How Laws Impact Independent Contractor Determinations

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There are many legal tests for assessing whether a worker is an independent contractor or an employee. The distinction is important under federal, state, and local tax laws, affects contract and tort liability exposure, and raises federal and state labor law compliance issues. Plus, it can affect insurance, employee benefits, and myriad other issues.

Worker classification is not determined merely by labels. Various government agencies and the courts can make their own assessment of who is an employee. In appropriate cases, the government can retroactively recharacterize workers, so the stakes can be huge. The courts have long been divided on how to define and interpret these rules. Even today, there is no single test for determining worker status.

The IRS and a variety of state and federal agencies make worker-status determinations, so a worker may be classified as an employee for one purpose and as an independent contractor for another. Quite apart from tax status, workers classified as employees have rights under federal labor and employment laws. Consequently, issues of statutory coverage and liability may turn on whether a person is found to be an employee.

Gradients of Control

Although tests for assessing worker status have differing formulations, the tighter the company's right to control the worker, the more likely he will be considered an employee. Most of the classification methods also evaluate the degree to which the worker is integrated into the company's operations, the worker's special skills, the longevity of the relationship, the company's ability to terminate the relationship, and so forth. These and other factors are used as earmarks of employment.

A court or agency must determine the worker's true status by evaluating the governing contract and business records. If the worker is micromanaged and subject to the employer's unfettered control, an ''independent contractor'' label in a contract will probably not save the worker from being recast as an employee.

Legal Requirements

Worker classification involves a fact-intensive determination. Because virtually everything is relevant in making the characterization determination, legal and regulatory requirements affecting the working relationship should also be considered. For example, suppose a trucking company mandates that its drivers drive for a maximum of eight consecutive hours before being required to rest.

This rule may appear to be one facet of employer control, which, along with myriad other contract provisions, rules, and practices, should be relevant in assessing whether the putative employer has exercised (or reserved the *right* to exercise) sufficient control to dictate employee status. However, if the eight-hour driving maximum emanates from federal or state transportation rules, can this requirement fairly be attributed to the company as a badge of control? In the few cases that consider such a point, the answer appears to be no.

Of course, employers may subject their workers to requirements that *exceed* prescribed regulations. For example, suppose an employer requires workers to check in with the company not fewer than once every 24 hours, because federal or state law imposes such a requirement. Suppose, then, that the applicable law changes to require workers to check in only once every 48 hours. If the employer is ignorant of this change and continues to require 24-hour check-in, should this enhanced level of ''control'' be considered in assessing the worker status?

Does it matter if the employer exercised due diligence in attempting to keep itself abreast of such legal and regulatory changes? Does it matter if the worker's status is being examined two weeks after the pertinent legal change was made, or five years after the legal change?

How one answers those questions is important, and is to some extent subjective. Some degree of employer rulemaking beyond bare legal requirements should not necessarily constitute sufficient control to import employee treatment to the worker. Nuances will be important.

Case Law and Legal Control

Although one may first think of the IRS in worker status controversies, it does not appear that this ''legal control'' issue has been expressly discussed in tax cases.

It has, however, come up in federal labor and employment law decisions. For example, in *National Labor Relations Board v. Associated Diamond Cabs, Inc.*,[1] the court evaluated whether Miami taxi drivers were independent contractors or employees. City of Miami regulations required taxi drivers to fill out ''trip sheets'' to record all trips, their origin and destination, fares charged, and the time of each trip. At the end of each day, drivers submitted their trip sheets to the company, which were retained for inspection by the city.

The court found that trip sheets did not evidence control by the company. In fact, the court said government regulations constitute supervision not by the employer but by the city. In effect, the *law* controlled the driver, not the employer. As a result, the court found that the regulations failed to evidence control by the company.

Similarly, in *K&D Auto Body, Inc. v. Division of Employment Security*,[2] the court considered federal drug testing laws and worker classification. K&D required its drivers to sign agreements affirming their independent contractor status, but Missouri found the drivers to be employees. On appeal, because K&D could require drivers to take random drug tests, Missouri claimed this indicated employment.

The appellate court ruled that the company had not required more from its workers than the law required. Thus, the drug tests done could not be considered control. However, as the *remaining* factors demonstrated an employer/employee relationship, the court held the truck drivers to be employees.

In *Air Transit v. National Labor Relations Board*[3] (NLRB), a cab company sought reversal of an NLRB decision ruling its cab drivers to be employees. Air Transit was a Virginia corporation providing taxicab services at Washington Dulles International Airport. The Federal Aviation Administration gave Air Transit the exclusive right to operate taxicab service at Dulles.

