

MEETING THE CHALLENGE  
AND MAKING A DIFFERENCE

 **ASHHRA**18  
Annual Conference  
& Exposition

# That's Not My Employee: Outsourcing Without Worker Misclassification Problems

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# ASHHRA HR LEADER MODEL



**Community Citizenship:** *Raise Your Voice*



**HR Delivery:** *Reach Beyond the Expected*



**Healthcare Business Knowledge:** *Embrace New Learning*



**People Strategies:** *Lead with Your Heart*



**Personal Leadership:** *Exemplify Excellence*



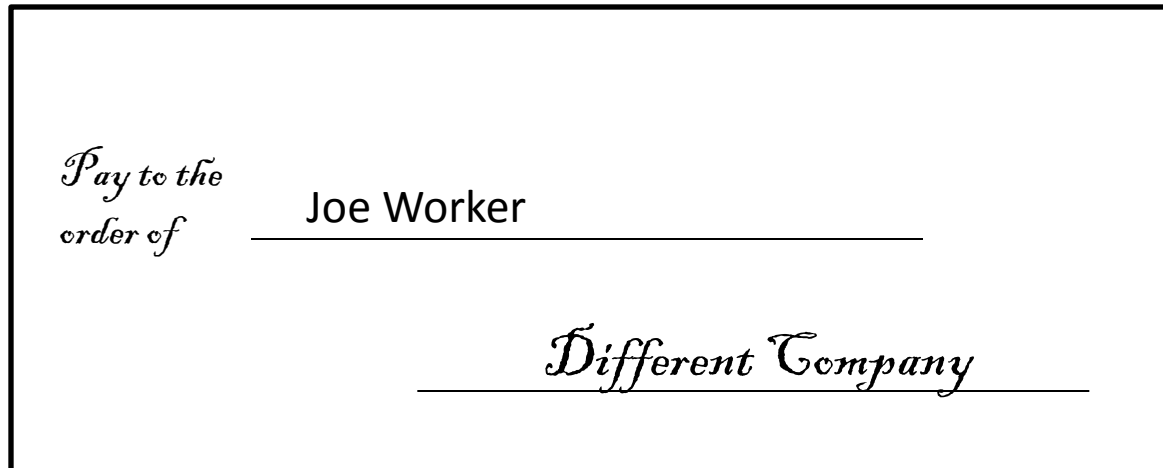
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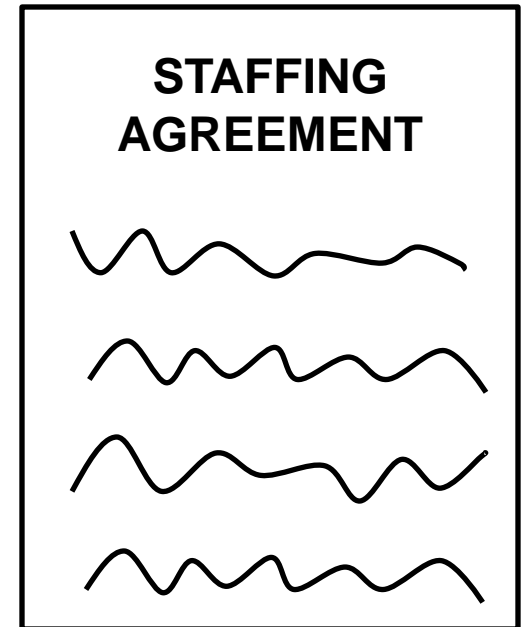
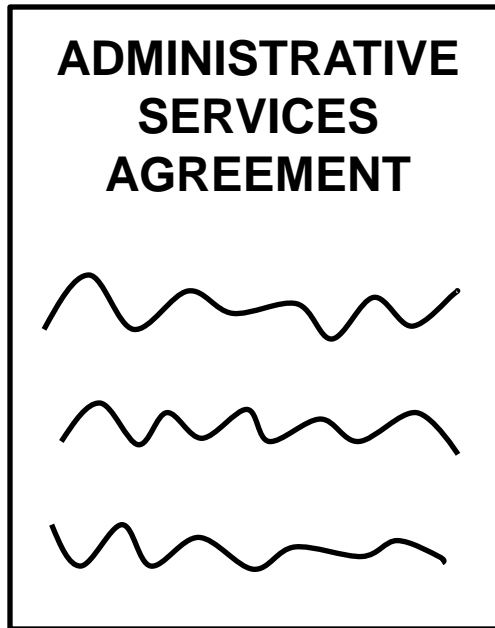
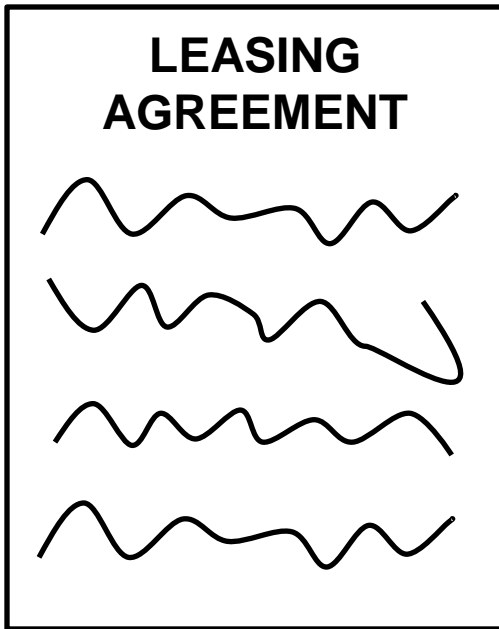
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# That's not my employee.



