

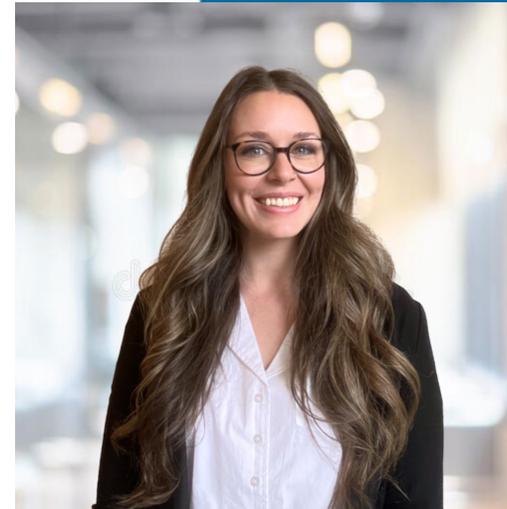
# Essential New York Independent Contractor Issues

April 3, 2024

# Today's Webinar Host:

**Stephanie Zielinski**

Marketing Director | ComplianceHR



# Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:  
Deliver expert guidance in a fraction of time and cost vs traditional methods

## Simplify the complexity of employment law



### **PolicySmart™**

Create and maintain an up-to-date and legally compliant employee handbook



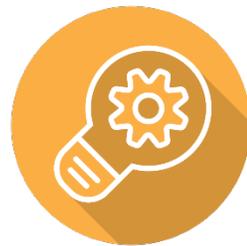
### **Navigator Independent Contractor**

Remove risk in determining Independent Contractor status



### **Navigator Overtime**

Determine if an employee is exempt or non-exempt



### **The Reference Center**

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



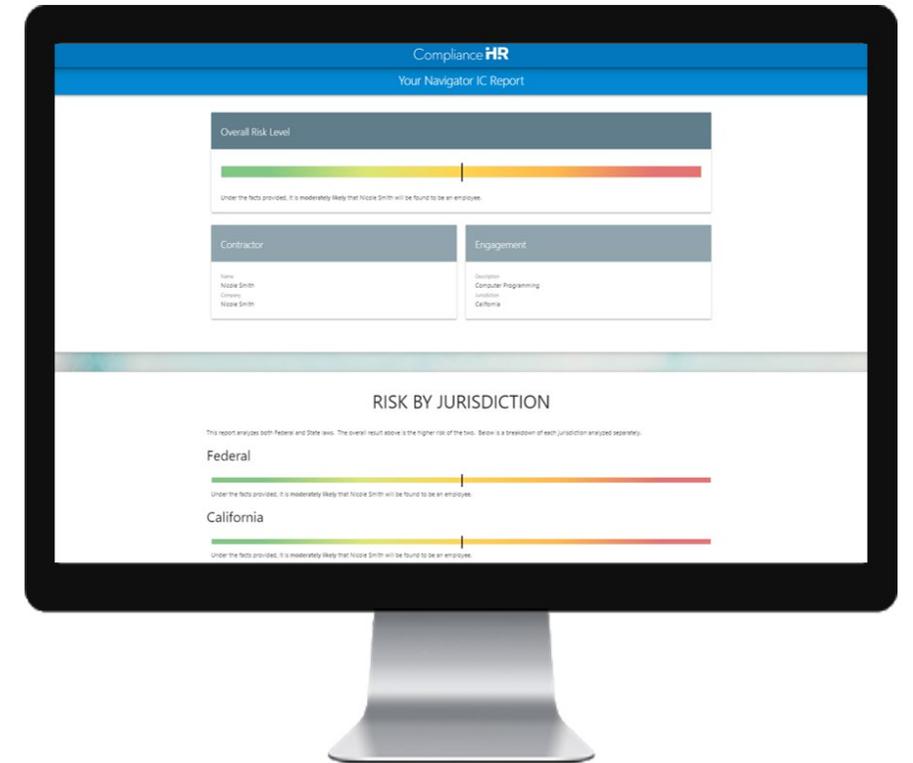
### **The Document Center**

Efficiently generate state and federal compliant documents throughout the employee lifecycle



# Navigator Independent Contractor

- Determines employee or independent contractor status
- Draws from a proprietary engine of 1,900 reported court decisions and DOL opinion letters
- Analyzes individual fact patterns under all applicable federal and state regulations
- Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, a summary of applicable laws, and a transcript of questionnaire answers



# Sign Up for a Demo

## Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link at the top of your screen
3. Visit the link in the Resources panel

## Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

### ComplianceHR Demo & Free Trial:

<https://compliancehr.com/webinar-demo/>

#### Resources

[Compliance HR - Demo & Free Trial](#)

[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

# Immediate Expert Guidance

## RISK BY JURISDICTION

This report analyzes both Federal and State laws. The overall result above is the higher risk of the two. Below is a breakdown of each jurisdiction analyzed separately.

