VIZCAINO V. MICROSOFT

By Renate M. de Haas

Increasingly, in the software industry and other sectors of the economy, corporations are relying less upon traditional employees and more upon temporary and contingent workers. These changes in the workplace have important implications for employee benefits. *Vizcaino v. Microsoft*[1] raises such issues in a prominent way.

Temporary and contingent workers include part-time workers, workers leased from temporary employment agencies, independent contractors, freelancers, and others who work outside the traditional employment domain. As companies try to keep operating costs down, they rely on temporary workers more and more. Some estimate that 20-30% of the workforce is now made up of temporary workers.[2] The numbers are increasing: the growth rate of contingent employment was at least 40% greater than that of the workforce as a whole during 1988, and has continued to climb since then.[3]

According to the National Association of Temporary Services, 24% of temporary workers are "professionals or other highly skilled workers."[4] In the high technology industry in Silicon Valley, temporary workers constitute up to 40% of the workforce.[5] Many of these high technology contingent employees are independent contractors who have less access to benefits from their employers.[6] The flexibility of working as an independent contractor and receiving more cash up front may outweigh the effects of not receiving benefits, motivating independent contractors to sign agreements that deny them these benefits.

New start-up companies that are unable to hire full-time employees due to capital and cash flow restrictions may turn to independent contractors to fill their employment needs. Other more established companies

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1. 120 F.3d 1006 (9th Cir. 1997) (en banc) [hereinafter *Vizcaino II*].
2. *See* Richard N. Belous, *The Rise of the Contingent Workforce: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 867 (1995).
3. *See* Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 STETSON L. REV. 1, 6-7 (1996).
4. Susan Diesenhouse, *In a Shaky Economy, Even Professionals Are Temps*, N.Y. TIMES, May 16, 1993, at C3.
5. David Klein, (Marketplace radio broadcast, Aug. 26, 1997).
6. *See id.*

may use contingent workers to keep costs down or to manage seasonal demand for employees. Regardless of the reason they are hired, contingent employees raise many concerns for the company and for any attorney representing that company. The *Vizcaino* decision is important not for its precedential value to temporary workers seeking employee benefits, but for bringing attention to concerns that must be addressed when dealing with a contingent workforce. If the largest software company in the world can fall prey to employee classification problems, it can happen to any company, unless one takes precautions to avoid the type of claims brought by these temporary workers in *Vizcaino v. Microsoft*.

I. THE CASE

In *Vizcaino*, eight individuals, classified by Microsoft Corporation as independent contractors, sued the company on behalf of themselves and a court-certified class claiming that they were entitled to savings benefits under Microsoft's Savings Plus Plan (SPP), an Employee Retirement Income Security Act (ERISA) plan, and stock option benefits under Microsoft's Employee Stock Purchase Plan (ESPP).[7] The workers based both of their claims on the theory that they were not independent contractors, but common law employees.[8]

Each plaintiff signed two agreements at the time of hire: a "Microsoft Corporation Independent Contractor Copyright Assignment and Non-Disclosure Agreement" and an "Independent Contractor/Freelancer Information" document.[9] The non-disclosure agreement provided that the worker "agrees to be responsible for all federal and state taxes, withholding, social security, insurance and other benefits."[10] The information document stated that "as an Independent Contractor to Microsoft, you are self-employed and are responsible to pay all your own insurance and benefits."[11] In addition, the plaintiffs received more cash on an hourly basis than regular employees.[12]

Microsoft integrated these independent contractors into its workforce. The independent contractors were required to work on-site, worked on teams with regular employees, performed identical functions to regular

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7. *See Vizcaino II*, 120 F.3d at 1006.
8. *See id.*
9. Vizcaino v. Microsoft, 97 F.3d 1187, 1190 (9th Cir. 1996) [hereinafter *Vizcaino I*].
10. *Id.*
11. *Id.*
12. *See Vizcaino II*, 120 F.3d 1019.

employees, and maintained the same hours as regular employees.[13] The independent contractors did differ from regular employees in some respects: they wore badges of different colors than regular employees, had different e-mail account addresses, were not invited to official company functions, were not paid salaries, and were not allowed to assign their work to others.[14] Further, they were not paid through Microsoft's payroll department, instead receiving payment for their services by submitting invoices to Microsoft's accounts receivable department.[15]