Air Transit used the services of approximately 100 taxicab drivers, who provided their own vehicles and picked up passengers from a designated cab line. Air Transit put a uniformed dispatcher at the head of the line to direct passengers and help with their luggage. Air Transit charged drivers $72 a week for participation in the feed line, but Air Transit received no share of the drivers' earnings.

The drivers did not report their earnings to Air Transit; did not keep trip sheets, manifests, or other accounts of their earnings; and had control over their own schedules. Drivers did not receive benefits, vacation time, sick leave, workers' compensation, or unemployment insurance from Air Transit. All drivers were personally responsible for their own accounting and self-employment taxes, and received no training.

However, Air Transit drivers were subject to many rules, some mandated by Air Transit's contract with the FAA, some required by Virginia law. Drivers had to use a radio dispatch system, wear name tags, maintain taxicabs in safe operating condition, display certain language and Air Transit's telephone number on the taxicab, display rate information, possess a valid driver's license, and license their vehicles for use in Loudon County, Va. Air Transit also enforced rules that were not required by the FAA contract or Virginia law, including requirements that drivers charge a flat rate for some customers, post a notice in their vehicles about how to file passenger complaints, and purchase greater insurance coverage than required by Virginia law.

The NLRB claimed that those controls meant the drivers were employees. Yet the appeals court ruled they were independent contractors. Most of the ''controls'' were mandated by the FAA contract or by Virginia law. The few remaining employee-like factors were grossly outweighed by factors suggesting they were independent contractors. Although Air Transit exercised *some* control over the drivers beyond legal regulations, it was insufficient to find the drivers to be employees.

More Case Law on Legal Controls

Taxicab companies seem to feature prominently in the ''legal control'' cases. For example, *Local 777, Democratic Union Org. Comm. v. NLRB*[4] involved two cab companies providing taxicab service in Chicago. The NLRB ruled the cab drivers were employees.[5] The court reversed, finding the facts insufficient to support employee status.

Each cab driver signed a lease under which the driver paid a fixed fee ($22 for a day lease, $15 for a night lease) and an hourly fee for late returns. The driver leased the cab for two days at a time, or three days on weekends. The driver agreed to be the sole driver, not to sublease the cab, to inspect it at the beginning of the lease and report defects, and to return the cab in good condition with a full tank of gas. The company provided the taxicab, the cab license, liability insurance, antifreeze, oil, towing service, tires, and maintenance. The lease said the drivers were not required to operate taxicabs in a prescribed manner, to accept calls or dispatches, to report their location, or to keep the cab in a designated location.

The drivers were required to comply with all applicable laws, ordinances, rules, and regulations. Chicago municipal regulations and state law governing taxicab drivers required taxicabs to be operated regularly to meet public demand for service, the meter flag to be kept down when the cab was carrying passengers, and that everyone requesting a ride was to be picked up, unless the cab was occupied. The municipal code established fare rates, prohibited passengers in the front seat, and prohibited refusing to transport passengers from the airport to the suburbs. Municipal regulations regulated courtesy to passengers, driver appearance and attire, and driver conduct at cab lines. Drivers could not use drugs, carry weapons, loiter in public outside their cabs, leave their cabs unattended, or violate traffic laws.

Drivers' conduct was never controlled by the cab companies. Drivers were not required to operate in any

[1]702 F.2d 912 (11th Cir. 1983).
[2]171 S.W.3d 100 (Mo. App. Ct. W.D. 2005).
[3]679 F.2d 1095 (4th Cir. 1982).
[4]603 F.2d 862 (D.C. Cir. 1978).
[5]*Yellow Cab Co.*, 229 NLRB Dec. 1329 (1977).

prescribed manner, report the cab's location, buy gas from the cab company, accept calls or dispatches, or keep their cab in a designated location. Drivers were on their own once they left the garage, and were free to prospect for fares in any manner. The only requirements the cab company enforced were the daily rate for the cab, care and skill in driving, and compliance with applicable laws and regulations. The court found compliance with the law was not control by the employer, and ruled the drivers to be independent contractors.

In *SIDA of Hawaii, Inc. v. NLRB*,[6] a company of independent taxicab owner-operators argued that its members were independent contractors. SIDA was a self-governing trade association, providing a collective body of independent drivers to compete with larger taxi companies in bidding for the right to operate at Honolulu International Airport. SIDA had an exclusive contract to provide taxi service at the airport. Any qualified applicant could be a member of SIDA by owning a suitable vehicle, having a valid license, and having an acceptable personal appearance. If the applicant was approved, he signed a Standard Independent Drivers Contract with SIDA.

