

ComplianceHR MasterClass

The Workplace Redefined:
Navigating Independent Contractor Compliance Under the
Shifting Legal Landscape

September 5, 2018



This presentation is for educational purposes only. TriNet provides its clients with HR and best practices guidance. TriNet does not provide legal, tax, or accounting advice.



Lori Brown

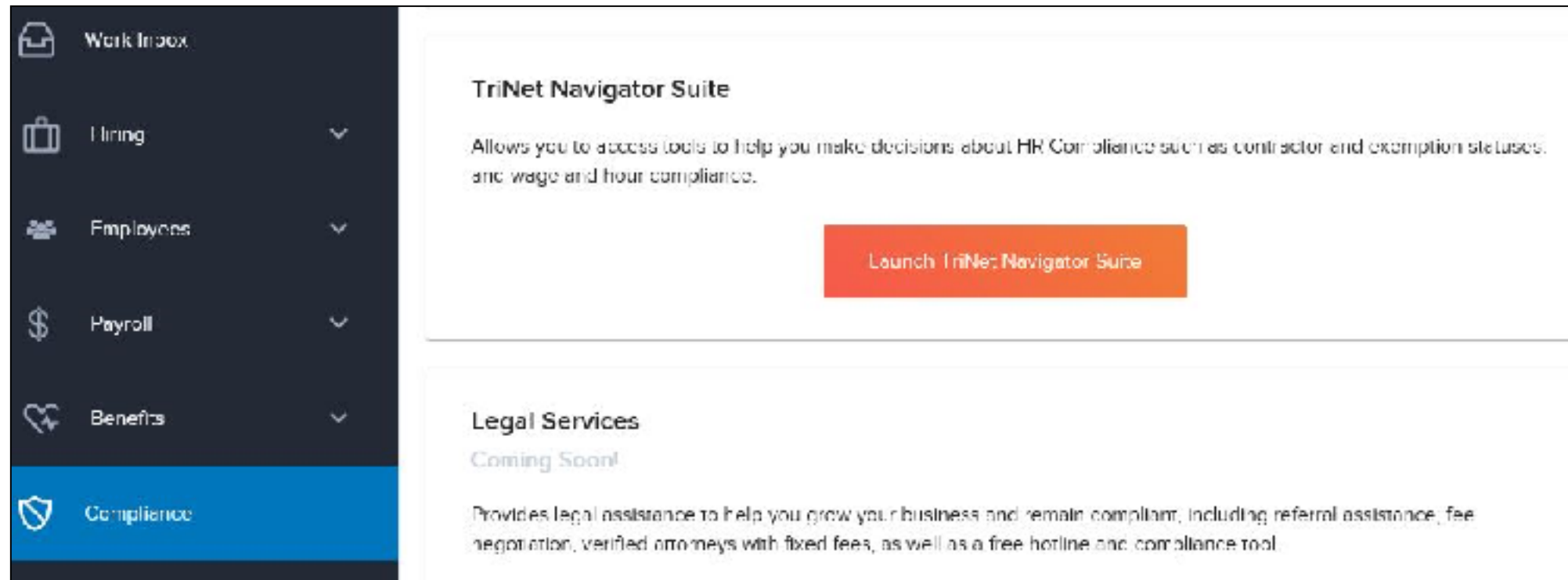
CEO, ComplianceHR
brown@compliancehr.com
[@labrown1419](https://twitter.com/labrown1419)

- Former Littler Shareholder
- Former General Counsel/Head of HR of Global Security Organization

