Leveling the Playing Field for Employers?

Government Initiatives Against Misclassification

By Jill Pedigo Hall

Federal initiatives calling for a new level of cooperation between the government and the plaintiffs' bar could trap a record number of well-meaning employers in an expensive enforcement regime.

"So tonight, I'm asking Democrats and Republicans to simplify the [tax] system. Get rid of the loopholes. *Level the playing field.*" *Sound familiar?* To those employers still believing that a divided federal government means a decrease in attention paid to misclassified independent contractors—long a topic of conversation among management-side employment attorneys—that statement by President Obama in his 2011 State of the Union address should have served as a wake-up call.

The president's turn of phrase was no accident. Approximately four months earlier, on September 15, 2010, the Fair Playing Field Act of 2010 was introduced in both houses of the then Democrat-controlled Congress. Vice President Biden said of the bill, "When employees are classified as independent contractors, whether by design or because the rules are unclear, they are denied access to critical benefits and protections, at significant cost to government at all levels … misclassification is an increasing problem, one that puts employers who properly classify their workers at a disadvantage in the marketplace and costs the government billions of dollars in unpaid taxes. I urge the Congress to stand up for workers and create a *level playing field*." Press Release, John Kerry, White House Endorses Legislation to Close Tax Loophole that Hurts Workers and Businesses (Sept. 15, 2010), http://kerry.senate.gov/press/release/?id=cd7f5a6e-7feb-41ae-8e8f-6004669821fc. The president's invocation of this "level playing field" language was not just a harkening to the Fair Playing Field Act; it was a signal that the Obama administration intends to continue nationwide efforts to eliminate misclassification of independent contractors.

The Fair Playing Field Act was just the latest of a series of state and federal initiatives to ferret out misclassification of independent contractors for obvious reasons: misclassification of workers incorporates pet issues of both sides of the aisle. The loss of payroll tax revenue from misclassifying workers as independent contractors, the lack of protections, benefits, and safeguards for the workers misclassified, and the idea that employers that purposely misclas-

■ Jill Pedigo Hall is a partner with Gonzalez Saggio & Harlan LLP in Milwaukee. Ms. Hall combines years of experience in operating her own company with years of employment law practice to provide creative, strategic counsel and defense to employers of every size on a full range of employment issues. She focuses in the areas of discrimination and medical leaves, with an emphasis on FMLA administration and disability litigation, wage and hour concerns, affirmative action, and employer strategy in handling electronic communication systems within the workplace. Associate Matthew J. Feery assisted with the preparation of this article.

sify have an unfair competitive advantage over law-abiding employers that categorize workers properly all are politically powerful sentiments that score easy points with constituents. By claiming that efforts to ensure proper classification "level the playing field," the Obama administration hopes to sell the initiatives as a boon for employers currently complying with the law. But this mythology masks an uncomfortable truth: even employers believing in good faith that they comply with classification laws can become caught up in enforcement efforts and the negative accompaniments.

The laws defining "independent contractor" differ not just from state to state, but also within each state from agency to agency.

The efforts to combat misclassification have created a "perfect storm" of enforcement swirling around employers that increasingly see independent contractors as the answer to their need to lower labor costs in a struggling economy. As discussed below, these efforts build upon and are a natural extension of state-level efforts of the past several years. Yet, the new federal initiatives go further than ever before, calling for a new level of cooperation between the federal government and the plaintiffs' bar that could trap a record number of well-meaning employers in an expensive enforcement regime.

The Risks of Misclassification

The economic advantages of using independent contractors have driven employers to sometimes overeagerly classify workers as independent contractors when legally employers should classify them as employees. While some misclassification is intentional, many employers simply do not understand or pay attention to the rigor applied by state and federal agencies and courts in this area, or to the significant financial consequences of misclassification.