**Federal**

Under the facts provided it is **moderately** likely that Nicole Smith LLC will be found to be an employee.

**New York**

Under the facts provided it is **highly** likely that Nicole Smith LLC will be found to be an employee.

## LOWERING YOUR RISK

You may be able to lower your risk score by taking the following steps.

### Reimbursement of Business Expenses

Generally, independent contractors are responsible for their own business expenses and are not reimbursed by the engaging company. In contrast, employees do not typically have any significant unreimbursed expenses.

Although reimbursing a contractor for travel costs rarely, by itself, determines employee status, ComplianceHR Demo may be able to reduce its risk score by minimizing the number and types of expenses for which MJ Corp is reimbursed.

### Contractor Economic Dependence on the Company

An independent contractor is not economically dependent on the engaging company; it operates independently of the engaging company. The success of the

ComplianceHR			
TRANSCRIPT			
Question	Manager Response	Contractor Response	Reconciled Response
Will Nicole Smith's work hours be set by ComplianceHR Demo?	No company will not control contractor work hours	No company will not control contractor work hours	No company will not control contractor work hours
Under the terms of engagement, how much control can ComplianceHR Demo assert over the order of work in which Nicole Smith will perform the work?	Some general guidelines on Company expectations	No control	Some general guidelines on Company expectations
To what degree is the work to be performed by Nicole Smith core to ComplianceHR Demo's business?	Somewhat		
Please indicate the level of instruction ComplianceHR Demo will give Nicole Smith:	Detailed instructions on how to perform only some of the work	Basic instructions on how to perform the work	Detailed instructions on how to perform only some of the work
Has Nicole Smith ever been an employee of ComplianceHR Demo?	No	No	No
Will ComplianceHR Demo control where Nicole Smith can perform the work under this engagement?	Yes the company will require the contractor to work at a customer location	Yes because the work cannot be performed elsewhere	Yes because the work cannot be performed elsewhere
Are ComplianceHR Demo employees performing the same or similar work that Nicole Smith is being engaged to perform?	No		
Is Nicole Smith required to personally perform the work?	Contractor can hire employees or subs	Contractor can find subs or refer work out	Contractor can hire employees or subs

## Presented by:



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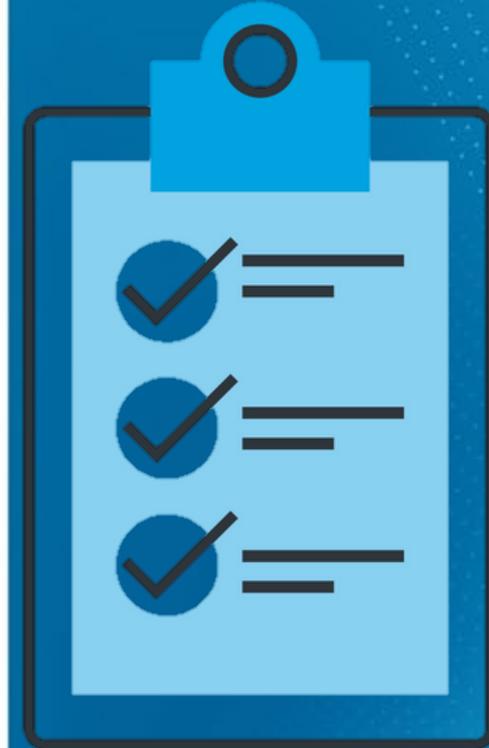
Associate

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# Agenda:

- Understand the legal framework of independent contractor classification and joint employer.
- Discussion of federal and New York specific laws (including the New York State Freelance Isn't Free Act (FIFA)).
- Risks of misclassification.
- “Best practices” for working within an independent contractor model.
- How to apply these guidelines



**Workers are classified as either an employee or independent contractor.**

The background is a solid blue color with a pattern of white dots. The dots are arranged in a series of curved lines that sweep across the bottom half of the image, creating a sense of motion and depth. The dots are more densely packed in some areas and more sparse in others, following the curve of the lines.

# Refresher: Who Is An Independent Contractor?

- Key Term is “Independent”
- Contract language or the freelancer’s preference do not control the determination; the court will look at the actual relationship of the parties.
- The more control exerted by the principle, the more likely the worker is an employee and not an independent contractor.
- **The default status is an employment relationship.**

# Signs of Independent Contractor Status

- Independent Contractors Can:
  - Work when they want
  - Accept the jobs they want
  - Turn down assignments
  - Wear what they want
  - Take the route they want
  - Employ others to perform the work
  - Use the equipment they want
  - Contract with competitors
  - Contract with customers
  - Promote their own business



# Signs of Independent Contractor Status

- Terms that Don't Apply to Independent Contractors
  - Employ/Employee/Employment
  - New hire
  - Apply/Application Process
  - Orientation/Training
  - Full time/Part time
  - Wages/Benefits
  - Payroll
  - Workers' Compensation
  - Supervise/Direct
  - Discipline



# Over 100 Different Legal Tests in the US

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

IRS 20-Factor Test

FLSA Economic Reality Test

*Darden* Common Law Test

Over 100 State Law Tests

# IC Classification Framework



- ICs are engaged on a 1099 rather than a W2.
- IC classification can be challenged via an agency claim or lawsuit.
- Burden is on you to show they are properly classified
  - If you succeed, you can keep engaging them on an IC basis.
  - If you lose, you need to stop engaging them on an IC basis and pay the fine, damages, or negotiated settlement.
- Misclassification can result in monetary costs, upending your business model, and harm to brand reputation.

