To Be or Not To Be: The Independent Contractor vs. Employee Debate Continues

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On October 11, 2022, the U.S. Department of Labor announced a proposed rule that would change how workers are classified, as either employees or independent contractors. As I write this, there is still a public comment period ongoing and no formal rule has been enacted. While the proposed rule applies to federal issues, such as minimum wage law, and will not directly impact workers' compensation statutes, the reverberations will be felt. Once again, we are brought back to the question: who is an employee and who is an independent contractor?

The distinction between employees and independent contractors goes back to the common law principles of agency, establishing a master-servant conception of the relationship between the employer and employee, and holding employers liable for the actions of their employees. Independent contractors had no such relationship with those they worked for and, therefore, no such liability existed. With the advent of state and federal workers' compensation schemes in the early 20th century, it was understood that this arrangement exists solely between employers and employees—independent contractors are not included.

The importance in distinguishing between employees and independent contractors continues to increase with the growth of the so-called "gig economy." Simply put, this includes those who do not hold "traditional" jobs where they function under the direct supervision of another, work exclusively for one company, have their benefits and payroll handled by that company, and it's assumed they will maintain a long-term work relationship with said company. Whereas discussions regarding independent contractors used to pertain primarily to truck drivers and real estate agents, today they involve those engaged in ride-sharing, food delivery, pet sitting, personal shopping, web development and more. With a greater number of American workers engaged in gig economy jobs, there is a greater percentage of workers' compensation claims filed by such workers. When those claims are filed, each employer needs to ask: is the claimant an employee or an independent contractor?

In determining employment relationship, the U.S. Supreme Court stated there is "no shorthand formula or magic phrase that can be applied to find the answer…" *Nationwide Mutual Insurance Co. v. Darden*. Instead, the determination is made on a fact-sensitive, case-by-case basis.

The first (and oldest) test used by the courts to determine employment relationship is the "control test." This test aims to

determine employment versus contractorship as it dates back to the common law "master-servant" relationship. The court will ask how much free reign a claimant had in completing a task. Were they assigned set hours, or were they free to set their own schedule? Were they expected to adhere to certain protocols and methods in performing the work, or was the sole concern that the particular project was completed?

The control test used to be the sole means of determining whether a claimant was an employee or an independent contractor. However, as legal commentators have observed, the courts have been shifting away from the control test as the exclusive means of determining employment versus contractorship and now largely see "control" as one of several factors to consider. Such factors include:

Method of payment. Was the claimant continuously paid on an hourly or salaried basis or paid per task? Was the claimant issued a paycheck with the proper withholdings, or were they paid without any withholdings and issued a 1099?

Provisions. Were the tools supplied by the company or by the claimant? Did the employer provide a uniform or logo? In one Illinois case, the court found an employment relationship existed, in part, because the claimant was required to have the company logo on his vehicle. *Roberson v. Industrial Com'n.* In contrast, in another case in New York, the court determined the claimant was an independent contractor, in part, because the company gave no such requirement. *Simonelli v. Adams Bakery Corp*.

Economic dependence. Is the claimant substantially economically dependent upon the employer? If the employer was their only means of income for a number of months, the court would likely find in the affirmative. On the other hand, if the claimant had various means of income at the time of alleged accident, the court may find less economic dependence.

Integration with the employer's business. Is the work being done by the claimant integral to the nature of the employer's business? In other words, when you think of the employer's business, does the claimant's job seem a natural part of it? When you think of a company that sells widgets, it is natural to think of widget salespeople. In contrast, when you think of a nursing home, it's not as automatic to think of a beautician. In one case, a beautician was working one to two days a week at on-site beauty salon established at a nursing home. This was in addition to her regular job at a local beauty parlor. After sustaining injuries while working at the nursing home, the beautician filed a workers' compensation claim. The Supreme Court of Louisiana determined that the nursing home had arranged for the beautician's services as an accommodation to its residents and not in the pursuit of its regular business. Accordingly, the beautician's work was deemed *not integral* to the business of the nursing home. *Hillman v. Comm-Care, Inc*.

Independent contractor agreements. If there is an independent contractor agreement, many companies will be quick to produce such documents in support of their claim for contractorship. However, such agreements are not necessarily determinative. At best, the courts view them as one of many factors in determining employment

versus contractorship. At worst, the courts have viewed them with suspicion, characterizing some agreements as a pretense enabling companies to avoid responsibilities to their employees. Thus, the presence or absence of an independent contractor agreement will not decide the issue.

Which side has the burden of proof? Does the court presume the claimant to be an employee until the employer proves otherwise, or is the burden on the claimant to prove employment? The answer varies by jurisdiction. For example, in Louisiana, the court presumes employment. In contrast, in Pennsylvania, the burden is upon the claimant to prove that they are an employee. However, when the burden rests with the claimant, the court is quick to point out that "'neither the compensation authorities nor the courts should be solicitous to find contractorship rather than employment' and given the remedial and salutary goals of workers' compensation, the factual bases favoring a finding of an employer-employee relationship need only be slightly stronger than those favoring contractorship." *IDI Logistics v. Clayton*. Thus, in workers' compensation claims, either the claimant or the employer has the burden of proof, for which either party is given every opportunity to rebut. In either event, any employer hoping to establish that a claimant was an independent contractor needs to present a strong argument and point to every factor they are able in order to establish contractorship.

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