Misclassifying employees, whether intentional or in error, can come at a significant price when a court or regulatory agency reclassifies independent contractors as employees. The extent of risk exposure depends upon the extent to which an employer makes use of independent contractors within its workforce. A reclassification may result in employer liability for years of unpaid federal, state, and local tax withholdings; Social Security and Medicare contributions; unpaid workers' compensation and unemployment insurance premiums; unpaid overtime compensation; and related interest and penalties. An employer may also be liable for back pay with interest, liquidated damages, and retroactive employee benefits if the reclassified workers previously have not been provided with health, pension, and other employee benefits to which they otherwise would have been entitled. Costs from benefits-related liability could include not only the costs associated with back contributions to benefit plans but also the loss of tax-exempt status for employer-provided employee benefit plans. In one well-known example, Microsoft paid a $97 million settlement to a group of long-term temporary workers whose status was reclassified and had not been afforded coverage under Microsoft's stock-purchase plan. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996) (*Vizcaino I*), *remanded*, 120 F.3d 1006 (9th Cir. 1997) (*Vizcaino II*), 142 F. Supp. 2d 1299 (W.D. Wash. 2001), *aff'd*, 290 F.3d 1043 (9th Cir. 2002). Attorneys' fees of $27 million were also awarded to the *Vizcaino* plaintiffs, demonstrating how lucrative misclassification litigation can be for plaintiffs' counsel, who regularly now encourage class and collective claims.

State Efforts to Shore Up Budgetary Shortfalls

Even before the U.S. Department of Labor (DOL) in February 2010 announced that it would undertake a "misclassification initiative" with U.S. Department of Treasury, state legislative activity surged addressing misclassification. In the past few years, at least 32 states have increased misclassification enforcement efforts or strengthened misclassification laws. The state efforts have been particularly fueled by the opportunity successful enforcement presents to increase state revenue, especially as state unemployment funds have been drained during the economic downturn. For example, in 2007, New York created the Joint Enforcement Task Force on Employee Misclassification, characterized as an interagency "strike force" that would "address the problem of employers who inappropriately classify employees as independent contractors." State of New York Annual Report of the Joint Enforcement Task Force on Employee Misclassification (2009), available at http://www.labor.state.ny.us/agencyinfo/PDFs/Misclassification_TaskForce_AnnualRpt_2008.pdf. After its first 16 months, in which the task force "engaged in joint enforcement sweeps, coordinated assignments and systematic referrals and data sharing between agencies," it reported the discovery of 12,300 instances of employee misclassification and $157 million in unreported wages, resulting in the assessment of $4.8 million in unemployment taxes, over $1 million in unemployment insurance fraud penalties, over $12 million in unpaid wages, and over $1.1 million in workers compensation fines and penalties. *Id.*

At first blush, the answer seems simple: just comply with the law when classifying workers. But the problem is much more complicated than that. The laws defining "independent contractor" differ not just from state to state, but also within each state from agency to agency.

On top of that, states employ a variety of solutions to address misclassification. Some states, such as Maine, approach misclassification by automatically considering every worker an employee unless the worker's services are found by the state to meet specific independent contractor criteria. But Maine only follows this approach for unemployment compensation purposes. Other states have focused independent contractor regulation on those labor sectors commonly identified by enforcement agencies as having high levels of misclassification, such as construction. For example, Wisconsin's Worker Classification Compliance Law, which took effect January 1, 2011, applies to public construction employers and provides strengthened investigative and enforcement power to the state's Department of Workforce Development, which includes required interagency information sharing of complaint

and investigation information, stop-work orders pending resolution of an investigation, and the power to levy fines and debar employers. *See* Wis. Stat. §103.06.

Still other states, such as Ohio, have expanded required coverage under workers' compensation or unemployment laws to include independent contractors under certain circumstances. Different still, some states, such as Utah, Connecticut, New York, New Hampshire, Maryland, and Vermont, have permitted or require intrastate agency information sharing and collaboration. Yet other states, such as California, Indiana, Kentucky, and Nebraska, have laws requiring employers to notify a worker of an independent-worker status determination and consequences and post workplace notices about classification laws. Some of these enforcement efforts were in play or launching just as the federal initiative was getting started.