Microsoft made benefit plans available to employees of the company. One such plan was the SPP, which Microsoft elected to establish in accordance with ERISA.[16] ERISA defines an employment benefit plan as "(1) a plan or program, (2) established or maintained by an employer (3) for the purpose of providing to its participants (4) benefits, through the purchase of insurance or otherwise, (5) in the event of sickness, accident, disability, death, unemployment, vacation, or in the event of retirement."[17] Microsoft's SPP was open to all employees "on the United States payroll of the employer."[18] Microsoft believed that because the temporary workers were paid through the accounts receivable department, and not its payroll department, they were not eligible to participate in the SPP.[19]

A second plan offered by Microsoft was its ESPP, which allowed employees to purchase Microsoft stock at 85% of its fair market value.[20] Not an ERISA plan, the ESPP conferred benefits in accordance with section 423 of the Internal Revenue Code,[21] which requires the ESPP be open to all employees of the company.[22] However, because Microsoft did not consider the workers to be employees, they were not permitted to participate in the ESPP.[23]

In 1989 and 1990, the Internal Revenue Service (IRS) examined Microsoft's employment records to determine whether the company was in compliance with the tax laws. The IRS used common law principles to

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13. *See Vizcaino I*, 97 F.3d at 1190.
14. *See id.*
15. *See id.*
16. *See Vizcaino II*, 120 F.3d at 1013.
17. Rita B. Gylys, *Employee Benefits: What They Look Like Today and How They Will Change Tomorrow*, *in* LITIGATION 1997, at 21, 214 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5259, 1997 (quoting 29 U.S.C. § 1002(1) (1994)).
18. *See Vizcaino II*, 120 F.3d at 1013.
19. *See id.* at 1010.
20. *See Vizcaino I*, 97 F.3d at 1191.
21. 26 U.S.C. § 423 (1994).
22. *See Vizcaino II*, 120 F.3d at 1014.
23. *See id.* at 1014-15.

determine that Microsoft's independent contractors were not temporary employees, but common law employees.[24] The IRS uses a twenty-factor test to determine if a worker is a common law employee.[25] Generally, in applying its twenty-factor test, the IRS assesses the manner and means by which the product is created, including whether the work is performed on-site, whether the worker pays for office supplies and machines, whether hours are set by the worker or the company, and so on.[26] Typically, if the worker exercises a great deal of control over her employment, she is an independent contractor; if the hiring party has more control, the worker is an employee. There are also several other tests, such as the agency test and the economic realities test, that use similar factors to determine whether an individual is an employee of a company.[27] Microsoft had substantial control over the working conditions of its temporary workers, thus, as a matter of law, the IRS determined that the workers were employees, not independent contractors.[28]

Microsoft issued W-2 forms to the workers and paid the employer's share of FICA taxes to the government in an effort to comply with the IRS decision.[29] Microsoft also realized that because the workers were employees, it had to change its system.[30] Workers affected by the IRS decision were either converted into full-time employees, rehired through a temporary agency, or were terminated.[31] After learning of the IRS ruling, reclassified workers sued Microsoft in an effort to get various permanent benefits, including access to the SPP and the ESPP.[32]

A. Procedural History

1. Plan Administrator

When the reclassified workers approached the company with their demands, Microsoft rejected the workers' claim for inclusion in the SPP and

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24. *See id.* at 1008.

25. *See* Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

26. *See id.*

27. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957); Equal Employment Opportunity Commission v. Fawn Vendors, Inc., 965 F. Supp. 909 (S.D. Tex. 1996). The agency test uses the principles of agency law to determine whether a worker would be considered an agent of the employer. The economics realities test considers the economic realities of the work relationship and the extent to which an employer control the means by which the work is produced.

28. *Vizcaino II*, 120 F.3d at 1008.

29. *See id.*

30. *See id.*

31. *See id.* at 1009.