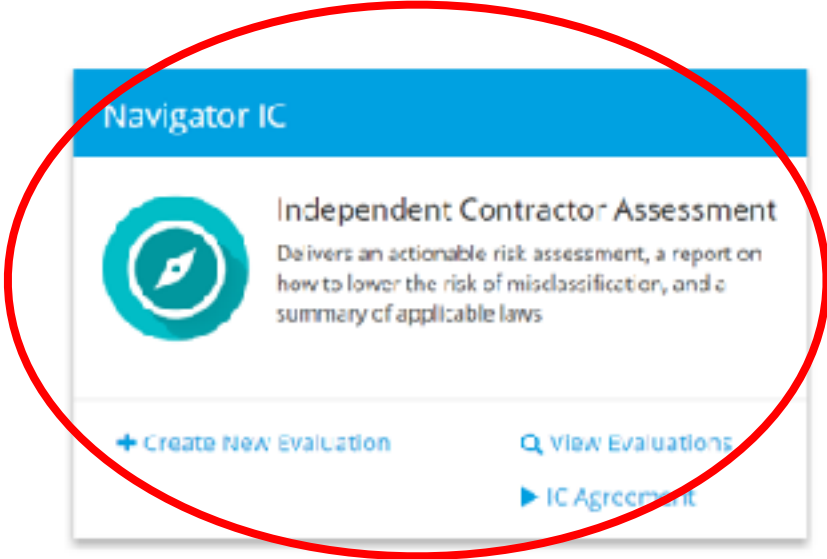


Accessing Your Navigator Suite

Under the Admin View, the TriNet Navigator Suite can be found under the “Compliance” link on the TriNet platform (login.trinet.com)



Accessing Your Navigator Suite

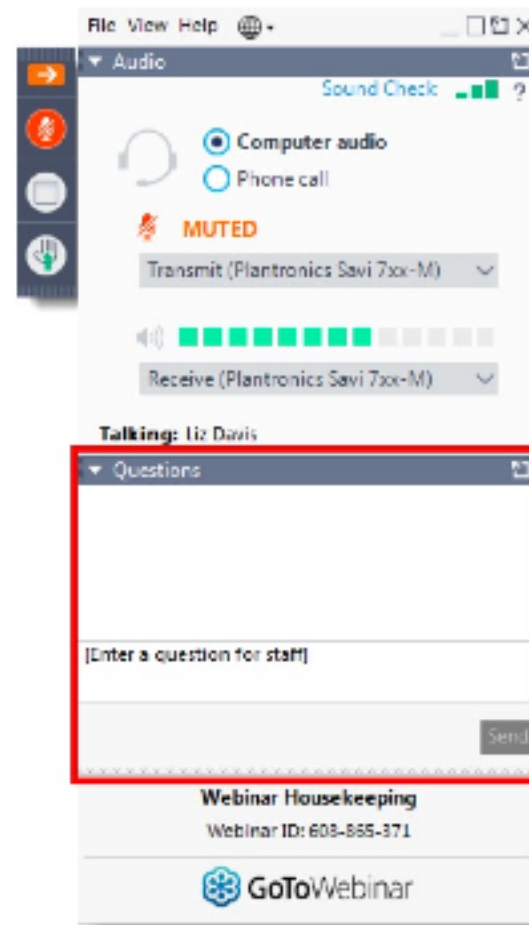


The Navigator Suite consists of four main modules, each represented by a card with a blue header, a circular icon, a title, a description, and a list of actions at the bottom.

- Navigator IC** (highlighted with a red circle):
 - Icon:** A teal circle with a white compass needle.
 - Title:** Independent Contractor Assessment
 - Description:** Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws.
 - Actions:**
 - + Create New Evaluation
 - 🔍 View Evaluations
 - ▶ IC Agreement
- Navigator OT**:
 - Icon:** A red circle with a white clock face.
 - Title:** Exempt Status Assessment
 - Description:** 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.
 - Actions:**
 - + Create New Review
 - 🔍 View Reviews
 - ▶ Use Leadership Navigator
 - 🔍 View Evaluations
- Navigator Pay Practices**:
 - Icon:** An orange circle with a white hourglass.
 - Title:** Wage and Hour Compliance
 - Description:** Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues.
 - Actions:**
 - ▶ Find Minimum Wage
 - ▶ Use Rapid Reference
- Navigator Onboarding**:
 - Icon:** A green circle with a white document icon.
 - Title:** Onboarding Document Production
 - Description:** Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents.
 - Actions:**
 - + Create New Document

Answering Your Questions

Please submit your questions via the text questions pane:





What You'll Receive:

1. Full slide presentation (pdf format)
2. Link to recorded audio presentation
3. White Paper: The Implications of *Dynamex Operations West v. Superior Court*
4. Publication: Littler on Classifying Workers

OBJECTIVES FOR TODAY'S SESSION:

- I. Intro to Navigating Independent Contractor Compliance
- II. Understanding the different nationwide legal tests for worker status/classification
- III. And then there's California! (*Dynamex*)
- IV. “Best practices, tips and hints” for employers who utilize contingent workers featuring **Navigator IC**



I. Navigating Independent Contractor Compliance

**“At its current growth rate,
the majority of the U.S.
workforce will be freelancers
by 2027”**

Edelman Intelligence, *Freelancing in America:2017*, at 5 (Oct. 17, 2017)



FREELANCING IN AMERICA

2017

"Freelancing in America" is the most comprehensive study of the independent workforce. Commissioned by Freelancers Union and Upwork, and conducted by independent research firm Edelman Intelligence, this study analyzes the state of the growing freelance economy and provides insights into the major role freelancers play in the future of work. In fact, based on this year's findings it is predicted that the majority of the U.S. workforce will be independent within a decade by 2027.



