**Employee or Independent Contractor??? MIS-Classifiying Workers in COVID-19 Times A Note to Businesses and Workers Alike**

What exactly is an “Employment Relationship” and why does it matter? You may be thinking, “I don’t know, I definitely do not care…and how did I wind up reading this?!” Otherwise, if you either own or work for a business that requires human capital to operate, knowingly or unbeknownst to you, you will certainly be a product of how the employment relationship is defined. Arriving at *an* accurate answer (not even necessarily “the” answer), may seem apparent based on personal, every-day experience if you are willing to hazard a guess. However, when you decide to drill down on what factors weigh most heavily on determining a reasonable interpretation, whether that’s done proactively prior to the parties beginning to perform what they believe to be their obligations and corresponding expectations that the other party will do the same as a consequence…what becomes apparent is that it’s actually not as concrete as it may appear such that it can be fixed in one commonly-accepted definition, universally applied. It’s especially important during this constant and rapidly evolving labor market with its accompanying accelerated demand for creative and efficient skills while considering that both parties now have new and flexible options not previously available to them. Therefore, from a practical perspective, it makes sense that the parties intentionally structure the relationship to meet their needs.

*Impact*

Misclassified workers often are denied access to critical benefits and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces. Employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers’ compensation funds. USDOL https://[www.dol.gov/agencies/whd/flsa/misclassification](http://www.dol.gov/agencies/whd/flsa/misclassification)

Some businesses knowingly and intentionally misclassify workers as part of an overall cost savings strategy, that also includes laying off a percentage of their staff, and requiring those employees who remain to continue to perform the same functions, however, they are “simply” being re-classified as independent contractors while simultaneously having their original job duties/descriptions (if they ever existed in the first place) substantially expanded, as well as the raw quantity of the worker’s expected output, A/K/A, “work’em to death”. The consequence of this can be significant for both the company and the worker as you can imagine. Independent contractors are a significantly cheaper source of labor for businesses. A benefit to the worker is that they get to keep more of their money, however, they have obligations to remit taxes on that income. As you may have learned, nothing is for free. Businesses adopting this practice, noticeably on an increasing scale since Covid-19 has begun, without putting the necessary and legal steps in place, are now beginning to see the impact in courts and administrative agencies.

*Legal Perspective*

From a legal perspective, and this does vary from state to state, between state and federal law and among various state and federal laws, when it comes down to it, regardless of the parties’ intentions, if the relationship is challenged in court. The courts will ultimately look (keeping in

mind that hindsight is always 20/20 as they say) to which party ultimately controls the relationship, *i.e*., which party has the leverage, determines the tools to be used, how to use them, and under what circumstances they should be used, hours of performance and any other means of accomplishing the goals of the party driving the relationship, and apply the what the court believes is the appropriate classification accompanied by the corresponding rights and obligations that come with that relationship. This usually comes to the court when a party believes they have been negatively impacted by the other party, seeking redress, asking the court to determine who owes what to who and why. It is often at this stage that one or both of the parties realize that they had been operating based on faulty premises and expectations for themselves and the other party leading one or both parties to suffer the consequences.

As certainty and minimizing business disruption is a priority for most successful companies, it is incumbent upon businesses to proactively “audit“ there employment relationships with their workers, making sure they are legally classified and consistent with meeting their goals. The author of this article has received an uptick in Company requests to perform this up-front work of reviewing such relationships and making recommendations. Once the decision is made to prioritize this path of risk mitigation, the decision to do so is proving to be disproportionately impactful on the profitability of the business and not surprisingly, strengthening the relationship between the business and the workers. Alternatively, not proactively addressing this scenario before it comes to a boiling point, is causing significant business disruption and unnecessary financial resources to resolve it.

*Employment Relationship Tests*

There are several tests that have developed over time for determining whether a “typical employment relationship” (using that phrase loosely) exists between two parties. A non- exhaustive list includes: (i) federal laws such as the Fair Labor Standards Act (“FLSA”) which mandates minimum wage and overtime for non-exempt employees (meaning, the actual job duties performed do not exempt the *employer* from paying overtime to that employee in certain circumstances); (ii) the Internal Revenue Service (“IRS Test”) rules, regulations and guidance - they are obviously trying to get *paid*; (iii) various anti-discrimination laws *e.g*., Title VII of the Civil Rights Act of 1964; and (iv) various state’s law’s equivalents, for example, the Pennsylvania Wage Payment and Collection Law, which governs the manner and method of payments, deductions, etc. that may be properly and are required to be withheld from an “employee’s” wages. Of the various tests used to determine the proper classification of a worker, the IRS Test and FLSA are at the forefront, likely for several of the reasons as discussed in this article. Adding to the complexity, federal and state courts create legal precedent through interpreting the foregoing, with inconsistent results.

