Will a Trump Victory Result in Decreased Efforts to Combat Misclassification of Workers?

By Kevin J. O'Connor

Watching the video today of the confrontation between Uber's CEO and one of its independent contract drivers[1] motivated me to finally put pen to paper on my thoughts about whether a 2016 victory by President Trump will have any significant impact on the concerted efforts to combat misclassification of workers as independent contractors that we saw during President Obama's tenure.

President Trump has promised to "make America great again" through an as-yet-to-be-defined program of stripping away regulation and bringing back jobs to middle America. Is it possible that his policies and the work of his cabinet will have a significant impact on the onslaught of audits, enforcement actions and

[1] https://www.youtube.com/watch?v=w_eu1tJy-_U

private litigation against businesses concerning misclassification of workers? *Maybe, but not to an extent that the risk of misclassification should be ignored*.

WHAT IS MISCLASSIFICATION?

For the past few decades, many employers have moved away from the traditional employee/employer relationship in favor of contract work with an "independent contractor" ("IC"). This provides financial incentives to the employer by placing the obligation on the IC to pay self-employment tax, to insure itself for liability and worker's compensation purposes, and other (perceived) advantages. The IC, on the other hand, is required to absorb these added expenses (including a significant increase in the amount of taxes that might otherwise have been paid), but allows the IC flexibility she might not otherwise have had in a traditional employee/employer relationship.

A 2015 study published by the Mercatus Center at George Mason University undertook an extensive analysis of the growth of contract workers in the United States in the last few decades. The study provides rather convincing data to support the premise that the number of workers classified as independent contractors issued 1099s by employers,[2] rather than classified as employees, has exploded. Surprisingly, the authors concluded that this shift to contract workers was not caused by the "sharing economy." They provide rather convincing data to

[2] https://www.mercatus.org.

show that the shift began long before the sharing economy emerged. The authors also conclude that the trend is here to stay.

As someone who defends employers for a living, a big problem to be tackled is the lack of consistency in what constitutes an "independent contractor." The definition varies based on the statute at issue, the jurisdiction, and even the part of the country in which the issue is being litigated. As a matter of law, the same worker who is an independent contractor under Title VII of the Civil Rights Act ("Title VII") may be considered *an employee* under the Fair Labor Standards Act ("FLSA"). Someone who may be defined as an employee on the West Coast could just as easily be defined as an independent contractor in a district other than the Ninth Circuit. Put the definition under FLSA side-by-side with the questions included in IRS Form SS-8 (the form which allows an employer or employee to seek a determination of IC status), and you can see how complicated the analysis of classification can become.

The shift to contract workers did not escape notice by State and Federal taxing authorities, who saw this trend as a dangerous development. In many cases, the misclassification of workers was indefensible and simply criminal, in an effort to cut costs at the expense of workers. In other cases, businesses who classified workers as ICs under circumstances that were far more defensible have found

themselves on the other side of federal or state audits, enforcement proceedings and civil litigation.

CONCERTED GOVERNMENTAL EFFORTS TO COMBAT MISCLASSIFICATION

There has been a concerted effort at the federal level since 2009 to combat independent contractor misclassification through the U.S. Department of Labor ("DOL") and the Internal Revenue Service ("IRS"). These efforts at the federal level have, by and large, focused on misclassification that was of an obvious nature. At the same time, the plaintiffs' bar has ramped up civil litigation against businesses throughout the country challenging the manner in which workers are classified. Many businesses, large and small, have been the target of civil litigation.

The IRS is a bureau of the Department of Treasury, and the Commissioner of the IRS is a political appointee. Steven Mnuchin has been tapped to run Treasury. The head of the DOL remains unclear at this point. Commerce will be run by Wilbur Ross, who has said that his main effort will be to "change the culture of the government" to be "pro-business." Trying to figure out which policies will be pursued by the Trump administration is like reading tea leaves at this point.

One casualty of the Trump Administration could be the "Misclassification Initiative" between the IRS and DOL commenced in September 2011. It is

reflected in a Memorandum of Understanding ("MOU") between the IRS and DOL, whereby they committed to joining efforts to share information to combat misclassification. Since then, according to the DOL's website, 35 state labor departments have signed an MOU with the DOL, and most of them are states with republican administrations.

Interestingly enough, the DOL just added the following disclaimer on its website above the press release on the Misclassification Initiative:

> **"Please Note: As of January 20, 2017, information in some news releases may be out of date or not reflect current policies."**

I have seen the results of this increased communication between state and federal agencies first hand, in the number of clients who have found themselves in the cross-hairs of any number of agencies. All that it takes for an audit is a disgruntled IC who has stopped receiving assignments, to file a claim for unemployment with a state agency and challenge his designation. Or perhaps he/she files an IRS form permitting him to challenge his designation as an IC. That's when the IRS or state agency will come knocking. Or maybe during an IRS audit the Small Business/Self- Employed Division gets involved and makes a demand for documentation concerning all 1099 workers.

Conclusion

In sum, it is too early to tell whether the Trump Administration will take action to de-emphasize prior concerted efforts to combat misclassification. Efforts

to challenge employer designations are widespread at both the federal and state level, and are probably here to stay. States have a significant financial advantage to pursue these issues as they perceive that they are shortchanged on unemployment insurance contributions and workers' compensation premiums, and see a significant decrease in employee income tax withholdings as a part of such classification. Many states have passed laws to combat misclassification, and those laws are not going anywhere. Lastly, the private plaintiffs' bar has been suing and developing a solid body of case law around these issues, and those lawsuits are unlikely to dry up anytime soon.

If you are a business relying upon ICs, be sure you are complying with the law by consulting with an informed attorney with knowledge of the myriad state and federal statutes, rules, regulations and case law on this complicated issue. The consequences of misclassification are severe, and while it is possible the risk of being caught in the dragnet of enforcement may be reduced in this new era, it is not a risk to be taken lightly.

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