Embracing Legal Requirements for Use of Independent Contractors

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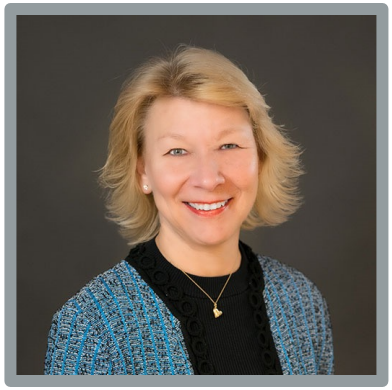

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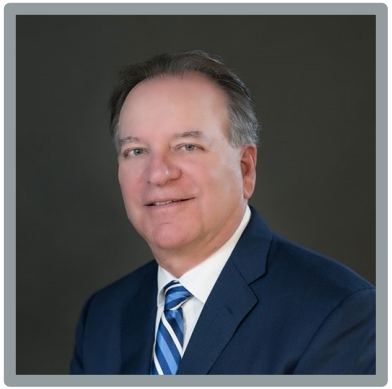

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AGENDA

I. WHY ARE WE HERE?

II. SO, WHY DO WE CARE ABOUT WHETHER THE "WORKER" (neutral term) IS AN "EMPLOYEE" OR "INDEPENDENT KOR"?

III. HOW DO YOU PARSE "FISH FROM FOWL"?

IV. LET'S CREATE MORE PAIN FOR HUMAN RESOURCES PERSONNEL

V. NEW LEGAL PARADE IN BLUE STATE JUDICIARIES

VI. NEW FEDERAL (DREADED) RULE ON ICs ABOUT TO HATCH

ABBREVIATIONS

- ❑ EE Employee
- ❑ IC Independent Contractor
- ❑ K Contract
- ❑ KORs Contractors

As the U.S. Supreme Court had occasion to note almost 80 years ago:

"Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship, and what is clearly one of independent entrepreneurial dealing." N.L.R.B. v. Hearst Publications, 322 U.S. 111, 121 (1944), reh'g denied, 322 U.S. 769 (1944).

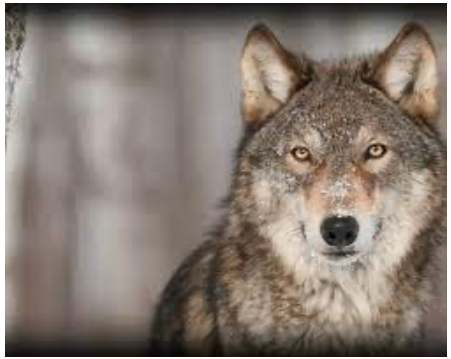
And nothing has changed in those 80 years to make this "line drawing" problem any easier, particularly given the increasing number of "alternative work arrangements" emerging in the "gig" economy.[1]

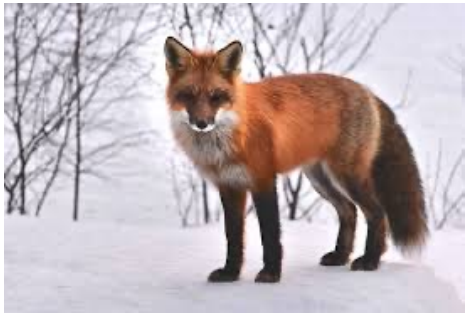
[1] The "gig" economy refers to a work environment in which short-term service engagements are common and companies and institutions rely heavily on the use of "independent contractors" and less so on longer-term "employees."

I. WHY ARE WE HERE?

ONLY FOUR WORK CREATURES ON EARTH:

1) EMPLOYEES
2) INDEPENDENT CONTRACTORS
3) PARTNERS
4) VOLUNTEERS





I. WHY ARE WE HERE? (Con't)

Compare: CORPORATIONS

THERE ARE SUB-SPECIES OF EACH OF THESE PRIMARY WORKING CREATURES

EEs:

- Full Time
- Part-Time
- Temporary
- Seasonal
- Intern

I. WHY ARE WE HERE? (Con't)

- ❑ INDEPENDENT KORs:
  - Thru a staffing agency
  - On their own (solo)

- ❑ Partners
  - Equity Partners
  - Non-Equity Partners (STOP!)

