PUBLICATION

Employee Misclassification Goes Viral with the Introduction of On-Demand Start-Ups, but the DOL May Have Just Crashed the Server

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The United States Department of Labor (DOL) administers and enforces the Fair Labor Standards Act (FLSA). The FLSA is the federal law commonly known for minimum wage, overtime pay and related recordkeeping requirements. The FLSA's requirements and wage mandates apply only to employees, not to independent contractors. Because they do not, companies using independent contractors have much lower administrative and labor costs. In July 2015, claiming it continues to receive numerous complaints about employees misclassified as independent contractors, the DOL issued additional guidance regarding the standards for determining who is an employee under the FLSA. As the DOL plainly concluded in its guidance memo: "[M]ost workers are employees under the FLSA's broad definitions." The guidance memo strongly favors classifying workers as employees, and it creates a huge hurdle for any business classifying its workers as independent contractors.

The classification of workers is a complicated subject that often boils down to what records a company is required to keep for each worker and whether each worker is overtime-eligible. If a worker is classified as an employee, the answers are all timekeeping, payroll and wage records and yes, unless the employee is exempt. If a worker is classified as an independent contractor, the answers are none and no. Knowing this, it is easy to see why a company would prefer to classify its workers as independent contractors as opposed to employees.

Classification issues have recently gone viral thanks to on-demand start-up companies such as Uber, Lyft, TaskRabbit, and until recently, Homejoy. These companies put access to local, on-demand services literally at your fingertips (as most are run on a smartphone app). To do this, they rely on an army of workers, almost all of whom are classified as independent contractors. The problem? The army of workers may be misclassified, and under the DOL's new guidance, they likely are.

When workers believe they are misclassified, they typically file class action lawsuits. These lawsuits can include tens of thousands of workers. Uber, for example, is currently defending a misclassification lawsuit in California. Just this month, the judge expanded the lawsuit to include 160,000 other drivers. Not only are these lawsuits costly to defend, but if they are successful, they can easily put a company out of business. We recently saw this with Homejoy. Homejoy was a global, on-demand house cleaning app. It was in 35 U.S. cities and five other countries. After it was hit with multiple misclassification lawsuits, between defense costs and potential liability, Homejoy shut down completely.

On the heels of the DOL's guidance memo, we expect to see an uptick in misclassification lawsuits across all industries and markets. While the guidance did not change the law, it did provide a roadmap for any worker or attorney looking to file a lawsuit. If you employ independent contractors and have concerns about whether your employees are misclassified, asking these three questions is a good place to start:

1. If you use both independent contractors and employees, are employees performing essentially the same duties as the independent contractors?
2. Do your independent contractors report to the office or a specific location at the start or end of each shift?

3. Do you have the ability to control how your independent contractors perform their duties?

If you answered "yes" to any one of these questions, you may have misclassified workers. For more information about misclassification issues or misclassification lawsuits, contact your regular Baker Donelson attorney or a member of our FLSA Audit Team.