



XpertHR Podcast

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How Independent Contractor Issues Are Bedeviling Employers

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David Weisenfeld:

I’m David Weisenfeld for XpertHR.com, published by Reed Business Information and proudly partnered with LexisNexis.

On this podcast, our focus turns to employee classification issues and why there are continuing to bedevil employers. The growth of the so-called, “gig economy” sparked by the popularity of companies like Uber and Lyft, and others that have followed suit, means the numbers of freelance workers is very much on the rise.

But are these workers truly independent contractors, or are they more akin to employees? And what role can HR professionals play in helping their employers steer clear of misclassification headaches?

For answers to some of those questions and more, we’re now joined by Cleveland employment attorney Todd Lebowitz, who practices with the nationwide firm of BakerHostetler. He also authors the *Who is My Employee?* blog focusing on independent contractor issues. Todd, welcome.

Todd Lebowitz:

Hi, David.

David Weisenfeld:

Well, it’s great to have you with us Todd, and I’ll start right there with Uber – there’s no question that it has saved a great deal on operating costs with its digital business model and classifying drivers as independent contractors. But it’s also led to a good deal of litigation as well. So what are your thoughts on where these workers should fall on the spectrum? [0:01:44.2]

Todd Lebowitz:

Yeah, thanks David, it’s a great question and companies like Uber and Lyft and a lot of these delivery companies, especially out on the West Coast, have really built their business around the model of rather than having employees, they’re going to have independent contractors.

And that model has become a lot more popular around the country in a lot of different areas, and from a business perspective it’s a great model in that you don’t have to work at all the administrative issues

relating to employees such as payroll deductions, withholding, and you save money. You don't have to pay into unemployment, workers comp, social security, Medicare. You don't have to provide benefits.

There are a lot of financial advantages to not having employees. But the rub is that all of those advantages for the company are disadvantages from the perspective, at least of the government, where they say for example, 'Well if there's no withholding, that means we're not getting the money that would otherwise be funding Medicare, social security, unemployment, workers comp.' And so the government has a vested interest in trying to question that model.

And then you've got a lot of activity and litigation too where the plaintiffs' bar is trying to put together class and collective actions to question whether these workers really are independent contractors or whether they should have been treated as employees and get all these benefits and everything else that comes with being an employee.

David Weisenfeld:

Let's talk about that litigation. With that said, do you think we will see more of these gig workers at Uber and elsewhere banding together to claim employment status? [0:03:34.8]

Todd Lebowitz:

So you know what I think we have David is we have a scenario where on one hand the gig economy is expanding because generally people like it, and people like the flexibility of being able to work when they want, where they want. If you talk to your Uber driver, you will hear that. But on one hand you have a group of people who like that model. On the other hand you have what I think is a very small group of workers who question that model, and I think you have government agencies who question that model because they have a financial interest in people being employees, not contractors.

Then you get class action litigation that is initiated either by individual, disgruntled workers, whether they're drivers, installers or whatever the field is. And they get counsel and the plaintiff's lawyers look to file class actions, and then these can be very costly for companies to defend, and they're very high risk lawsuits. You see settlements and verdicts in seven figures, eight figures. We have even seen some nine-figure settlements recently.

David Weisenfeld:

I do hear that a lot, that many of these drivers like the flexibility. But by the same token as you note, it seems like there are a number of people who are bringing these claims and wanting the benefits of being an employee. So it seems like this isn't going away anytime soon. [0:04:59.5]

Todd Lebowitz:

Yeah, that's exactly right, David, it's not going away. There's a lot of money to be had here and part of the problem is that it's really hard to tell whether somebody is properly classified as an independent contractor or an employee because you've got different tests. And different tests apply when you are looking at different laws. So, for example, if you're looking at tax law, you've got a right to control test. If you're looking at wage-and-hour law, you've got another test. If you're looking at state unemployment or workers comp law you might have a third test.

So if you evaluate these relationships in different states and under different laws, it's really tough to make a determination because you can easily have a situation where the same relationship with the same individuals is a legitimate independent contract relationship under some laws, but is an employment relationship under other laws, and that's really hard to manage.