The Questionable Employment Tax Practices Initiative

These independent state efforts have combined with increased federal-state coordination to identify independent contractor misclassification. For example, at least 39 state workforce agencies have now signed a "memorandum of understanding" with the IRS under the Questionable Employment Tax Practices (QETP) initiative. *Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification*, 110th Cong. (2010), Before the S. Committee on Health, Education, Labor, and Pensions (statement of Seth D. Harris, Deputy Secretary, U.S. Department of Labor).

Launched in 2007, the QETP initiative was designed to "facilitate cooperation and information sharing between the IRS and state workforce agencies." Press Release IR-2007-184, Internal Revenue Service, IRS and States to Share Employment Tax Examination Results (Nov. 6, 2007). Specifically, the QETP initiative aims to "increase compliance with federal and state employment tax filing and payment regulations; increase compliance with Form 1099 and Form W-2 filing; increase collection of federal and state employment/unemployment tax debts; enhance efforts to reduce the tax gap at the federal and state levels and ensure that businesses are all operating on a competitive level playing field by ensuring that everyone pays their proper share of employment taxes; and leverage IRS, state and other federal agency resources to improve compliance with employment tax laws." *Id.*

Under the QETP initiative, state workforce agencies exchange employment tax information for civil cases, exchange audit reports and audit plans, participate in concurrent examinations, share 1099-MISC reports of employers and 1099 income reports of workers, participate in coordinated enforcement efforts, and share independently conducted examination results or work side by side on examinations.

And while a memorandum of understanding contains a statement of intent by both parties to "strive to be consistent with their examination results, reducing the chances that states might classify a worker as an employee while the IRS classifies the worker as an independent contractor, or vice versa," in practice it is impossible for one agency to surrender its independent contractor definition and analysis for that of the other given the varying tests between states and the federal government.

This federal-state coordination of efforts requires employers to adopt a careful and balanced approach to defending an examination of independent contractor status by state unemployment agencies. These determinations, before seen as isolated because unemployment compensation tribunals favor the finding of an employee status, are now subject not only to information sharing between state agencies but now also to information sharing with the IRS and the DOL. Because definitions of independent contractor status differ across state and federal law, the effectiveness of information sharing to bolster enforcement is questionable at best, increasing the risk of arbitrary enforcement and investigation.

The New Federal Misclassification Initiative

The Fair Playing Field Act of September 2010, which focused on the elimination of section 530 of the Revenue Act of 1978, was an example of the federal effort to continue and build upon previous efforts to cooperate with state agencies. Section 530 grants a business safe harbor to treat workers as independent contractors—for employment tax purposes only—if a business has a reasonable basis for such treatment and has consistently treated such employees as independent contractors as defined under the law. 27 U.S.C. §3401. The findings included in the bill, which was introduced in the Senate by cosponsor Senator John Kerry, succinctly summarized the often-repeated concern with this safe harbor: "Such misclassification for tax purposes contributes to inequities in the competitive positions of businesses and to the Federal and State tax gap, and may also result in misclassification for other purposes, such as denial of unemployment benefits, workplace health and safety protections, and retirement or other benefits or protections available to employees." S. 3786, 111th Cong. §1(b)(4) (2010).

The effectiveness of information sharing to bolster enforcement is questionable at best, increasing the risk of arbitrary enforcement and investigation.

Earlier in 2010, the DOL had signaled its priorities with the April 2010 issuance of its Congressional Budget Justification for FY 2011 and the companion U.S. Department of Labor Strategic Plan Fiscal Years 2011–2016. Secretary of Labor Hilda Solis had previously identified the need to protect "vulnerable workers," who she described as "those that are employed in industries with subcontracting, independent contracting, and other contingent workforce characteristics." The FY 2011 budget supported this vision, including $25 million to support a joint Labor-Treasury initiative "to strengthen and coordinate Federal and State efforts to enforce statutory prohibitions, identify, and deter misclassification of employees as independent contractors." Justifications cited for the increased budget not only invoked "[i]ndividuals wrongly classified as independent

contractors [who] are denied access to critical benefits and protections to which they may be entitled as regular employees," but the "substantial losses to the Treasury and the Social Security, Medicare and Unemployment Insurance Trust Funds" caused by worker misclassification. U.S. Department of Labor, Strategic Planning Fiscal Years 2011–2016, at 31 (2010).