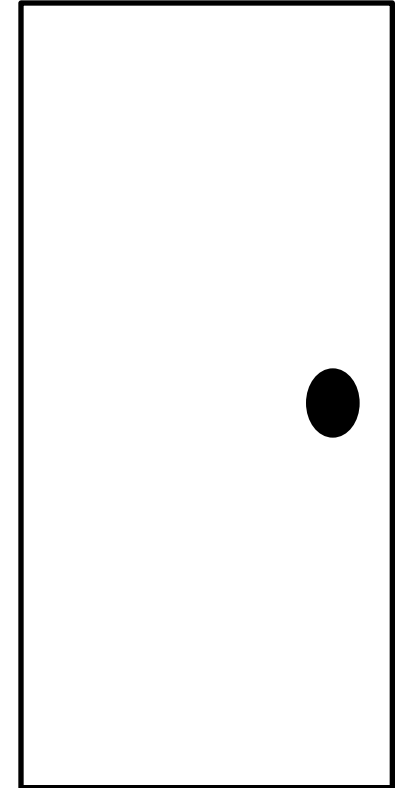
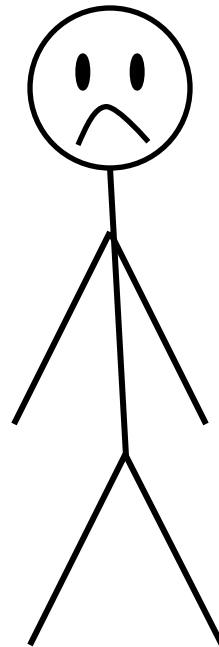
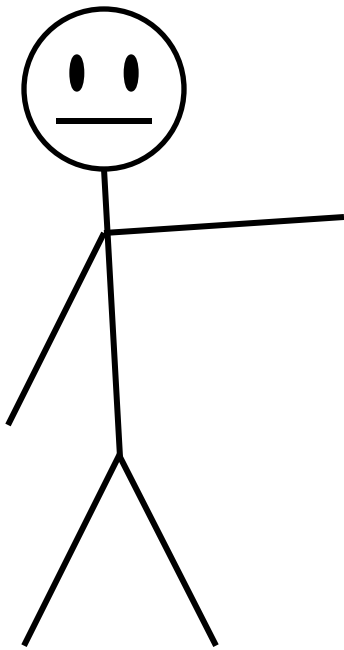
# Someone else signs his paycheck.

