

Colorado HR Connection

Who We Are



Our Purpose

Provide employers and HR professionals with resources, support, and educational opportunities to help them comply with employment laws, implement best practices, and engage in meaningful conversations.

Disclaimer

The information presented by Colorado HR Connection, including information, resources, and presentations is intended as general information about Colorado employment laws. While our presenters and organizers are attorneys and HR experts, the information provided is not intended as legal advice. We encourage you to seek the guidance of your own attorney for advice tailored to your unique circumstances and workforce.



The New Independent Contractor Rule: Tips and Tricks to Employee Classification

- **Determine Current Rules**
- **Benefits and Insurance Responsibilities**
- **Demystifying IC Status in Staffing Agencies**
- **Other Elements to Consider**



Misclassification of Employees Part I

I have a contract employee...

- There is no such thing, yet this is a commonly used term.
- There are only “employees” or “independent contractors” (sometimes called 1099 workers*)
- Terminology is important



Determine Current Rules

US Department of Labor (DOL)

Final Rule 2024

- ✓ On January 9, 2024, the DOL issued a final rule undoing prior attempts to loosen the tests for determining when a worker can be appropriately classified as an independent contractor
- ✓ Rule effective March 11, 2024
- ✓ DOL cares about this issue because it believes misclassification results in lost wages and benefits, along with lost payroll taxes (unemployment) and workers' compensation



The Six-Factor DOL Test

- ❖ Worker's opportunity for profit or loss depending on managerial skill
- ❖ Investments by the worker and the potential employer
- ❖ Degree of permanence of the work relationship
- ❖ Nature and degree of control
- ❖ Extent to which the work is an integral part of the alleged employer's business
- ❖ Skill and initiative



The Six-Factor List

- ❖ Factors are not exhaustive/Totality of circumstances/No single factor is determinative
- ❖ Emphasizes economic reality test: independent contractors are workers who, as a matter of economic reality, are in business for themselves **and not dependent upon the employer.**



Opportunity for Profit or Loss Depending on Managerial Skill

This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work.

- ❖ Whether the worker determines or can meaningfully negotiate the charge or pay for the work provided;
- ❖ Whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed;
- ❖ Whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and
- ❖ Whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.

Opportunity for Profit or Loss Depending on Managerial Skill

If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

How does the final rule explain “investment by the worker and the employer?”

This factor considers whether any investments by a worker are capital or entrepreneurial in nature.

- ❑ Costs to a worker of tools and equipment to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status.**
- ❑ Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.**
- ❑ Additionally, the worker's investments should be considered on a relative basis with the potential employer's investments in its overall business.**

How does the final rule explain “investment by the worker and the employer?”

The worker’s investments do not have to be equal to the potential employer’s investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.

How does the final rule explain “degree of permanence of the work relationship?”

- Likely an employee when the work relationship is:
 - Indefinite in duration,
 - Continuous, or
 - Exclusive of work for other employers

- Likely an independent contractor when the work relationship is:
 - Definite in duration, non-exclusive, project-based, or
 - Sporadic based on the worker being in business for themselves, and
 - Marketing their services or labor to multiple entities.
 - May include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification

How does the final rule explain “degree of permanence of the work relationship?”

Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative.

How does the final rule explain “nature and degree of control?”

This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship.

Whether the potential employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the potential employer's control over the worker include whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose.



How does the final rule explain “nature and degree of control?”

Whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose.

