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At the Intersection of Independent Workforce Arrangements and Employment Law

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Over the past several years, the "gig" economy has grown as more businesses decide to outsource all sorts of functions to independent contractors and independent workforce arrangements have become nearly ubiquitous within most industries in the United States. The reasons for using this kind of model are many (focusing internal resources, lowering costs, supplementing scarce labor, supporting working preferences, to name a few) and often unique to a particular industry.

Regardless of the reason, and in part due to their prevalence, independent workforce arrangements have attracted the attention of organized labor, regulators, legislators, and the public. Consequently, the legal environment is evolving rapidly where these independent workforce arrangements intersect our system of employment law. This article summarizes some significant legal developments shaping the nature and sustainability of independent workforce arrangements.

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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, are actually employees and ratcheted up its enforcement efforts.

The current administration has shifted the enforcement paradigm slightly, and, from an enforcement perspective, the DOL 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 Fair Labor Standards Act (FLSA).[1] 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 hired through a virtual market place was an independent contractor.[2] While these developments should be monitored, the vast majority of misclassification challenges occur under state law.

STATE AND LOCAL DEVELOPMENTS

Both regulators and courts have made significant changes to the rules for classifying independent workers. For example, in April 2018, the California Supreme Court, in *Dynamex Operations West, Inc. v. Superior Court*, held the traditional "suffer or permit" test of employment status presumes that anyone performing work for a business is an employee, unless the hiring entity can prove the worker (a) is free from the business's control and direction (both by contract and in fact), (b) performs work outside the usual course of the hiring business, and (c) is customarily engaged in an independently established trade, occupation, or business performing the same work for which it was hired to perform by the hiring entity.[3] This test is referred to as the "ABC Test" and is used in several other states. Since *Dynamex* was decided, California legislators introduced AB 5, a bill to codify the ABC Test in California. AB 5, which includes a variety of industry-specific exceptions and has garnered significant support, worked its way through the legislature and will likely be signed into law and become effective January 2020.

Colorado, through its criminalization of a wage theft law to become effective in 2020, also may impose criminal penalties on business owners that get it wrong and classify an employee as an independent contractor.

In New Jersey, the Governor's "Task Force on Employee Misclassification" released a report on "strategies and actions to combat employee misclassification." The report included a call for, among other things, legislative reform, coordination among enforcement agencies, stiff civil and criminal penalties for misclassification. Consequently, Delaware, New

Jersey, and Pennsylvania signed a "Reciprocal Agreement" that commits the three states' labor agencies to sharing investigative information and referrals regarding alleged misclassification.

New York City enacted a groundbreaking 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.

Tennessee, on the other hand, relaxed its employment classification standard. Effective January 2020, the state will no longer apply a five-factor control test, but rather a 20-factor test to evaluate whether an employment relationship exists.

In addition to these developments, Maine, Maryland, Nevada, Rhode Island, Virginia, and Wisconsin have created initiatives or established formal task forces to evaluate how their state agencies are identifying and investigating "employee misclassification." Some initiatives have resulted in changes to the law or enforcement paradigms and have increased interagency 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 that use 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.

RISE OF MARKETPLACE CONTRACTOR STATUTES

Companies operating a "virtual marketplace" are increasingly finding that they are exempt from worker classification disputes. 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. The requirements are strict and compliance can be challenging, especially given the dearth of judicial guidance on the subject. States that successfully enacted a virtual marketplace law 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

Arbitration of independent contractor disputes is alive and well. In the last 12 months, the U.S. Supreme Court delivered three decisions

concerning the use of arbitration agreements. The first, *Epic Systems*, confirmed that class action waivers in the arbitration clauses within employment agreements do not impinge the right to engage in concerted activity under the National Labor Relations Act.[4] The second, *New Prime,* clarified that the Federal Arbitration Act does not apply to "transportation workers," which include much of the transportation industry's independent workforce.[5] The third, *Lamps Plus,* reiterated that arbitration is a creature of contract, and employers should not be forced into class arbitration where the arbitration agreement did not expressly provide for class arbitration.[6] Both before and after this trio of cases, lower courts have issued decisions regarding the enforceability of arbitration agreements and class action waivers in both the employment and independent contractor context.

These cases 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 litigation risk. Finally, those already using arbitration agreements 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. 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.

CONCLUSION

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 businesses to handle agency inquiries effectively, decrease liabilities, and facilitate positive outcomes in investigations and litigation. It is imperative for those using independent workforce arrangements to remain informed about the rapidly evolving environment in order to protect and promote a sustainable business model.

NOTES

1. 84 F.R. 14043.
2. FLSA2019-6 (Apr. 29, 2019).
3. Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 (2018).
4. 138 S. Ct. 1612 (2018).
5. 139 S. Ct. 532 (2019).
6. 139 S. Ct. 1407 (2019).