

Restrictions on Use of Independent Contractors

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In recent years, the “on-demand” economy, an industry built on apps that instantly connect customers with services performed by independent contractors, such as drivers and delivery workers, has thrived. However, regulatory battles that could force many on-demand companies to convert their independent contractors to employees threaten the model on which these businesses are based and put all companies that rely on services of independent contractors at risk.

A number of federal and state government agencies, led by the Department of Labor (DOL), are heavily invested in restricting the use of independent contractors and increasing the number of workers classified as employees. Some jurisdictions have limited application of the traditional “right to control” test, which looks primarily to the degree of control exerted or retained by the company to determine if a worker is an employee. Many courts have relied on a more expansive “economic realities” test, which looks at multiple factors including whether the work is integral to the business, the worker’s opportunity for profit and loss, the relative investments of the company and worker, the permanency of relationship and the company’s degree of control. Under this test, the ultimate question is whether the worker is economically dependent on the company (an employee) or is in business for himself or herself (an independent contractor).

On July 15, 2015, the DOL’s Wage and Hour Division issued guidance on the economic realities test and concluded that most workers will be considered employees. Furthermore, a number of states have adopted what is arguably the most difficult standard to overcome: the “ABC” test, which presumes an individual is an employee unless the employer can make a three-prong showing as to the individual’s autonomy and independent nature of services. Cases against on-demand ride-sharing companies Uber and Lyft and delivery services companies Postmates and Shyp, among others, are currently pending in federal district courts in California. These cases should be closely monitored, as they will have significant implications on businesses’ growing use of independent contractors.