July 2016 Independent Contractor Misclassification and Compliance News Update

Blog Independent Contractor Compliance and Misclassification Legal Blog

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Four of the five independent contractor (IC) misclassification cases reported below from July 2016 illustrate how companies continue to fail to structure, document, and implement a business's IC relationships in a manner that minimizes the likelihood of being targeted by class action lawyers and regulators. These four cases involve two types of workers: drivers in the delivery/logistics and transportation industries, and musicians in the performing arts industry. Both types of workers can be bona fide ICs if their relationships are structured, documented, and implemented in a compliant manner. How can companies in these and other industries enhance their IC compliance? As noted in our White Paper on minimizing IC misclassification liability, this takes a focused effort using diagnostic tools designed to assess and then enhance IC compliance.

In the Courts (3 cases)

LOGISTICS COMPANY SERVING HOME DEPOT, J.C. PENNY AND SEARS SETTLES DRIVERS' IC MISCLASSIFICATION LAWSUIT FOR $13.5 MILLION. A California federal judge has granted preliminary approval of a $13.5 million class action settlement between logistics company, Exel Direct Inc. (Exel), and 386 delivery drivers in their class action IC misclassification lawsuit, subject to a December fairness hearing. Exel, now known as MXD Group, provided retailers such as Home Depot, J.C. Penney and Sears with delivery drivers to make home deliveries of furniture and other oversized items purchased in those stores. The Court concluded that "the Settlement is sufficiently within the range of reasonableness to warrant the preliminary approval of the Settlement, certification of the Class, the scheduling of the Fairness Hearing, and the mailing of notices to Class Members." *Villalpando v. Exel Direct Inc.,* Nos. 12-cv-04137-JCS and 13-cv-03091-JCS (N.D. Cal. July 12, 2016).

PORT TRUCKERS SETTLE IC MISCLASSIFICATION CLASS ACTION WITH TRUCKING COMPANY FOR $5 MILLION. A class of port truckers has reached a tentative $5 million settlement with QTS Inc., a trucking company, and its related entities in an IC misclassification class action. The proposed class consists of almost 400 Latin- and Korean-American truck drivers who are represented by the Wage Justice Center and Asian Americans Advancing Justice-LA. The complaint, first brought in 2013 and most recently amended on July 7, 2016, alleges that the trucking companies violated various provisions of California and federal law by misclassifying drivers as independent contractors, making unlawful deductions from their pay, failing to reimburse them for meal and rest breaks and expenses reasonably incurred during their employment, and engaging in unfair competition. During the long course of litigation, QTS also filed for bankruptcy. The drivers' motion for preliminary approval of the settlement is scheduled to be heard on August 12, 2016. *Talavera v. QTS, Inc.,* No. BC501571 (Cal. Super. Ct. Los Angeles County, July 14, 2016).

UBER UNSUCCESSFUL IN COMPELLING ARBITRATION OF IC MISCLASSIFICATION CASE IN PENNSYLVANIA. Uber's motion to compel arbitration and stay the proceedings in an IC misclassification class action was denied by Pennsylvania federal court on grounds that the plaintiff limousine drivers demonstrated that they had "opted out" of Uber's Arbitration Agreement. Uber, a ride-hailing company providing on-demand car services to the public, unsuccessfully argued a highly-technical legal assertion that the

drivers' opt-outs were invalidated by an order issued in another Uber case being litigated in a California federal court that "nullified" the arbitration provision and therefore rendered ineffective the drivers' right to opt out of the Arbitration Agreement. The Pennsylvania court rejected that argument and held that, as a matter of law, the California judge's order did not render the Arbitration Provision a nullity and that the drivers did not agree to arbitrate whether a court or arbitrator should determine this issue because they opted out from the Arbitration Provision. The drivers will now continue to litigate their misclassification claims against Uber in federal court in Pennsylvania alleging violations of the Fair Labor Standards Act, Pennsylvania Minimum Wage Act, and Pennsylvania Wage Payment and Collection Law. *Razak v. Uber Technologies, Inc*., No. 16-cv-573 (E.D. Pa. July 21, 2016).

