Labor & Employment

A Look at the Issues Affecting Valley Businesses Today

LABOR AND EMPLOYMENT

The Administration's War on Independent Contractors

By RICHARD S. ROSENBERG

Business owners need to know that the Obama Administration has declared war on the independent contractor relationship. The goal: reclassify most workers as "employees" (who will be taxed and covered under the myriad of federal and state labor laws).

Earlier this summer, the U.S. Department of Labor issued an official "Administrator's Interpretation" on the topic. The DOL boldly declared that most workers will be employees, not independent contractors. This admonition couldn't be any clearer. Any company using independent contractors is now on official notice that the federal government considers most companies that engage independent contractors to be labor law scofflaws. This is intended to be fair warning that the federal wage-hour agency intends to bring an end to the practice.

Companies that mistakenly misclassify employees as independent contractors face a world of hurt if they are sued. Compliance audits by any one of the myriad federal and state labor law regulators are expensive and time consuming to resolve. And, class action lawsuits over worker misclassification are hugely popular these days.

Recently, the California Labor Commissioner ruled in favor of a driver of Uber Technologies, Inc. and ordered the company to reimburse her for costs incurred while driving. The Commissioner concluded that Uber is an "employer" of the driver and that the driver did not qualify as independent contractors.

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And, just this month, a federal judge in San Francisco certified a class of Uber drivers in a class action suit claiming that Uber misclassified them as independent contractors and unlawfully withheld tips. Both rulings are huge setbacks for the "the sharing economy," as they set the stage for similar class actions and wage claims against other companies whose business model is centered on a flexible workforce it designates as independent contractors.

From a risk management perspective, the only way to be sure you get it right is to start with the basic proposition that every worker is an employee unless you are sure that the independent contractor relationship will pass muster, if tested. And, don't get lulled into complacency because you have a contract stating that the worker is a contractor. While it's good evidence of what the parties intend, the contract isn't worth the paper it's written on unless the actual relationship comports with the law.

When doing your analysis, you should keep one very unsettling reality in mind. There is no such thing as a safe harbor. Case law makes clear that one agency's finding on the matter is not binding on another. To make matters worse, different agencies and courts weigh different factors and then ascribe to them different levels of importance.

For example, defeating the claim of a contractor who files for unemployment insurance doesn't insulate the company from a case brought by that same person before the EEOC for discrimination or a claim for an industrial injury before the Workers Compensation Appeals Board. Keep in mind that if the situation is a close call, you are sticking your chin out big time and risking costly litigation, fines, back wages, taxes and the like.

At its core, these DOL guidelines, as well as other agency and court rulings, are designed to evaluate whether the contractor is truly an independent business enterprise. Using the "economic realities" test, the DOL's guidelines focus on a set of six factors to evaluate whether the worker is "economically dependent" on the employer (in which case the worker is an employee) or truly an independent business with all of the trappings of business ownership.

Some agencies and courts use at what's referred to as the "right to control" test, examining whether the company retains the right to tell the putative contractor what to do, how to do it, when to do it and where to do it. Layered on to that test is an assessment of where the work is done, whose equipment and materials are used and whether the contractor has a financial stake in the venture. Control over the methods and means of how the work is done indicates employment, as does the use of equipment owned by the company. And, if the contractor has no risk of financial loss if the project doesn't go well, this also leans in favor of employment.

By issuing these guidelines, the Obama Administration is throwing down the gauntlet when it comes to worker misclassification. Business owners should heed this warning and evaluate all independent contractor relationships before legal complications arise.

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