David Weisenfeld:

Well Todd, the Chair of the House Workforce Committee recently equated applying the Fair Labor Standards Act to the gig economy to trying to fit a square peg in a round hole. In light of that do you think the FLSA will be amended or should be to create a new classification of workers that might fall between the traditional employees and independent contractors? [0:06:26.5]

Todd Lebowitz:

Square peg in a round hole is a good analogy. The Fair Labor Standards Act was an act in the 1930s to protect mainly industrial workers in factories. It's being applied now in situations that never could have been contemplated 80 years ago.

And so yes I think there is a major call in the business community for a lot of updates to the Fair Labor Standards Act, not only with regard to independent contractors, but also with regard to exempt, non-exempt, things like that. And yes, I think the time is right for some other kind of classification so that there is some protection on the wage an hour laws, or under other laws as well, including the Fair Labor Standards Act.

But an amendment to the FLSA, it wouldn't address a lot of the problem because that's just one of the many laws that applies to this issue of independent contractor versus employee. So even if you had an amendment to the FLSA that created some new category for wage and hour law purposes, because the FLSA addresses minimum wage law and overtime law, that still wouldn't address the issues of whether workers are misclassified under federal tax law, or state tax law, or state unemployment law, or state workers comp law or state wage and hour law.

So yes, I think the time is right for a change in the FLSA, but I don't think that would go far enough to make a lot of difference in the bigger picture here.

David Weisenfeld:

Interesting. Todd, what kinds of occupations do you find most susceptible to these kinds of misclassification lawsuits? [0:08:11.9]

Todd Lebowitz:

Yeah, great question. I posted a blog on this a few weeks ago called *The Hit List*, which industries are on the *Hit List*. And that's on whoismyemployee.com, and some of the areas that I listed are construction workers, drivers, whether they're delivery drivers or passenger drivers, freelance journalists, IT workers, insurance sales people, performers, installers like cable installers, and installers of equipment or appliances, those are often independent contractors, consultants, truck drivers.

There is a really long list of industries where it's a very common practice to use non-employee workers, specifically independent contractors. And that's where you're seeing a lot of the litigation, a lot of the government audits. It's a pretty broad range of industry.

David Weisenfeld: With so many of these multimillion dollar settlements, and you alluded to some verdicts earlier in this area, and not just with Uber, but with FedEx, Lowes and some others, why do you think companies are paying so much to settle these claims? [0:09:20.5]

Todd Lebowitz: You're right, these are settlements. These aren't even judgments. So that means that these companies are making a decision that they're better off paying \$100 million than taking their chances at trial where the outcome could even be worse.

And the answer is that there's so much money at stake, especially for these companies whose business model's really dependent on using independent contractors. Like you look at Uber, and it's hard to imagine what would happen if all of their drivers around the country were suddenly made employees. How would that even work administratively?

So some of these lawsuits really strike at the core of the business model for some of these companies. And we've actually seen some of the food delivery services actually go out of business because they can't defend these lawsuits. They just strike at the core of how they do business.

So that's why you're seeing such big numbers. It's because in businesses where they're completely reliant on independent contractors to perform the services, you've got a large number of people sometimes spread over a large geographic area. And when you start to add up the potential damages for not doing the things that you have to do for employees, and you start multiplying those individual damages by the number of people affected, and then you start multiplying that by the number of years that you can look back. The numbers get really big really fast.

David Weisenfeld: Again, we're speaking with BakerHostetler employment attorney Todd Lebowitz in Cleveland. Todd, what's the most common misconception that clients have in terms of employment status? [0:11:04.6]

Todd Lebowitz: David, I would say that what I hear most often is, "Well everybody agreed that this person was going to be an independent contractor. The person has signed the independent contractor agreement, and so I should have nothing to worry about." Well, that's true in a lot of cases, but it's not true in the issue of independent contractor misclassification. And the reason is the issues that we're looking at are issues of tax law, employment law, employee benefits law, and whether someone is an employee or an independent contractor is determined by those laws.