32. *See id.*

the ESPP, maintaining that the workers were independent contractors who should receive no benefits from the company.[33] The workers sought review of Microsoft's denial through the Microsoft SPP administrator.[34] The plan administrator decided that the workers were not eligible to participate in the SPP or the ESPP because they had contractually waived their rights to benefits and were not "regular full-time employees in approved headcount positions."[35] Although ruling only "technically" on SPP plan participation, the plan administrator stated that the workers would be excluded from the ESPP for the same reasons.[36]

2. District Court

Following cross-motions for summary judgment, the district court referred the matter to a magistrate judge.[37] The magistrate judge recommended that an award be made in favor of the plaintiffs on both the SPP and ESPP claims.[38] The district court, however, declined to adopt the magistrate judge's recommendation, rejected the plaintiff's motion for summary judgment, and granted Microsoft's motion for summary judgment.[39] The plaintiffs then appealed the district court's ruling with respect to the SPP and ESPP claims.[40]

3. Ninth Circuit Court of Appeals

The Ninth Circuit Court of Appeals found that although the Microsoft plan gave the plan administrator discretion to construe whether workers were entitled to benefits, the plan administrator did not apply "on the United States payroll of the employer," the phrase on which [SPP] plan eligibility depended.[41] Microsoft believed that the workers were not eligible to participate in the SPP because they were not paid through the payroll department but the accounts receivable department.[42] The first time

33. *See Vizcaino*, 97 F.3d at 1191.

34. *See id.* ERISA requires that a beneficiary exhaust all administrative remedies before filing suit, therefore the plaintiffs were required to appeal to the plan administrator before filing suit against Microsoft. The plaintiffs sought review specifically from the SPP administrator because only the SPP was an ERISA plan. *See* 29 U.S.C. § 1133(2) (1994). *See also* Medical Center-West, Inc. v. Cluett, Peabody & Co., Inc., 814 F. Supp. 109 (N.D. Ga. 1993).

35. *Vizcaino I*, 97 F.3d at 1191(citations omitted).

36. *Id.*

37. *See id.*

38. *See id.*

39. *See id.* at 1192.

40. *See id.*

41. *Id.* at 1193.

42. *See id.*

Microsoft argued this theory was during its motion for summary judgment;[43] thus, the plan administrator never applied this phrase to the workers. The court then decided that because this crucial phrase was subject to more than one interpretation, it would consider extrinsic evidence that may shed light on its meaning.[44] The court concluded that the ERISA guidelines entitled all persons employed by Microsoft and paid from its United States accounts to participate in the SPP, regardless of whether they were paid through a payroll account or accounts receivable.[45]

The court decided further that the workers should not have been excluded from the ESPP.[46] Although the workers had contractually agreed to waive this benefit, the court found that these agreements did not exclude the workers from the ESPP because they inaccurately labeled workers as "independent contractors."[47] Because all employees could participate in the ESPP, the temporary workers, as common law employees, should not have been excluded.[48] The court also found that the provision contained in the workers' agreements that the workers would be "responsible for ... other benefits" was not inconsistent with their participation in the ESPP.[49] The employee makes the payment for stock issued to them pursuant to the ESPP; therefore, the worker is still responsible for these other benefits.[50]

Judge Reinhardt, the author of the majority opinion, took a firm position against "the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits."[51] In a strong dissent, Judge Trott felt that because the workers and Microsoft had unambiguous, written agreements as to what benefits the workers would and would not receive, it would be a violation of the constitutional right of freedom to contract to hold these contracts unenforceable.[52] He believed that "the majority seems to overlook the constitutional right of private parties freely to enter into contracts of their own choice and benefit."[53]

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43. *See id.*
44. *Vizcaino I*, 97 F.3d at 1194.
45. *See id.* at 1196.
46. *See id.* at 1197.
47. *Id.* at 1198.
48. *See id.*
49. *Id.*
50. *See id.*
51. *Id.* at 1187.
52. *See id.* at 1202-03.
53. *Vizcaino I*, 97 F.3d at 1203.

4. En Banc Rehearing by Ninth Circuit

Microsoft next petitioned for a rehearing en banc.[54] Upon the rehearing, the Ninth Circuit held that Microsoft's recognition that the workers were employees and not independent contractors made them eligible for ERISA benefits under the SPP.[55] Although the workers, as employees, were entitled to participate in the SPP, that participation was subject to their being "on the United States payroll of the employer."[56] The court here determined that the phrase "on the United States payroll of the employer" must be construed in the first instance by the plan administrator and not by the court as held in *Vizcaino I*.[57] The administrator never applied this phrase to the plaintiffs; therefore, the court did not look at extrinsic evidence to determine what the phrase meant within the context of plan benefits,[58] as the court did in *Vizcaino I*.[59] Finally, the court held that:

> any remaining issues regarding the rights of a particular worker in the ESPP and his available remedies must be decided by the district court on remand. However, any remaining issues regarding the right of any or all of the [w]orkers to participate in the SPP must be decided by the plan administrator.[60]

The dissent viewed the ESPP issue as a simple contract case.[61] Because no law mandated that Microsoft give these benefits to employees to begin with, the workers were only eligible to participate in the ESPP to the extent they contracted with Microsoft to do so. Here, however, the workers specifically waived their benefit of participating in the ESPP. Therefore, the workers could not be allowed to reap the benefit of a plan for which they knowingly waived participation.

II. RECENT CASES INVOLVING EMPLOYEE CLASSIFICATION

In order to avoid the mistakes made by Microsoft, one must understand what situations may generate claims such as those advanced in

54. *See Microsoft Employees Who Were Misclassified as Independent Contractors Get Benefits*, 5 No. 5 ERISA LITIG. REP. 10 (1996) [hereinafter *Microsoft Employees*].
55. *See Vizcaino II*, 120 F.3d at 1013.
56. *See id.* at 1013.
57. *Id.*
58. *See Vizcaino II*, 120 F.3d at 1013.
59. *See Vizcaino I*, 97 F.3d at 1194.
60. *Id.* at 1015.
61. *See id.* at 1019.

Vizcaino I and *Vizcaino II*. There have been several cases that wrestle with employee classification issues similar to those presented by *Vizcaino I* and *Vizcaino II*. Courts in these cases have applied various tests with similar factors for determining whether a worker is an employee under the common law. Because each court must examine the various factors and apply them to the facts of each case, such inquiries are very fact-specific.

In *Nationwide Mutual Insurance Company v. Darden*,[62] a former agent for Nationwide Mutual brought an action under ERISA to recover retirement benefits. The U.S. Supreme Court found that because ERISA only defines an employee as "any individual employed by an employer,"[63] the "term 'employee' as used in ERISA incorporates traditional agency law criteria for identifying master-servant relationships."[64] In applying these criteria "all of the incidents of the employment relationship must be assessed and weighed with no one factor being decisive."[65] In order to identify whether an individual is an employee, the Court applied a test that was previously laid out in *Community for Creative Non-Violence v. Reid*.[66] This test was essentially the same as the twenty-factor IRS test.

In a similar case, the Eleventh Circuit found there was a genuine dispute of material fact regarding Honeywell's authority over the manner and means by which plaintiff Daughtrey discharged her duties under a consultant agreement.[67] Although she had signed an agreement indicating that she was not an employee of Honeywell, Daughtrey sought to recover employee benefits from the company. The court held that "the employment

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62. 503 U.S. 318 (1992).

63. *Id.* at 318

64. *Id.*

65. *Id.* at 319.

66. 490 U.S. 730 (1989).

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to the inquiry are: 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; and the tax treatment of the hired party.

Darden, 503 U.S. at 1348 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. at 751-52).

67. *See* Daughtrey v. Honeywell, Inc., 3 F.3d 1488 (11th Cir. 1993).

status of an individual for the purposes of ERISA is not determined by the label used in the contract between the parties."[68] The court decided that a factors analysis approach was necessary and it applied the same test used in *Vizcaino II* and *Darden*.[69] The court determined that the company controlled many aspects of the worker's employment, as the company furnished all equipment and supplies, required the work be done on-site and did not allow workers to offer services to other companies.[70]

In *Equal Employment Opportunity Commission v. Fawn Vendors, Inc.*,[71] the court analogized the requirements for a Title VII action to the factor test for determining whether a worker is an employee. Although the worker had signed an "Independent Sales Representative Agreement," the EEOC believed her to be an employee.[72] *Fawn Vendors* is similar to *Microsoft* in that the court in each case had to determine whether an individual was an employee, despite the existence of a contract stating that the individual was, in fact, an independent contractor.[73] The court then applied a hybrid common law/economics realities test outlined in *Diggs v. Harris Hospital-Methodist, Inc.*,[74] which utilizes essentially the same factors as the common law test and the IRS test.[75] The factors indicated that the plaintiff was, in fact, an employee.[76]

In *Holt v. Winpisinger*,[77] a former employee brought an action to recover pension benefits.[78] Holt was a part-time administrative assistant.[79] Because the company had a policy against part-time employees, Holt was

68. *Id.* at 1492.

