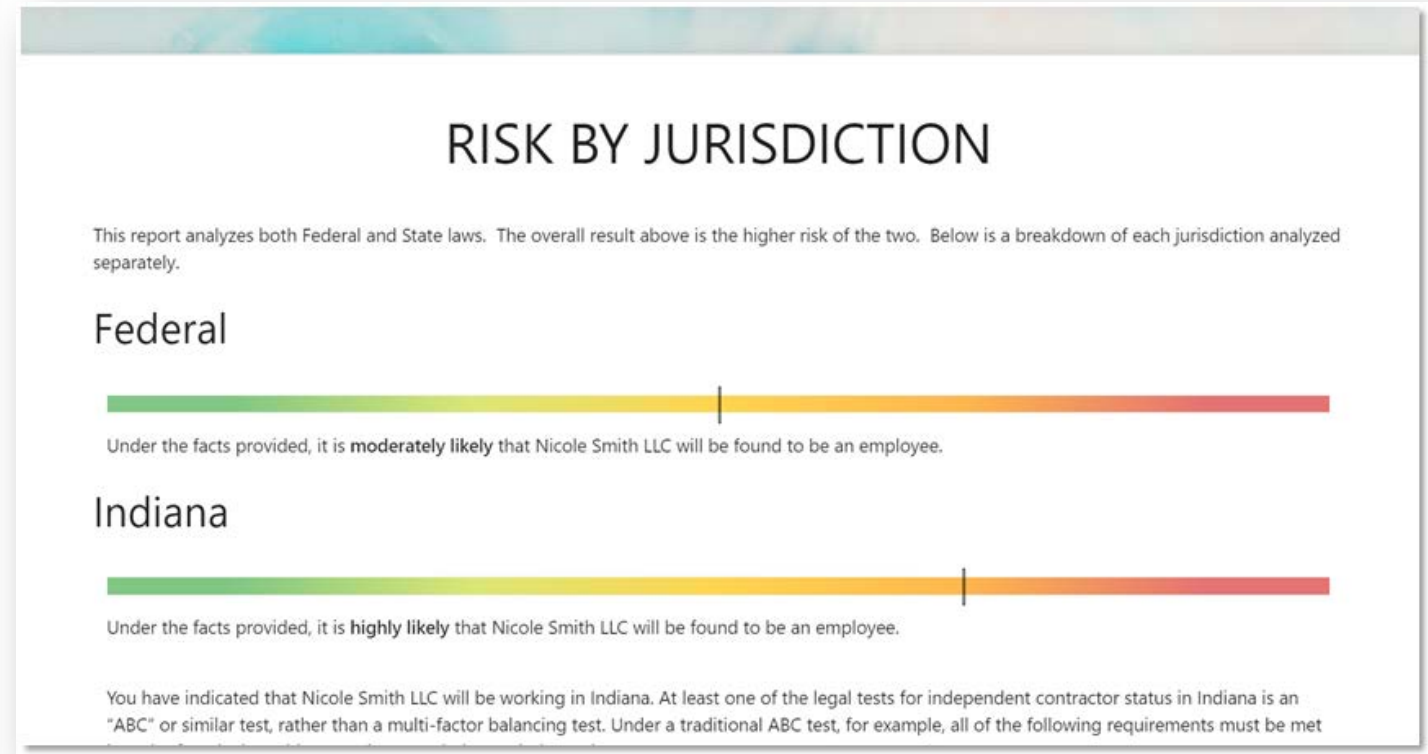
No, Nicole Smith LLC can hire employees or subcontractors

What applies to Nicole Smith LLC's employees or subcontractors?

Select all that apply

None of the Above

Will Abc Inc. provide Nicole Smith LLC, it's employees or it's subcontractor's employees



