

## A Boutique Law Practice Specializing in Employment Law Litigation and Consultation

**BEWARE: New ADA Amendments Likely to Cause  
Headaches for Employers**

### New ADA Rules for Employers to Navigate: President Bush Signs 2008 ADA Amendments.



On September 25, 2008, President George W. Bush signed the Americans with Disabilities Amendments Act of 2008. The intent of this legislation is to restore the remedial nature of the Americans with Disabilities Act (ADA).

The ADA was initially enacted in 1990 to ensure that disabled employees had equal access to employment opportunities. The ADA requires covered employers to provide a reasonable accommodation to qualified disabled individuals (that is, individuals who have a condition that substantially limits a major life activity). The recently approved ADA Amendments Act of 2008 (the "ADAAA" or the "Act") significantly broadens the application of the ADA by overturning a series of U.S. Supreme Court decisions that narrowly interpreted the ADA and re-defining terms that previously resulted in the narrow application of the ADA. The end result: more exposure under the ADA for employers.

Perhaps the change that will likely result in the the most additional potential liability for employers is the modified definition of "major life activity". The definition of "major life activity" now includes the following: caring for oneself; performing manual tasks; seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking and breathing; learning, reading, concentrating, thinking, communicating, and working; and major bodily functions such as the immune system, digestive system, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. So essentially, at the risk of oversimplifying, if any of the above activities are substantially impacted by the employee's condition, they will likely be deemed disabled and protected by the ADA and

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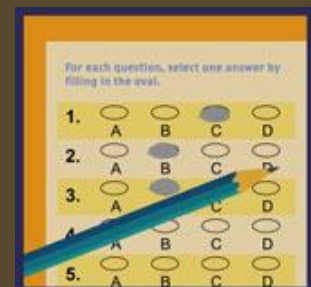
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#### Employment Law Pop Quiz

What you Don't Know  
CAN Hurt you!



#### QUESTIONS

1. Company ABC must have \_\_\_\_\_ number of employees to qualify under the FLSA?
  - a. 1
  - b. 2
  - c. 15

ADAAA.

The amendments to the ADA will become effective on January 1, 2009. Employers should take time prior to the New Year to meet with their employment lawyer and Human Resources professional to ensure that their policies and practices are compliant with the Act.

## Independent Contractor Pay Issues

### The "Million Dollar Question": Are Employers Required to Pay "Independent Contractors" Overtime?



Independent contractors are not "employees" covered by the Fair Labor Standards Act ("FLSA"), and employers are not required to comply with the FLSA's requirements for minimum wage

and overtime pay for independent contractors. However, it is important to realize that an employer's own classification of a worker as an independent contractor, even if expressly recognized in an independent contractor contract between the employer and worker, does not necessarily meet the requirements of the FLSA. There are six factors for determining whether a worker is an employee or independent contractor under the FLSA:

1. The degree of the alleged employer's right to control the manner in which the work is performed;
2. The alleged employee's opportunity for profit or loss depending upon managerial skill;
3. The alleged employee's investment in equipment or materials required for the work;
4. Whether the service rendered requires special skills;
5. The degree of permanence of the working relationship; and
6. Whether the service rendered by the worker is an integral part of the alleged employer's business.

No single factor is more important than the others in determining independent contractor status for FLSA purposes. Generally, on a case-by-case basis, the courts must consider the above factors and determine whether as a matter of "economic reality," an individual is an employee of the Company or an independent contractor in business for him/herself. The greater the dependence a worker has on the business for continued work, the more likely the worker will be found to be an employee.

It is important to note that the IRS Code and the Georgia Department of Labor have a separate definition for independent contractor that is different from the FLSA definition. The IRS has a 20-factor test it uses in determining whether an employee is an independent contractor or employee. Generally, if the worker would be considered an employee under at least 10 of the factors,

d. 50

2. True or False. An employee who is paid a salary for all hours worked for Company ABC is always exempt from the overtime requirements of the FLSA?

3. Amy is a non-exempt employee working for Company ABC and earns \$10 per hour. Company ABC has a policy prohibiting its employees from working overtime and has made Amy sign a waiver that she agrees not to be paid for overtime. Amy worked 50 hours last week. How much overtime pay is Amy entitled to under the FLSA?

4. True or False. A worker deemed to be an "independent contractor" for federal taxation purposes, is automatically deemed an independent contractor under the FLSA and therefore exempt from wage and hour requirements.

5. Bob works for Company XYZ and earns \$20 per hour. Company XYZ has a policy against working through meal breaks. Bob violates the company policy and works through his meal break. Is the Company required to compensate him under the FLSA? If working through his meal break causes him to go over 40 hours per week, is he entitled to overtime pay?

#### ANSWERS

1. a.

Discussion: Most private employers are covered under the FLSA because there is no minimum number of employees needed. One employee may subject Company ABC to the requirements of the FLSA if Company ABC also engaged in interstate commerce and has \$500,000 in annual dollar volume of business.

2. False.

Discussion: The determination of whether an employee is exempt from the FLSA depends on whether the employee's primary job duty falls within one of the FLSA exemptions, not whether the employee is paid a salary versus paid hourly. Salaried employees can, and often do, qualify for overtime pay.

3. Amy is owed \$150 in overtime pay (10 hours of overtime paid at a rate of \$15 per hour).

Discussion: Employees may not waive their right to overtime under the FLSA even if the employee agrees to work for no extra pay, signs a waiver and the Company prohibits overtime work.

4. False.

he/she should be treated as an employee. IRS Form SS-8 is the form used by the IRS to determine employee/independent contractor status for purposes of income and employment taxes and may be a helpful reference for employers in making their determinations.

For purposes of determining the liability of an employer for state unemployment taxes in Georgia, independent contractor status will be found if the IRS has made an independent contractor finding pursuant to an SS-8 determination. Alternatively, independent contractor status may be found where (1) the worker has been and will continue to be free from control or direction over the performance of services for wages, both under contract of service and in fact; and (2) the worker is customarily engaged in an independently established trade, occupation, profession, or business. See O.C.G.A. § 34-8-35(f)(1) (note that this statute was recently amended in 2007 to be a less-stringent standard).

As the foregoing indicates, the classification of a worker as an independent contractor or employee differs in various contexts. In order for an employer to be certain that it is safe in treating a worker as an independent contractor for FLSA and federal and state tax purposes, the best course of action is to be sure all definitions are met and to periodically review those determinations for changes in circumstances or changes in the law.

Discussion: The FLSA and the IRS Code each have different tests to determine whether a worker is an independent contractor. See the following article for more information about properly classifying your workers.

5. Yes, and yes.

Discussion: According to a recent opinion letter issued by the Wage and Hour Division of the U.S. Department of Labor, an employer must compensate the employee for all hours worked including time worked against company policy during a missed meal period. Additionally, the missed meal period is considered work time for purposes of determining overtime compensation. Management must exercise its control and ensure that work is not performed if it does not want it to be performed. The mere promulgation of a rule or policy against such work is not enough.

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