WWW.FREELANCECONTRACTINGECONOMY.COM

57.3M people
freelance



The majority of
workers will
freelance by 2027



Millennials are
leading the way

47%

of Millennial workers
freelance, more than
any other generation



Freelancers contribute an estimated

\$1.4 Trillion

annually in freelance earnings to
our economy



More income
sources are better

Freelancers lack having
diversified income is
more secure than one
employer (42% agree)



Tech is enabling
freelancing

71%

of freelancers say
the amount of work
they obtained online
increased over the
last year



Don't call this
the gig economy

What freelancers
prefer calling this
economy



Top drivers
and barriers to
freelancing

DRIVERS

- ☒ Freedom
- ☒ Flexibility
- ☒ Earning extra money

BARRIERS

- ☒ Income predictability
- ☒ Finding work
- ☒ Benefits

Freelancers
are preparing for
the future



55%

FREELANCERS

30%
who rebooked
within the last 6
months

OTHERS

Regulation, Agency Action and Litigation: Speeding Up, Not Slowing Down

NEW YORK CITY COUNCIL PASSES FREELANCER PAYMENT PROTECTION BILL. On

October 27,

Freelance

bill seeks to

vari

EEOC ISSUES 4-YEAR STRATEGIC PLAN THAT INCLUDES IC MISCLASSIFICATION. In its

newly published Strategic Enforcement Plan, the Equal Employment Opportunity Commission

PENNSYLVANIA LABOR DEPARTMENT COMMENCES IC MISCLASSIFICATION

workplace

AWARENESS CA

statewide public a

FEDEX GROUND'S RECENT IC MISCLASSIFICATION COSTS NEARING \$500 MILLION. A

Oregon federal district court approved FedEx Ground's \$15.4 million class action settlement

GAS AND ELECTRIC UTILITY COMPANY SUED FOR PENSION BENEFITS ALLEGEDLY

DENIED TO WORKERS MISCLASSIFIED AS IC'S. Pacific Gas & Electric Company's

retirement plan has been sued by three contract workers who claim they have been

misclassified by PG&E as independent contractors and therefore denied service credits for

purposes of coverage under the PG&E pension plan. The complaint alleges that PG&E