The enhanced enforcement from all sides and burgeoning private actions should persuade employers using independent contractors to consider self-auditing such arrangements.

Specific budget support for the initiative included the following:

- An additional $12 million and 90 full-time employees for the Wage and Hour Division (WHD) to train field investigators for and implement an additional 4,700 targeted misclassification investigations in "fissured" industries: construction, child care, home health care, grocery stores, janitorial, business services, transportation and warehousing, poultry and meat processing, and landscaping. *Id.* at 44
- $11.25 million and 2 full-time employees for competitive grants to states to increase their capacity to focus on misclassification and reward those states most successful at detecting and prosecuting employers that fail to pay their fair share of taxes due to misclassification. *Id.* at 28.
- $1.6 million and 10 full-time employees allocated to the Office of the Solicitor of Labor "to pursue misclassification litigation, including multi-State litigation to coordinate enforcement with States and leverage their groundbreaking work." *Id.* at 2.
- $150,000 to OSHA to modify its training curriculum and investigation guidelines to allow inspectors to identify potential employee misclassification and share information with the WHD. *Id.* at 6.

When the plan and budget were issued, the WHD had already begun to implement baseline compliance investigations focused on the identified "key" industries, especially construction.

Finally, in 2011, federal agencies will implement new reporting requirements for employers. In the Unified Agenda of Federal Regulations Fall 2010 Statement of Regulatory Priorities, Secretary of Labor Solis identified a strategy of targeted regulatory actions "centered on two broad themes—Plan/Prevent/Protect, and Openness and Transparency." As part of these two strategies and beyond the increased targeted enforcement already underway, the WHD will publish a proposed rule, "Right to Know Under the Fair Labor Standards Act," which will update Fair Labor Standards Act (FLSA) recordkeeping regulations to "require employers, before declaring that a worker is not an 'employee' under the FLSA… to perform a written analysis of the worker's status… disclose the analysis to the affected worker, and… keep a record of the analysis in their files for review should a [WHD] investigator seek this information." *Leveling the Playing Field: Protecting Workers and Businesses affected by Misclassification*, 110th Cong. (2010) Before the S. Committee on Health, Education, Labor, and Pensions (statement of Seth D. Harris, Deputy Secretary, U.S. Department of Labor). This "greater transparency" is intended to "provide workers with essential information about their employment status and earnings." *Id. See also* U.S. Dept. of Labor Regulatory Agenda Narrative, Spring 2010. The DOL has also indicated, without further elaboration, that the rule "will also address burdens of proof when employers fail to comply with records and notice requirements." *Id.*

This additional reporting requirement will not only assist enforcement efforts but may also buoy the current upward trend in wage and hour litigation. The regulatory agenda even extends to OSHA and the Office of Federal Contract Compliance Programs (OFCCP), both of which will soon propose similar requirements regarding notifying workers of their employment status. *Id.*

The DOL's One-Way "Bridge to Justice"

While moving forward on its vision for enforcing misclassification and citing its accelerated enforcement effort success, the DOL also voiced concern that "every year there are thousands of workers whose claims we cannot resolve because of limited capacity." *See* Bridge to Justice: Wage and Hour Connects Workers to New ABA-Approved Attorney Referral System, U.S. Dep't of Labor Wage and Hour Division, http://www.dol.gov/whd/resources/ABAReferralPolicy.htm (last visited Apr. 27, 2011). The DOL's solution to this dilemma has not been to refine its internal procedures, but rather to partner with the plaintiffs' bar to facilitate an increase in the already burgeoning rate of wage and hour litigation.

On November 19, 2010, Vice President Biden and Secretary of Labor Solis announced the "Bridge to Justice" program. Under this program, "beginning on December 13, 2010, when FLSA or FMLA complainants are informed that the Wage and Hour Division is declining to pursue their complaints, they will also be given a toll-free number to contact the newly created ABA-Approved Attorney Referral System." Hilda Solis, Secretary of Labor, Remarks at the Middle Class Task Force Event—Bridge to Justice (Nov. 19, 2010). Under this collaboration with the ABA, a complainant will receive the toll-free referral number at any one of four stages:

- At the complaint intake stage, if the worker decides not to file a complaint or the worker indicates a preference to pursue a private right of action;
- At the complaint review stage, if the WHD determines "that giving the complainant the ABA's toll-free number provides the worker with the quickest access to justice";
- After a failed attempt at conciliation with the employer, if the WHD manager decides that giving the complainant the toll-free number is a better option than the WHD continuing investigation or litigation; or
- After an investigation, if the matter is not resolved through settlement and the WHD decides that the best course is to "leverage the resources of the private bar."