The court found an absence of actual control by SIDA because of the following:

- Drivers made substantial personal investments in their taxicab activities, purchasing and maintaining their own vehicles; obtaining all necessary city and state permits; paying their own income taxes, health insurance, Social Security, unemployment benefits, and auto insurance; and paying a monthly stall rental fee to SIDA, along with a 50-cent trip fee for each trip made out of the airport.
- Drivers were substantially independent in their operations. They were free not to work for SIDA, could work for other cab companies, could make their own arrangements with clients, and were not limited to operate in a particular area. Fares were not determined by SIDA but by local ordinances, and were collected and retained by the drivers. SIDA did not pay compensation to the drivers, did not withhold taxes, and kept no income tax records for them.
- Drivers' contracts specifically provided for an independent contractor relationship.

The NLRB argued that SIDA's rules, regulations, and enforcement were strong evidence of the company's control over the drivers. The court disagreed. Many of SIDA's regulations merely incorporated requirements imposed by its commercial contracts and state and local ordinances. Thus, the court found the owner-operators to be independent contractors.

Legal and Community Standards

Meyer Dairy, Inc. v. NLRB,[7] involved the status of milk distributors as independent contractors or employees, and put a particular spin on the existence of compliance with laws. Meyer Dairy Distributors Association was a group of milk distributors that petitioned the NLRB to bargain with its putative employer, Meyer Dairy Co.[8] The company countered that association members were independent contractors. The NLRB found the association members (distributors) to be employees, and the company appealed to the Tenth Circuit.

Meyer Dairy Co. contracted with retail distributors who agreed to purchase the company's dairy products at fixed prices, and to sell the products to customers in specified areas. The distributors delivered dairy products to customers over fixed routes. They provided their own trucks for delivery, paid all costs and expenses of operation, and could hire helpers if needed. The company provided distributors with suggested retail prices, but they were not required to adhere to them. The distributors' contract required them to comply with regulations and policies of public health authorities, and meet standards established by the company, consistent with similar dairy businesses in the greater Kansas City area.

Distributors had no other obligations to the company except to pay for the products they purchased. Distributors had complete control over their sales and decisions regarding credit, were responsible for losses from retail sales, paid their own income and Social Security taxes, controlled their vacations, and provided their own self-retirement plans or medical and liability insurance.

The court found that the distributors were essentially holders of franchises to sell Meyer Dairy products within a specified area. They were not controlled by the company except to maintain standards required by state law, and thus were independent contractors.

In *Global Home Care, Inc. v. State, Dep't of Labor & Employment Security*,[9] similar issues arose in the healthcare industry. The Florida Department of Labor and Employment Security ruled that live-in aides were employees, and Global appealed. The Florida Court of Appeal reversed, holding that Global's lack of control over the aides rendered them independent contractors. Notably, the court held that Global's insistence on compliance with state regulations did not constitute supervision of the aides.

The court held the aides to be independent contractors because they worked for other agencies, at sites away from company supervision, and because the clients provided materials and a workplace. The aides were engaged only as needed on a temporary, per-job basis, and both parties intended an independent contractor relationship. Moreover, the majority of control Global exercised over its aides was done to comply with state requirements for home healthcare. Other aspects of control were deemed too minimal to be significant.

Control in Excess of Regulations

In *Associated Diamond*, *Air Transit, Local 777*, *SIDA of Hawaii*, *Meyer Dairy*, and *Global Home Care*, the employers did not wield control significantly in excess of pertinent regulations. They merely imposed standards following

[6]512 F.2d 354 (9th Cir. 1975).
[7]429 F.2d 697 (10th Cir. 1970).
[8]*Meyer Dairy, Inc., subsidiary of Milgram Food Stores, Inc.*, 178 NLRB Dec. 454 (1969).
[9]521 So. 2d 220 (Fla. Dist. Ct. App. 2d Dist. 1988).

federal or municipal regulations. In *K&D Auto Body*, the control went well beyond compliance with law. The courts in those cases suggest that to have workers reclassified as employees, an employer must wield pervasive control exceeding the scope of the government-imposed control to a significant degree.

The court in *Global* recognized the complexity that compliance with laws adds to the worker-status mix. The cases take a reasoned, realistic view of the amount by which a putative employer exceeds legal requirements. An employer's imposition of rules infinitesimally larger than legal requirements should presumably not be fatal to a claim of independent contractor status.

