PRESENTATION

Independent Contractor Misclassification – A Problem for Uber or a Problem for You-ber?

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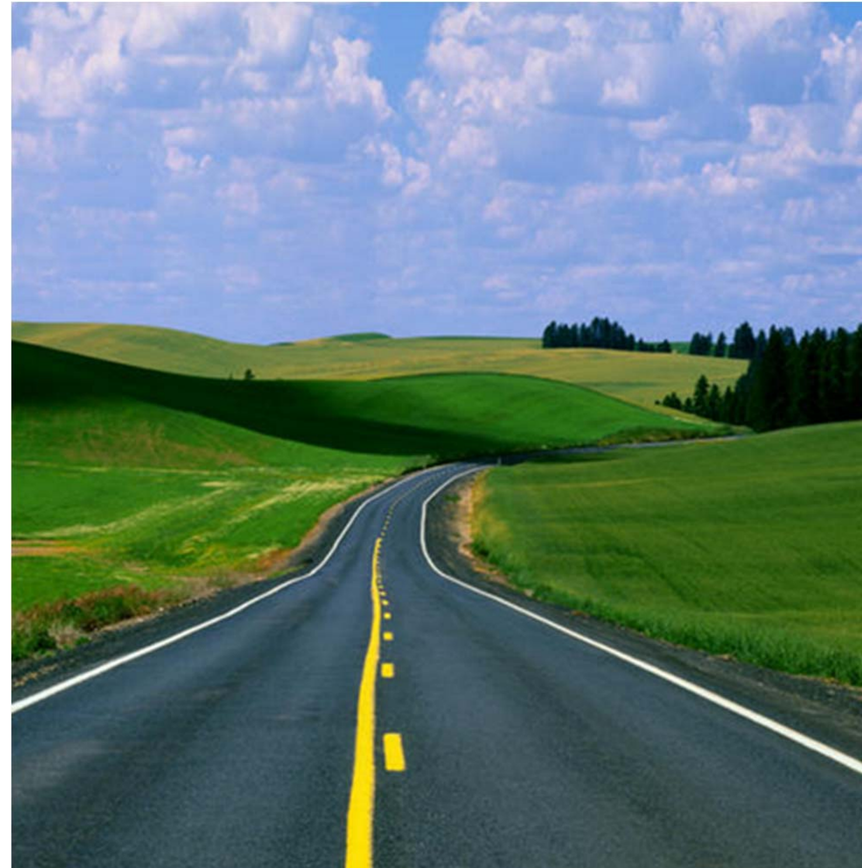
Today's Roadmap

- Recent Developments
- What's Really Going On Here?
- Legal Requirements
- Compliance Strategies



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Recent Developments With Uber

- June 2015 – California Labor Commissioner's Office rules that an Uber driver was an employee rather than an independent contractor
- Commissioner ordered Uber to reimburse the driver's expenses (totaling over $4K)
- Other state labor commissions have declined to follow suit, but the California ruling sent shockwaves throughout the "sharing economy" and beyond
- The ruling was widely reported in the national media and discussed in countless blogs and social media posts

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O'Conner v. Uber Technologies, (N.D. Cal.)

- Proposed class action of Uber drivers challenging their status as independent contractors
- March 2015 – Court denies Uber's motion for summary judgment, which means a jury will decide whether drivers were properly classified as independent contractors
- September 1, 2015 – Court grants drivers' motion to certify a class, but limits scope of class to California
- The case is primarily about unpaid tips and unreimbursed expenses, but most issues in the case hinge on the drivers' status as employees or independent contractors

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U.S. Department of Labor – Administrator's Interpretation No. 2015-1 (July 15, 2015)

- Subject: "Application of the Fair Labor Standards Act's Suffer or Permit Standard in the Identification of Employees Who Are Misclassified as Independent Contractors"
- Administrator David Weil doubles down on DOL's ongoing efforts to combat independent contractor misclassification and provides "additional guidance" for deciding who is an employee
- After noting DOL's long standing six-part "economic realities" test, Administrator Weil defines the ultimate goal as "determin[ing] whether the worker is economically dependent on the employer (and thus its employee) or is really in the business for him or herself (and thus an independent contractor)."
- Available at: www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf

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What Has Changed?

- In Administrator Weil's opinion, the DOL's new guidance does <u>not</u> change the legal landscape; it is just another installment in an ongoing DOL initiative
- Indeed, the DOL announced back in 2010 that it would target the "growing problem" of independent contractor misclassification
- September 2011 – DOL and IRS enter a Memorandum of Understanding to coordinate their efforts to combat independent contractor misclassification
- Labor departments in 25 states have entered similar Memorandums of Understanding with DOL (AK, AL, CA, CT, CO, FL, HI, IA, ID, IL, KY, LA, MA, MD, MN, MO, MT, NH, NY, RI, TX, UT, WA, WI, WY)

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DOL Misclassification Initiative (2010)

- “The misclassification of employees as … independent contractors, presents a serious problem for affected employees, employers, and to the entire economy.”
- “Misclassified employees are often denied access to critical benefits and protections – such as family and medical leave, overtime, minimum wage and unemployment insurance – to which they are entitled.”
- “Employee misclassification also generates substantial losses to the Treasury and to Social Security and Medicare funds, as well as to state unemployment insurance and workers’ compensation funds.”