69. *See id.*

70. *See id.* at 1493.

71. 965 F. Supp. 909 (S.D. Tex. 1996).

72. *Id.* at 911. The existence of an employer-employee relationship is a prerequisite to bringing a claim under Title VII.

73. *See id.* at 911-12.

74. 847 F.2d 270, 272 (5th Cir. 1988).

75. *Fawn Vendors*, 965 F. Supp at 910-11.

76. Although the individual was paid on commission basis and sales agreement indicated that she was an "independent agent," her employer had a right to control the manner and means by which work was to be performed, which is the most important factor in the common law test. Important facts included: that her position required little skill; her work was an integral part of company's business; corporation monitored her activities by requiring her to submit daily reports, providing her with leads, instructing her as to the details of sales approach she was to take, and did not permit her to work for any other company. *See Fawn Vendors*, 965 F. Supp at 912.

77. 811 F.2d 1532 (D.C. Cir. 1987).

78. *See id.* at 1533.

79. *See id.*

paid from a general fund used to pay outside contractors.[80] After working part-time for one year, Holt became a regular full-time employee.[81] The *Holt* court held that the common law rules of agency, as stated in the Restatement Second of Agency, must be applied to determine employee status for purposes of ERISA.[82] The intent of the parties was one factor, but it was not dispositive as to employment status, as the defendants had claimed.[83] Therefore, the court decided that Holt was an employee.

Although the foregoing cases utilized a factors analysis present in the IRS, common law, economic realities and agency tests, there are cases where the court did not use the factors analysis in making their decisions. In *Abraham v. Exxon Corp.*,[84] the Fifth Circuit held that leased employees do not necessarily enjoy the same benefits as full-time employees. The plan at issue specifically excluded leased employees, and ERISA permits such exclusion if it is not on the basis of age or length of service, so long as the employee is at least 21 years of age and has completed at least one year of service to that company.[85]

Also, in *Clark v. DuPont*,[86] a worker was disqualified due to the plain language of the plan. The plan in *Clark* was available only to "any full-time employee on the [pay]roll as of 12/1/85 who continues to work at

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80. *See id.* at 1534.

81. *See id.*

82. *See id.* at 1540-41. These factors are:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
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> (b) whether or not the one employed is engaged in a distinct occupation or business;
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> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
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> (d) the skill required in the particular occupation;
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> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
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> (f) the length of time for which the person is employed;
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> (g) the method of payment, whether by the time or by the job;
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> (h) whether or not the work is part of the regular business of the employer;
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> (i) whether or not the parties believe they are creating the relation of master and servant; and
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> (j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220(2) (1957).

83. *See Holt*, 811 F.2d at 1540-41.

84. 85 F.3d 1126 (5th Cir. 1996).

85. *See id.* at 1130 (quoting 29 U.S.C. §1052(a)(1)(A) (1994)).

86. No. 95-2845, 1997 WL 6958 (4th Cir. Jan. 9, 1997).

least 20 hours a week on a regular basis."[87] Clark was not on the payroll of the company, was not an employee, and therefore was excluded from the plan.

It may not be necessary for a court to apply any test if it finds the provisions of a plan or an agreement to be very clear. When a court must use a test, however, all courts rely on the common law factors test, illustrated in the IRS, common law, economics realities, and agency tests. Because courts use essentially the same test, results differ only to the extent specific facts in each case differ. Little guidance can be gained from specific cases because of this fact-intensive inquiry.

III. PRACTITIONER'S POINT OF VIEW

The change in the structure of the workforce is especially prevalent in high technology industries. Because of the enormous shift from traditional employees to a contingent workforce, companies and the attorneys representing them must be careful to avoid the type of problems that arose in *Vizcaino I* and *Vizcaino II*. The following discussion includes some suggestions to guard against such claims.

