

# 38<sup>th</sup> Annual Corporate Counsel Institute

## *Whose Employee is it Anyway?*

### *Independent Contractors, Employees, and Joint Employer Issues*

Charlene Tsang-Kao  
Senior Counsel

Chevron

Gary D. Eisenstat  
Shareholder

Ogletree, Deakins, Nash,  
Smoak & Stewart, P.C.



**Ogletree  
Deakins**

Atlanta / Austin / Berlin / Birmingham / Boston / Charleston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit (Metro)  
Greenville / Houston / Indianapolis / Jackson / Kansas City / Las Vegas / London / Los Angeles / Memphis / Mexico City / Miami / Milwaukee  
Minneapolis / Morristown / Nashville / New Orleans / New York City / Orange County / Philadelphia / Phoenix / Pittsburgh / Portland / Raleigh  
Richmond / San Antonio / San Diego / San Francisco / St. Louis / St. Thomas / Stamford / Tampa / Toronto / Torrance / Tucson / Washington, D.C.  
[www.ogletreedeakins.com](http://www.ogletreedeakins.com)

## D.O.L. Mindset on Independent Contractors

- Currently 42 million consultants, independent contractors, entrepreneurs, and freelancers. (U.S. Government Accountability Office Study).
- July 15, 2015 blog post from Wage/Hour Admin. David Weil:
  - "...**misclassifying employees** as independent contractors is among the most damaging to workers and our economy."
  - "Misclassified employees are often **denied access to the critical benefits and protections** they are entitled to."
  - "We also will continue to work with the **IRS and 23 states** on this issue in a variety of ways — through, for example, information sharing and coordinated enforcement."

**Ogletree  
Deakins**

Atlanta / Austin / Berlin / Birmingham / Boston / Charleston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit (Metro)  
Greenville / Houston / Indianapolis / Jackson / Kansas City / Las Vegas / London / Los Angeles / Memphis / Mexico City / Miami / Milwaukee  
Minneapolis / Morristown / Nashville / New Orleans / New York City / Orange County / Philadelphia / Phoenix / Pittsburgh / Portland / Raleigh  
Richmond / San Antonio / San Diego / San Francisco / St. Louis / St. Thomas / Stamford / Tampa / Toronto / Torrance / Tucson / Washington, D.C.  
[www.ogletreedeakins.com](http://www.ogletreedeakins.com)

## Federal Enforcement Initiatives

- **\$14 million** budget allocated to independent contractor misclassification in FY 2016.
- **\$10 million** D.O.L. grant to 19 states to implement and improve worker classification detection initiatives through unemployment insurance programs in FY 2014.
- **\$79 million** recovered by D.O.L. through investigations in 2014.
- “Bridge to Justice Program” — referral to private plaintiffs’ lawyers with estimates of back pay due.
- Use of apps, social media, and DOL website as information resource.

## Consequences of Improper Classification

- Back taxes and lower tax revenue for federal/state government
- Social Security and Medicare taxes
- Workers’ Compensation
- Interest and civil penalties
- Criminal penalties
- IRS Audits
- State DOL/TWC Audits
- Back wages and liquidated damages
- Health insurance and benefits (e.g., pension plan)
- Coverage under federal/state employment laws
- Uneven playing field for employers who properly classify workers

## Litigation Trends

- FLSA collective actions
- State wage payment claims
- State fraud/misrepresentation claims
- ERISA/benefit claims

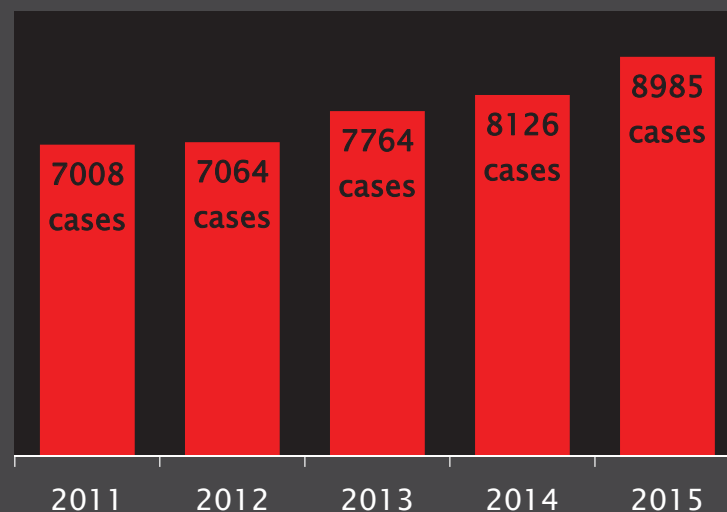


**Ogletree  
Deakins**

Atlanta / Austin / Berlin / Birmingham / Boston / Charleston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit (Metro)  
Greenville / Houston / Indianapolis / Jackson / Kansas City / Las Vegas / London / Los Angeles / Memphis / Mexico City / Miami / Milwaukee  
Minneapolis / Morristown / Nashville / New Orleans / New York City / Orange County / Philadelphia / Phoenix / Pittsburgh / Portland / Raleigh  
Richmond / San Antonio / San Diego / San Francisco / St. Louis / St. Thomas / Stamford / Tampa / Toronto / Torrance / Tucson / Washington, D.C.  
[www.ogletreedeakins.com](http://www.ogletreedeakins.com)

5

## FLSA Cases Filed by Year



**Ogletree  
Deakins**

Atlanta / Austin / Berlin / Birmingham / Boston / Charleston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit (Metro)  
Greenville / Houston / Indianapolis / Jackson / Kansas City / Las Vegas / London / Los Angeles / Memphis / Mexico City / Miami / Milwaukee  
Minneapolis / Morristown / Nashville / New Orleans / New York City / Orange County / Philadelphia / Phoenix / Pittsburgh / Portland / Raleigh  
Richmond / San Antonio / San Diego / San Francisco / St. Louis / St. Thomas / Stamford / Tampa / Toronto / Torrance / Tucson / Washington, D.C.  
[www.ogletreedeakins.com](http://www.ogletreedeakins.com)

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Whose Employee Is It, Anyway? Independent Contractors, Employees, and Joint Employer Issues

Also available as part of the eCourse

[Corporate Counsel 2016: Employment Law Update](#)

First appeared as part of the conference materials for the  
38<sup>th</sup> Annual Corporate Counsel Institute session  
"Whose Employee Is It, Anyway?"