SANDBERG PHOENIX

EMPLOYER LAW BLOG

Independent Contractor vs. Employee: The Classification Battle is Far From Over

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Far from over is the battle between classifying workers as independent contractors or as employees.

With lots and lots of money at stake, the Department of Labor has once again tried to reduce the tests for how a worker should be treated to six (6) factors. That's way down from the 21 (21) common law tests that the U.S. Supreme Court adopted decades ago, stating that Congress had failed on numerous occasions to define when a worker is an employee.

Briefly, the six-factor test is:

1. A worker's opportunity for profit or loss;
2. Investments by the worker and the potential employer;
3. The degree of permanence of the work relationship;
4. The degree of control the putative employer has over the work;
5. How integral the work is to the employer's business;
6. The use of the worker's skill and initiative.

We will spare the reader of all 21 common law tests for an independent contractor v. employee. Suffice it to say, the six factors are reminiscent of at least six of the 21 tests.

So, what has changed? One might conclude: not much. One of the important tests is the existence, or lack thereof, of a Written Agreement between the worker and the business.

Why is it important to know whether a worker may be classified as an employee or not? Among the important effects are:

- The obligation to withhold from the worker's wages or other pay applies to employees only.
- Wage and overtime rules apply to employees.
- The obligation to pay FICA taxes.
- Coverage for benefit plans, including 401(k), health plans and profit sharing, which apply to employees.
- Employment lawsuits apply only in the case of employees.

It explains why the DOL received more than 54,000 comments on the proposed change in the testing rules. It also evoked this announcement from Acting Secretary Su with respect to the rules:

"Independent contractors who are in business for themselves play an essential role in our economy, and this rule won't change that."

What Time Is It in California?

It's time for ABC.

California skins the cat three ways, and the California Supreme Court has provided this explanation:

1. The type and degree of control the business exercises over the worker.
    1. EE: Work-at-home knitters and seamstresses were within the employer's control when the workers were furnished the same patterns to produce clothing.
    2. I/C: A construction worker was not under the control of the business where the worker set his own schedule, worked without supervision, purchased all materials using his own business credit card, and had declined an offer of employment proffered by the business.
2. Is the work in the usual course of the hiring entity's business?
    1. I/C: When a retail store hires an outside plumber to repair a leak.
    2. I/C: Or hires an electrician to install a new electrical line.
    3. EE: When a bakery hires cake decorators to work on a regular basis on its custom-designed cakes.
    4. EE: When a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns it supplies.

3. Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?
    1. I/C: Incorporation, licensure, advertisements,
    2. I/C: Routine offerings to provide the services of the independent business to the public or to a number of potential customers.
    3. EE: A worker is not necessarily an independent contractor by requiring the worker to sign a contract designating the worker an I/C.
    4. EE: For example, where a taxi driver was required to hold a municipal permit that may only be used while that driver is employed by a specific taxi company.