A. Waiver

Although the majority believed waiver was not an issue in *Vizcaino II*,[88] waivers are still an option for practitioners drawing up agreements with independent contractors. Waiver is a tool commonly used by employers to protect against former workers suing for benefits.[89] Waiver, however, is not always effective at avoiding litigation when a worker is reclassified. In *Vizcaino I* and *Vizcaino II*, the workers had signed waivers expressly denying benefits from the company.[90] These waivers were ineffective because they were predicated on the mistaken premise that the workers were "independent contractors." If an employee is later reclassified, the agreement must be valid *despite* being based on the mistaken premise of independent contractor status.[91]

In general, specific provisions usually prevail over general provisions, and there is a long-held right to freedom of contract.[92] The court in

87. *Id.* at *3.

88. Because Microsoft agreed to reclassify the workers, the court did not address whether the waivers would have been effective. Both Microsoft and the plaintiffs stipulated that there was no waiver issue. *See Vizcaino II*, 120 F.3d at 1012.

89. *See Microsoft Employees, supra* note 54, at 15.

90. *See Vizcaino I*, 97 F.3d at 1190.

91. *See Vizcaino II*, 120 F.3d at 1012.

92. *See Microsoft Employees, supra* note 54, at 14.

Vizcaino II, however, expressed doubt that an employee could waive ERISA and other benefits without being subject to special strict scrutiny.[93]

In enacting ERISA, Congress sought to protect employees and encourage participation in retirement plans. As one court observed, "Congress intended 'that minimum standards be provided assuring the equitable character of such plans ....'"[94] These types of waiver inquiries, therefore, must be colored by issues of equity due to the vastly different bargaining positions of the worker and the company. There is a great potential for fiduciary abuse in these cases. Often, the plan administrator is acting on the company's behalf, as well as a fiduciary for the employee. There may be grave public policy concerns if an employer is allowed to circumvent the ERISA protections provided to employees by contracting away these benefits.

In *Amaro v. Continental Can Co.*,[95] it was precisely Congress' intent to safeguard employee benefits that led the Ninth Circuit to hold that benefits could not be waived. The court held that because the Congressional intent in enacting ERISA was to protect employees, minimum protection standards of ERISA cannot be waived.[96] The court in *Amaro* did not "believe Congress intended that these minimum standards could be eliminated by contract. ERISA is intended to protect the interests of the pension plan participants by improving the equitable character ... of such plans by requiring them to [meet certain standards] ...."[97]

But there is precedent that ERISA and other benefits can, in fact, be waived by an employee.[98] Even though ERISA was enacted to provide protection for employees, there are several instances where courts have held that ERISA benefits can be waived. The Second Circuit has held that a waiver of *all* ERISA plan participation is permissible. In *Laniok v. Advisory Committee of the Brainerd Mfg. Co. Pension Plan*,[99] the court held it is permissible for an individual to waive participation in the company's pension plan even though he was clearly eligible under the plan document. Laniok had relinquished his right to participate in the ERISA pension plan by executing a written waiver when hired by the company.[100] The Second

93. *See Vizcaino II*, 120 F.3d at 1012.

94. Amaro v. Continental Can Co., 724 F.2d 747, 752 (9th Cir. 1984) (quoting section 2 of ERISA, 29 U.S.C. § 1001(a) (1994)).

95. *Id.*

96. *See id.* at 749-50.

97. *Id.* at 752 (quoting Section 2 of ERISA, 29 U.S.C. § 1001(c)) (1994).

98. *Microsoft Employees*, supra note 54, at 14.

99. 935 F.2d 1360 (2nd Cir. 1991).

100. *See id.* at 1363.

Circuit looked at the same ERISA provision that the Ninth Circuit examined in *Amaro*, and found that:

> [a]llowing an eligible individual to decline to participate and to waive his right to do so does not seem to us to be inconsistent with the purposes of ERISA. ... Allowing an individual to relinquish his opportunity to 'fulfill[ ] whatever conditions are required' to qualify for benefits is not inconsistent with protecting the legitimate expectations of those who are entitled to benefits.
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> ....
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> Moreover, ERISA does not require that a worker be offered any particular retirement benefits. Although the Congress that enacted ERISA sought to improve the equitable character of private retirement plans and to encourage increased participation in them, it also recognized that such plans were voluntary on the part of the employee. Since ERISA did not change the voluntariness of an employer's decision to offer benefits, we are hesitant to conclude that ERISA was intended to prohibit an employee from declining to accept the offer.[101]

The court in *Laniok* found support for its decision in precedent upholding an individual's ability to settle or waive a claim of discrimination in violation of the Age Discrimination in Employment Act or Title VIII, as long as the waiver is made knowingly and voluntarily.[102] These cases list several factors that a court can use to determine whether the waiver in the settlement is made knowingly and voluntarily. Such factors compel courts to consider some of the equitable and bargaining position issues that are present in waiver cases

In *Leavitt v. Northwestern Bell Telephone Co.*,[103] a worker voluntarily terminated his employment and signed a separation agreement and general release of any known or unknown claims of any nature in exchange for $15,000. The Eighth Circuit looked at the totality of the circumstances to make certain that the fiduciary did not obtain the release in violation of his duties to the beneficiary.[104]

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101. *Id.* at 1365 (citations omitted).