# That's not my employee.



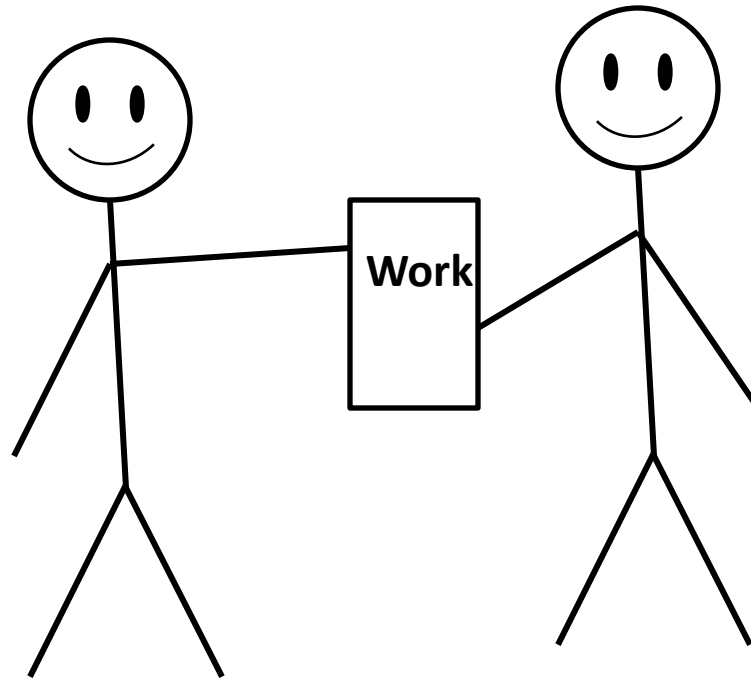
## The contract describes a different relationship.

That's not my employee.



Someone else can fire her.

That's my employee.



I can tell him what to do.

## ➤ Who is my employee?

- ✓ Each federal or state statute that regulates the employment relationship can define who is an “employee.”
- ✓ But most don’t or define “employee” vaguely.
- ✓ Common Law Test: “employee” status determined by extent hiring party retains the “right to control” the manner and means by which work is accomplished.
- ✓ A worker may be a common law employee even if you do not call him or her an employee.

## ➤ Worker misclassification

- ✓ The Department of Labor estimates that 10-30 percent of employers misclassify workers.
- ✓ The Internal Revenue Service estimates that over a billion dollars are lost each year due in tax revenue to worker misclassification.

## ➤ Why is misclassification a problem for employers?

- ✓ Audit: The IRS and DOL have recently increased efforts to identify misclassified workers.
- ✓ Litigation: Wage and hour, overtime, benefits, taxes.

## ➤ Areas of potential misclassification

- ✓ Independent Contracts
- ✓ Leased employees
- ✓ Professional Employer Organizations
- ✓ Joint employers
- ✓ Outsourcing



## ➤ Health care industry outsourcing

- ✓ Outsourcing in health care systems continues to grow.
- ✓ Cost-savings is the primary motivating factor.
- ✓ Allows companies with expertise to perform non-core services.
- ✓ May also be referred to as vendors or partners.

## ➤ Departments or services being outsourced

- ✓ Laundry
- ✓ Food service
- ✓ Janitorial/Housekeeping
- ✓ IT
- ✓ Billing/Revenue Cycle
- ✓ Emergency room
- ✓ Nursing
- ✓ Radiology

## ➤ Fair Labor Standards Act (FLSA) “employee” definition

- ✓ “Employee” means any individual employed by an employer. 29 U.S.C. § 203(e)(1).
- ✓ “Employ” includes “to suffer or permit work.” 29 U.S.C. § 203(g).
- ✓ Supreme Court has repeatedly acknowledged how broad “suffer or permit” is and its origins in child labor laws.

## ➤ Joint employers

- ✓ Regulations specifically acknowledge that two or more employers can be joint employers. 29 C.F.R. 791.2.
  - ✓ Where there is an arrangement between the employers to share the employee's services;
  - ✓ Where one employer is acting directly or indirectly in the interest of the other employer in relation to the employee;
  - ✓ Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer

## ➤ “Economic realities” factors:

- ✓ The extent to which the services rendered are an integral part of the principal's business
- ✓ The worker’s opportunities for profit and loss
- ✓ The amount of the worker’s investment in facilities and equipment
- ✓ The amount of initiative, judgment, or foresight in open market competition with others required for the success of the worker
- ✓ The permanency of the relationship
- ✓ The nature and degree of control by the principal

## ➤ Who is my employer?

✓ Anita Nurse is a nurse who signed up to work for three different staffing agencies. Each agency refers nurses to temporary assignments at hospitals in the area. The agencies tends to refer nurses to a hospital where they have worked before, and Anita has worked repeatedly at St. John's. St. John's works with 10 different staffing agencies. St. John's requires its temporary nurses to sign in and out. Under its agreements with the staffing agencies, St. John's can choose not to work with a specific nurse. There have been weeks when Anita accepted referrals to St. John's from two or more agencies and worked more than 40 hours.