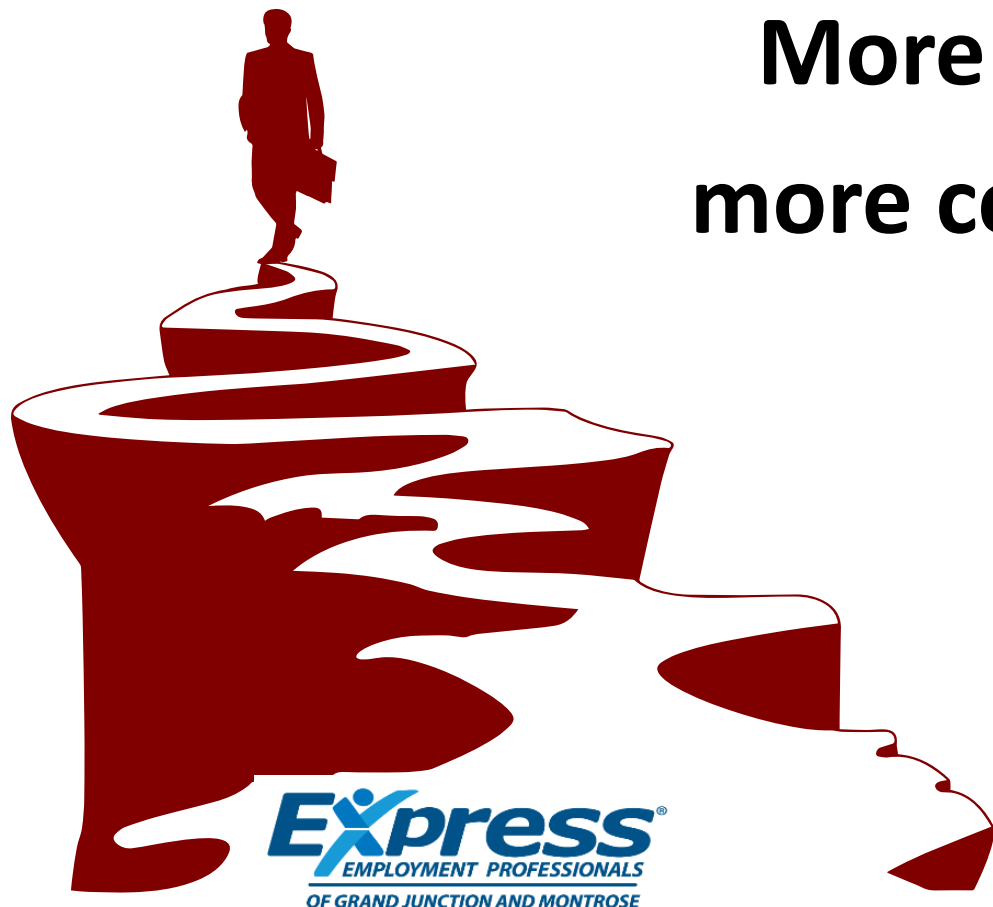
Whether the potential employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker.



How does the final rule explain “nature and degree of control?”

NOTE: Actions taken by the potential employer for the sole purpose of complying with a specific, applicable federal, state, tribal, or local law or regulation are not indicative of control.

**More control by the potential employer favors employee status;
more control by the worker favors independent contractor status.**