Tammy's Danger Signals & Best Practices

Red Flag #1

Engaging contractors to perform the same work as employees



Red Flag #2

Engaging contractors for full-time work over a long period of time



Red Flag #3

Prohibiting contractors from working for other companies



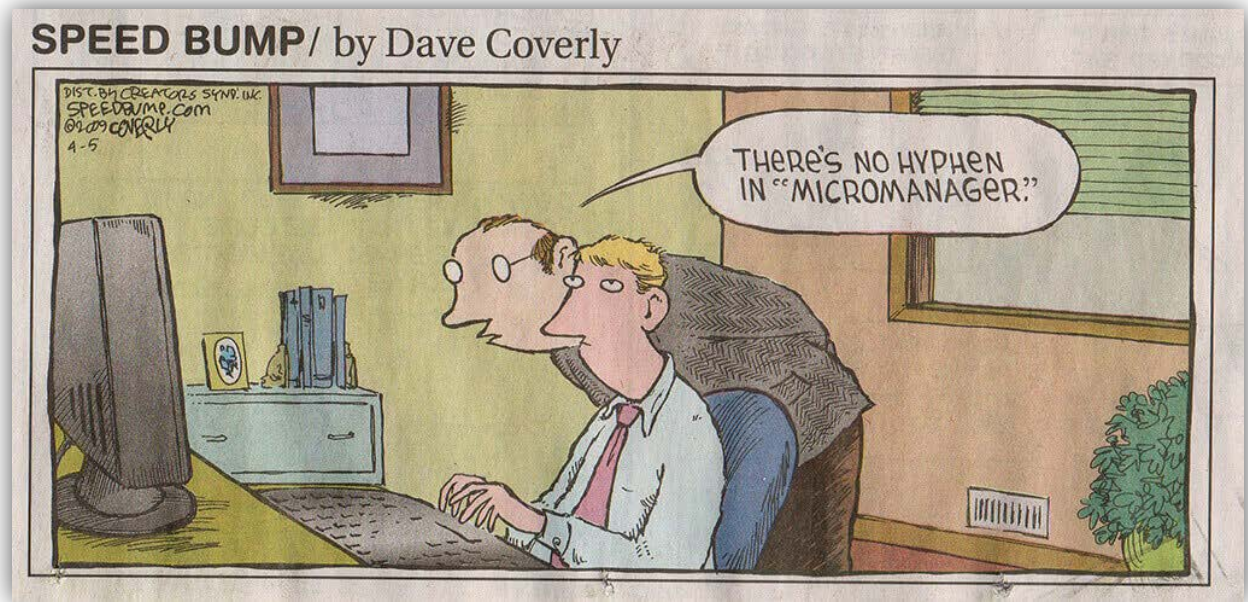
Red Flag #4

Treating contractors like employees



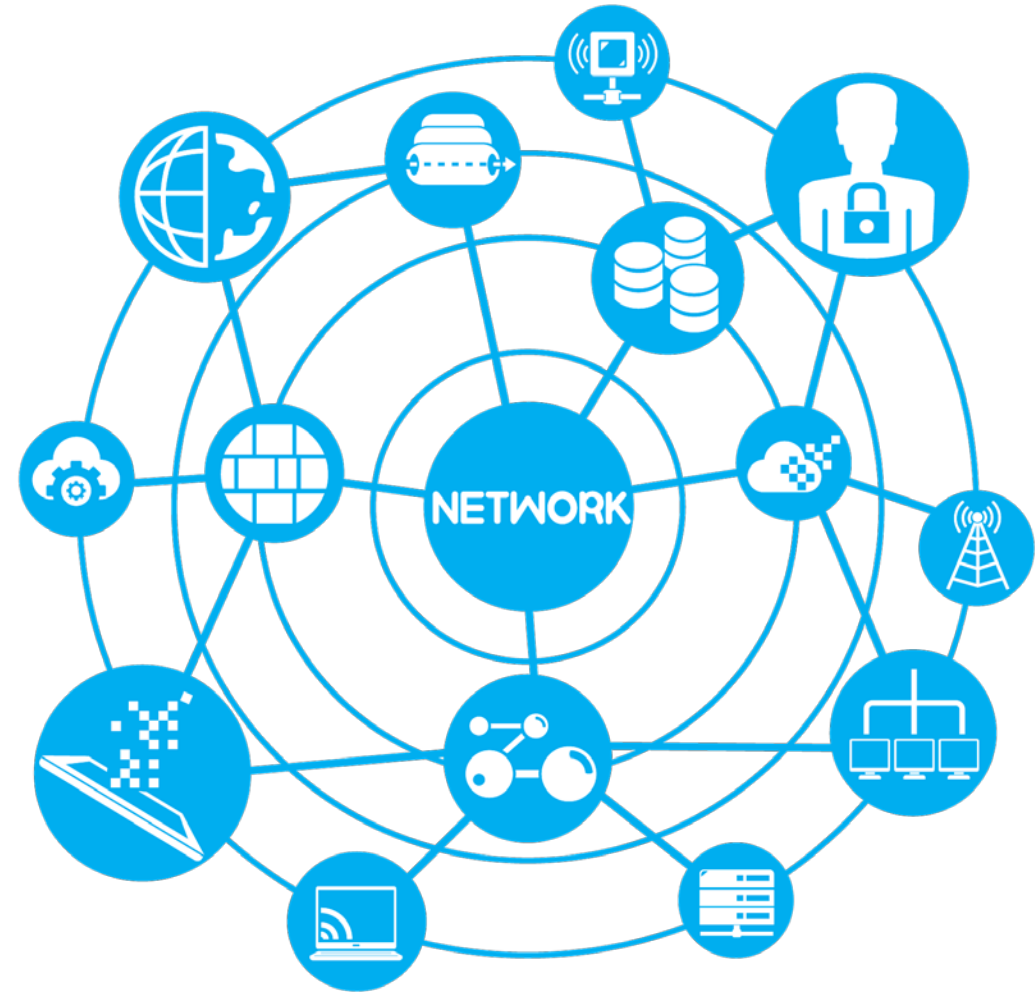
Red Flag #5

Controlling when,
where or how the
contractor performs the
work



Best Practice #1

Engage contractors
through a third-party



Best Practice #2

Pay by the project, not by the hour