    If it is "non-equity," it is an EE and CANNOT be a "Partner"

- ❑ Volunteers
  - Unpaid worker
  - Candy Striper
  - Intern

I. WHY ARE WE HERE? (Con't)

Corporations:

- Joint Venture = a corporation jointly owned/managed by two companies
- There are two forms of corporate partnerships
  - P.C. (Professional Corporation)
    - Common as to lawyers/accountants
    - Equity owners are "Shareholders"/employees and NOT "Partners"
  - LLC (Limited Liability Corporation)
    - Equity owners are "Shareholders"/employees and NOT "Partners"

II. SO, WHY DO WE CARE ABOUT WHETHER THE "WORKER" (neutral term) IS AN "EMPLOYEE" OR "INDEPENDENT KOR"?

- First: 40% (65 million) of the 163 million workers in the U.S. Civilian Labor Force (CLF) are now Independent Contractors.

- That percentage and number (both) of ICs are recently steadily growing in quantum leaps year-over-year (69% since 2020)

38.2%	51.1%	64.6%
2020	2021	2022

II. SO, WHY DO WE CARE…? (Con't)

- Second: Historically, Employees had "rights" under state and federal statutes, and ICs had rights only under service or supply contracts.
- In the last several years, the Plaintiffs' employment law bar has realized both that IC use is skyrocketing and that corporate HR departments across the country are routinely "misclassifying" true "employees" as "Independent Contractors." This realization has led to a major shift in Wage/Hour litigation AWAY from typical minimum wage, overtime, missed rest and meal breaks & no seats litigation to "misclassification" cases where all these claims may be brought, plus claims for benefits

II. SO, WHY DO WE CARE…? (Con't)

- Third: Lots of Implications of being an IC:
  - NO state or federal taxes withheld
    - Taxing authorities sick about the loss of income taxes they suspect ICs are NOT paying
  - Rights conveyed by "statutes" protecting "employees" miss and do not protect ICs

II. SO, WHY DO WE CARE…? (Con't)

- Few statutory or civil rights protections extend to ICs (except as to African Americans pursuant to 42 U.S.C. Section 1981, aka the Civil Rights Act of 1866: requires non-discriminatory contracting)
  - ➢ NO Title VII protections
    - NO sexual harassment protection of young female ICs
    - NO Wage/Hour protections (Fair Labor Standards Act=FLSA)
- NO unions (National Labor Relations Act (NLRA) only provides rights to "employees")
    - Hence "Blue states" readying to re-write employment statutes to also provide statutory rights to Independent Contractors

II. SO, WHY DO WE CARE…? (Con't)

- NO benefits and perks corporations typically make available to "employees"
  - NO PTO
  - NO health care coverage
  - NO stock or stock options
  - NO 401(k) plan
  - Etc.

III. HOW DO YOU PARSE "FISH FROM FOWL"

- HR names for these Four Work Creatures do NOT count
  - What counts is the essence of the work
    - Does "control" of the work (neutral term) exist or is the "control" only over the result
    - Quick, informal, & broad dipstick test for ICs:
      - EE: Someone "controls" the "means & manner" of the work of the worker
      - IC: Someone controls only the result of the worker's work

III. HOW DO YOU PARSE "FISH FROM FOWL" (Con't)

- EACH OF THOSE FOUR CREATURES ARE DEFINED IN LAW (not by function)
  - COMMON SENSE DOES NOT HELP YOU. THIS IS TECHNICAL. YOU ARE DEALING WITH LEGAL DEFINITIONS
- UNFORTUNATELY, HR HAS BEEN VERY CASUAL OVER THE YEARS AND TOO OFTEN DOES NOT SPEAK IN TERMS OF THE LEGAL DESCRIPTION OF A WORKER
  - "Temp"
  - "Consultant"
  - "Partner"