See Bridge to Justice: Wage and Hour Connects Workers to New ABA-Approved

Attorney Referral System, U.S. Dep't Labor. The WHD will do more than provide a toll-free referral number under the "Bridge to Justice" program. Depending when referral occurs, the WHD will provide a complainant with investigation information to aid the prospective plaintiff's litigation efforts.

At both the first intake stage and if a complaint is declined at the complaint review stage, the WHD has indicated that it will have "no information" about a complaint. However, based upon the information sharing between states and the WHD—discussed above—the WHD will have access to and could disclose state audit information in its files regarding an employer-respondent. The WHD remains silent about this possibility.

At the failed conciliation stage, a complainant will not only receive the referral telephone number, but the WHD will also provide to the complainant undefined "information about the complaint and WHD's 'attempt at conciliation.'" The WHD has advised that "[t]he amount of information available at the conciliation stage will vary." *Id.* The *type* of information that the WHD will provide to a complainant at this stage is also unclear.

Finally, and most concerning, when the WHD declares its investigation complete and determines that it will "leverage" its new relationship with the plaintiffs' bar, a complainant will now receive information about the WHD's determination regarding "violations at issue" and "back wages owed." Bridge to Justice: Wage and Hour Division Connects Workers to New ABA-Approved Referral System, Am. Bar Ass'n Div. for Legal Services (Dec. 6, 2010), http://apps.americanbar.org/legalservices/lris/attorneyapprovproginfo.html. The WHD has instituted "a special process for complainants and representing attorneys to quickly obtain certain relevant case information and documents when available." *Id.* The WHD commits to make this disclosure to complainant or counsel "expeditiously," *without requiring a complainant or counsel to adhere to the requirements of the Freedom of Information Act*. However, because the "bridge to justice" appears one-way, respondent-employers and their counsel are still bound by the cumbersome Freedom of Information Act process when requesting the same file documents. Documents that the WHD will expediently provide to a prospective plaintiff or his or her counsel include the complainant's own statement, information provided to the DOL, and WHD's back-wage computations. A complainant or his or her counsel also is entitled to request a copy of the investigation file's case narrative, which the WHD will provide after redaction. It is unclear how much and what type of information the WHD will redact or what limitations the program will place on the information provided to likely plaintiffs and their counsel.

The ABA has, in droll understatement, stated that the expedited information process "will be very useful for attorneys who may take the case." Indeed, this "useful" information will lead to a rise in private litigation. Individuals will litigate matters that the WHD might have resolved if retained or handled by the WHD. Having the WHD's initial investigation "violations" findings, which sometimes are based on incorrect or incomplete understanding of the facts or flawed legal analysis, seems likely to encourage prospective plaintiffs and their referral counsel inordinately. If the WHD would instead retain investigations and see them through to resolution, disposing of them might be achieved more efficiently and cooperatively and without the burdens of litigation. It seems unlikely that unduly enabled counsel who stand to reap significant financial benefit from pursuing these claims will resolve them amicably and relatively inexpensively.

Another outcome of this "bridge" building is that because of this "special process" all employers facing demands for information and document disclosure in state and federal audits and investigations should exercise significant caution. Before disclosure, an employer should make all possible efforts to narrow the focus of an audit or investigation, disclose only that information a good faith and thorough analysis of the law requires, and assert confidentiality when disclosing financial, trade secret, or employment information.

Self-Auditing—Context Is King

The enhanced enforcement from all sides and burgeoning private actions should persuade employers using independent contractors to consider self-auditing such arrangements to determine whether they meet applicable standards. The first step of a self-audit is to identify existing independent contractor relationships, including both those identifiable from existing independent contractor agreements and those identifiable from filed IRS 1099 forms.