ists due to IC
d violations for
ng from their
U.S. Court of
ovees and not





II. Tests, Tests and More Legal Tests



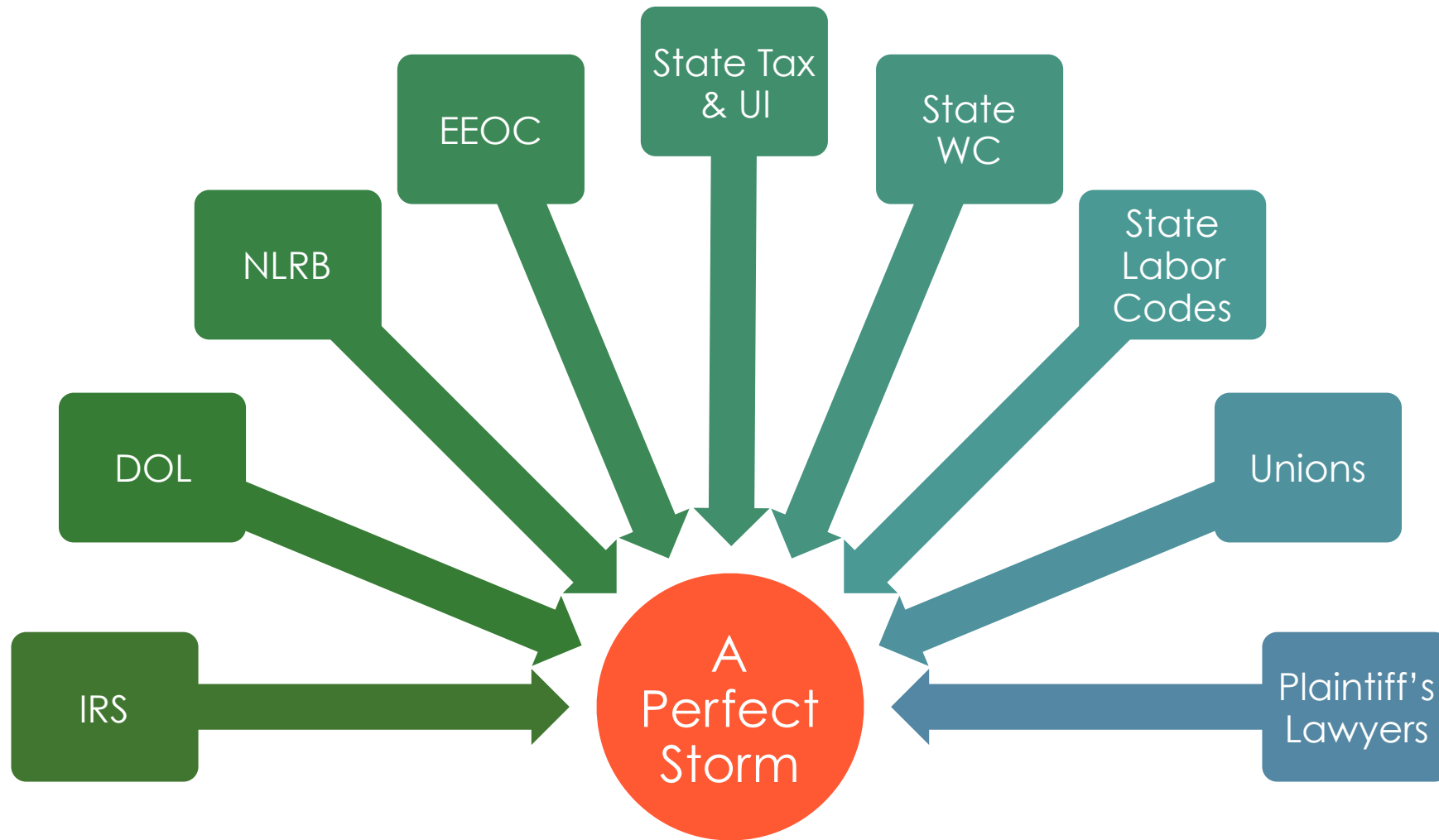
Neil Alexander

Littler Shareholder

Phoenix, AZ

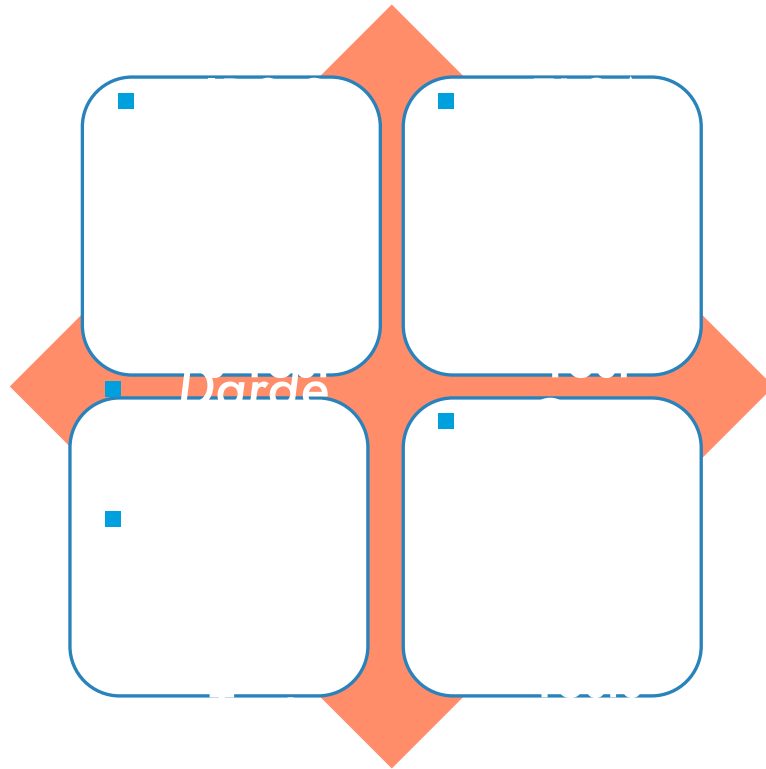
Nalexander@littler.com

- Co-Chair of Littler's Staffing, Independent Contractors and Contingent Workers Practice Group
- Significant experience auditing & evaluating IC classifications
- Regularly appears in state & federal courts, and before the EEOC, DOL, among others
- Deep expertise in employment risk management, workforce design and maximizing contingent worker options, compliance with the ADA and FMLA, and other legal issues