III. HOW DO YOU PARSE "FISH FROM FOWL" (Con't)

- Bad News: There is NOT one homogenous definition of the term "employee"
  - It depends on the statute you are concerned about (and how THAT statute defines the term "employee")
    - EXAMPLE: An unpaid Intern does not exist under the Fair Labor Standards Act (FLSA=minimum wage and OT), but is a "Volunteer" under the "Common Law" definition of the term "Employee" (can't sue for sexual harassment under Title VII or unionize, for example. Not in your AAPs)

III. HOW DO YOU PARSE "FISH FROM FOWL" (Con't)

- OFCCP/Title VII/National Labor Relations Act (NLRA) provide jurisdiction to ONLY "employees" AND use "the Common Law" definition to determine who that is
  - A Volunteer may thus NOT file a Complaint with OFCCP, or a Title VII Charge with the EEOC, or an NLRA Petition with the NLRB (because a "Volunteer" is not a Common Law employee), BUT could file a minimum wage/OT FLSA Complaint filed with the USDOL Wage and Hour Division
  - So an unpaid intern is not an "employee" for the purposes of the 3 above-referenced statutes, but is nonetheless—at the very same moment in time--an "Employee" for purposes of the FLSA—because "economically dependent" on the employer

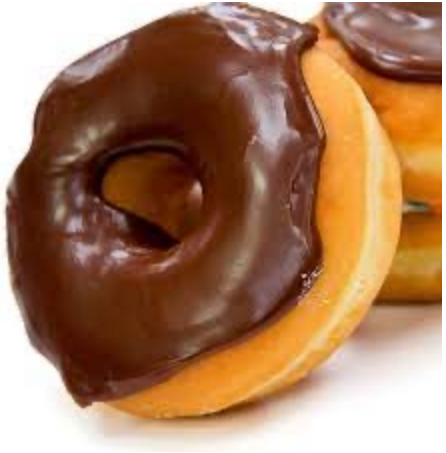
IV. BUT, LET'S CREATE MORE PAIN FOR HUMAN RESOURCES PERSONNEL

- Different legal tests are emerging to BROADEN the definition of the term "Employee"
- Since the time of the Pilgrims, U.S. "Common Law" has borrowed from British "Master and Servant Law" (no kidding) the notion of "control of the manner and means of the work" to find a worker to be an "employee."
  - Early lead legal case in the U.S. on the "employee" issue had to determine if a wealthy landowner was legally responsible for one of his field hands who drove a team of horses and wagon belonging to the landowner over a pedestrian and killing him while the field hand was driving his master's farm produce to market
  - EE? IC?

V. NEW LEGAL PARADE IN BLUE STATE JUDICIARIES

- Out with the old; in with the new!
  - ENTER: The "ABC" test:
    - The at-issue "worker" is an "employee" unless all the following 3 things are true:
      A. No Control: The worker is free from the control and direction of the hiring entity (under the K and in the performance of the work)

V. NEW LEGAL PARADE IN BLUE STATE JUDICIARIES (Con't)



B. IC does not mirror the work of Employees. The worker performs work outside the usual course of the hiring entity's business (i.e., no employees are a "mirror image" to the ICs)
   - [This is the death knell for most big corporations hiring ICs: rejects the Dave Packard "donut design" of employee staffing]