Administrative and Regulatory Initiatives (3 matters)

NLRB FINDS MUSICIANS ARE EMPLOYEES, NOT IC'S, AND MAY THEREFORE CHOOSE TO BE REPRESENTED BY A MUSICIANS UNION. The NLRB ruled in July that musicians who played in performances for a Massachusetts production company, Fiddlehead Theatre Company, Inc., are employees and not independent contractors and that a union election should proceed where the Boston Musicians' Association is seeking to represent the musicians for purposes of collective bargaining. In reaching its decision, the NLRB found that the following factors supported employee status: the musicians' performance of music in Broadway-style musicals constituted the regular business of the Company; the Company provided the venues for rehearsals and performances; musicians did not have any input into scheduling of rehearsals or performances; musicians had to familiarize themselves "with how the artistic director wanted the conductor" to have the music played; and a dress code had to be followed. Although the NLRB found other factors to support IC status, such as the work was on a show-by-show basis, the musicians were highly skilled, the method of payment was a flat fee-for-service, the musicians supplied their own instruments, and they had the right to decline engagements, it did not find those factors to be sufficient. Rather, the NLRB concluded that the factors in favor of employee status outweighed those favoring IC status. The NLRB's decision to issue a complaint may well have favored the production company if it had used a tool such as IC Diagnostics. *Fiddlehead Theatre Company, Inc*., No. 01-RC-179597 (NLRB, July 26, 2016).

NLRB ISSUES TWO MORE IC MISCLASSIFICATION COMPLAINTS AGAINST TRUCKING COMPANIES REGARDING DRIVERS ALLEGEDLY MISCLASSIFIED AS IC'S. The NLRB Regional Office in Los Angeles issued unfair labor practice complaints against two separate port trucking companies, XPO Cartage and Laca Express, based on charges filed by the International Brotherhood of Teamsters. The complaints stem from the identical argument that the drivers have been misclassified as independent contractors and not employees "thereby inhibiting them from engaging in Section 7 activity and depriving them of the protections of the [National Labor Relations] Act." The complaints are not based solely on an allegation of misclassification; rather, misclassification is alleged in the context of other unfair labor practices, including claims that drivers were prohibited from talking about the union during work hours; drivers were prohibited from displaying union stickers on their trucks or wearing union insignia at work; drivers were threatened with job loss and/or other reprisals if the union won; and that as a condition of employment, the employees had to sign and be bound by lease agreements and an Independent Contractor Agreement. As remedies for the alleged unfair labor practices, the NLRB General Counsel seeks, among other things, an order requiring reimbursement of all work-related expenses incurred by the drivers, including reimbursement for the purchase of trucks. As noted in our recent blog post analyzing a similar complaint issued by an NLRB Regional Office, where an unfair labor practice complaint includes allegations of other "classic" violations of the law (threats, interrogations, and promises), it is not feasible to ascertain if the General Counsel of the NLRB is taking the position that mere misclassification of workers as independent contractors violates the National Labor Relations Act – or that something more must be done to a worker whom the General Counsel believes should be classified as an "employee" under NLRB and court decisions defining that term. *XPO Cartage, Inc.,* No.21-CA-150873 (July 14, 2016); *Laca Express, Inc.,* NLRB Region 21, No.21-CA-150928 (June 28, 2016).

NEW YORK EXPANDS IC MISCLASSIFICATION TASK FORCE. New York Governor Andrew Cuomo has established a permanent Joint Task Force to develop strategies for systematically investigating employee misclassification and facilitating the prosecution of employers in violation of the law. As described more fully in our blog post of July 21, 2016, Executive Order No. 159 expanded the existing Joint Enforcement Task Force on Employee Misclassification into a Joint Task Force on Worker Exploitation and Worker Misclassification. According to a Press Release issued by the Governor on July 20, 2016, the Joint Task Force is vested with many powers and duties including facilitating the sharing of information between Task Force members relating to suspected employee misclassification and worker exploitation violations in a timely manner; working cooperatively with labor and community organizations, businesses and business coalitions, and other advocacy groups to (1) seek and develop new methods of prevention, detection, and deterrence of employee misclassification and worker exploitation; (2) enhance or modify mechanisms for identifying and reporting instances of alleged employee misclassification and worker exploitation; (3) receive input on educational needs or compliance

opportunities; and (4) collaborate with federal, state, and local social services agencies to provide timely assistance to vulnerable populations that have been misclassified and exploited. Together with the issuance of the Executive Order, the Joint Task Force issued the 2016 Annual Report, which identified several industries where independent contractor misclassification and/or worker exploitation is prevalent, such as nail salons, restaurants, agriculture, car washes, domestic workers, construction, landscaping, dry cleaning, supermarkets, home health care, and retail. While the Executive Order and 2016 Report focus on the negative impact of misclassification of ICs, there is no mention of the value to the U.S. economy from the legitimate use of independent contractors that has been noted both by U.S. Secretary of Labor Thomas Perez and Dr. David Weil, Administrator of the Wage and Hour Division of the U.S. Department of Labor.

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