The second step, which sounds deceptively simple, is to analyze the independent contractor arrangements using the applicable tests. Unfortunately, this step collides with the unfortunate truth that we do not have one universal definition at either the state or federal level of an "independent contractor." Generally, government agencies and courts consider the totality of the circumstances of a work arrangement when determining whether a worker is an employee or an independent contractor. For example, the IRS has stated that "[i]n any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered." *See* IRS Publication 15-A, Employer's Supplemental Tax Guide (2011) at 6.

Some state statutes, however, create a rebuttable presumption of employee status through remedial legislation—such as unemployment and workers' compensation statutes—which employ clearer bright-line criteria. To be an independent contractor, a business-worker relationship must constitute an exception to these statutory defaults. While this approach offers more certainty for analyses of certain state agencies, it broadens the definition of employee and creates conflicting audit results. It is not unusual for analyses of identical facts to result in a finding by one federal entity—such as the IRS—that a worker is appropriately classified as an independent contractor, and a concurrent but conflicting finding by a state unemployment compensation division that the worker is a statutory employee. For example, Wisconsin's workers' compensation law considers all workers employees and only considers those work arrangements satisfying 10 itemized factors an exception that creates an independent contractor arrangement. *See* Wis. Stat. §102.07(8). Similarly, the test for a statutory employee under Nevada's Industrial Insurance Act is all-inclusive, so if any prong is not met, a worker is a statutory employee. *See* Nev. Stat. §616B.603(1).

Under each of these previously men-

tioned state statutes, an IRS finding that the worker in question is an independent contractor is irrelevant. This is not to say that federal and state tests do not consider many of the same factors, but the regulatory and statutory context within which those factors are examined determines the relative weight assigned to each. Moreover, even within a state, differing regulatory contexts can result in differing classification findings. An employer should tailor a self-audit of an independent contractor arrangement to consider each potentially applicable statutory or regulatory context.

It is not unusual for analyses of identical facts to result in a finding by one federal entity… and a concurrent but conflicting finding by a state unemployment compensation division.

FedEx Ground Delivers Lessons on the Right to Control

The existence of specific state remedial statutes aside, the universal component or ultimate determination in most legal tests of employment status is whether a business has the "right to control the manner and means" by which a worker accomplishes his or her work result. *See Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322 (1992). Federal and state laws definitions combine varying criteria to determine whether a company controls the means of work or controls its result. A court's determination then rests upon its consideration of the facts and circumstances of the control of the method and the outcome of the work performed within the context of the specific law at issue.

A recent example of court analysis of the right to control is found in the comprehensive December 13, 2010, ruling of Judge Robert L. Miller Jr. in the multi-district litigation, *In re FedEx Ground Package System, Inc., Employment Practices Litigation*, ___ F. Supp. 2d ___, 2010 WL 5094230 (N.D. Ind., Dec. 13, 2010) (*FedEx Ground*). In this nationwide class action, which encompassed 42 lawsuits in 27 different states, certain FedEx drivers sued FedEx alleging that the company misclassified them as independent contractors for purposes of federal and state employee benefit and labor laws. The drivers sought damages for unpaid employee benefits and overtime, as well as unreimbursed employee expenses. Judge Miller found that FedEx had properly classified the drivers as independent contractors in lawsuits stemming from 23 of the states. He further found that FedEx misclassified employees as independent contractors under the laws of three states, including Kentucky, ruling that those drivers were "employees" under Kentucky's wage payment statute but independent contractors under Kentucky common law. He declared moot the suit involving another state.

The ruling presents a valuable analysis because the case's procedural posture limited the evidence considered to the workers' operating agreement and FedEx's generally applicable policies and procedures. The court refused to consider anecdotal evidence that would otherwise be considered when assessing actual control in the work relationship. As the court stated, "FedEx might actually exercise more control than authorized, but… the court is limited to determining whether FedEx *retained the right to control*. The court relies on the policies and procedures to the extent they show how FedEx implemented its authority as retained by the Operating Agreement." *Id.* at *3 (emphasis added). This focus highlights the importance of crafting independent contractor agreements and policies and procedures that are customized to the classification criterion of pertinent state and federal laws.