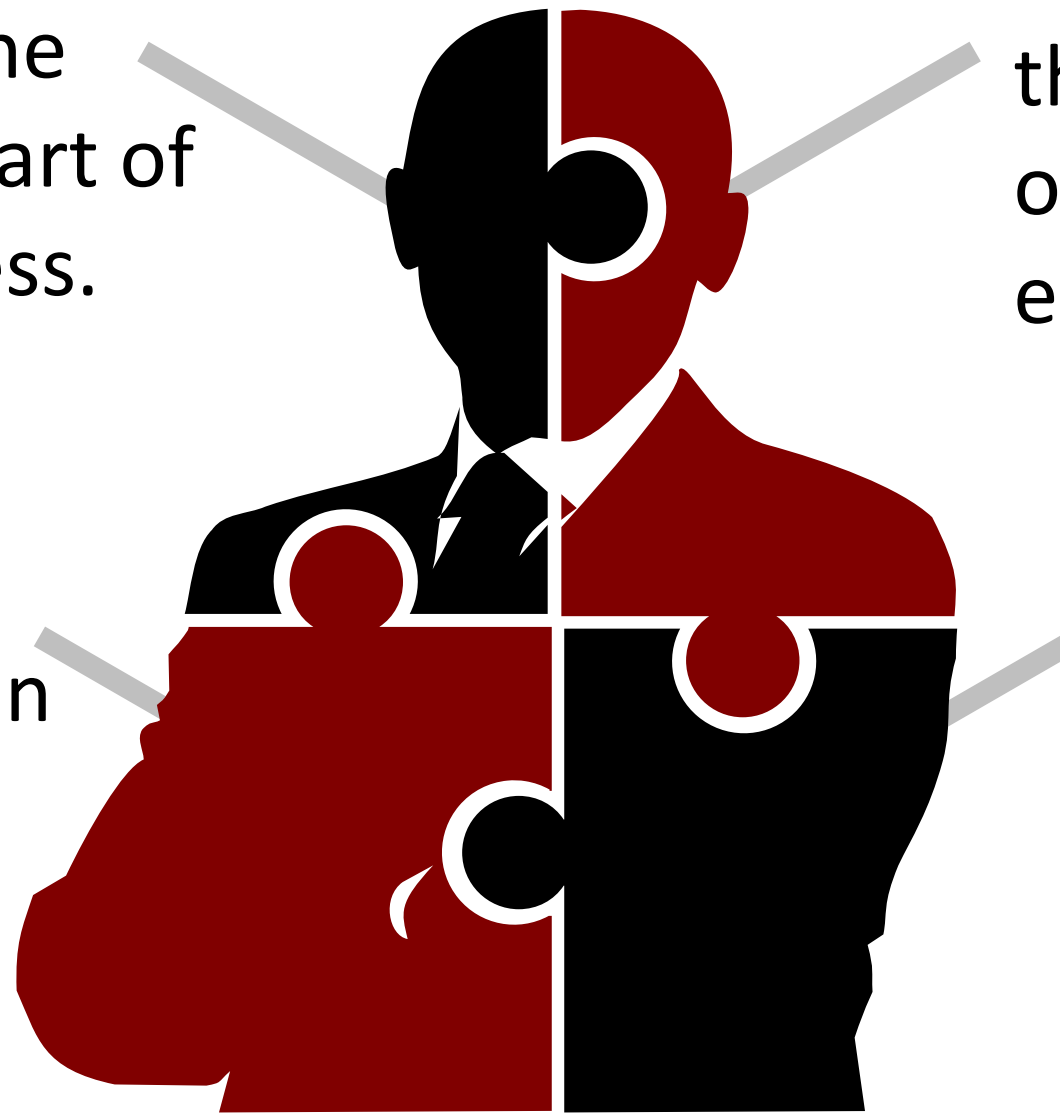
How does the final rule explain “extent to which the work performed is an integral part of the employer’s business?”

This factor considers whether the work performed is an integral part of the potential employer’s business.

Likely an employee when the work they perform is critical, necessary, or central to the potential employer's principal business.

Does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part of the business.

Likely an independent contractor when the work performed by worker is not critical, necessary, or central to the potential employer's principal business.



How does the final rule explain “skill and initiative?”

This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.

Likely an employee where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work.

Caution: the fact a worker brings specialized skills to the work relationship, is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers.

It is the worker’s use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

Not the Only Test...

To be clear, this test is solely for purposes of determining classification under the Fair Labor Standards Act (FLSA).

Other tests, slightly different, include:

- IRS (taxes)
- National Labor Relations Act (unionization)
- Title VII (discrimination)
- Common Law (tort liability)
- Colorado law (unemployment, minimum wages and overtime)

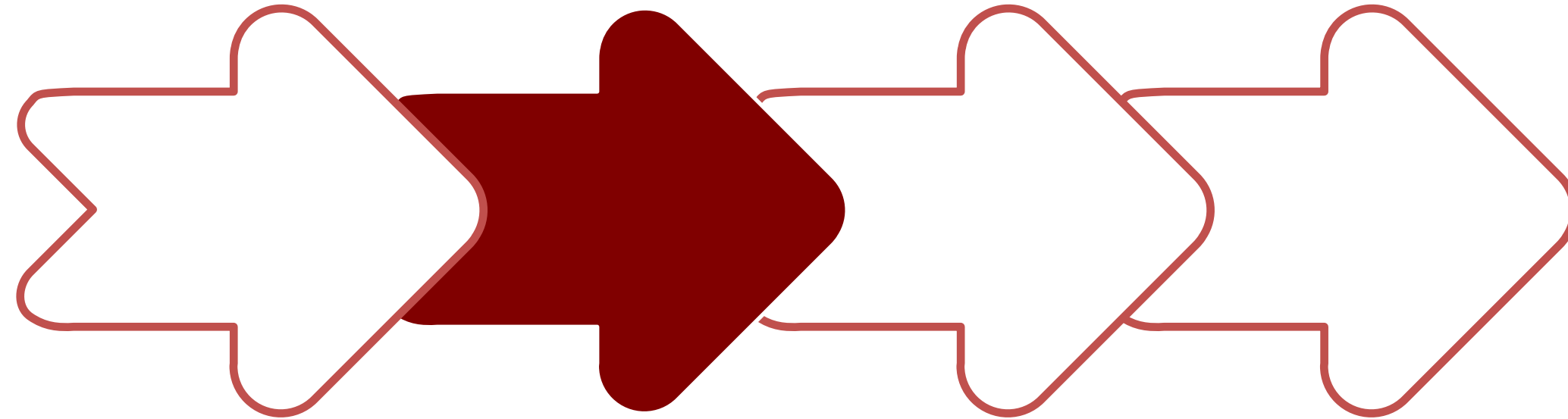
The FLSA does not preempt any other laws that protect workers, so businesses must comply with whichever standard provides workers with the greatest protection. See 29 U.S.C. 218.





