

Independent contractors say they aren't 'independent'

By Holly Culhane, Contributing Columnist



Drivers filed a lawsuit against online superstore Amazon. At the Los Angeles and Long Beach ports, truck drivers went on strike. These were two headline grabbing events that occurred in a single recent week. Both involved disputes over classifying drivers as “independent” contractors.

According to the Amazon lawsuit, drivers wear Amazon uniforms; sign into an Amazon tracking device; and make deliveries dictated by Amazon Pride Now’s dispatchers. The four Orange County drivers named in the suit claim they have no control over their schedule and working conditions; yet, they are not considered employees of Amazon or Scoobeez, its contracted courier company. Instead, they are treated as “independent contractors” and do not receive overtime pay, mileage reimbursement, workers’ compensation and other protections

“employees” receive under state and federal laws.

At the two Southern California ports, “independent” drivers claim they, too, are being exploited and cheated out of wages, benefits and protections. At a port press conference on Oct. 27, Teamsters President James P. Hoffa told striking drivers, “The whole country supports you. We will be here until this fight ends. We are just beginning.”

These are the latest developments in an increasingly volatile controversy that is roiling the “1099 Economy” – the number in the IRS code that applies to “self-employed” and “independent contractors.”

But as the number of independent contractors grows, the arrangement is drawing the increased scrutiny of state and federal regulators; it is being increasingly challenged in the courts by workers who claim they really are not “independent.”

In this hostile environment, employers are urged to tread carefully when using independent contractors. The dollars saved by not paying for overtime or workers’ benefits could be peanuts compared to the cost of litigation and – if you lose – back pay and government penalties.

Earlier this year, the U.S. Labor Department issued Fair Labor Standards Act guidance about classifying workers as independent contractors, rather than employees.

Labor Secretary Thomas Perez declared misclassification to be a serious problem, noting it deprives workers of overtime and protections, and deprives state and federal agencies of required payroll taxes.

The Labor Department guidance was written by Wage and Hour Administrator David Weil in the wake of a California court ruling that Uber taxi service was improperly treating a driver as an independent contractor.

While the ruling applied to only a single driver, it was clear that it would be applied to other employers in the growing “sharing economy” that includes ride-hailers Uber and Lyft, Luxe on-demand parking, and delivery companies. Some companies are fighting to hold onto their independent contractor arrangements, while others have voluntarily converted their independent contractors to employees to avoid legal challenges.

An estimated 50 million American workers are classified as non-employee contractors, freelancers or temporary workers. The number is expected to grow to 60 million by 2020.

Employers argue independent contractors allow startup companies to be flexible, and allow workers to work for more than one employer concurrently and on a short-term, part-time basis to meet specific needs.

The Labor Department's 15-page advisory letter and other guidance for employers and workers can be found at www.dol.gov/whd/flsa/. The guidance includes industry-specific examples and clarifies the limits placed on independent contractor arrangements.

Further efforts to rein in the use of independent contractors are reflected in the Payroll Fraud Prevention Act of 2015, which was introduced by Sens. Robert Casey of Pennsylvania and Al Franken of Minnesota. The bill proposes to amend the Fair Labor Standards Act to require workers be told how they are being classified and be instructed on how to file grievances about the classification; and to levy penalties on employers.

Now is the time for company owners and managers to analyze their contracting arrangements, seek the advice of human resources and labor law experts, and ensure their independent contractors are, indeed, independent.

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