
Beyond COVID-19, Employment Law is Changing: Focus Independent Contractors

By Vanessa M. Kelly / Oct 07, 2020

While employers' and the world's attention has rightly been placed on the pandemic and legislation to address workplace issues, there has been activity outside of the COVID-19 space that may have been overlooked. As the workplace re-opens or remains open in a remote form, employers will need to be alert to other workplace laws and changes. One such area is the classification of independent contractors.

The US Department of Labor (DOL) proposed a rule in September of 2020 to provide much-needed guidance to companies on the issue of whether a worker should be classified as an "employee" or "independent contractor." Likewise, New Jersey passed the Independent Contractor Misclassification Act and other legislation called the "Misclassification Package" to address New Jersey's presumption that the majority of independent contractors are misclassified. Other states too, like California, have enacted similar laws. The passage of differing states laws on this issue makes it challenging for companies that operate in multiple states to have a clear strategy for working with independent contractors and classifying their workforce.

The proposed DOL rule, which is now in the open comment stage, seeks to be the "sole and authoritative interpretation of independent contractor status under the FLSA." The proposed rule uses the "economic realities test" to determine worker status. The test seeks to determine whether the worker is economically dependent on the possible employer or if the worker is indeed in business for him or herself. The focus under the economic realities test is on two "core factors":

- The nature and degree of the individual's control over the work; and
- The individual's opportunity for profit or loss.

In examining "control," if the individual, not the potential employer, exercises substantial control over his/her own performance, such as scheduling, selection of projects, or ability to work with others, the relationship appears to be more of an independent contractor than employee. Similarly, if the individual has an opportunity to earn profits or incur losses based on his/her exercise of initiative or monetary investment, such as equipment or material for work, that too will tip the scales towards an independent contractor classification. The DOL will also look at three other factors, including:

- The amount of skill required for the work;
- The degree of permanence in the working relationship; and
- Whether the work is part of an integrated unit of production.

Of course, it is the "actual practice" of the individual and company that is the focus and not the contractual arrangement between the parties that will control.

New Jersey passed the Misclassification Package in January of 2020 but did not codify the test to be used to determine classification. The original legislation proposed the use of the "ABC Test," which is similar to California's law. However, that legislation did not pass due to substantial opposition from gig workers and contractors. So, while the New Jersey Department of Labor and Workforce Development (LWD) can issue "stop work" orders against employers who violate wage, benefit, or tax laws, penalize employers for misclassification, require notices to be posted in workplaces relating to the worker misclassification, and engage in audits, there is no clear direction to employers on how to determine if they are properly classifying their workers in the law itself. The LWD issued a [poster](#) that includes the test applied by the LWD to determine worker status. The current LWD test reviews the following factors and is commonly referred to as the ABC test:

- Whether the individual is free from control or direction over the work performed under both the contract and in practice;
- Whether the work is outside the usual course of the business performed, or the work is performed outside of all places of business for the company for which the service is performed; and
- Whether the individual is customarily engaged in an independently established trade, occupation, profession, or business.

The analysis of whether an individual is an employee or contractor is not determined by the existence of a contract alone. Instead, all the facts and circumstances surrounding the working relationship will be examined to determine if the classification was proper.

As this article describes, the determination of whether a worker is an independent contractor or employee is complex. The outcome may also vary depending on what test is applied. Employers may want to consult with employment counsel to assist in the determination, especially where they operate in multiple states. If you have any questions, please do not hesitate to reach out to Vanessa Kelly or to the Clark Hill attorney with whom you work.