# IRS “20 Factors”

1. No instructions
2. No training
3. No integration
4. Services do not have to be rendered personally
5. Control over assistants
6. No continuing relationship
7. Work hours
8. Time to pursue other work
9. Job location
10. No requirements on the order or sequence of work
11. No required reports
12. Payment for the result
13. Business expenses
14. Own tools
15. Significant investment
16. Possible profit or loss
17. Working for multiple firms
18. Services available to the general public
19. Limited right to discharge
20. Liability for non-completion



Department of the Treasury  
**Internal Revenue Service**

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# The FLSA Economic Realities Test

1. Integration
2. Profit & Loss
3. Investment
4. Skill and Initiative
5. Length of the Relationship
6. Control



# Example IC Test – Darden Test

Darden test (1992): federal common law multi-factor test, heavily emphasizing right to control when, where, and how the work is performed. No one factor is determinative of worker's status.

- The work does not require a high level of skill or expertise.
- The employer furnishes the tools, materials, and equipment.
- The work is performed on the employer's premises.
- There is a continuing relationship between the worker and the employer.
- The employer has the right to assign additional projects to the worker.
- The employer sets the hours of work and the duration of the job.
- The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
- The worker does not hire and pay assistants.
- The work performed by the worker is part of the regular business of the employer.
- The employer is in business.
- The employer provides the worker with benefits such as insurance, leave, or workers' compensation.
- The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes).

# New York's Freelance Isn't Free Act (FIFA)



# New York's Freelance Isn't Free Act (FIFA)

- New York State's latest layer of independent contractor regulation.
- The law goes into effect on **August 28, 2024**.
  - Who is (and is not) covered under the FIFA?
  - When does FIFA apply?
  - What does FIFA require?
  - What are the risks for non-compliance?



# New York's Freelance Isn't Free Act (FIFA)

- **Who *is* covered under the FIFA?**

- “Freelance Workers.” Any person hired or retained as an independent contractor to provide services valued at \$800 or more.
- Virtually *all* employers (including sole proprietorships, corporations, LLCs, etc.).

- **Who *is not* covered under the FIFA?**

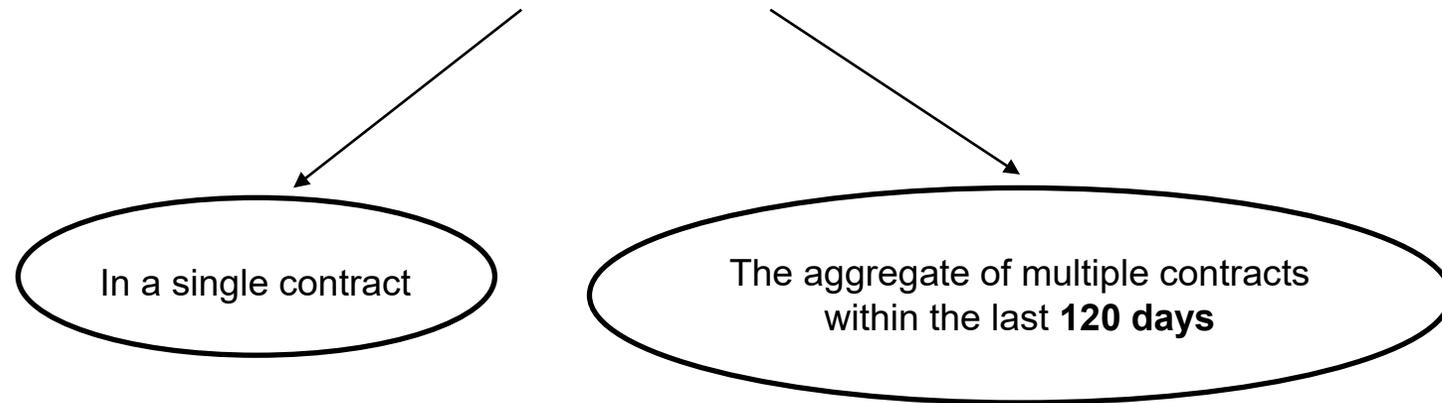
- The federal, state, and local governments.
- Attorneys.
- Licensed medical professionals.
- Sales representatives.
- Construction contractors.



