Legal Update Article

Time for a Checkup on Independent Workforce Arrangements

By Adam L. Lounsbury

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Meet the Authors

Adam L. Lounsbury

(He/Him)

Office Managing Principal and Office Litigation Manager

804-212-2863

Adam.Lounsbury@jacksonlewis.com

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The legal rules applicable to the "gig" economy continue to evolve. In the past year, there have been significant legal developments and trends that create both new risks and new opportunities. Companies that use independent workforce arrangements need to keep up. This article highlights some of these legal developments and trends.

Department of Labor's Shifting Position

The Department of Labor (DOL) under the Obama Administration took the position that most workers, including those identified as independent contractors, actually are employees and ratcheted up its enforcement efforts. The current administration has shifted the enforcement paradigm slightly.

The DOL has expressed its intent to consider the "totality of circumstances" to evaluate whether an employment relationship exists. Moreover, in April 2019, the DOL issued a Notice of Proposed Rulemaking on the standard for joint-employer liability under the FLSA. (See our article, Department of Labor Proposes Updated Interpretation of Joint Employer Standard Under the FLSA.) The proposed rule would limit joint-employer liability to situations in which a purported employer exercises significant control over the worker. The DOL also issued an opinion letter that concluded that a particular "gig economy" worker was an independent contractor. (See our article, Gig Economy Virtual Marketplace Company Gets FLSA Nod in DOL Opinion Letter.) While these developments can be leveraged in agreements, the majority of misclassification claims are filed under state law.

State and Local Developments

Both the regulators and the courts in a number of states have made significant changes to the rules for classifying independent workers. For example, in April 2018, the California Supreme Court held the traditional "suffer or permit" test actually meant that courts should apply the "ABC Test" when evaluating whether an independent worker is an employee. *Dynamex Operations West, Inc. v. Superior Court,* 4 Cal. 5th 903 (2018). (See our article, California Supreme Court Broadens Definition of Employee in Independent Contractor Analysis.) The Ninth Circuit has held that the test is retroactive, even though it appears to be a significant departure from the previous law. *Vazquez v. Jan-Pro Franchising Int'l, Inc.,* 2019 U.S. App. LEXIS 13237 (9th Cir. May 2, 2019). (See our article, California's 'ABC' Test for Independent Contractor Analysis to be Applied Retroactively.) A bill seeking to codify the ABC Test in California is working its way through the state's legislature. In another example, New York City enacted a local ordinance that effectively sets minimum pay standards for drivers who drive for ride-hailing companies; this was the first move by regulators to establish a minimum "wage," irrespective of the worker's classification.

At the other end of the spectrum, Tennessee moved toward a more lenient classification

standard to determine whether a worker is an independent contractor through legislative action. Effective January 2020, the state will no longer apply a five-factor control test, but rather apply a totality of the circumstances test that looks to 20 factors to evaluate the relationship. (See our article, Tennessee Adopts 20-Factor Test in Independent Contractor Analysis.)

In addition to these developments, Colorado, Maine, Maryland, Nevada, New Jersey, Rhode Island, Tennessee, Virginia, and Wisconsin have created initiatives or established formal task forces to evaluate how their state agencies are identifying and investigating "employee misclassification." Some of these initiatives have resulted in changes to the law or enforcement paradigms and have increased inter-agency information sharing. For example, significant information sharing has occurred between the taxing authorities, unemployment agencies, and worker's compensation agencies. The result is more companies using an independent workforce have become targets of agency investigations and enforcement actions. As classification standards within a state sometimes are inconsistent, workforce arrangements and relationships must be tailored to pass muster under multiple standards.

Companies using independent workforce arrangements should consider evaluating both whether their particular model supports the use of such arrangements and, where it does, whether the relationships between the company and its independent workers will withstand scrutiny under state and local employment classification standards.

Rise of Marketplace Contractor Statutes

There is a growing trend among states to protect companies operating a "virtual marketplace" from the scrutiny arising out of the worker classification tangle. Several states have passed (or tried to pass) "marketplace contractor" statutes that treat service providers making their services available in a "virtual marketplace" platform as independent contractors. Typically, under these statutes, the company that creates and hosts the virtual marketplace is protected from claims that it is an employer, but the requirements are fairly strict and compliance can be challenging, especially given the shortage of judicial guidance on the subject. States to have successfully enacted this kind of legislation include Alabama, Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah. States that have tried, but failed, to enact such legislation include California, Colorado, Georgia, and North Carolina.

Arbitration Agreements and Class Action Waivers

In the last 12 months, the U.S. Supreme Court delivered three decisions related to the use of arbitration agreements. In May 2018, *Epic Systems* confirmed that arbitration provisions with class action waivers in employment agreements do not impinge on workers' right to engage in concerted activity under the National Labor Relations Act. (See our article, Supreme Court: Class Action Waivers in Employment Arbitration Agreements Do Not Violate Federal Labor Law.) Almost a year later, in *Lamps Plus,* the Court reiterated that arbitration is a creature of contract and refused to force an employer to arbitrate on a class basis where the arbitration agreement did not expressly provide for class arbitration. (See our article, U.S. Supreme Court: Employment Class Arbitration Must Be Expressly Addressed in Contract.) Finally, in *New Prime,* the Court held that the Federal Arbitration Act does not apply to "transportation workers," which include much of the transpiration industry's independent workforce. (See our article, Supreme Court: Interstate Transport Companies' Independent Contractor-Drivers are

Exempt from FAA.) Both before and after this trio of cases, lower courts have issued important decisions regarding the enforceability of arbitration agreements and class action waivers in both the employment and independent contractor context. Consequently, as arbitration agreements and class waivers become more common, plaintiffs' lawyers have found new ways to challenge these agreements.

The Supreme Court's decisions reinforce the availability and effectiveness of arbitration agreements containing class waivers. They also suggest that companies using independent workforce arrangements should consider whether an arbitration program, and an agreement containing a class action waiver, should be part of their strategy to mitigate risk in this area. Further, those with arbitration agreements (with or without class action waivers) should review their agreements regularly to keep pace with these changes.

Harassment in the Workplace

In addition to classification questions, companies using independent workers must consider both whether they have an obligation to protect independent contractors from harassment and whether they have a duty to train independent contractors on the contractors' obligations within the workplace and to police their conduct. For example, in 2018, New York extended protection from harassment to independent contractors and confirmed that a company can be liable for the harassing conduct of independent contractors. Other states, including Pennsylvania and Vermont, have enacted similar laws.

In the wake of the #MeToo movement, managing the risk arising out of these laws can place companies using independent contractors in a tough spot: to train or not to train. Reconciling the scope and content of anti-harassment training with the often strict independence requirements of many misclassification tests can be difficult without guidance.

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Businesses using independent workforce arrangements need to be aware of the risks and benefits of using independent contractors by performing a structured assessment of their business model and implementing a strong compliance program that contemplates the varying standards in the states in which they operate. Taking the time to understand the requirements, structuring the relationship carefully, and building a defensible model can position the business to handle agency inquiries effectively, decrease liabilities, and facilitate positive outcomes in investigations and litigation.

Now is the time to perform a checkup on your independent workforce model. The attorneys at Jackson Lewis are knowledgeable practitioners in this area and are available to help your business evaluate your independent workforce arrangements, lower risks, and defend the company against misclassification lawsuits.

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