As a law school professor used to say, if you want to find the answer, “follow the money”. When workers are misclassified, less money is ultimately remitted to the government in the form of taxes, in this case, W-2 income taxes, which an employer is required to withhold from an employee’s paycheck, and remit to the IRS along with the employers’ share of tax liability. Consequently, the less “employees” a business employs, the less employment taxes the government receives. When a worker is classified as an independent contractor/consultant, the worker him or herself is required to remit taxes to the government as a 1099 Independent

Contractor (“IC”), which may be offset using certain corporate and tax structure mechanisms by the IC. Therefore, there are incentives by all parties, often, but not always competing, governing each party’s preferred structure. Correspondingly, as noted above, there are consequences to choosing the incorrect structure.

These laws, when known and understood, inform workers and businesses alike how to determine whether a traditional employment relationship exists and consequently, to what extent certain rights, responsibilities, and obligations of the participants exist. Importantly for businesses, and particularly for officers of such businesses, the courts apply a “strict liability” approach. As such, officers can be held criminally liable if certain criteria are met. An example of this would be the FLSA, for misclassifying a worker as an IC and failing to pay minimum-wage and overtime. Although rarely applied, the penalty exists in the law and therefore even if not ultimately ordered, can be used by plaintiffs employment lawyers as leverage in negotiating a civil financial settlement

- substantially more expensive then simply performing the audit mentioned above, putting into place proper classifications, and paying workers properly. Think lawsuit or department of labor investigation and administrative action and attorneys’ fees which are *mandatory* if a plaintiff is successful. These fees are commonly seen in wage payment and civil rights statutes, which operate as an incentive for lawyers to accept cases when clients are typically unable to pay upfront for their representation.

*Why it Matters*

Generally speaking, although this is certainly changing at the state and local levels, traditional employment laws often do not apply to independent contractors. Think discrimination, another pandemic that has existed for centuries but has recently surfaced in the public’s attention. Overtime laws as referenced above, for workers working more than 40 hours per week, covered by the FLSA do not cover independent contractors. A former employee working 40 hours now expected to work 65 hours from home and re-classified as an independent contractor, will not get the benefit of the overtime laws. This is particularly troublesome, now that many workers are “on call “working from home, just sending an email here and there”, all compensable time, for which the company can be held responsible, along with penalties, if the worker is subsequently re-classify as an employee and not in fact an independent contractor.

What it is particularly troublesome during these Covid-19 times, touched on above, is the obvious discrepancy between the benefits often afforded to those individuals, classified as “employees”, as compared with their unprotected, counterparts, welcomely labeled by both parties as “independent contractors“ or “consultants.” However, as each party believes they are reaping a significant benefit, the real long-term costs must also be identified and evaluated as compared with the short-term financial benefits. Low-paid independent contractors also fare badly in health care coverage. Their earnings are so low that over a quarter are covered by Medicaid (twice the rate for all New York workers), while 20 percent do not have any health insurance (compared to eight percent of all New York State workers). In transportation, one of the fastest-growing industries, 46 percent of contractors have Medicaid and 19 percent do not have any health insurance coverage. The precariousness of their health coverage puts at serious risks workers left vulnerable to ordinary illnesses as well as to public health threats like Covid-19.

<http://www.centernyc.org/urban-matters-2/2020/3/25/covid-19-shows-why-wrongly-labeling-> workers-as-contractors-must-stop?format=amp

How workers are classified cuts across genders as well. Transportation and construction, for example, are heavily male, while personal services (including maids and housekeepers) and social assistance are heavily female industries. In New York City, fully two-thirds of individuals who report low-paid independent contracting as their primary job are persons of color, compared to 44 percent statewide. Wherever one looks, however, low-paid independent contractors have taken a hit in earnings over the past decade, when their median inflation-adjusted earnings fell 11 percent. Id.

*Conclusion*

When the above is considered in conjunction with the reality of the current political climate

- candidates appear to celebrate “public healthcare for all” in concept, yet in courts, the same candidates and party leadership are simultaneously and intentionally attempting to eliminate that same policy, knowing full well that the consequences could be devastating, particularly for *those* individuals supporting such candidates, it begs the question as to whether we are entering into or have already been living in an “Alice in Wonderland” construct. A topic for another article.

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