Not Just About the IRS

The Legal Issues



Over 100 Different Legal Tests

- Federal law alone has three different tests for determining IC status
- Layered on top of these, states may have up to six different tests under different laws

IRS Test Uses

3 Groups of Factors

Behavioral Control

- When/where to do the work
- What tools/equipment to use
- What workers to hire/use
- Where to buy supplies/services
- What work is assigned to specific individuals
- What order/sequence to follow

Financial Control

- Business expenses
- Worker's investment
- Extent to which worker's services are publicly available
- Payment method
- Worker's risk of profit or loss

Type of Relationship

- Written contracts describing the intended relationship
- Whether employee-type benefits are provided
- Permanency of relationship
- Are services provided a key aspect of the company's business

Darden Common Law Test

1. The skill required
2. The source of the instrumentalities and tools
3. The location of the work
4. The duration of the relationship between the parties
5. Whether the hiring party has the right to assign additional projects to the hired party
6. The extent of the hired party's discretion over when/how long to work
7. The method of payment
8. The hired party's role in hiring and paying assistants
9. Whether the work is part of the regular business of the hiring party
10. Whether the hiring party is in business
11. The provision of employee benefits
12. The tax treatment of the hired party

FLSA Economic Realities Test

1. The extent to which the work performed is an integral part of the employer's business
2. Whether the worker's managerial skills affect his or her opportunity for profit and loss
3. Investments in facilities and equipment
4. The worker's skill and initiative
5. The permanency of the worker's relationship with the employer
6. The nature and degree of control by the employer







State Tests

The “ABC” Conjunctive Test

- A. The contractor is free from control and direction by the company;
 - B. The services to be performed by the contractor are either outside the usual course of the company’s business or will be performed outside of the company’s place of business; *and*
 - C. The contractor is customarily engaged in an independently established trade, occupation, profession or business.
- May be multi-factor balancing tests or conjunctive tests with multiple required elements
 - Some state laws create a presumption of IC status, but other states have a presumption of employee status

Accessing Your Navigator Suite

| Navigator IC | Navigator OT |
|--|---|
|  Independent Contractor Assessment Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws |  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 Evaluation View Evaluations IC Agreement | + Create New Review View Reviews Use Leadership Navigator View Evaluations |

| Navigator Pay Practices | Navigator Onboarding |
|---|--|
|  Wage and Hour Compliance Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues |  Onboarding Document Production Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents |
| Find Minimum Wage Use Rapid Reference | + Create New Document |

Setting Up the Evaluation

Welcome to Navigator IC

Create a new evaluation by entering the information below. Click the following link for information about how Navigator IC handles [industry-specific standards](#).

Type of engagement:

Graphic Design

State where work will be performed:

California

Please provide the following information about the prospective contractor:

Prefix

☐ Mr. ☒ Ms.

First Name

Dagny

Last Name

Taggart

Company
(Optional)

Dagny Taggart LLC

Who will complete the questionnaire?

- ☒ Complete the questionnaire myself
- ☐ Assign the questionnaire to someone else

Would you also like the prospective contractor to complete a questionnaire? [More Information](#)

- ☐ Yes
- ☒ No

Intuitive Fact-Gathering

Dagny Taggart LLC: Graphic Design

To what degree is the work to be performed by Dagny Taggart LLC [core](#) to Abc Inc.'s business?

Somewhat, although not directly performing the core work, Dagny Taggart LLC's work will be part of Abc Inc.'s primary workflow

Will Abc Inc. control where Dagny Taggart LLC can perform the work under this engagement?

Yes, because the work cannot be performed elsewhere

Are Abc Inc. employees performing the same or similar work that Dagny Taggart LLC is being engaged to perform?

☐ Yes ☒ No

Has Dagny Taggart ever been an employee of Abc Inc.?

☐ Yes ☒ No

Please indicate the level of [instruction](#) Abc Inc. will give Dagny Taggart LLC:

No instructions

Under the terms of the engagement, how much control can Abc Inc. assert over the [order](#) in which Dagny Taggart LLC will perform the work?

No control

Will Dagny Taggart LLC's work hours be set by Abc Inc.?