# New York's Freelance Isn't Free Act (FIFA)

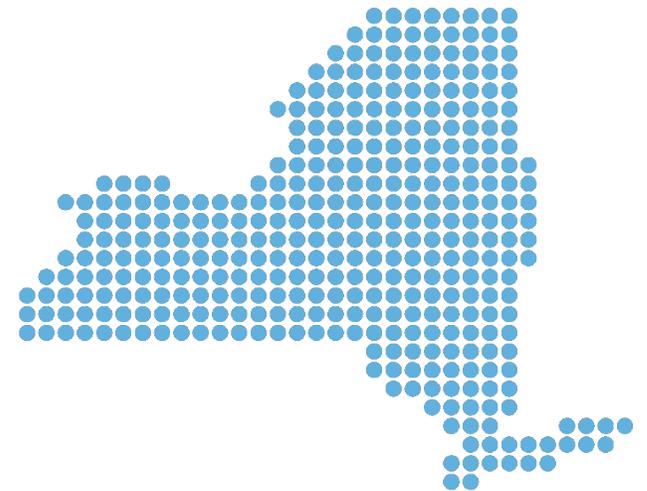
## *When does FIFA apply?*

1. When a company hires a “freelance worker;” and,
2. The value of the services is \$800 or more



# New York's Freelance Isn't Free Act (FIFA)

- ***What* does FIFA require?**
  - Written contract.
  - Timing and manner of compensating “freelance workers.”
  - Recordkeeping.
  - Anti-discrimination.



# New York's Freelance Isn't Free Act (FIFA)

- **FIFA's Written Contract Requirement**
  1. Parties' names and mailing address;
  2. Itemization of all services to be provided;
  3. Value of those services;
  4. Rate and method of compensation for the services;
  5. Date on which payment will be issued to the "freelance worker" or the mechanism by which such date will be determined; and,
  6. Date (i.e., deadline) by which "freelance worker" must submit a list of the services rendered under the contract.

**Note:** "Freelance workers" must be provided with a physical or electronic copy of the contract.

# New York's Freelance Isn't Free Act (FIFA)

- **Manner of Compensating “Freelance Workers”**
  - “Freelance workers” must be paid either:
    1. On or before the specified date in the contract; *or*
    2. No later than 30 days after the completion of the services (assuming the contract is silent as to the timing of payment).
  - Companies cannot require “freelance workers” to accept less compensation than the contracted amount as a condition of timely payment.

# New York's Freelance Isn't Free Act (FIFA)

- **Recordkeeping and Anti-Discrimination Requirements**
  - Companies must maintain and keep all written contracts entered into with “freelance workers” for at least **six (6) years**.
  - Failure to maintain the contracts creates a “presumption” that the terms the “freelance worker” may set forth are true, accurate, and the parties’ agreed-upon terms.
  - Companies cannot harass, discriminate, threaten, intimidate, discipline or deny work opportunities to a “freelance worker” for exercising, or attempting to exercise, any rights under the FIFA.

# New York's Freelance Isn't Free Act (FIFA)

- **Consequences for Non-Compliance**
  - Private civil lawsuits by “freelance workers.”
  - Actions by the New York Attorney General.



# New York's Freelance Isn't Free Act (FIFA)

- **Consequences for Non-Compliance**

- Failure to comply with the written contract requirements:
  - \$250 statutory damages.
- Failure to comply with the manner and timing of payment requirements:
  - Double damages.
  - Injunctive relief.
  - Attorney's fees and costs.
- Failure to comply with FIFA (in addition to the above):
  - Statutory damages equal to the contract amount.
  - Civil penalties by the Attorney General (ranging between \$1,000 and \$3,000).
  - Up to \$25,000 in a civil action for engaging in a “pattern or practice” of violating FIFA.

# New York's Freelance Isn't Free Act (FIFA)

- **Consequences for Non-Compliance**

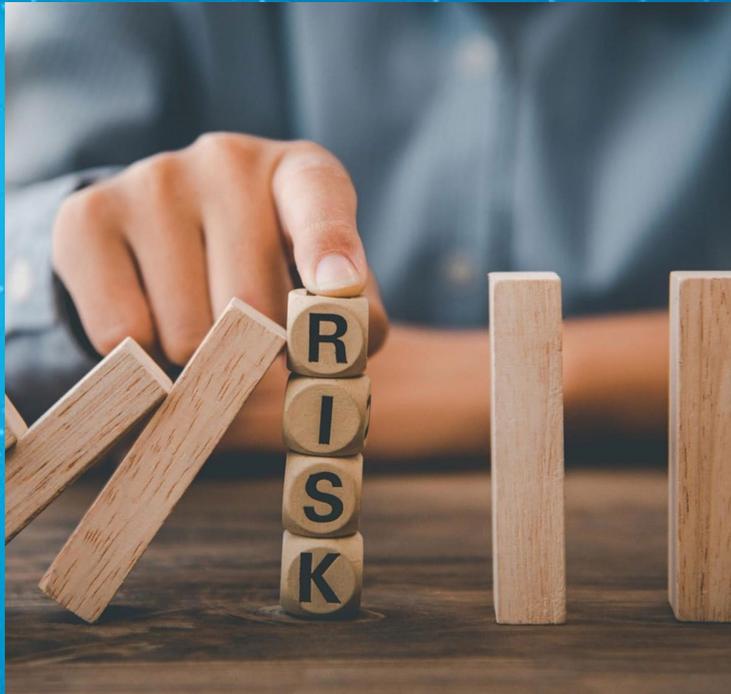
- Failure to comply with the manner and timing of payment or the anti-discrimination requirements = **6-year** statute of limitation.
- Failure to comply with the written contract requirements = **2-year** statute of limitation.

