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"Contractor" versus "Employee" – Misclassification Increasingly Costly to Oregon Businesses

By Nicole Elgin

The question of whether a person qualifies as an independent contractor versus an employee is an increasingly important one in the rise of the gig economy. For businesses, it can be an expensive question to get wrong, considering the various wages, taxes, insurance, and benefits costs—not to mention the penalties—that a business owner might owe if what the business called "contractors" are actually "employees."

In Oregon, that question recently cost a company $3.2 million. In *Acosta v. Senvoy, LLC*, the U.S. District of Oregon ordered the owner of a courier service and three of his Portland-based companies to pay drivers $3,087,100 in wages and liquidated damages as well as $112,900 in civil money penalties for violating the Fair Labor Standards Act (FLSA). Going forward, the company is required to classify its drivers as employees and pay for a third party audit to ensure ongoing compliance.

The drivers were initially classified as employees but the company reclassified them as independent contractors in 2010 pursuant to industry standards. As independent contractors, they did not receive overtime, minimum wages, or reimbursed costs of their vehicles. In evaluating the relationship between the companies and drivers, the court found that the company controlled the manner in which the work was performed in several ways, including requiring drivers to install a specific GPS tracking app, requiring drivers to wear uniforms, and preventing drivers from rejecting work. The drivers had little ability to profit from their business because the company limited their ability to hire their own employees and work for other companies. These factors outweighed the fact that the drivers invested in their own vehicles, cell phones, uniforms, fuel, and insurance. The court's decision is an important reminder to businesses that industry practice is not a defense to worker misclassification.

The Oregon Supreme Court has also recently found "independent business owners" were actually employees for purposes of unemployment insurance tax in *ACN Opportunity, LLC v. Employment Department*. There, the company sold satellite television, telephone, internet, and home security services. The company used a network of direct-to-consumer sellers that it called "independent business owners." In auditing the company, Oregon's Employment Department found that the company was an employer and was required to pay unemployment insurance tax on the earnings the company paid to the independent business owners for their sales.

To avoid Oregon unemployment insurance tax liability, the burden is on the business owner to prove that the worker is an independent contractor or qualifies from one of the exemptions from "employment." The court found that the company's independent business owners failed the "customarily engaged in an independently established business" factor because running their "independent businesses" from a table at a coffee shop did not meet the test's requirement that independent contractors affirmatively "maintain a business location." Additionally, the court highlighted that the independent business owners did not have sufficient authority to hire others to provide the services, which is another important factor to the independent contractor test.

Those surprised by some of the court's application of the statutory language to the realities of the modern-day workforce were not alone. In his concurring opinion, Justice Balmer agreed that the sellers were employees, but urged the Oregon legislature "to consider revising some of the many statutes that regulate

the relationship between those who perform work and those individuals or businesses who pay them, in light of the far-reaching changes that have occurred in the workplace and in the economy over the last two decades." Reflecting on the increasingly mobile and flexible nature of the growing gig economy, Justice Balmer concluded that "it is apparent that existing statutes and regulations do not address the realities of important parts of today's work environment."

In response to calls from labor and management interests, the Oregon Legislature is considering bills aimed at revising the current tests for classifying an independent contractor versus an employee. For example, House Bill 2498 would redefine "independent contractor" to require that the contractor "does not provide services that are within the usual course of the other person's business." Such a definition would fundamentally alter companies' ability to classify workers as contractors in the growing gig economy (ride share drivers come to mind).

In addition to ensuring all contractors are appropriately classified under the current legal framework, Oregon businesses should stay tuned for potential legislative changes to these classification tests. For questions on classifying workers as contractors or employees, contact Barran Liebman attorney Nicole Elgin at (503) 276-2109 or nelgin@barran.com.