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Targeted Litigation Tactics Can Advance Return to Common-Law Agency Test for Worker Classification

by Michael J. Lotito

In recent years, the independent-contractor business model has been under attack. This attack, which reached peak levels during the Obama Administration, has led to a proliferation of different standards for determining whether a worker is an independent contractor.

By way of example, the Internal Revenue Service uses a "right to control" test, which focuses on behavior control, financial control, and the relationship of the parties. The U.S. Treasury uses a modified "right to control" test for Affordable Care Act purposes. The Department of Labor looks at the "economic realities" of the relationship between an independent contractor and the putative employer under the Fair Labor Standards Act, but uses a right-to-control test under the Employee Retirement Income Security Act of 1974 and in interpreting federal discrimination statutes. If these variations were not enough, there is also a patchwork of tests used to determine whether an independent-contractor relationship exists for state-law purposes, including workers' compensation and unemployment regimes and wage-and-hour laws.

This proliferation is the result of disregard by many administrative agencies, on both the state and federal levels, of their obligation to apply common-law principles of agency to independent-contractor issues. In fact, the U.S. Supreme Court has explicitly stated that when Congress uses the term "employee" without defining it, its intent is to describe the conventional master-servant relationship as understood by common-law agency doctrine. Instead of implementing Congressional intent, many agencies have inferred Congressional silence on independent-contractor issues as a sort of *carte blanche* to disregard common-law principles in favor of advancing activist agendas. This activism has successfully transformed independent contractors into employees, creating liability for the putative employers while generating legal fees for lawyers.

What's worse is that the proliferation of these tests have made it nearly impossible for businesses to structure their relationships with independent contractors and be sure that these contractors will continue to be considered independent. In an increasingly shared economy, this concern has created significant operational impediments—a concern that only will become more acute as businesses transition jobs due to technological improvements and artificial intelligence, developments which will likely result in the displacement of many employees.

Given that these agencies have disregarded their obligation to enforce the statutes Congress has enacted, it is time for employers and litigants to force administrative agencies to adhere to their mandate: apply common-law principles of agency to independent contractor determinations, *unless a specific statutory definition or standard exists.* As opportunities develop to litigate issues relating to whether a worker is classified as an independent contractor or employee, businesses should reach out to Washington Legal Foundation. This will ensure identification of opportunities to rein in these agencies, to force them to adhere to their statutory mandates, and to apply the common law of agency in appropriate circumstances.

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