No, Abc Inc. will not control Dagny Taggart LLC's work hours

Will Abc Inc. provide Dagny Taggart, her employees or subcontractors' employees with training or direction in any of the following areas (check all that apply):

- ☐ Security or safety procedures
- ☐ Use of basic equipment (two-way radios, telephones, copy machines)
- ☐ Anti-harassment, discrimination or other codes of conduct
- ☐ Software programs required to perform the work
- ☐ General work rules dictating the terms of the engagement (hours of work, lunch and rest breaks, job location, security protocols)
- ☐ How to perform the work (whether by a manual, seminar, classroom training, video demonstration or other similar means)
- ☐ Job shadowing or on-the-job training
- ☒ [Situational interviews](#)
- ☐ Use of tools or equipment required to perform the work
- ☐ Training for workers who do not have the experience or skills needed to complete the work
- ☐ Select All
- ☐ None of the above

Is there a written independent contractor agreement?

☒ Yes ☐ No

What is the anticipated length of this engagement between Dagny Taggart LLC and Abc Inc.?

1-3 years

Before the work is completed, when does Abc Inc. have a right to terminate its relationship with Dagny Taggart LLC?

Only as allowed under the terms of a contract (for example, if one of the parties breaches the contract)


Before the work is completed, when does Dagny Taggart LLC have a right to terminate the relationship with Abc Inc.?

Only as allowed under the terms of a contract (for example, if one of the parties breaches the contract)


Expert Results, Instantly Delivered

Compliance **HR** NAVIGATOR IC


Independent Contractor Risk Report for Abc Inc.



CONTRACTOR
Ms. Dugny Toggart




ENGAGEMENT
Graphic Design



JURISDICTIONS
California
Federal

▶ [View Risk by Jurisdiction](#)


What is the risk of classifying Atlas Design as an independent contractor?



Under the facts that you have provided, it is unlikely that Atlas Design will be found to be an employee.


FOR MORE INFORMATION ABOUT YOUR RESULTS PLEASE SEE THE RESOURCES BELOW:

- ▶ [How to Lower Your Risk Level](#)
- ▶ [Summary of Independent Contractor Laws](#)
- ▶ [Transcript of Your Questions and Answers](#)
- ▶ [Disclaimer](#)



California

It is unlikely that Atlas Design will be found to be an employee.



Federal

It is highly unlikely that Atlas Design will be found to be an employee.





















Consultative Guidance, On Demand

Compliance **HR** NAVIGATOR IC

| Risk Factors | Steps to Lower Risk |
|---|--|
| The Contractor's Business Organization | <p>A company may be able to lower misclassification risk by engaging contractors who have a separate and independent business organization. Although none are determinative, indicators of a separate business include: payment of business-related taxes; maintaining a formal business structure (other than a sole proprietorship); having a Federal Employer Identification Number (FEIN) for tax purposes (not a Social Security Number); operating under a business name different from the contractor's own name; maintaining licenses, registrations or permits required to operate a business; maintaining business insurance; maintaining records of expenses, assets, income and liabilities; having a bank account (separate from an individual or family account) for the purpose of depositing business revenues and paying business expenses; and maintaining a business office away from the contractor's home. Abc Inc. may be able to reduce its risk score by ensuring Atlas Design meets most of these indicators of having a separately established business.</p> |
| Parties' Rights to Terminate the Engagement | <p>Employees may be terminated at will. An independent contractor relationship can be terminated only as set forth in the contract. Independent contractors are responsible for the satisfactory completion of a job and are liable for failing to complete the job in accordance with the contract.</p> <p>Abc Inc. may be able to reduce its risk score through contract terms providing that: (1) the contract can be terminated only for a breach; and (2) the breaching party will be liable for damages caused by the breach.</p> |