Best Practice #3

Enforce the contract, sure,
but do nothing else



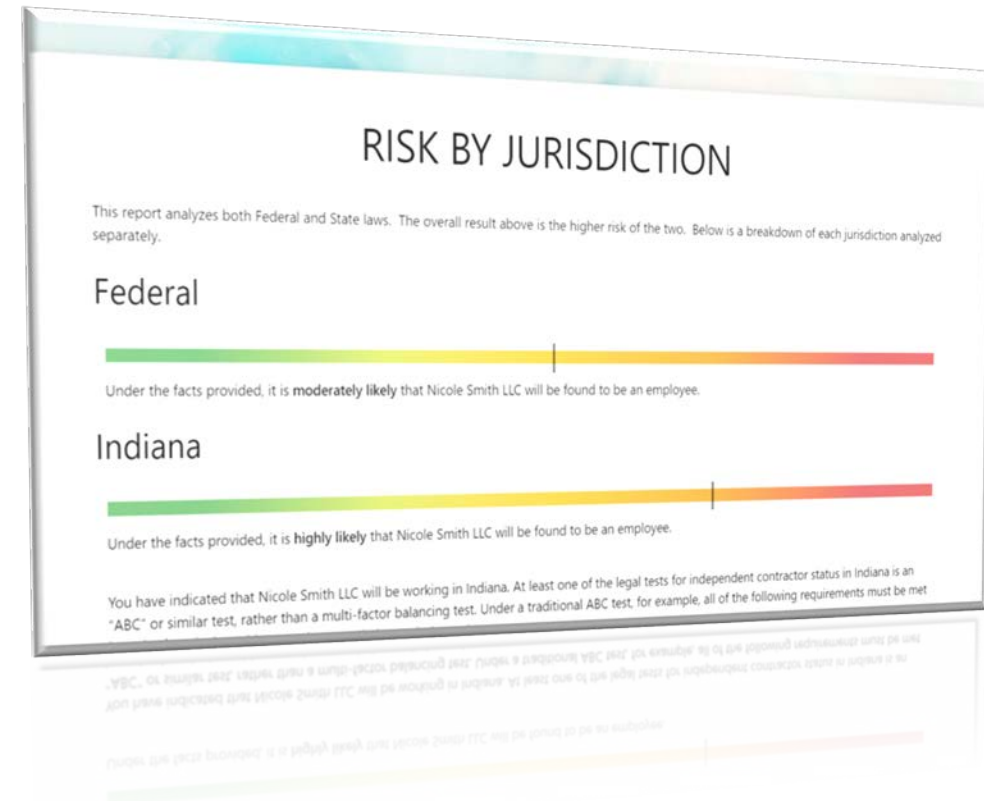
Best Practice #4

Never be a contractor's first or only customer



Best Practice #5

Audit your practices regularly, using the most difficult applicable test – or, even better, the Navigator IC app.



Questions?



Littler[®]

Request Your Free Trial 3 Ways



Presentation Button



freetrial@compliancehr.com



Q & A Request, provide your email address





Joe Panza
panza@compliancehr.com

Thank you!



Tammy McCutchen
tammy@compliancehr.com

Littler[®]