V. NEW LEGAL PARADE IN BLUE STATE JUDICIARIES (Con't)

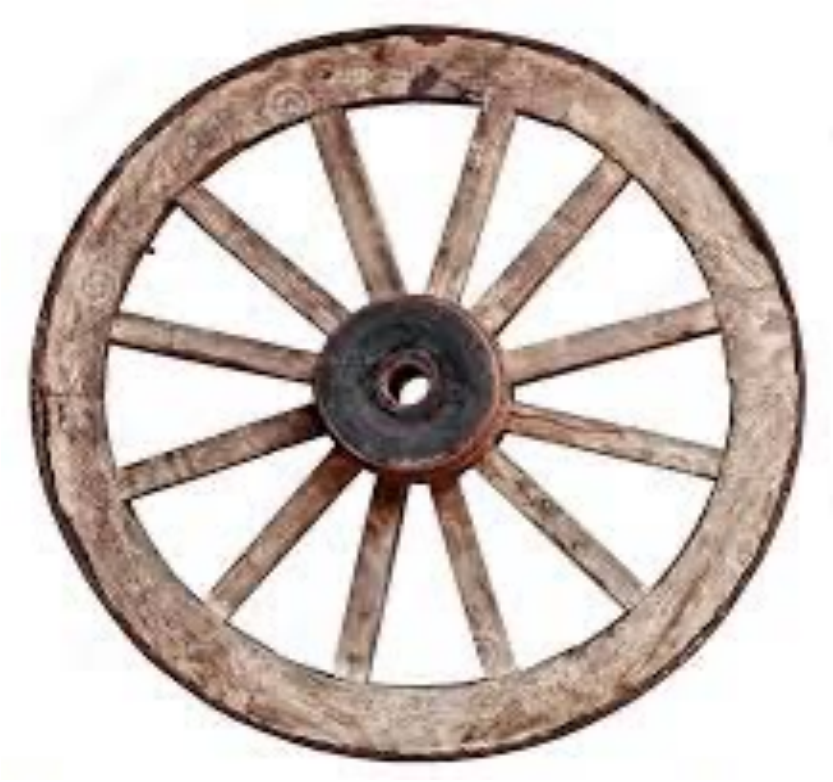
C. The IC engages in a recognized trade. "The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."

[This establishes a "technical need" requirement to be an IC and is the death knell of corporations seeking ICs to perform unskilled work or provide production labor. Is a "Door Dash" driver in an "established trade, occupation, or business?" Maybe. What about an unskilled laborer on a factory production line? Likely not, right? Is an "established trade" only those trades originally formed as Middle Ages "Craft Guilds" made up of craftsmen (there were no craft women) and artisans in the same occupation, such as oil painters, armorers, hatters, carpenters, bakers, weavers, masons & blacksmiths?]

NOTE: Where are the "lists" of acceptable "established trades, occupations, or businesses" that will satisfy the ABC legal test?

V. NEW LEGAL PARADE IN BLUE STATE JUDICIARIES (Con't)

The wagon wheel maker is the classic and quintessential independent contractor.



VI. NEW FEDERAL (DREADED) RULE ON ICs ABOUT TO HATCH

- October 13, 2022: Notice of Proposed Rulemaking to modify analysis used to determine independent contractor classification under the FLSA
  - Revised "Totality of Circumstances" Test proposed:
    1. Opportunity for profit or loss: Does the worker exercise managerial skill that affects their economic success or failure?
    2. Investment by the worker and the employer: Does the worker make capital or entrepreneurial investments in their business?
    3. Degree of permanence of work relationship: Is the work relationship indefinite in duration or continuous in nature?
    4. Nature and degree of control: Does the business control, **or reserve control**, over the performance of the work and the economic aspects of the relationship?
    5. Extent to which the work performed is an integral part of business: Is the function the worker performs critical, necessary, or central to the principal business?
    6. Skill and initiative: Is the worker using a specialized skill to perform work?

VI. NEW FEDERAL (DREADED) RULE ON ICs ABOUT TO HATCH (cont'd.)

- No predetermined weight to various factors (no one-factor determinative)
  - So, no "bright line" legal test. Need lawyer at HR's side, worker-by-worker
- Wage and Hour Division will view the relationship in light of the "economic reality" of the "whole activity" the worker performs
- DE Week in Review discussion: https://directemployers.org/2022/10/17/ofccp-week-in-review-October-17-2022/#usdol-independent-contractor
- WHD in January 2023 projected May 2023 as the month it would publish its Final Rule

THANK YOU

DISCUSSION
and
QUESTIONS?

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