Benefits and Insurance Responsibilities

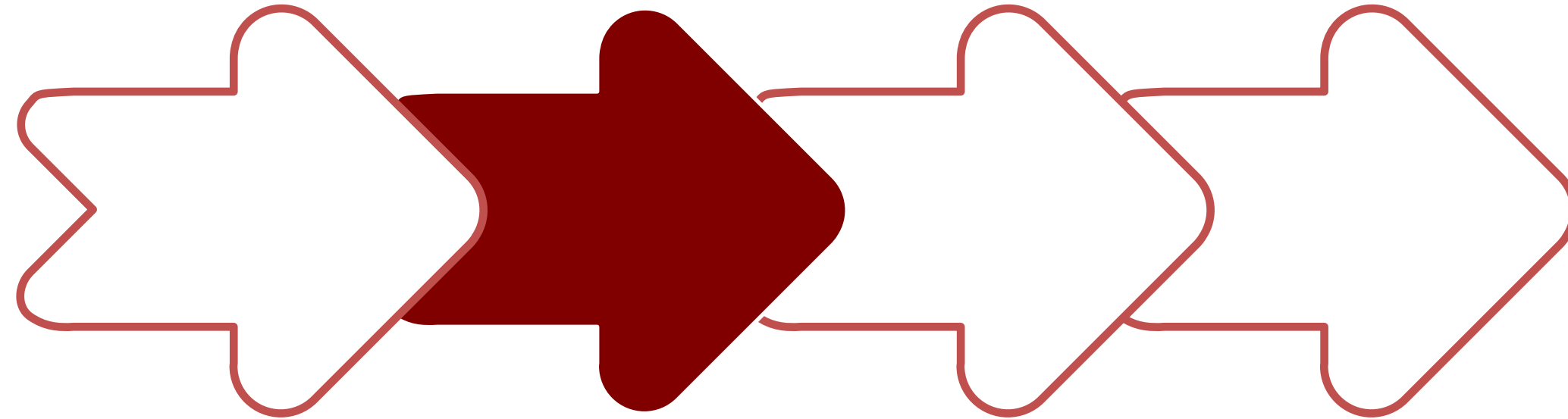
Colorado Law – C.R.S. 8-70-115(1)(b)



Services performed by an individual for another shall be deemed to be employment...unless and until it is shown to the satisfaction of the Division that such individual is:

- ❖ Free from control and direction in the performance of the service, both under *their* contract for the performance of service and in fact, and
- ❖ Customarily, engaged in an independent trade, occupation, profession or business related to the service performed.
- ❖ A contract can help establish the independent contractor relationship **IF** the contract meets the requirements of the law.

Colorado Law – C.R.S. 8-70-115(1)(b)



The contract must contain a disclosure, in type which is larger than the other provisions in the document or in **bold-faced type** or underline type, that the IC is not entitled to unemployment insurance benefits unless unemployment coverage is provided by the IC or some other entity, and that the IC is obligated to pay federal and state income tax on any moneys paid pursuant to the contract relationship.