102. *See id.* (citing Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647, 1653 (1991); Alexander v. Gardener Denver Co., 415 U.S. 36, 52 (1974); Borman v. AT&T Communications, Inc., 875 F.2d 399, 402 (2d Cir. 1989), *cert. denied* 493 U.S. 924 (1989); Coventry v. United States Steel Corp., 856 F.2d 514, 522 (3d Cir. 1988)).

103. 921 F.2d 160 (8th Cir. 1990).

104. *See id.* at 162. The factors listed by the court include:

Additionally, in *Gaynor v. Ephrata Community Hospital*,[105] a Pennsylvania district court held that the parties may bargain regarding whether an employee can be a participant in an ERISA benefits plan.[106] The fiduciary has a duty to explain all ramifications of not participating; however, there is no such duty when the employee has consulted with counsel.[107] The court in *Gaynor* also noted that its decision was supported by the ERISA provisions that prohibit waiver of *vested* benefits, but not participation.[108]

Even though ERISA benefits are allowed to be waived, courts still enforce protection for employees. A spousal waiver of benefits is allowed by ERISA, but certain requirements must be met. The court confronted this issue in *Lasche v. George W. Lasche Basic Profit Sharing Plan*.[109] The court held that a spousal waiver of benefits was effective only if it was witnessed by the plan representative or a notary public, according to ERISA regulations.[110] Because there must be strict compliance with specific ERISA requirements in order to protect a spouse, the intent of the parties is not controlling.[111] This decision, in effect, allows the waivers of rights granted by ERISA, but maintains close safeguards to protect workers.

Additionally, in *Sharkey v. Ultramar Energy Ltd., Lasmo PLC, Lasmo (Aul Ltd.)*,[112] the court held that the "validity of waiver of pension benefits under ERISA is subject to closer scrutiny than waiver of general contract claims. The essential question is 'whether, in the totality of circum-

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1) the employee's education, and business experience;
2) the employee's input in negotiating the terms of the release;
3) the clarity of the release language;
4) the amount of time the employee had for deliberation before signing the release;
5) whether the employee knew of his rights under the plan and relevant facts when he signed the release;
6) whether the employee had an opportunity to consult an attorney;
7) whether the employee received adequate consideration for the release; and
8) whether the release was induced by improper conduct on employer's part.

105. 690 F. Supp. 373 (E.D. Pa. 1988).
106. *See id.* at 376 (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 91 (1983)).
107. *See Gaynor*, 640 F. Supp at 376.
108. *See id.* at 380 (citing 29 U.S.C. §1053(a) (1994) (emphasis added).
109. 111 F.3d 863 (11th Cir. 1997).
110. *See id.* at 867.
111. *See id.* (citing 29 U.S.C. § 1055(c)(2)(A) (1994)).
112. 70 F.3d 226 (2d Cir. 1995).

stances, the individual's waiver of his right can be characterized as knowing and voluntary.'"[113] The court decided that the same level of scrutiny applies to waivers of severance claims under ERISA.[114]

Because there is some support for waivers of ERISA and other benefits, practitioners should take great care in drafting these documents. The waivers in *Vizcaino II* were not effective because they were based on the incorrect classification of the workers as "independent contractors."[115] Waivers should be drafted in order to avoid having to pay retroactive benefits. Many benefit plans have ambiguous language that can cause problems. For example, one commentator observed: "suppose an employer's pension plan is available to all 'Employees' with one year of service. The definition of 'Employee' states that it includes 'all employees, excluding employees subject to collective bargaining agreements where the collective bargaining agreement does not provide for participation in the Plan.'"[116] This plan language does not address the individual hired as an independent contractor who is later reclassified as a common law employee. Better plan language would include a provision that would address this situation. The ERISA Litigation Reporter suggests plan language such as: "an individual should only be considered an Employee for the purpose of the Plan if the person is a common law employee of the employer who is also initially treated as a common law employee on the payroll records of the employer."[117]