Conversely, there should also be no special latitude (that is, no special allowance for employer controls just because there is also a legal framework). The legal or regulatory environment should be entirely neutral to the employee vs. independent contractor characterization question, at least if the employer's regimen of rules exactly tracks the legal requirements.

Evaluating Extra Controls

Employers who subject workers to requirements and standards in *excess* of legal requirements should be scrutinized. Thus, in *National Labor Relations Board v. Deaton, Inc.*,[10] the court considered the status of interstate courier drivers in the context of Interstate Commerce Commission (ICC) and Department of Transportation regulations. Each truck traveling in interstate commerce must be certified. The goal of such registration is to promote safe operation of trucks, and to ensure continuous financial responsibility so that truck-related losses receive compensation.

The court found it to be unnecessary to decide whether ICC-mandated controls alone would be sufficient to establish employee status. The court analyzed the substantial nexus of control required by federal regulations, but found that the facts established the existence of "additional control" voluntarily reserved by the employer. For example, although ICC regulations required Deaton to make standard inquiries, Deaton more thoroughly checked out all drivers, including their work references, police records, and driving records.[11]

Moreover, although ICC regulations forbade any disqualified person from driving, Deaton's practice of assessing whether a driver was a "good risk" involved a subjective, employer-like inquiry. The court found this inquiry to be qualitatively different from merely ensuring that drivers were not barred from commercial driving. Based on the control exerted by the company over the drivers, the court found the drivers to be employees.

Conclusions

The cases illustrate that an overlay of legal controls on work performance can make already tough independent contractor vs. employee characterization determinations tougher still. Usually, that will require reference to applicable law, and evaluation whether the putative employer merely tracks the law or goes beyond it. However, that problem can be exacerbated when legal or regulatory standards are amorphous.

For example, how should one evaluate a requirement that sales people receive training that is "thorough and adequate"?[12] Although rules from regulatory bodies ought not to bespeak employment,[13] exactly what is *required* by the government's rules may not be clear. In that circumstance, it may be particularly difficult to fairly determine whether the employer is merely trying to duplicate legal requirements, or inject its own standards as well.

In theory, rules imposed by law should be neutral to contractor-employee determinations. In fact, at least in the context of labor and employment law decisions, the courts have consistently held that governmental regulations do not evidence control by the employer.[14] Rules imposed by the government constitute supervision not by the employer, but rather by the state.[15]

However, even a seemingly sensible rule may be very difficult to apply in practice. For example, suppose a multistate employer requires independent contractor and employee painters alike to wear protective gear when spraying. Further, suppose that the protection is not required in 2 of the 15 states in which the employer operates, but uniformity and ease of administration explain the company's uniform policy.

Although technically this may mean the employer's safety rules fall outside of the protective umbrella of legal requirements in the two nonconforming states, perhaps this kind of discrepancy should not be held against the company in a worker-classification dispute. Alternatively, perhaps it should be held against the company only in those two states. The answer remains unclear.

At the very least, when worker-status issues are examined, the presence of laws and regulations that affect that relationship must be considered. The case law (at least in the labor and employment law field) demonstrates that a legal regime should not be treated as employer control, but rather as control by the pertinent legal authority. How applicable those authorities are in federal and state tax law, tort cases, and so forth, however, is also unclear.

Although legal controls should generally be discounted in making worker-status determinations, the extent to which variations between an employer's rules and legal requirements should be examined, and particularly whether any variations should be strictly construed against the employer, are largely unclear. The authorities have thus far examined this issue in the context of federal labor and employment laws. However, the same issues may be expected to arise in federal and state tax cases, and in state tort law cases. Those issues may also impact

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[10]502 F.2d 1221 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975).

[11]*Id.* at 1224.

[12]*See* Title 10, Cal. Code of Regulations, section 2695.6 (applying to insurance sales persons).

[13]*See K&D Auto Body, supra* note 2.

[14]*Associated Diamond Cabs, supra* note 1, at 922.

[15]*Local 777, supra* note 4, at 875; *Global Home Care, supra* note 9.

legal disputes between the workers themselves and the company over their status as either independent contractors or employees.

As with so much else in the field of employee vs. independent contractor classification, the presence of laws regulating worker or company conduct in a particular industry or location will require careful thought and attention. One must consider the factual setting, the specifics of the relevant laws, and the manner in which the employer incorporates legal compliance into its operations, as well as into its relationship with its workers.