On the Horizon
Regulatory and Legal Challenges for 2018 and Beyond

Topics

- Independent contractor v. employee
- The misclassification jungle
- Creating the B2B agreement
- Joint Employment issues-Franchising
- Fair Play Acts
- Alphabet soup-OSHA, WC, UI, DOL
- Class and Collective Actions
- Mandatory Arbitration Agreements

Independent Contractor or Employee? IRS Standards-Old and New

20 FACTOR ANALYSIS

1. Company gives instructions
2. Company provides training
3. Workers' services integrated into the business
4. Workers' services personally performed and non-delegable
5. Worker hired, supervised and paid by company
6. Existence of a continuing relationship
7. Company sets working hours
8. Worker required to work full time
9. Job performed on company premises
10. Company sets order or sequence of work
11. Company requires oral or written reports
12. Worker paid by the hour, week or month
13. Worker reimbursed for business or travel expense
14. Company furnishes tools or materials
15. Worker does not make a substantial investment
16. Worker cannot realize a profit or loss
17. Worker cannot work for other businesses
18. Worker limited in making services available to the public
19. Company can discharge worker
20. Company can terminate the relationship

BEHAVIORAL CONTROL ANALYSIS

TYPES OF INSTRUCTION

1..When and where?
2..What tools must be used?
3.What workers are hired to assist?
4.Where to purchase supplies and services?
5..What work must be performed by a specified individual?
6.Order or sequence of work

DEGREE OF INSTRUCTION

1.The more detailed the instruction, the greater the control
2.Evaluation systems-measuring HOW work is performed, not merely the end result
3.Training supporting conclusion of employment

FINANCIAL CONTROL

1."Significant", but undefined $ of investment
2.Unreimbursed expenses
3.Opportunity for profit or loss-potential to lose money is a hallmark of being in one's own business
4.Ability to make oneself available to the public
5. Method of payment

Q&A

QUESTION: Is the worker economically dependent on the company or in business for himself?
1. Written contract may be relevant but is not determinative (except in CA)
2. Was the agreement subject to arms' length negotiation?
2. Are the services integral to the company's business?
3. What are the relative investments made by company and contractor?
4. Does the work require special skills or initiative?
5. What is the duration of the relationship?
6. What degree of control does company exercise?

NOTE: US DOL states that the location of services, existence of a contract, timing or mode of payment are NOT determinative…but go tell that to the state!

ABCs
Right to Control or Economic Realities Tests

A company must prove that:

1. Workers are free from direction and control both contractually and in fact
2. Workers' services must be performed outside the usual course of business OR outside the employer's place of business
3. Worker must be customarily engaged in an independently established trade, occupation or business of the same nature as the service being provided

NOTE:Adopted by NJ, IL, CT---Maine, MA and NH have adopted variants

Financial Consequences of Misclassification

- Entire entity could be deemed out of compliance with the ACA
- One unemployment filing can result in major, multi-agency, multi-state audits
- Snowballing-audit agencies use extrapolation techniques and share data-tax authorities now collaborating with workers' comp carriers and Dept's of Labor
- Backbreaking settlements

How to Manage Exposure

- Take every unemployment claim seriously
- Avoid branding former employees as ICs
- Avoid retaining contractors to do the same work as employees (Microsoft class action)
- Draft well written IC agreements
- Be aware that the same rules will not apply across multiple jurisdictions
- Be proactive-constantly reassess strategies
- Retain counsel to consult on existing relationships
- Don’t be complacent about staffing agencies or TPAs; most contracts will not shift liability away from you

FOCUS ON FIELD SERVICES

NEUTRAL OR CONTROLLING FACTORS

- INSTRUCTIONS: Who sets the rules, you or your client?
- TRAINING: Don't provide training yourself! If a training video is on You-Tube, DOL can find it, too! Consider third party training, certification by outside entity, etc.
- INTEGRATED SERVICES: Consider separating business into more than one entity or creating subsidiaries for construction/repair work
- HIRING PRACTICES: Posting on Craig's List or Indeed for workers is an indicium of employment. Post for B2B relationships.
- PERSONAL SERVICES: will be an indicator of employment. You must permit substitution but contractually protect against "off the books" labor in a B2B contract.
- HOURS: Do not set minimum or maximum.
- TERRITORY: Do not assign; let contractors choose and also overlap inside territories.
- SEQUENCING: Do not set.
- REPORTING: Target must be the client, not the company.
- PAYMENT: Either automatic or X days after submission of invoice, on contractor's own form.
- DO NOT REIMBURSE for expenses.
- DO NOT PROVIDE ONE STOP SHOPPING FOR MATERIALS: If you dictate this, it will be deemed an indicium of employment (i.e., pharma trucking cases)
- THE CONTRACTOR MUST MAKE AN INVSTMENT: in tools, materials, computer, vehicle, gasoline, supplies.
- RISK OF LOSS: consider licensing fee for contractor access to your database system; if contractor actually pays workers regardless of whether you have paid them, that constitutes risk of loss.
- WORK ALTERNATIVES: Outside work, whether in the industry or in other endeavors, must be permitted, including work for competitors
- LIMIT INSTRUCTIONS
- AFFILIATE WITH EXPERIENCED PROFESSIONALS in the real estate, appraisal, mortgage, and insurance industries

  Avoid college students, first time workers, and beware of liability for part-timers

Bowerman v. Field Asset Services

CASE UPDATE

2017

FAS's motions for summary judgment and to decertify a class action was denied by Judge William Orrick, US District Judge, Northern District of CA

This is not dispositive of the merits but suggestive of the judge's approach.