IC Dashboard

353 Completed Evaluations

| | Name | Contractor | Contractor Company | Engagement Man... | Assignee | Department | Report | Started | Ended |
|---|----------|-------------------|------------------------|-------------------|---------------|------------|---|-----------|-----------|
|  | Eval-325 | Apple, Big | Empire Consultants | Bocci, Joanne | Bocci, Joanne | Compliance |  | 3/24/2017 | 3/24/2017 |
|  | Eval-166 | Apple, John | Gotham Consultants | Bocci, Joanne | Bocci, Joanne | Compliance |  | 5/29/2016 | 6/29/2016 |
|  | Eval-329 | Arco, Joan | Tech Team, LLC | Bocci, Joanne | Bocci, Joanne | Compliance |  | 3/24/2017 | 3/24/2017 |
|  | Eval-165 | Boston, Vicky | VCB Partners | Bocci, Joanne | Bocci, Joanne | Compliance |  | 5/29/2016 | 6/29/2016 |
|  | Eval-247 | California, Sunny | Chilin In CA | Bocci, Joanne | Bocci, Joanne | Compliance |  | 11/1/2016 | 11/1/2016 |
|  | Eval-168 | Cheese, Ron | Greenbay Contracting | Bocci, Joanne | Bocci, Joanne | Compliance |  | 5/30/2016 | 6/30/2016 |
|  | Eval-183 | Colligan, Phil | PC Enterprises | Bocci, Joanne | Bocci, Joanne | Compliance |  | 7/19/2016 | 7/19/2016 |
|  | Eval-178 | Empire, Natalie | Gotham City Consulting | Bocci, Joanne | Bocci, Joanne | Compliance |  | 7/18/2016 | 7/18/2016 |
|  | Eval-199 | Keen, Devra | dk International | Bocci, Joanne | Bocci, Joanne | Compliance |  | 8/26/2016 | 8/26/2016 |
|  | Eval-55 | Meyers, Mark | Mark Repair Co | Smith, John | Smith, John | HR |  | 3/10/2016 | 3/10/2016 |

Meanwhile in California...



III. The Implications of *Dynamex* *Operations West* *v. Superior Court*



William Weissman

Littler Shareholder

Walnut Creek, CA

wweissman@littler.com

- Leads Littler's Employment Taxes Practice Group
- Among other areas of expertise, Will's practice heavily focuses on worker status.
- Helps clients restructure and strengthen their relationships with independent contractors, advises clients to convert contractors to employees when necessary, and defends clients in disputes with state and federal agencies including the DOL, as well as in private litigation in federal and state courts.
- Counsels employers of all sizes, ranging from single-person start-ups looking to hire the first employee to Fortune 100 companies with sophisticated human resource, payroll and in-house legal departments.

The Dynamex Decision

- On April 30, 2018, the California Supreme Court issued a landmark decision in *Dynamex Operations West v. S.C. (Lee et al.)*
- Rejected the *Borello* test in favor of adopting a modified “ABC” test, similar to that used in Massachusetts and Indiana
- Eliminates the option of qualifying as an IC if all the work is done off site or remotely
- Burden is now on the organization to prove that an individual meets the qualifications of an independent contractor
- ComplianceHR's Navigator IC is the only intelligent, on demand solution applying California's new Dynamex standard



What *Dynamex* Does and Does Not Hold

Dynamex Holds:

- That the ABC test is the broadest test possible to capture employment relationships subject to the wage order
- That this test differs from the FLSA standard and *Borello* standard used



Dynamex Does Not Hold:

- That the ABC test applies to worker's compensation, unemployment taxes, benefits, or much of the Labor Code
- That an employee under the wage order is an employee for other non-wage order purposes

Best Practices in a Post-Dynamex California

- Examine whether the ABC prongs apply
 - Focus on the “B” prong and whether the business is unusual
 - If fail “A” prong would likely fail *Borello* as well
- Assuming you fail the ABC test, does it matter?
 - Would the worker be exempt (executive, professional, administrative, outside sales)?
 - Is there really liability (are they paid minimum wage, can take breaks, don’t work a lot of hours, etc.)?
 - Can you make changes to minimize the impact of the wage order?
- Talk to your lobbyists and representatives
 - This does not have to be the final word on worker status in California



Misclassification Issues with Benefit Plans

- Failure to offer coverage for medical plans
- Failure to follow terms of retirement plans
- Multiple employer welfare arrangements
- Employer reporting for ACA
- Record retention for hours of service for benefit plans
- Liabilities (penalties and past due taxes of FICA/FUTA, Medicare, and state and local income taxes)



Questions



IV. Best Practices, Tips & Tricks to
Strive for Contingent Worker Compliance

General Rules for Compliance

INDEPENDENT CONTRACTOR

- A business offering services to the public with separate employees and facilities.
- Contract is for duration of project or for less than a year. IC has time to work for others.
- IC responsible for own business expenses and makes a significant investment in his business.



EMPLOYEE

- An individual who does not have an independent business organization.
- Relationship is continuous and full-time. Individual is not allowed to work for other firms.
- Principal provides tools and equipment and reimburses the individual for business expenses.

General Rules for Compliance

INDEPENDENT CONTRACTOR

- Paid by project/task; no non-compete; terminated only for contract breach; may subcontract.
- Work is not an integral part of the principal's business and can be performed by the IC's employees.
- Controls when, where and how the work is performed. Controls sequence and hours of work.