# New York's Freelance Isn't Free Act (FIFA)

## Snapshot Summary of the FIFA

- Effective Date: **August 28, 2024**. It is **not** retroactive.
- Applies to almost *all* employers and independent contractors.
- Must enter into written contract for services to be provided.
- Must maintain contracts for at least 6 years.
- Failure to comply may result in statutory damages and penalties.

# Mitigating Risk



# Mitigating Risk

- **Step 1: Get the classification right**
  - Independent Contractor Business Review or Audit
  - Independent Contractor Policy and Best Practices
  - Eliminate high risk engagements
- **Step 2: Stack protections to reduce risk & damages**
  - Standardized Contracts
  - Indemnity
  - Insurance
  - Worker Acknowledgments w/ arbitration agreement & class action waiver



# Red Flags re IC Classification

1. Control manner and means of completing the work
2. Control scheduling
3. They work full time exclusively for you
4. Duration (longer than 12 months raises a flag)
5. Engaged as both an IC and EE – 1099 and W2 in same year
6. Their services are part of your core business
7. IC doing same work as an employee
8. Training and Extensive Onboarding
9. Equipment and Reimbursement (if you provide tools, equipment and reimbursement for business expenses, it raises a flag)
10. No business formalities such as LLC, taxpayer ID, insurance, business license, business card



# When Interacting with ICs:

- **Do not** discuss “salary” or “bonuses”
- **Do not** “approve” time off
- **Do not** discuss opportunities for regular employment.
- **Do not** conduct performance reviews or provide written performance feedback
- **Do not** discipline or “fire” an IC. You can terminate an engagement/contract.
- **Do not** provide ICs Company perks
- **Do not** allow ICs to attend Company events
- **Do not** include ICs in meetings and discussions unrelated to their assignment
- **Do not** give personal references
- **Do not** approve reimbursement for business expenses

# Common Misclassification and Joint Employment Claims

*Why you should be concerned with getting the IC classification right, and otherwise mitigating risk.*



# Common Sources of Independent Contractor Liability



## Workers' Comp & Unemployment Insurance

- Defense of “that’s not my employee” may trigger audit



## Wage & Hour

- FLSA – overtime and minimum wage
- State Labor Codes – meal and rest breaks, expenses



