Worker Classification Rules in Flux: What Missouri Employers Should Know
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Employers often struggle with applying various tests to classify workers as employees and independent contractors. Properly classifying workers is important for a myriad of reasons. Only employees are entitled to the benefits and protections of the Fair Labor Standards Act ("FLSA"), including minimum wage and overtime requirements. Independent contractors lack such protections and benefits. Misclassifying workers can expose an employer to significant liability under federal and state wage and hour laws, anti-discrimination laws, and worker's compensation laws. Moreover, inconsistencies between various federal and state laws and regulations have created confusion for employers.

To further complicate matters, on January 6, 2021, the Department of Labor ("DOL") issued new rules impacting worker classification under the FLSA. This new rule is considered to be "employer-friendly." During his campaign, however, President Biden promised to, "[a]ggressively pursue employers who violate labor laws, participate in wage theft, or cheat on their taxes by intentionally misclassifying employees as independent contractors." In the early days of his Administration, President Biden has already directed the DOL to freeze implementation of the new rule. Given President Biden's position, the January 6th rule likely will be replaced with a new, more employee-friendly approach to worker classification. This article summarizes the current federal and state standards and discusses what employers should anticipate, as the legal landscape regarding worker classification continues to evolve.

What is worker classification?

Employers typically classify workers as "employees" or "independent contractors." Although not a hard and fast rule, employees are typically entitled to benefits and minimum wages and/or minimum salary requirements. Employees also receive the protection of federal and state laws targeted at employee protection – such as anti-discrimination, worker's compensation, and wage and hour laws.

Independent contractors, on the other hand, typically do not enjoy the benefits to which employees are entitled. They are treated as "contract" employees – and are afforded very little protection.

The FLSA does not include a definition of "independent contractor." Because there is no statutory definition, courts and the DOL have traditionally applied a complex multifactor test to determine whether a worker is an employee or an independent contractor. However, this test has become murkier over time as courts have applied the test on a case-by-case basis.

January 6, 2021 "New" DOL Rule

The DOL issued a final rule on January 6th, clarifying the definition of "employee" under the FLSA. The rule adopts an "economic reality" test to determine whether a worker is an independent contractor or an employee for the purposes of the FLSA. This test has five factors – two core factors and three additional factors that can assist in making the determination of whether a worker is an employee or an independent contractor. No one factor of this test is dispositive.

The two "core factors" are:

1) The nature and degree of the worker's control over the work, *and*
2) The worker's opportunity for profit or loss based on initiative and/or investment.

The Department accords these "core factors" the most weight as it considers them the most probative in determining whether, in economic reality, a worker is dependent on another's business or is in business for himself or herself.

The three additional factors are:

3) The amount of skill required for the work;
4) The degree of permanence of the working relationship between the worker and the potential employer; *and*
5) Whether the work is part of an integrated unit of production.

These factors serve as "guideposts" in evaluating a worker's status but are given less weight than the "core factors."

As noted above, upon taking office, President Biden directed the DOL to freeze implementation of the final rule. Thus, the rule will not take effect on March 8, 2021, as intended. The DOL has been tasked with reviewing and potentially revising the new rule. It is likely that President Biden's DOL will either issue an updated final rule or request Congressional action to promote a standard that is more employee-friendly.

Biden's Proposed Plan

During his campaign, President Biden repeatedly emphasized that worker classification would be a top priority for his Administration. Biden expressly stated that he believes the "epidemic" of worker misclassification has been made possible by ambiguous legal tests that give too much discretion to employers, too little protection to workers, and too little direction to government agencies and courts. Biden's campaign issued a plan that focuses on combatting intentional misclassification, which includes stricter enforcement of wage and hour laws. It is likely that the new DOL will issue a new rule or request Congressional action consistent with this plan.

Several states, including California, have adopted a three-prong "ABC test" to distinguish employees from independent contractors. President Biden has stated that he intends to establish a federal standard modeled on this test.