Now you can't contract out of those laws. You can't make an agreement with somebody that we're not going to follow the Internal Revenue Code, we're not going to follow the Fair Labor Standards Act. You just can't do that in a contract.

And so even though people at the beginning of a relationship might all agree, this is an independent contractor relationship. The courts and the government agencies are generally going to discard that because

instead they look at the facts of the relationship. It's the facts of the relationship that determine whether somebody is an independent contractor or an employee.

David Weisenfeld:

And that goes for the whole control test a bit too, doesn't it?
[0:12:19.9]

Todd Lebowitz:

Yeah, it does, it does. So while having an independent contractor agreement is not by itself protection against these claims. There are a lot of things that the companies can do in these independent contractor agreements to help create defenses to a misclassification claim.

So, for example, you mentioned control. One of the major tests that's used for example under tax law, under federal anti-discrimination law, is a right to control test. And, the main thing that gets looked at there is to what extent does the company control how the work is done. So, for example, if a company hires an independent contractor and says, "I care that I get this result. I don't care how you do the work, when you do the work, where you do the work. I don't care if you hire helpers." Then that's a typical independent contractor relationship.

On the other hand, if you say, "I do care when you work. I do care where you work, and I am controlling all those things." Then, you more likely have an employment relationship. So what you can do is you can use the contract as an opportunity to emphasize the good factors. So, for example, if you don't care where the person works, you can put in the contract, "We have no right to control where the person does the work."

And that's actually a helpful clause because if you are defending a claim of misclassification, and the court or the agency is looking at the facts of the relationship, then you can say two things. Number one, "You don't control where the work is done." And number two, "We're not even allowed to control where the work is done. Here, look at this contract, it says, 'We are not allowed to do it.'"

So you can use the contract as an opportunity to emphasize the good facts, but only having a contract that says, 'We all agree that this is an independent contract relationship.' That's not really all that helpful.

David Weisenfeld:

Todd, with a lot of HR folks listening in our audience, is there any scare story you can share for the listeners from your practice or even just from what you've observed over the years? [0:14:30.3]

Todd Lebowitz:

One thing that I say to HR people is that oftentimes they don't even know that their company has this potential liability because these independent contractors are not employees, and so they don't go through HR. They don't go through payroll. They don't get an employee handbook. They don't go through the onboarding process. And so oftentimes you'll have operations people signing independent contractor agreements and retaining non-employee workers, and HR people don't even know about it.

And so sometimes you have these big liabilities that are created by very well intentioned operations people who don't realize that what

they're doing is creating a liability for the company by retaining independent contractors.

And so one thing that HR people can do is talk to operations people, talk to a plant manager, talk to the people out in the field, talk to people who handle contracts, the procurement department, and find out are we issuing a lot of 1099s? Do we have a lot of independent contractor agreements? Because, if we do, maybe this is something that we ought to look more closely at. Maybe we ought to have our outside counsel look at it.

HR people can issue spot and can alert people in the company to a potential problem that other people in the company might not know exists. So that would be a tip there, try to issue spot.

David Weisenfeld:

Picking up on that point, Todd, I would imagine with an employment agency that might be another concern for HR, where an outside agency is working with the company and providing independent contractors, and HR might be out of the loop in that case. [0:16:18.3]

Todd Lebowitz:

Yeah David, you raise an interesting point, and this is a slightly different issue. So you've got the issue of independent contractor misclassification, where you've got 1099 workers, and the issue is whether those individuals are employees or independent contractors. And then you've got staffing agency workers where you know that these people are employees. So they're employees of the staffing agency. They get a W2. The staffing agency withholds taxes, pays into unemployment, social security, Medicare, all those things that are typical of employment relationships.

And the question with staffing agency workers is not whether they are anyone's employees because we know they are the staffing agency's employees. The question here is whether they are also your joint employees, and what does that mean? And so with joint employment, when you have a staffing agency providing services and those staffing agency workers are under the control of the company that benefits from those services, generally you are going to have a joint employment relationship.