The court noted that "determining the line between means and methods, and results, is context specific and requires considering multiple factors and examining the totality of the circumstances of a given working relationship." *Id.* at *7. The court distinguished FedEx's right to control the manner in which work was performed from control over the results as expressed in the operating agreement and policies, and noted the difficulties of bright-line standards:

> [M]ost important under the common law—and Restatement tests generally—is the right to control, which typically is the weightiest factor…. In most states, control of results doesn't indicate employee status; control of means used to achieve contracted-for results does indicate employee status. Drawing the line between means and results is a challenging, highly contextual and fact-specific task. Bright-line rules prove elusive here.

Id. at *6 (citation omitted).

Arguably, *FedEx Ground*'s most important contribution is its comprehensive and fact-specific application of the common law standard of right to control within the context of each separate and distinct state law. Citing its previous decision disposing of part of the claims under Kansas law, the court reiterated the factors demonstrating that FedEx retained control over results, not manner:

> This court held that the controls reserved to FedEx were results-oriented: FedEx provides work to and pays contractor-drivers to provide the specific result of timely and safely delivered packages to FedEx customers…. FedEx has no right to discharge drivers at will. FedEx can non-renew a contract or cancel a contract for breach, but these are unexceptional rights common to any contractee in an independent contractor relationship; notably, FedEx is contractually unable to discharge a driver at a whim and on the spot the way an employee in an at-will employment relationship could be discharged….
>
> FedEx supervises the drivers' work and offers numerous suggestions and best practices for performance of assigned tasks, but the evidence doesn't suggest that FedEx has the authority under the Operating Agreement to require compliance with its suggestions. Further, other factors strongly weigh in favor of independent contractor status; in particular, the parties intended to create an independent contractor arrangement, *the drivers have the ability to hire helpers and replacement drivers, they are*

Misclassification, continued on page 86

Misclassification, from page 50

responsible for acquiring a vehicle and can use the vehicle for other commercial purposes, they can sell their routes to other qualified drivers, and FedEx doesn't have the right to terminate contracts at-will.

Id. at *5–6 (internal citations omitted) (emphasis added).

For companies considering self-audits, this decision demonstrates the importance of considering context. And while the case presents a relatively clean analysis of the right to control means versus results within the context of many state laws, in the normal course of enforcement or litigation, a company will be called upon to provide evidence of the relationship outside of contract and policy. A proactive self-audit should thus include comparison of job descriptions of current employees with a contract, and should consider actual work duties and functions and the degree of actual day-to-day control exerted by management over the performance of the work.

What to Do with Unfavorable Audit Results

When the result of a self-audit shows that a worker would be regarded as an employee rather than an as independent contractor under one or more laws, stymied companies tend to reclassify the worker as an employee. Before taking that step, which has economic ramifications, probe the existing relationships to identify adjustable factors that demonstrate control over the manner and means by which an individual perform the work. Those factors are often delineated in pertinent state laws, but they also are found by reviewing practical facets of control. For example, a company may be able to remove some indicia of control by allowing a worker to define the hours or the location of work, by providing work on a project basis, and by allowing an individual to work for multiple employers. If the work can be competently and completely performed with less evidence of control, an employer should modify the independent contractor accordingly.

If voluntary reclassification is the only apparent option, the wording, timing, and presentation of reclassification announcements should be well considered to minimize concern of those reclassified. And, in the reclassification process a company must consider relevant federal and state tax, employee benefits, and labor laws. The decisions should be made only after consulting with counsel.

Conclusion

In the face of government initiatives to discover misclassified workers and the tangled web of laws, employers must proactively track misclassification laws that may institute new and more rigorous standards and determine whether they should perform a self-audit. Just because a worker's independent contractor status has been previously examined by federal or state agencies does not mean it will never be reassessed. Vigilance and preparation are crucial. After all, just because someone else decides to level the playing field does not mean that you should forget to prepare your clients for the game. FD