Under the ABC test, a worker is automatically considered an employee and not an independent contractor *unless* the hiring entity can establish:

1) 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;

2) The worker performs work that is outside the usual course of the hiring entity's business; *and*

3) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

As noted, the proposed plan expands the definition of who qualifies as an employee under federal law – and creates a framework where an employer/employee relationship is presumed, unless overcome by the employer. This expansion will make it more difficult for businesses to classify workers as independent contractors. Additionally, it is anticipated that employers will be subject to increased enforcement actions by the DOL regarding potential misclassification of workers under this new standard.

State Law Considerations

Missouri appellate courts have historically applied a 20-factor "right-to-control" test, modeled after IRS regulations, to ascertain whether an employer has sufficient control over workers to establish an employer-employee relationship. The factors employers must consider in Missouri when classifying workers include:

(1) Whether a worker mut comply with the employer's instructions;
(2) Whether the employer provides training for the worker;
(3) Integration – whether a business could continue without the contribution of the worker's services;
(4) Whether the employer requires the worker's services to be rendered personally;
(5) Whether workers are involved in hiring, supervising, and paying assistants;
(6) Whether the worker and employer have a continuing relationship;
(7) Whether the employer establishes set hours of work;
(8) Whether the employer requires full time work;
(9) Whether the work performed is on employer's premises;

(10) Whether the worker must perform services in the order or sequence set by the employer;
(11) Whether the worker is required to submit oral or written reports to the employer;
(12) Whether workers receive payment by hour, week, month;
(13) Whether the employer remits payment of business and/or traveling expenses;
(14) Whether the employer furnishes tools and materials;
(15) Whether the worker undergoes significant investment in facilities used;
(16) Whether the worker has the potential for realization of profit or loss;
(17) Whether the worker is working for more than one firm at a time;
(18) Whether the worker makes his/her services available to general public;
(19) Whether the employer has a right to discharge the worker; and
(20) Whether the employer or the worker has the right to terminate the relationship.

The Western District of the Missouri Court of Appeals recently applied this test when analyzing the classification of workers at a company that offered in-home pet care and pet-sitting services to clients – in the context of determining whether workers were employees for purposes of Missouri's unemployment statute. *417 Pet Sitting, LLC v. Div. of Employment Sec.*, No. WD 83833, 2020 WL 6276711 (Mo. Ct. App. Oct. 27, 2020).

The Court concluded that thirteen of the relevant factors indicated the existence of an employer-employee relationship. The Court primarily focused on the degree to which the company had the right to control the manner and means of performance of the pet-sitters. The Court found it "particularly demonstrative of an employer-employee relationship" that sitters were not allowed to assign clients to third parties; they were at risk of dismissal for noncompliance; the company counseled pet-sitters after receiving client complaints; and the company's operations were heavily dependent on the sitters' services. Thus, Court held that the company had misclassified its workers as independent contractors when they should have been considered employees.

The test currently utilized by Missouri courts is similar to the now-frozen final rule promulgated by the prior administration's DOL. In Missouri, an employer/employee relationship is not presumed but rather, can only be established after a nuanced analysis of the 20 factors outlined by the IRS.

Take-Aways for Missouri Employers

Properly classifying workers is an important task for employers. Missouri appellate courts have historically applied a 20-factor "right to control" test when analyzing worker classification. This test conflicts, in some respects, with the Biden Administration's proposed plan to curtail intentional misclassification of workers, under which it is presumed that an employer/employee relationship exists unless an employer can establish, among other things, that the worker is free from the control and direction

of the hiring entity. The general rule under the FLSA is that, if there is a conflict between state and federal law, the more employee-friendly standard governs. Thus, if Biden's proposed plan is implemented, Missouri employers will need to follow the federal standard.

Given the likely upcoming shift toward a presumption of an employer/employee relationship, employers should audit their workforce to determine if current worker classifications would pass muster. Special consideration should be afforded long-term contractors, where there is higher risk of potential liability. We anticipate updated federal guidance on this issue in the coming months and getting ahead of the probable spike in federal enforcement on this issue is advisable.

Tueth Keeney will continue to monitor this area of the law and will update you when changes are announced. If you have any questions or concerns about worker classification, please contact a Tueth Keeney attorney to discuss the matter further.