And so the risks there are slightly different because, like I said, somebody's paying into unemployment. Somebody is paying taxes. Somebody is doing all those things, and so it's not quite a misclassification risk. The primary risk there, or the biggest risk there, is what if your staffing agency doesn't do what it's supposed to do? What if they miscalculate overtime? What if they miscalculate taxes and withholding? What if they fail to pay a minimum wage or fail to pay a person for all time that they worked?

Well, if you're a joint employer in that situation, you can be held liable for the mistakes of the staffing agency, even though you might have no control over their payroll practices, over their time recording practices, things like that. In a joint employment scenario because you're benefitting from those services, and you exert control over those workers, you could find yourself liable for their mistakes.

And so when working with a staffing agency it's really important to make sure that you're working with a reputable company, that you've

got a solid agreement with that vendor that covers all these various scenarios and makes it clear that they're responsible for doing these things, that if they fail to do these things, you want to make sure that you're well protected in that sort of agreement.

David Weisenfeld:

Well Todd, the National Labor Relations Board has certainly been front and center in terms of enforcement on these issues. But do you think we will see much less enforcement activity in light of the switch in administrations, and are you seeing any evidence of that yet already? [0:19:05.0]

Todd Lebowitz:

Not yet, not yet. I think the biggest obstacle to a change is that the general counsel of the NLRB it acts like the chief prosecutor, and is really an independent body. And his term doesn't expire until November of 2017. So you have somebody in that position right now who is really gung ho on trying to classify people as employees, trying to promote unionization wherever possible. And that's not going to change. The new administration is not going to have an opportunity to put a new general counsel in until at least November. And then you've got the issue of this administration's been very slow to fill voids anyway, and will that even happen in November?

So that's the chief prosecutor of the NLRB. Then you've got the board itself which is a five member, when it's full it's got five members. Right now, you've got two Democrats, and you've got one Republican, and you've got two vacancies. And as soon as this administration gets around to filling those vacancies, you will then have three Republicans and two Democrats, and you'll start to see a shift in decisions by the NLRB, not only in cases that they prosecute but in their actual decision-making. I think you'll start to see a more pro-company bent to some of those decisions that will help preserve independent contractor status in ways that we're not really seeing right now or that we haven't seen in the last few years.

David Weisenfeld:

So that will definitely be interesting to watch in the next year or two. Well, Todd is there a final piece of advice in our final minute that you'd like to add? [0:20:49.9]

Todd Lebowitz:

I would tell listeners, be proactive. What I hear a lot is, 'Well, I don't think we have a problem because we've never been sued. I don't think we've a problem because we've never been audited.' And that's true for every company that's ever been sued is they've never been sued before until they get sued. They've never been audited before until they get audited.

And so I would say take an opportunity, evaluate the situation you have. Evaluate your contracts with independent contractors. Evaluate your contracts with staffing agencies.

Because in almost every situation there are things you can do to change the facts slightly to release control in certain areas that you don't really care about. And you can make changes in the facts of the relationship that will preserve the business reasons for using non-employee workers, and will tilt the scales a little bit more in the direction of having a legitimate independent contractor or non-employment relationship.

Remember these are balancing tests generally, and so the more bricks you can put on one side of the scale the better, and you should really take an opportunity to move the bricks from one side of the scale to the other whenever you can. So my advice to HR people, to controllers, CFOs, CEOs, anybody who's thinking about this issue, just be proactive about it. Don't wait until you have a problem because then your opportunity to solve the problem is much more limited.

David Weisenfeld: Todd Lebowitz practices in Cleveland with the nationwide firm of BakerHostetler. He's also the author of the whoismyemployee.com blog, which explores many of these independent contractor misclassification issues. And I can speak firsthand that it's very personably written and down to earth with some Mick Jagger and James Bond references just to name a few. Todd, thanks again for your insights.

Todd Lebowitz: Thanks David, I always try to keep it interesting on the blog, so hopefully readers will enjoy it. I really appreciate you having me on today, and have a great day.

David Weisenfeld: I'm David Weisenfeld. We hope you've enjoyed this podcast. Continue checking our website regularly for more podcasts on key employment-related issues. Recent programs include *Making the Most of Mobile Recruiting* and *Protecting Trade Secrets Before It's Too Late*.

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