Required Contract Clauses

The contract **MUST** contain the following clauses that both parties agree to and act accordingly. Specifically, the company does **NOT**:

- Require the individual to work exclusively for the person for whom services are performed, except that the individual may choose to work exclusively for the said person for a finite period of time specified in the document.
- Establish a quality standard for the individual, except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed.



Required Contract Clauses

The contract **MUST** contain the following clauses that both parties agree to and act accordingly. Specifically, the company does **NOT**:

- Pay a salary or hourly rate but rather a fixed or contract rate.
- Have ability to terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce a result that meets the specifications of the contract.
- Provide anything more than minimal training for the individual.
- Provide tools or benefits to the individual, except that materials and equipment may be supplied.



Required Contract Clauses

The contract **MUST** contain the following clauses that both parties agree to and act accordingly. Specifically, the company does **NOT**:

- Dictate the time of performance, except that a completion schedule and a range of mutually agreeable work hours may be established.
- Pay the individual personally but rather makes checks payable to the trade or business name of the individual; and the company does not combine their business operations in any way with the individual's business, but instead maintains such operations as separate and distinct.



Not Eligible for Benefits

According to the Fair Labor Standards Act (FLSA), independent contractors do not qualify for employee benefits like health insurance, paid time off, and retirement plans provided by their clients.

Independent contractors, being self-employed individuals, bear the responsibility of managing their own taxes and expenses. Additionally, they wield greater control over their work compared to employees.

Therefore, employers should not furnish any benefits such as those stated above, or overtime pay, disability accommodations, etc., to independent contractors under the FLSA.



What About Workers' Comp?



- If your business operates within the construction industry, and you use contractors, you must make sure the contractors also meet workers' compensation requirements, and if they don't, you could be fined.
- **If you use contractors to perform construction work, you must do one of the following:**
 - Provide workers' compensation insurance to your contractors. You can charge the contractors for their portion of the insurance premium.
 - Get proof of workers' compensation compliance from everyone you have a direct contract with, which can come in two forms:
 - proof of workers' compensation insurance; or
 - proof of rejection of coverage.

What About Workers' Comp?