EMPLOYEE

- Paid a salary or by the hour; cannot incur a loss; may be terminated at will.
- Work is essential to the principal's business and/or performed by its own employees.
- Principal provides training and instruction on how to perform work, sets work hours, and requires reports.

Bottom Line: Know the IC Red Flags


- Do not classify individual workers or former employees as ICs
- Do not prohibit ICs from working for other companies
- Do not provide training, instruction or attempt to control HOW work is performed
- Limit review of IC work to safety, quality control and compliance with contract specs
- Do not provide tools or equipment
- Pay on flat fee/per project basis if possible and do not reimburse business expenses
- Contract terms on:
 - IC status
 - Indemnification
 - All of IC's workers to be paid in compliance with the FLSA, DBA and state laws

Steps to Access Your Risk of Independent Contractor Engagement

1. Identify every contract your organization has entered into regularly for your company (either on a contract basis or for the past 2 years) and compare it to the W-2 employee base.
2. Determine if you have contracts in place with each provider. Are the contracts up to date and do they align with your company interests.
3. Nature of the work:
 - Determine which services are being performed, performing the same or very similar services as direct employees. Is the service a core function of your company?
4. Examine how the provider spends their time. Do they devote their full working time to providing services to your company and do they also provide services for other companies? Do they have any other personal commitments?

Or Make It Easy!

Navigator IC




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Navigator Onboarding



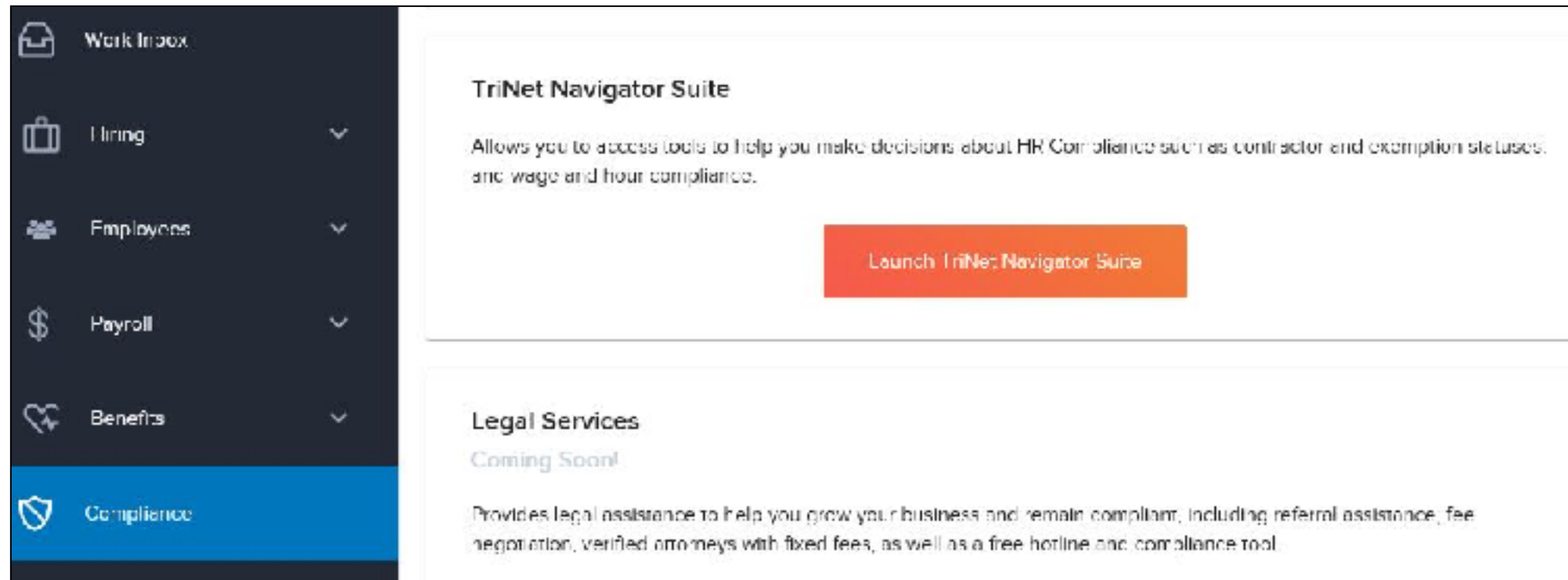
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Lightning Round

Indemnity

The *Dynamex* Trend

Outsourcing

Duration of Engagement

Income Percentage

Unemployment

Worker Intent

Worst State

Arbitration



Thank you!