## ➤ Who is my employer?

- ✓ The staffing agencies are Anita's common law employers . . . but
- ✓ St. John's Hospital is (likely) a joint employer under FLSA. It could be liable for her overtime.
- ✓ *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008).

## ➤ Who is my employer?

✓ St. John's decides to outsource its emergency room to Emergent Health, Inc., a company that specializes in providing emergency room staff to hospitals. The transaction closes on December 31. Anna Stesiologist is an anesthesiologist who works at St. John's in the ER on December 31. On January 1, Anna drives to the same building, works in the same location, and provides the same services. Emergent Health, however, signs Anna's paychecks, sets her hours, and provides her benefits. The ER is busy, and Anna often works 50 hours per week.

## ➤ Who is my employer?

- ✓ Emergent Health is Anna's common law employer and responsible for her overtime pay.
- ✓ But St. John's Hospital could be liable as a joint employer under FLSA if Emergent Health fails to pay Anna.
- ✓ PhyAmerica Physician Group, Inc.'s bankruptcy
  - ✓ Chapter 11 bankruptcy prevents hospitals from terminating contracts for cause.
  - ✓ One hospital had to pay physicians who threatened to walk out.
  - ✓ Malpractice insurance was underfunded.



➤ **How do you build positive morale in a building where some workers are your employees and some are not?**

## ➤ Employee Retirement Income Security Act (ERISA) does not really define “employee”

- ✓ The term “employee” means any individual employed by an employer. ERISA § 3(6).
- ✓ The definition is “completely circular and explains nothing.” *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992)
- ✓ *Darden* adopts common law definition of “employee” for ERISA.

## ➤ **Darden factors:**

- ✓ The skill required
- ✓ The source of the instrumentalities and tools
- ✓ The location of the work
- ✓ The duration of the relationship between the parties
- ✓ Whether the hiring party has the right to assign additional projects to the hired party
- ✓ The extent of the hired party's discretion over when and how long to work
- ✓ The method of payment
- ✓ The hired party's role in hiring and paying assistants
- ✓ Whether the work is part of the regular business of the hiring party
- ✓ Whether the hiring party is in business
- ✓ The provision of employee benefits
- ✓ The tax treatment of the hired party

## ➤ IRS 20-factor test

- ✓ Level of instruction
- ✓ Amount of training
- ✓ Degree of business integration
- ✓ Extent of personal services
- ✓ Control of assistants
- ✓ Continuity of relationship
- ✓ Flexibility of schedule
- ✓ Demands for full-time work
- ✓ Need for on-site services
- ✓ Sequence of work
- ✓ Requirements for reports
- ✓ Method of payment
- ✓ Payment of business or travel expenses
- ✓ Provision of tools and materials
- ✓ Investment in facilities
- ✓ Realization of profit or loss
- ✓ Work for multiple companies
- ✓ Availability to public
- ✓ Control over discharge
- ✓ Right of termination

## ➤ Updated IRS test

### ✓ Behavioral control

- ✓ Facts that show whether the company has a right to direct and control how the worker does the task for which the worker is hired

### ✓ Financial control

- ✓ Facts that show whether the company has a right to control the business aspects of the worker's job

### ✓ Type of relationship

## ➤ Do you have to offer benefits to all common law employees?

- ✓ Generally employers are not required to offer benefit plans.
  - ✓ Affordable Care Act (ACA) requires employers to offer health care coverage to full-time employees.
- ✓ Employers cannot offer benefits to people who are not employees.
- ✓ Eligibility rules can be used to limit which employees participate.