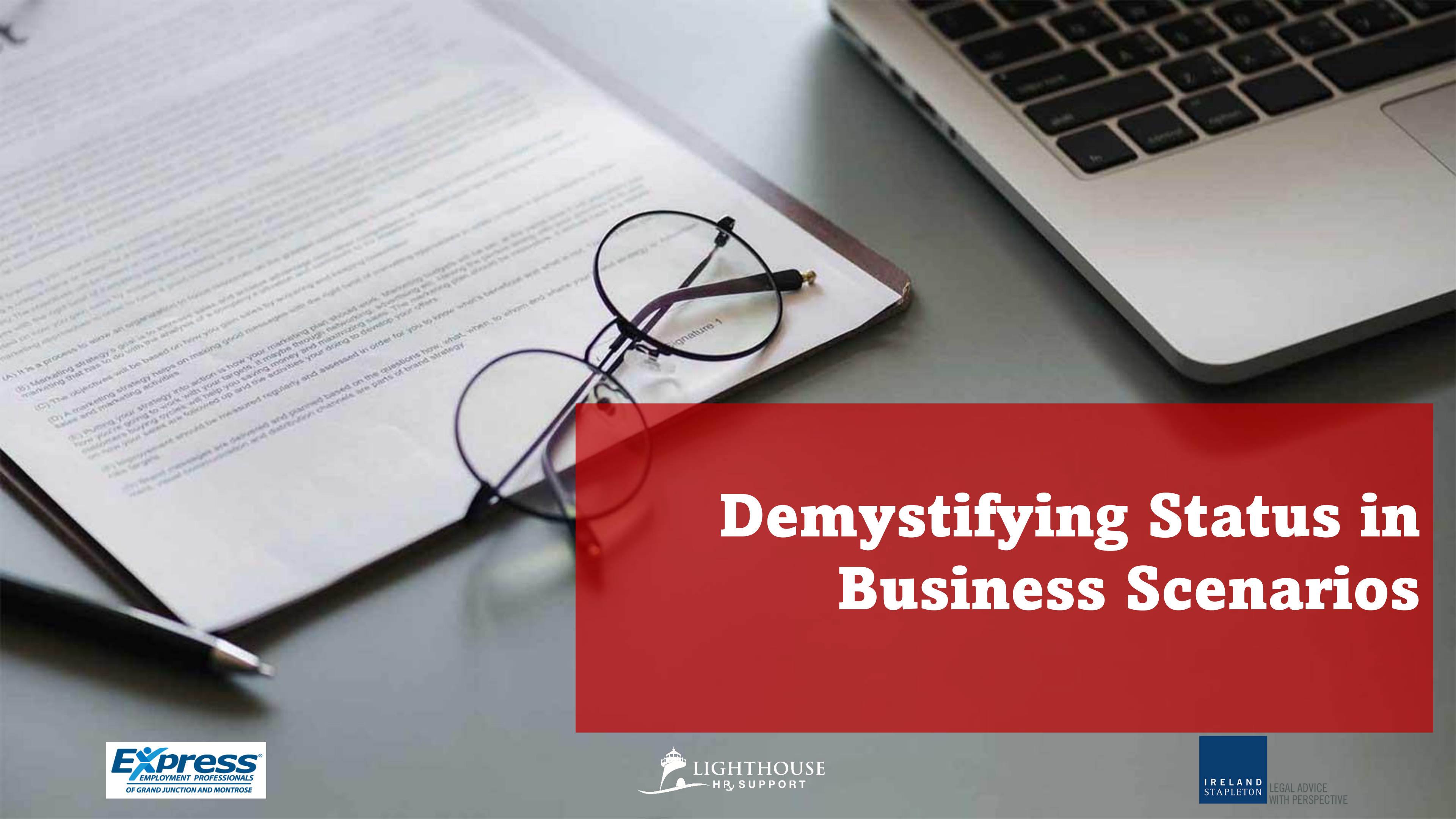


- If a contractor has no employees, the contractor must be covered by workers' compensation insurance unless they choose to reject coverage using the appropriate form.
- For corporations and limited liability companies (LLCs)
 - [Form WC 43 - Rejection of Coverage by Corporate Officers or Members of a Limited Liability Company](#)
- For sole proprietors and partnerships
 - [Form WC 45 - Rejection of Coverage By Partners and Sole Proprietors Performing Construction Work on Construction Sites](#)
- CDLE has resources available online to verify if a contractor has a workers' compensation insurance policy or has filed their rejection of coverage.

What About Liability Insurance?



- Independent contractors are **strongly recommended** to have general liability insurance.
- While it is **not a legal requirement**, having this type of insurance is crucial for protecting their business interests. General liability insurance provides coverage for claims related to **property damage, bodily injury, and advertising injuries** (encompasses various offenses related to advertising goods, products, or services) that may occur during the course of their work.



Demystifying Status in Business Scenarios

Industry Demands

Tech Industry

- Implementation & Migration projects
- Software development
- Testing
- Team management

Healthcare

- Minimum Staffing Requirements
- Declining Revenues/reimbursement rates
- Increased Demands