The case discovery reflects a dispute between the company, which contends that vendors have the right to control performance and plaintiffs' allegations that FAS instructs them on where, when, what, how, etc.

NOTE: that defendant's business model includes property preservation, maintenance and repair services and impact of Fair Play Act in the construction industry. FAS is an intermediary for lienholder entities but this will not insulate it from liability.

NOTE: that class has been limited to those who did not work for any other entity more than 30% of the time, indicating that at least some contractors are engaged in their own businesses

NOTE: Standard for a grant of summary judgment is exceedingly high and is rarely granted

NOTE: Class had already been limited during initial discovery.

NOTE: Appraisers were required to have their own business licenses and TIN, to purchase their own equipment and choose services to perform. BUT they were not required to have prior experience. They could decline work orders. FAS could reassign work if they did not respond on the on-line system. Instructions were detailed based on client specifications. FAS required vendors to be trained on its on-line system. Agreement automatically renewed annually. Contractors were required to post a notice onsite that property is being maintained by FAS. Invoice must be posted within 24 hours of job completion or risk loss of payment. FAS has the right to view photos to determine whether payment should be made. FAS has right to reduce vendors' cap on $ amount of work orders to be handled and can penalize them by providing less work in the future for failure to communicate daily or declining too many offers. FAS utilizes a scorecard system with metrics.

2018

Jury trial resulted in decision against FAS for failure to pay overtime wages, liquidated damages, interest and attorneys' fees. Judgment entered against FAS for $2,638,698!!!

How can the Industry protect itself?

The use of mandatory arbitration agreements has been approved by the U.S. Supreme Court in 2018 in Epic Systems Corp. v. Lewis

Arbitration agreements are to be enforced as written

Putative employees cannot claim that this limits their rights to collective action under the NLRA

An arbitration agreement limits recourse to the arbitral forum, not the courts

The Supreme Court has never red a right to a class action into the NLRA.

Arbitration agreements are enforceable except upon grounds set in law or in equity for contractual reasons

DISSENT BY JUSTICE GINSBURG: Employees must have the right to act collectively in order to match the employer's clout in setting terms and conditions of employment. Is this a meaningful analysis in a full employment economy?

The futility doctrine: If an employer did not compel arbitration immediately, has the right to compel been waived? Headed up to the Supremes…..

The Risks of Class and Collective Action Litigation

- Threshold for conditional certification is very, very low
- Basic standards: numerosity, typicality, commonality and adequate representation
- Risk of incompatible outcomes and potential prejudice in individual litigations
- Collective actions typically raise injunctive relief issues
- Class and collective actions in federal courts typically involve state law claims as well
- Complexity in defending cases which include both opt-in and opt-out parties
- Extensive discovery and litigation costs

The Risks of OSHA Audits

- OSHA standards apply to Mortgage Field Services
- Expectation: diminished enforcement by Trump administration
- Expectation: any enforcement could result in investigation by workers' compensation or be generated by a single workers' compensation claim

Watch that Clock

- If found to be covered employment, the clock will begin to tick:
- Time between assignments as compensable
- Lunch breaks counted as on the clock if no sign in/sign out records
- Mercenary employees can claim any number of hours
- Wage theft prevention statutes will apply
- Wage notice statutes will apply
- Demands for reimbursement of costs will escalate

Upholding Your Clients' Standards Is that Control or Not?

Jimmy John's case-Illinois Supreme Court has ruled that there is difference between upholding contractual standards and controlling terms of employments

Setting standards does not equal control of employees

Crucial indicator with respect to joint employment and franchise situations

What's Fair in Play and Employment?

Many states have enacted "Fair Play Acts" in industries such as construction and trucking.

Fair play acts have such broad definitions of construction that field services would be included. This has huge ramifications with respect to defining covered employment, holding both subcontractors and lead contractors liable under workers' comp laws and redefining misclassification.

B2B
The Way to Go

Best defense is a good offense. Draft contracts which clearly reflect a business, not individual, relationship.

Contract terms are important, but states are continually reinterpreting the law and creating uncertainty

Multistate entities must deal with laws on both sides of the aisle

See, e.g., Buffalo Bills Cheerleaders case: the Bills minimized their involvement in work rules by putting a 3rd party contractor in the middle.

The conundrum: if you give up control of the services, you risk breach of contract with your clients; if you don't, then you are looking for a finding of covered employment

Flying Below the Radar

Bowerman became a case of national import such that field services are now on the radar of state departments of labor and other regulators.

Mandatory arbitration is a tool to keep you under the radar and out of the courts, with no precedential trail.

Watch Those Tax Returns
The Latest Trend

In an effort to collect employment taxes and hold companies liable for workers' compensation premiums, state regulators are comparing gross corporate revenues with W2 wages. Companies with disproportionally low wage reporting are now becoming targets of workforce investigations under the "low hanging fruit" theory.

Hon. Ruth B. Kraft

Chair, Employment Law Group
Vigorito, Barker, Patterson, Nichols & Porter, LLP
300 Garden City Plaza
Garden City, New York 11530
Telephone: 516-282-3355
R.Kraft@vbpnplaw.com

Nationwide Compliance Practice &
Employer Representation

Employment Law Services

VBPNP Law provides employment law counsel solely to management on misclassification, wage/hour litigation, class action defense, employment policies, and business strategies.

Judge Kraft holds a Juris Doctor from the Yale Law School as well as a certificate in Alternate Dispute Resolution from Harvard Law School.

Members of the employment law group are admitted to the federal courts *pro haq vice.*