Could A Proposed Federal Law Solve The Misclassification Riddle?

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For years, businesses have struggled with properly identifying workers as either independent contractors or W-2 employees. The hundreds of thousands of jobs created by the gig economy have complicated matters even further. Over the years, administrative bodies have attempted to craft tests to be used in the classification process. These tests, in many respects, have not been helpful. Our courts, too, have attempted to solve the riddle, but have largely been unsuccessful due to inconsistent rulings. As a result, businesses that have attempted to properly classify workers in good faith have found themselves in hot water with the Internal Revenue Service and state taxing authorities, state employment departments, workers' compensation boards, and the courts.

Traditional independent contractors and those involved in the gig economy have large roles. Many businesses rely on workers who display characteristics consistent with W-2 employees. These same workers may also display characteristics consistent with 1099 workers. For many businesses, these workers are critical partners for which they could not operate without. The problem for many businesses is that they analyze the various factual scenarios using the multitude of legal tests, and administrative opinions, etc. However, due to the incongruence of these tests and opinions, businesses do not always feel confident in classification decisions, despite best efforts. Businesses worry about I.R.S. exposure, as well as exposure to wage and hour law suits. So, what are businesses to do?

Help could be on the way. On July 13, 2017, Senator John Thune introduced a bill titled "the New Economy Works to Guarantee Independence and Growth Act of 2017," or "the NEW GIG Act of 2017." One of the goals of the proposed legislation is to create a safe harbor for taxpayers to qualify as independent contractors if they can meet a series of objective tests. The proposed legislation contemplates relationships specific to traditional independent contractors, as well as parties to more traditional tripartite gig economy relationships. Under the proposed legislation, service providers would be treated as independent contractors for tax purposes. The service recipients and gig economy firms would not be treated as employers for tax purposes. The proposed legislation aims to clarify the classification issue using the following test:

1. **Nature of Relationship:** The relationship between the parties (e.g., job-by-job arrangement, the service provider incurs his or her own business expenses, the service provider is not tied to a single service recipient).

2. **Location of Services:** The location of the services or the means by which the services are provided (e.g., the service provider has his or her own place of business, does not work exclusively at the service provider's location, and provides his or her own tools and supplies).
3. **Written Contract:** A written contract (e.g., stating the independent contractor relationship, acknowledging that the service provider is responsible for his or her own taxes, providing the service recipient's reporting and withholding obligations).

Traditional independent contractors would still require companies using the workers to file a Form 1099-MISC showing the amount paid, but the bill would raise the reporting threshold from $600 to $1,000. Gig economy firms would be required to report payments of more than $1,000. Gig economy firms and buyers would be required to withhold a portion of payments made for deposits to the I.R.S. that would be treated as an estimated tax payment. The proposed bill also contemplates retroactive costs. So, when parties enter into an independent contractor relationship, but it is later determined that the relationship fails to satisfy one of the safe harbor provisions, the I.R.S. would reclassify the worker prospectively so long as that party can demonstrate a good faith attempt to comply with the safe harbor requirements.

This proposed bill is still just that: a proposed bill. It currently has no impact on the state of the law. Of course, it is possible that this bill will eventually become law in a similar vein as new laws recently enacted in both Florida and Texas. We will continue monitoring the progress of this particular bill and update you as appropriate.