High Liability

- High Injury rates
- Cost of coverage

Difficult to fill

- Work when they “want”
- Come & go untethered
- 40 hours not required

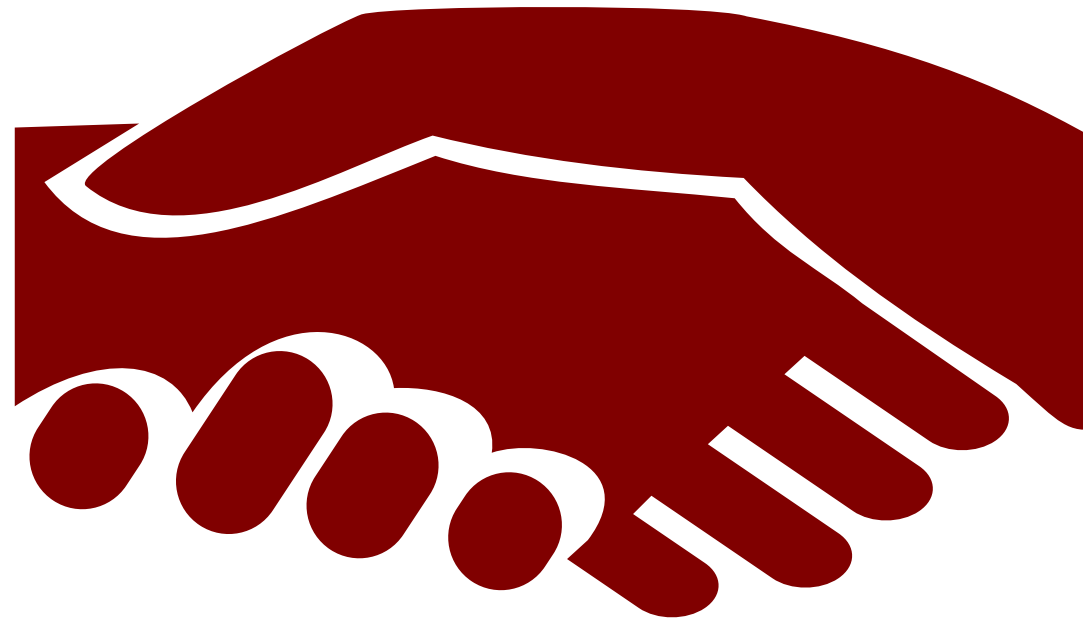
Organizational Dangers

Tech Industry

- IP & Patents
- Fragmented Communication & Coordination
- Microsoft 1997: \$97M (\$181.4M)

Healthcare

- Compliance & Legal
- Inconsistent Quality of care
- Malpractice Coverage
- 2022: \$44,500 – \$9.3M retro OT