## Other Federal

- IRS – unpaid taxes
- EEOC
- OSHA
- NLRA

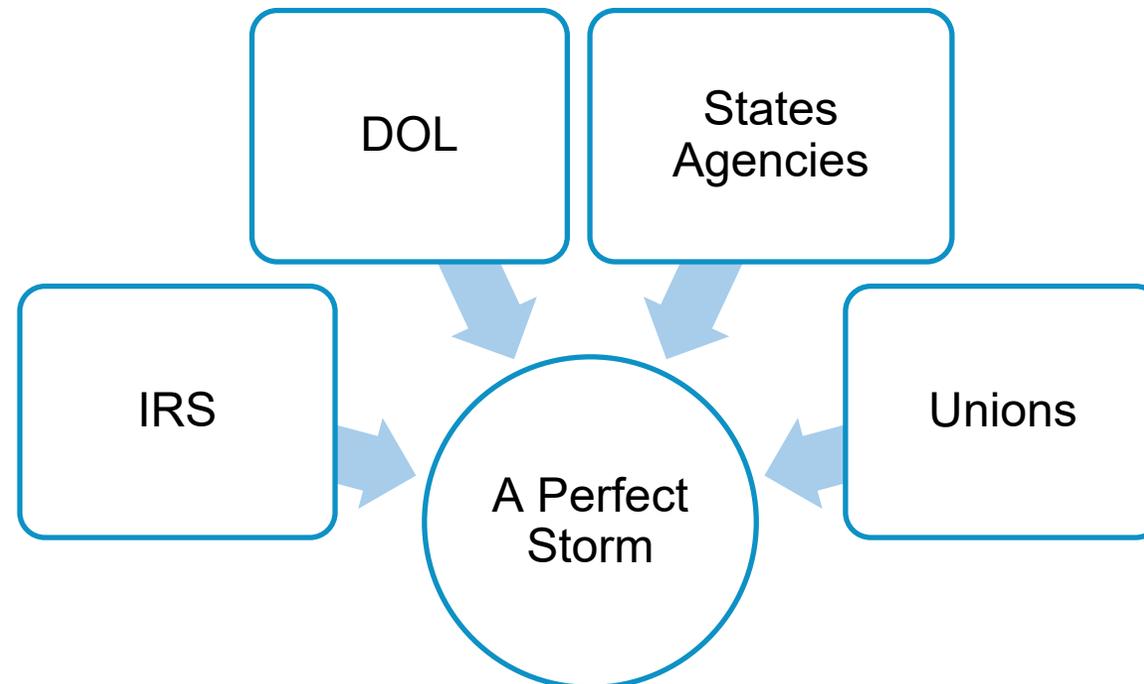


## Benefits

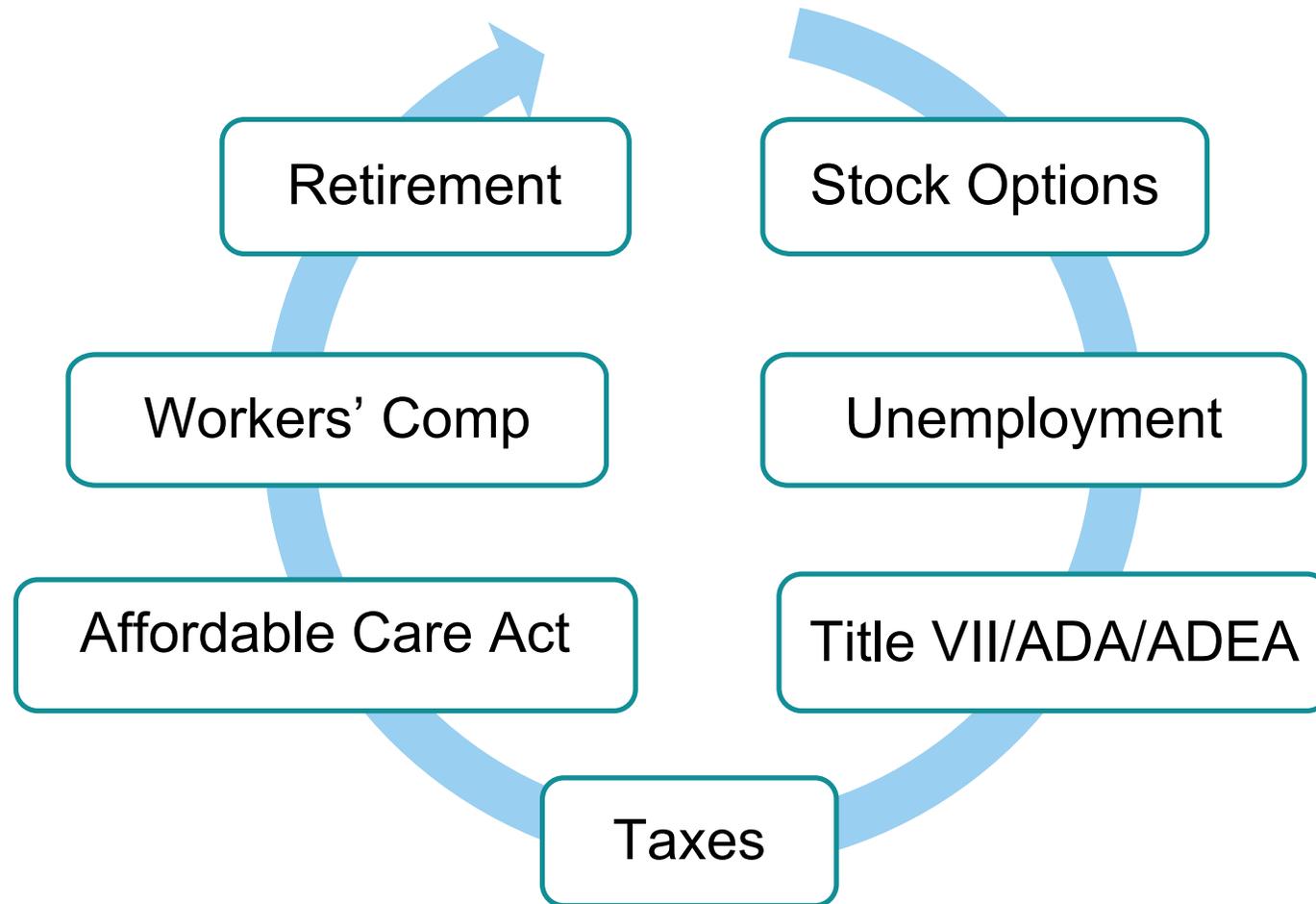
- ACA
- 401(k)
- Pension plans

# Risks for Misclassifying Workers as ICs: Pressure From All Sides

- Federal agencies, state agencies, labor unions, and other advocates focused on stopping “wage theft” resulting from IC misclassification