## ➤ Who has to be eligible?

- ✓ Tax-qualified retirement plans (401(k), pensions)
  - ✓ Subject to non-discrimination and coverage testing
  - ✓ Minimum age and service requirements
- ✓ Church plans
  - ✓ Subject to pre-ERISA non-discrimination and coverage rules in the Internal Revenue Code
- ✓ 403(b) plans must be universally available
  - ✓ Cannot cover employees at for-profit entities

## ➤ Who can you properly exclude from a retirement plan?

- ✓ Individuals the employer did not classify as an employee;
- ✓ Workers paid a fee under a contract;
- ✓ Any person who agrees to perform services as an independent contractor or is considered by the employer to be an independent contractor;
- ✓ Persons paid hourly (or by salary); and
- ✓ Persons covered under a particular collective bargaining agreement.



## ➤ Retirement Plans

- ✓ Improper inclusion of independent contractors or exclusion of employees is considered a failure to comply with the "exclusive benefit" rule of Internal Revenue Code § 401(a)(2).
- ✓ Plans may lose their tax-qualified status.

## ➤ Welfare Plans

- ✓ Improperly included non-employees may be taxed on income erroneously treated as pre-tax.
- ✓ Welfare plans will not suffer tax consequences from improper inclusion or exclusion of workers.

## ➤ Lawsuits: individual, class action, or government

- ✓ Benefits claims under ERISA § 502(a)(1)(b)
- ✓ Breach of fiduciary duty claim under ERISA § 502(a)(2)
- ✓ Interference with respect to attainment of protected rights under ERISA §510
  - ✓ Workers must make a prima facie case that employer intended to interfere with benefits.
  - ✓ Employer can rebut with a showing of a legitimate, nondiscriminatory business reason.
  - ✓ Worker must then show the reason was pretextual.

## ➤ Who is my employer?

- ✓ St. John's new Vice President determines that the billing department is inefficient: the technology is outdated, too much work is done manually, and the employees—most of whom have been with the hospital for decades—are slow to adapt to new technology. The Vice President selects Revenue Manager LLC to be the billing vendor. On March 31, St. John's terminates all billing employees. Their average age is 54, and Tom Teammate is 54 and 10 months. St. John's pension plan allows early retirement at age 55. Revenue Manager hires the majority of employees effective April 1 but not Tom. The other employees continue to work at St. John's using Revenue Manager's equipment. They are paid by Revenue Manager and participate in its 401(k).

## ➤ Who is my employer?

- ✓ Revenue Manager is the employer of the billing department employees.
- ✓ Former employees could file claims for St. John's pension benefits at early or normal retirement.
  - ✓ Employees may claim their benefits should have vested as part of the transaction.
- ✓ Given the average age of billing department employees, they may claim that the outsourcing was designed to interfere with their benefits.
  - ✓ *Jakimas v. Hoffmann-LaRoche, Inc.*, 485 F.3d 770 (3d Cir. 2007)
  - ✓ *Register v. Honeywell Federal Manufacturing & Technologies, LLC*, 397 F.3d 1130 (8<sup>th</sup> Cir. 2005)
- ✓ Breach of fiduciary duty claims may arise based on representations made as part of the transaction.

➤ **Salary and benefits often change when employees are outsourced. How do you ensure outsourced workers feel they have been treated fairly?**

## ➤ IRS Correction methods

- ✓ Voluntary Classification Settlement Program (VCSP)
  - ✓ Settlement involves paying 10% of employment tax liability that would have been due on the group of reclassified workers for the most recent tax year.
- ✓ Employee Plans Compliance Resolution System (EPCRS)
  - ✓ Self-correction
  - ✓ Voluntary Correction Program (VCP)
  - ✓ Audit Closing Agreement Program (Audit CAP)

## ➤ Other legal risks :

- ✓ ACA requires large employers to offer health care coverage to full-time employees.
  - ✓ Employee is defined as a common law employee. 26 C.F.R. §54.4980H-1(a)(15)
  - ✓ Misclassification as non-employee may lead to unanticipated tax penalties under ACA.
  - ✓ Misclassified workers may bring employer over the 50-employee threshold.

## ➤ Other legal risks:

- ✓ Tax
- ✓ Title VII (discrimination)
- ✓ Workers Compensation
- ✓ FMLA
- ✓ OSHA



➤ How do you outsource control of workers while maintaining health, safety, and quality standards?

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