This language reflects the intentions of the parties at the beginning of the employment relationship. But intent is only one factor considered by courts when determining whether a worker is a common law employee. It may be wise to include a provision in all employment agreements with independent contractors that "the cash payments to them represent their sole compensation, even if they are eventually reclassified as employees."[118] There would still be no plan eligibility because the employer did not originally treat the worker as a common law employee. This language may protect an employer in the event that an individual convinces a court that she is not an independent contractor but a common law employee.[119]

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113. *Id.* at 231 (citations omitted) (quoting *Laniok*, 935 F.2d at 1368).

114. *See Sharkey*, 70 F. Supp. at 376.

115. *See Vizcaino II*, 120 F.3d at 1012.

116. *Microsoft Employees*, *supra note 54*, at 10.

117. *Id.*

118. *Id.* at 15.

119. There are, however, different considerations if the employer obtains workers through a temporary staffing agency. The employer may not be able to modify employment contracts with leased employees because the worker often contracts with the

B. Other Suggestions to Clearly Distinguish Temporary Workers from Employees

Practitioners should encourage clients to define categories of workers clearly, especially in plan language defining who is eligible to participate in the benefit plan. Some suggestions are included above, but companies should also pay attention to other firm literature, such as training manuals, employee handbooks, and other documents. Probably the most effective policy for a company to adopt is also one of the easiest to implement: make sure that independent contractors really are working independently.

Companies should establish a pay structure for contingent workers that is different from that for permanent employees. Although this did not protect Microsoft, which paid employees through a payroll department and independent contractors through accounts receivable, it is one of the factors that courts use in determining if an individual is an employee. Paying workers from a different department not only establishes the intent of the parties (another factor considered by courts), but also emphasizes the difference between employees and contingent workers.

It is also important to review all contracts and agreements in light of any changes that are made in order to differentiate employees and contingent workers. Once a practitioner has established the proper language to use to distinguish among segments of the workforce of a company, it is crucial that all literature, contracts and agreements reflect the chosen language. All written documents should be cohesive in order to preclude lawsuits due to conflicting statements as to who is an employee. Specific employment agreements, especially, should reflect these changes.[120]

C. Small Companies

Small companies may have a hard time differentiating independent contractors from employees. Many new companies and start-ups do not have differentiated pay accounts with which to pay different types of workers. It is crucial that small companies and start-ups have adequate counseling to avoid mistakes that may prove costly later. While it may be

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agency, while the agency contracts with the company. A practitioner may need to discuss these issues with the client and the temporary agency to determine if and how the contingent workers contract may be modified. *See* Arthur Rutowski & Barbara Long Rutowski, *Employees or Independent Contractors for ERISA Purposes–What about Leased Employees?*, 11 No. 12 EMPULI 1 (1996).

120. It is also worth noting that one should think carefully about agreeing to reclassify workers in an effort to quickly resolve IRS disputes. This reclassification may open the door for workers who were denied benefits to sue, but this discussion is beyond the scope of this comment.

difficult and expensive to set up a different pay account, the risks of not establishing procedures to distinguish between independent contractors and employees may prove to be even greater.

There are many things small companies can do to make the distinction among different classes of workers. Several of the suggestions above should not be very difficult to implement. For example, making certain that there are clearly differentiated language for independent contractors in company literature is not expensive nor difficult to do. Although the tests that courts use to determine a worker's status have different names, they all contain relatively the same factors. These factors determine the manner and means by which the work product is created. Companies using independent contractors should be aware of these factors in order to create a work environment that is truly independent and not merely a label for an individual who is actually an employee.

IV. CONCLUSION

Due to the changes in the make up of the workforce, there will be more litigation like that in *Vizcaino I* and *Vizcaino II*. Unless there is a clear delineation between regular employees and contingent employees, any company can be susceptible to such lawsuits. Although there remains ambiguity regarding the waivability of benefit programs, *Vizcaino I* and *Vizcaino II* make clear that employee agreements should be carefully drafted to minimize such risks and best convey the parties' intentions.

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