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Independent Contractor Legal Review

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TOPIC 1 – Review of the Applicable Law

Who is an Independent Contractor?

Defined by Statute

Carve Outs Like Md. Code §8-206 (other states Tenn. Texas

Maryland Statute Example

- This subsection applies to an individual who is an owner operator of:
 - a Class F (tractor) vehicle, described in § 13-923 of the Transportation Article; or
 - except as provided in subparagraph (ii) of this paragraph, a Class E (truck) vehicle, as described in § 13-916 of the Transportation Article, including a Class E (truck) vehicle described in § 13-919 of the Transportation Article.
 - This subsection does not apply to an individual who is an owner operator of a vehicle registered as a Class T (tow truck) vehicle under § 13-920 of the Transportation Article.

Maryland Statute Example

Work is not covered employment when performed by an owner operator if the Secretary is satisfied that:

- the owner operator and a motor carrier have entered into a written agreement that is currently in effect for permanent or trip leasing;
- under the agreement:
 - there is no intent to create an employer-employee relationship; and
 - the owner operator is paid rental compensation;
 - for federal tax purposes, the owner operator qualifies as an independent contractor; and

Maryland Statute Example

➤ the owner operator:

- owns the vehicle or holds it under a bona fide lease arrangement;
- is responsible for the maintenance of the vehicle;
- bears the principal burden of the operating costs of the vehicle, including fuel, repairs, supplies, vehicle insurance, and personal expenses while the vehicle is on the road;
- is responsible for supplying the necessary personnel in connection with the operation of the vehicle; and
- generally determines the details and means of performing the services under the agreement, in conformance with regulatory requirements, operating procedures of the motor carrier, and specifications of the shipper.

Right of Control Test

The States that use this test use different factors to determine what constitutes “control” of the driver. The burden is sometimes on the employer to prove it does not control.

Right of Control Test

- IRS 21 Factor Test – this test is used in some places and/or influences courts.
- Example – Oregon – right of control test established by case law - *Moholt v. Dooney & Bourke, Inc.*, 63 F. Supp. 3d 1289, 1302 (D. Ore. 2014).
 - “Oregon's right-to-control test requires courts to weigh four factors: (1) direct evidence of the right to, or exercise of, control; (2) the furnishing of tools and equipment; (3) the method of payment; and (4) the right to fire. Direct evidence of the right to control is the most important factor under Oregon law. In addition, the test for determining whether one is a servant or an independent contractor is not the actual exercise of control—the actual interference by the employer with the manner and method of accomplishing the result—but the right to interfere.”

Right of Control Test

- Example – Ohio – hybrid right of control test, established by caselaw but influenced by statute. See *Marine City Sales, LLC v. Ohio Dep't of Job & Family Servs.*, 2015 Ohio Misc. LEXIS 12532, *6-9 (Ohio C. App. Franklin County 2015).
 - “Ohio Adm. Code 4141-3-05(B) sets forth twenty (20) factors as "guides" for determining if there is sufficient direction or control to create an employer-employee relationship. These factors are drawn from the common law, where they are used to distinguish between employees and independent contractors.”

Right of Control Test

- ABC Test – NEW CASE LAW CALIFORNIA – New Supreme Court case moved California to an “ABC” test.

Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 964 (Cal. 2018)

- In sum, we conclude that unless the hiring entity establishes
 - that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact,
 - that the worker performs work that is outside the usual course of the hiring entity's business, and
 - that the worker is customarily engaged in an independently established trade, occupation, or business, the worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage orders. The hiring entity's failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order.”

Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 964 (Cal. 2018)

- The Second Prong or “Part B” is going to be the challenge for trucking companies in California that use independent contractor drivers. This was the part of the test that hurt Dynamex the most.
 - “Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.”

Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 964 (Cal. 2018)

- Under the Dynamex decision the burden is on the employer to establish that the individual in question is an independent contractor. The ABC test is the way the employer meets its burden.

Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 964 (Cal. 2018)

- Dynamex case opening is a good example of the way some courts and many government entities view these classification battles.
 - On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families. Although in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.

Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 964 (Cal. 2018)

➤ Relevant Facts from Dynamex

- Dynamex is a courier delivering goods for Home Depot and Office Depot among others.
- Drivers provided their own trucks, paid all own expenses such as maintenance, tolls, insurance, worker's comp, etc.
- Drivers set own schedule, did have to tell Dynamex when they intended to work.
- Were required to purchase a specific cell phone, were also expected to wear Dynamex shirts and badges, also had to use Dynamex's record keeping and tracking system.
- Drivers were not under forced dispatch

Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 964 (Cal. 2018)

➤ Relevant Facts from Dynamex

- Drivers could make deliveries for other companies
- Dynamex could terminate the driver's contract with 3 days notice, other than that the contract ran indefinitely.
- Per contract Dynamex retained the right to control workflow.
- Prior to 2004 all Dynamex drivers had been employees.

Economic Realities Test

Young v. Act Fast Delivery of W. Va., Inc., 2018 U.S. Dist. LEXIS 682 (D. W. Va. 2018).

- Economic Realities Test Defined: “Thus, “[w]hen a worker is economically dependent on a putative employer—or . . . his putative joint employers—he qualifies as an employee protected by the FLSA. By contrast, a worker whose profit or loss depends upon his own

Economic Realities Test

Young v. Act Fast Delivery of W. Va., Inc., 2018 U.S. Dist. LEXIS 682 (D. W. Va. 2018).

- 4th Circuit Guidance Factors: “(1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business.”

Economic Realities Test

Young v. Act Fast Delivery of W. Va., Inc., 2018 U.S. Dist. LEXIS 682 (D. W. Va. 2018).

- Young Case Background: Omnicare is a pharmaceutical company that delivers drugs to nursing homes. It hired Act Fast to serve as its delivery company. Young was an Act Fast driver and after his contract was terminated he brought the lawsuit alleging violations of the Fair Labor Standards and West Virginia wage laws.

Economic Realities Test

Young v. Act Fast Delivery of W. Va., Inc., 2018 U.S. Dist. LEXIS 682 (D. W. Va. 2018).

- Holding: The Court ruled that Young was an employee and due the nature of the relationship between Act Fast and Omnicare, Omnicare (the shipper) was also ruled to be Mr. Young's employer. Court considered Act Fast and Omnicare to be in a joint employment relationship.

Economic Realities Test

Young v. Act Fast Delivery of W. Va., Inc., 2018 U.S. Dist. LEXIS 682 (D. W. Va. 2018).

- Case Facts:
 - Drivers used their own cars (no substantial investment)
 - Required to wear uniforms and identification
 - Had to use a certain type of cooler for storage of the medications
 - Act Fast gave a scanner to the drivers they were required to use.

TOPIC 2 – LEGAL CLIMATE

Legal Climate

- The “gig” economic (think Uber) is pushing what was often only a trucking issue into the general political debate.
- Robots vs. People – the high costs of insurance, taxes, employee demands are pushing several industries to further automation. See fast food and grocery stores.

Questions

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