High Liability

- Pay now or pay later
- Injury Claims with backpay closes businesses

Difficult to fill

- Limited control & oversight
- Possession of work product

Agency Determinants

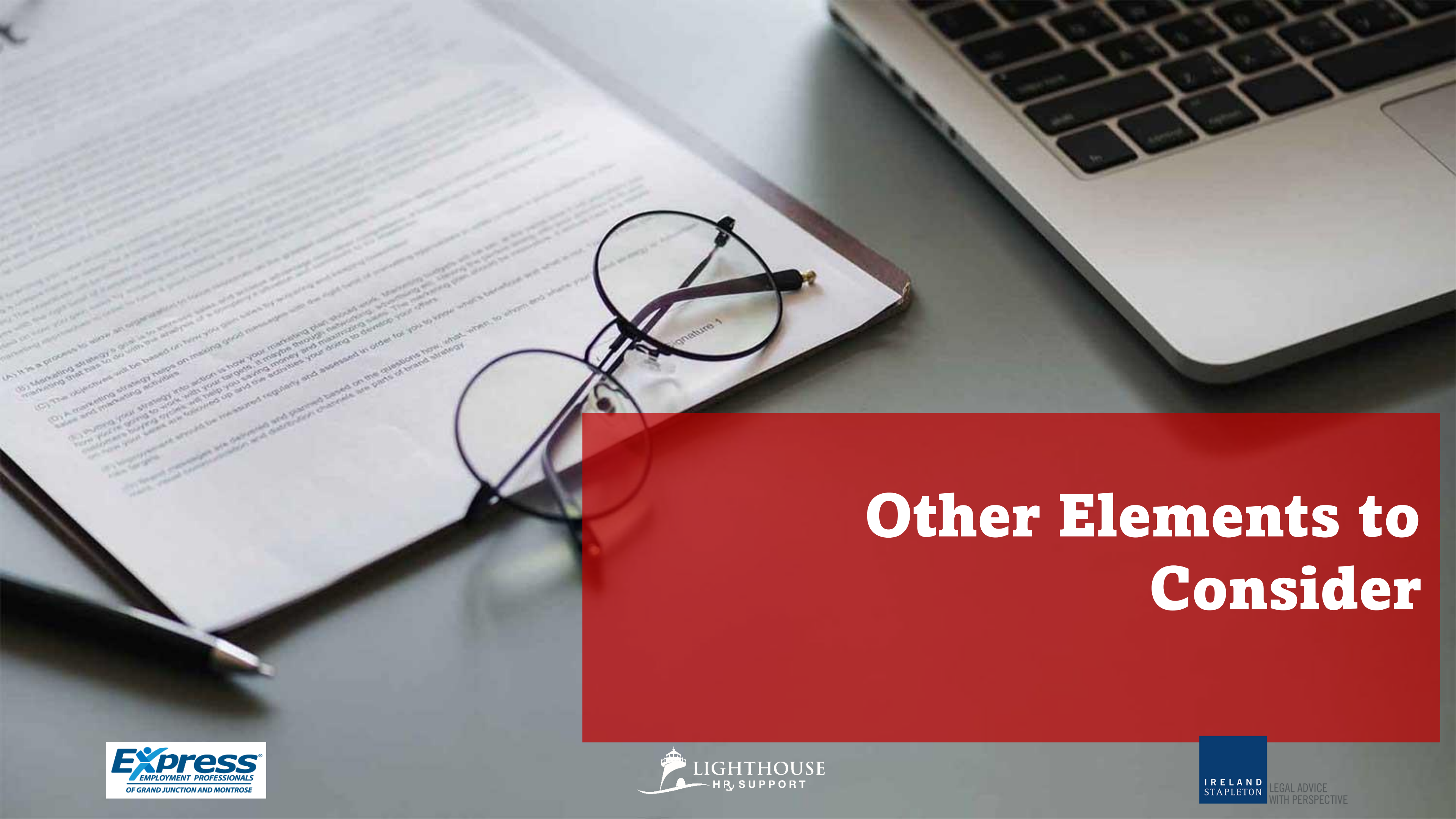


- ✓ Liability coverage
 - FICA, FUTA, SUTA, HFWA, FAMLI,
 - General Liability, E&O, Worker's Compensation
- ✓ Employer reporting
 - New Hire reporting
 - Year-end W2s
- ✓ Special Pay
 - Holiday
 - Insurance

HR Data Control



- ✓ Document changes in employment environment:
 - Termination, discipline, or demotion
 - Performance reviews
 - Transfer to different projects/jobs
 - Change in wages, benefits, hours, schedule, etc.
 - Working conditions
 - References



Other Elements to Consider

How Does a Claim Arise?

Random
Audit

Targeted
Audit

Audit Based
on Complaint

Claim
Brought by
Former
Contractor

Application
by Former
Contractor
for UI
Benefits

Potential Costs/Penalties and Considerations

- Back wages/overtime
- Back taxes
- Interest
- Federal/State Penalties
- Risk of others in similar positions being audited/reclassified – class action

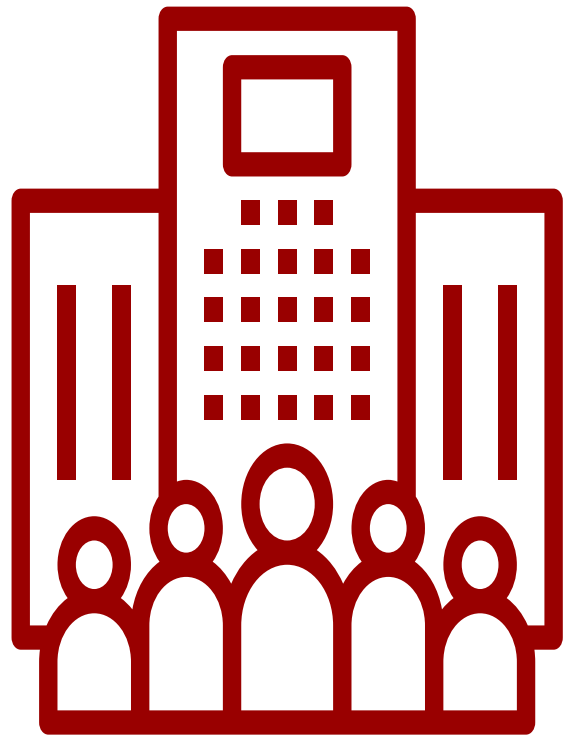


Potential Costs/Penalties and Considerations

- Unemployment benefits if individual files claim for unemployment benefits
- Attorneys' fees
- Amended or corrected W2 and 941 forms
- Amend to state and/or federal returns
- Once audited and problems discovered, on the “watch list”



Ways to Prevent or Minimize Penalties/Costs



- ☐ Analyze each position/class of positions
- ☐ Always use an independent contractor agreement
- ☐ Put mechanisms in place to ensure compliance with law
- ☐ Seek legal or other professional advice early
- ☐ If in doubt, make the individual an employee

THANK YOU!



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