# Risks for Misclassifying Workers as ICs: Liability Goes Far Beyond Unpaid Overtime



# Joint and Several Liability is Real

- Joint employers independently share liability for violations by one entity
- Either can be sued for entire liability (generally not “comparative fault”)
- Employee may collect judgment from parties in various amounts until judgment is paid in full
- If any defendant cannot pay equal share, others must pay the difference



# Wage Theft: Potential For Criminal Liability

- Employers who commit wage theft in New York will now face larceny charges under new “Wage Theft” law
  - Amendment to penal law
- Manhattan District Attorney’s Office responsible for prosecuting
  - Partnering with the NYSDOL
- Under the law, employers would commit “wage theft” if they fail to pay workers the minimum wage rate, overtime or promised wage if greater than the minimum wage rate and overtime
- Applies to employees and ICs

# \$\$\$ Joint Employment Liability \$\$\$

- Financial services company and two staffing agencies agreed to pay \$1 million to proposed class of clerical workers hired to help implement anti-money laundering controls who alleged the bank and agencies failed to pay them overtime wages
- DOL orders snack food company to pay production workers provided by staffing companies over \$2 million in back wages and damages for minimum wage and overtime pay violations
- Plastics company and staffing agency pay more than \$1.4 million in back wages & liquidated damages for failing to pay overtime wages
- Hospital and staffing company agree to \$1.6 million settlement for missed meal and break periods and transportation time

# Best Practices

## Risky Practices

- Utilizing Employees and ICs for the same job
- Having ICs “report” to local supervisors
- Providing guidance on “how to” do the work
- Allowing long, protracted relationships.

## Best Practices

- Work with freelancers that have are incorporated and serve other businesses (even competitors)
- Present projects as outcome-oriented.
- Limit duration of engagement.
- Allow for negotiation of contract terms and prices, when possible.

# Sign Up for a Demo

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## Benefits of a custom demonstration:

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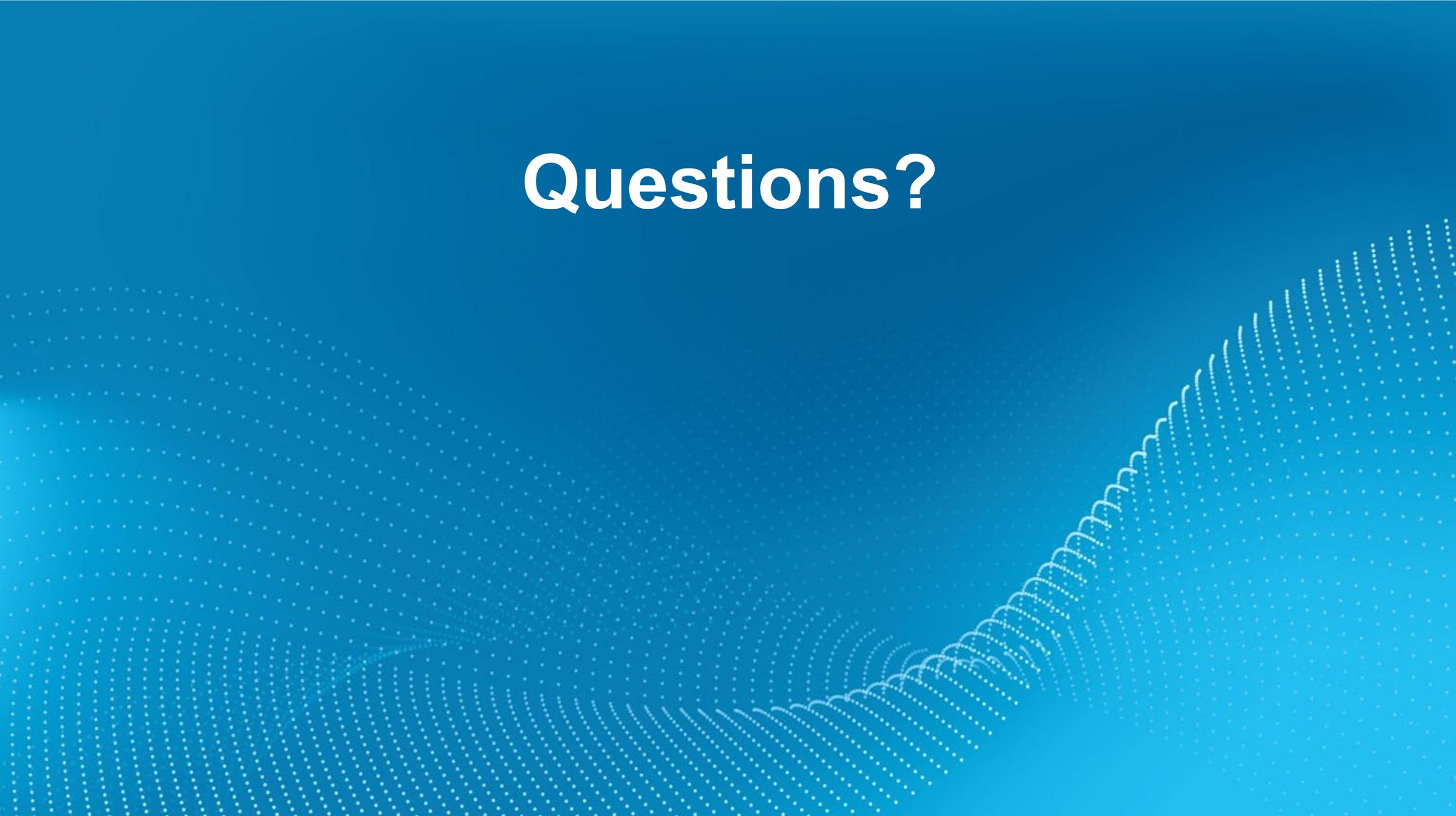
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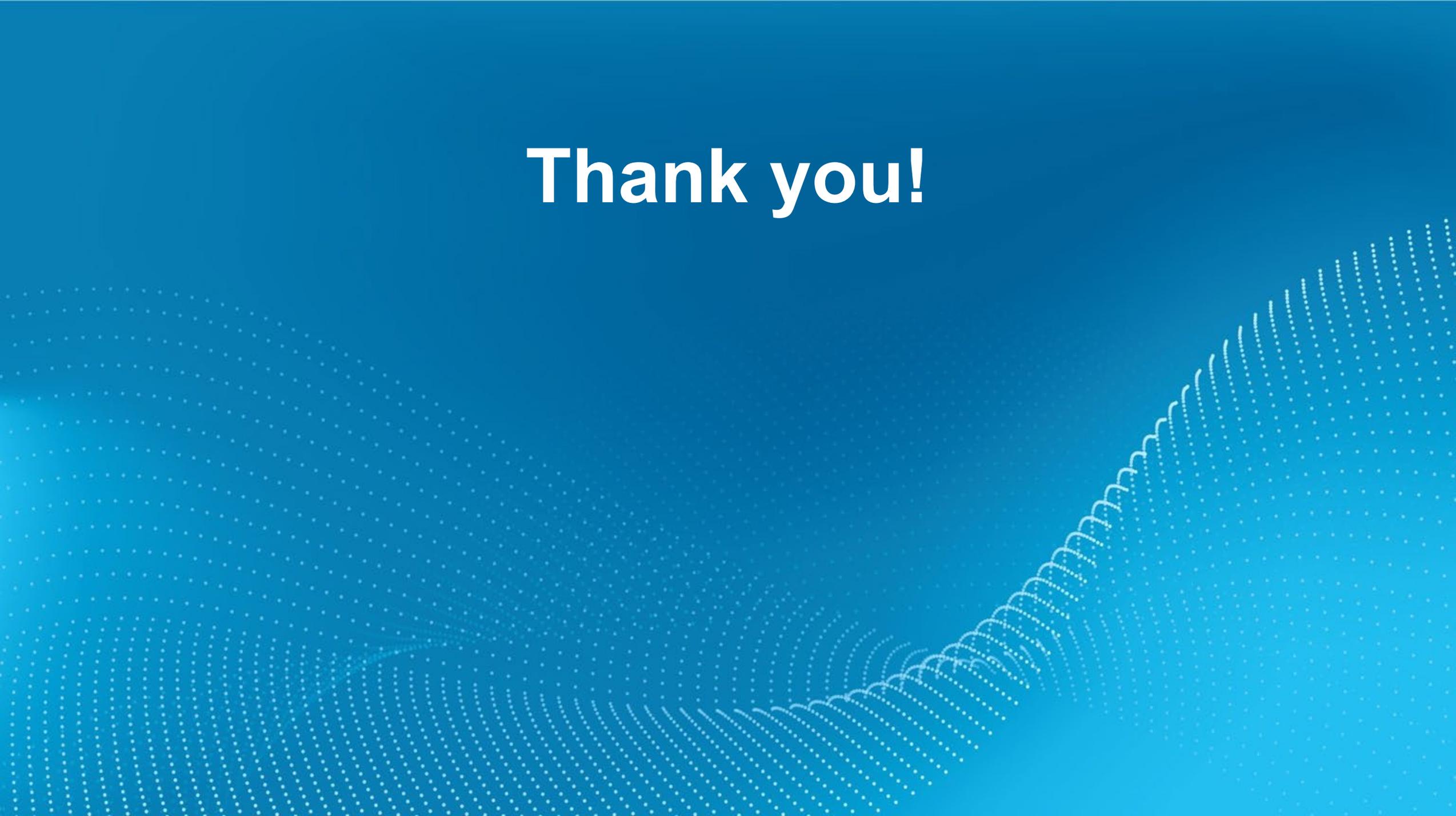
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**Questions?**



**Thank you!**

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