Labor Department’s Misclassification Guidance

By Gregory M. Feary, Esq
President & Managing Partner
Scopelitis, Garvin, Light, Hanson & Feary

The U.S. Department of Labor's July 15 “interpretation” of the Fair Labor Standards Act in audits and determinations of whether workers are deemed employees or independent contractors is far more a further revelation of a political agenda and shift in America than a balanced legal analysis of the proper application of a legal test in determining worker status.

That agenda is designed to support its bold thesis advanced just three paragraphs into its political statement — i.e., “most workers are employees under the FLSA.” It doesn’t hide from its end-justifies-the-means conclusion in that same tone-setting paragraph — i.e., “A worker who is economically dependent on an employer is suffered or permitted to work by the employer.” And it carves a “standard” out of whole cloth from what it calls the “statutory directive” that is animated by the FLSA’s broad “suffered or permitted to work” so-called definition of “employ.” Indeed, it carves a “broad” — a word used well in excess of 25 times — pathway toward what seems now to be the agency’s mission.

That mission appears bent on narrowing entrepreneurial opportunities in America by stifling business growth and replacing it with paternalistic government protection fueled by a tax-generating reworking of the economic realities test. This reworking is made apparent in the application examples provided within the “interpretation” and leads inexcitably to the conclusion that the three prongs of the Teamster-favored ABC test — noted later herein — will be, in fact, the test used by the agency.

Its “interpretation” reveals its most stark self-indictment of paternalism by connecting, seemingly without self-awareness, the genesis of its freshly minted statutory directive embodied in the nebulous “suffered or permitted to work” battle cry of employment by exclaiming that it was derived originally from the key rationale in the creation of child-labor laws. Thus, what was appropriate to end the workplace abuse of children in the early 1900s must, of course, logically be reapplied to end the abuse of entrepreneurship in the workplace today? The agency relies on this as justification for its self-serving version of the economic realities test!

Regardless of the political orientation, business bias or point of view one holds, we can agree the “interpretation” does not suffer from a hidden political agenda. Yet, it does attempt quite mightily to hide the weapon it will use to force this agenda on the American business community. It fashion an awkward excuse to abandon the right-of-control test for the economic realities test. But the agenda truly hidden is that the Labor Department’s version of the economic realities test is a thinly veiled repackaging of the ABC test — when applied under state law, a test several courts have found preempted by the Federal Aviation Administration Authorization Act because of its irreconcilable effect on independent contractor operations in interstate trucking.

By its examples and illustrations of the “broad” factors within the economic realities test, the agency has managed to shoehorn almost every factor that is not right of control (prong A) or integral work of the worker within the employer’s business (prong B) into the exclusive relationship between the worker and the employer (prong C) factor — with the possible exception of the “relative investment” in tools analysis, which the “interpretation” obliterates by, in essence, requiring a small business to have a comparatively similar investment to a much larger business, an investment not in the tools but in the business. It even goes so far as to exclaim that the factor seeking to determine whether the worker holds a highly specialized skill is not really about the worker’s skill — such as that of a skilled plumber, carpenter or electrician — but about the skill of succeeding through decisions that will advance the worker’s business by gaining new customers.

Opportunity for profit or loss under the “interpretation” derives not from the possible economic gain or loss on the entrepreneur’s balance sheet but from gaining new customers. In its most telling moment, the following unsupported and uninform ed conclusion is advanced: “After all, a worker who is truly in business for himself or herself will eschew a permanent or indefinite relationship with an employer and the dependence that comes with such permanence or indefinites.” These words create a new model of independent small business entrepreneurship.

It sends out a warning to every start-up business in America: to wit, until a contractor puts at risk the profit earned through care, effort and diligence in forming a reliable customer relationship and stream of business, for the risk of developing a second, third and possibly fourth such relationship and do so concurrently and not serially — no matter what your capacity, interest or ability to do so is — you are not an independent contractor. You are not your own business, and your customer is in great peril of the agency’s reinterpretation of your business relationship.

The agency’s “interpretation” leaves open just one question: How many customers must a small business have before the agency will grant it entrepreneurial business status? Is suspect those who seek to earn a living or just extra money by forming a relationship with Uber might be in the front of the line to learn the answer to this question.

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