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Things Have Indeed Changed

- DOL’s new emphasis on “economic dependence” and its bold statement that “most workers are employees under the Fair Labor Standards Act” should embolden DOL to more aggressively combat independent contractor misclassification
- Courts may not agree with DOL’s new interpretation, but employers simply must recognize that the independent contractor classification is in the DOL’s crosshairs
- DOL’s new economic dependence analysis must be considered as an overarching consideration when reviewing the more familiar economic realities test

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The Economic Realities Test (Six Parts)

1. Is the work an integral part of the employer's business?
   - The thought here is that workers are more likely to be employees of a company if they perform the company's primary work
   - Independent contractors, by contrast, are more likely to provide ancillary services to the company
   - Example: In a construction company, framers most likely are employees, but software developers who design software to track bids properly may be classified as independent contractors

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The Economic Realities Test (con't)

2. Does the worker's managerial skill affect the worker's opportunity for profit or loss?
   - Independent contractors in business for themselves can make management decisions (such as hiring an assistant, purchasing materials, advertising) which can directly affect their opportunity for profit or loss
   - Employees, by contrast, do not have this ability, and their opportunities to earn more (or less) depend almost entirely on the amount of work provided by their employer, which does not depend on the employees' managerial skills

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The Economic Realities Test (con't)

3. How does the worker's relative investment compare to the employer's investment?
   - All employees make minimal investments in their jobs; the key to this factor is to compare the worker's investment in the business to the employer's investment
   - Independent contractors typically make capital investments to such a degree that they can operate as independent businesses

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The Economic Realities Test (con't)

4. Does the work performed require special skill and initiative?
   - This factor is the source of much confusion. According to the DOL (and some courts), "special skill" does not mean the technical skills required to perform a particular job since many employees are skilled laborers
   - The DOL interprets this factor to require "special skill and initiative" that permits independent contractors to operate as economically independent businesses

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The Economic Realities Test (con't)

5. Is the relationship between the worker and the employer permanent or indefinite?
   - The concept here is that true independent contractors generally do not work for one company for extended periods of time; instead they are engaged for set periods of time, typically on a project basis
   - As a result, an exclusive independent contractor relationship lasting for years is a common misclassification red flag
   - On the other hand, short duration seasonal work does not equate to an independent contractor relationship

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The Economic Realities Test (con't)

6. What is the nature and degree of the employer's control?
   - Historically, courts have considered this the most important of the six factors, but the DOL disagrees
   - Here, the DOL places much emphasis on their new economic dependence consideration. They argue:
     - A worker must control <u>meaningful</u> aspects of her work
     - Her control must be more than theoretical, she must actually exercise it

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Other Red Flags

- Do you have employees performing essentially the same duties as your independent contractors?
- Have you classified the independent contractor as an employee in the past while she was performing essentially the same tasks as she is now?
- If the answer to either of these questions is YES, you may need to reconsider your classification of the worker as an independent contractor

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Factors to Keep in Mind

- Employers have the burden to prove their classification of a worker as an independent contractor is correct
- If it's a close question, the best choice is to classify the worker as an employee
- Penalties for misclassification include:
  - Payments to the government: unpaid payroll taxes (both portions), interest, statutory penalties, and/or
  - Payments to the worker: back pay (typically overtime), value of lost benefits, coverage of work-related injuries under workers' comp., unemployment comp.

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Other Government Agencies

- The IRS has its own way of analyzing whether a worker is an independent contractor, which seems to emphasize the control factor more than the DOL. See http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee

- The National Labor Relations Board is interested in this topic as well because employees are members of a bargaining unit but independent contractors are not

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The Value of Written Agreements

- Written agreements between an employer and independent contractor define the relationship and avoid confusion between the parties
- Further, an accurate independent contractor agreement can assist your efforts to defend the classification
- Nevertheless, a written agreement will not control if the classification is challenged; what the worker actually did for the employer is what matters
- Written agreements, therefore, must be accurate

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Conduct a Self-Audit … Soon

- Don't wait for a DOL investigation or a lawsuit; perform a proactive self-audit of your independent contractor relationships
- Use the six-part economic realties test, but also consider the new factors discussed in the Administrator's Interpretation discussed earlier
- We strongly recommend having your counsel perform (or at least coordinate) the audit to maintain the attorney-client privilege
- Immediately reclassify anyone whose classification presents a close question

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Questions?

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