Light at the End of The Tunnel? USDOL Signals Intent to (Finally) Issue Classification Rules

Insights
9.26.18

We've been waiting for something like this since the gig economy was established: a set of rules and regulations, adapted for the modern era and with the gig economy in mind, addressing the issue of independent contractor classification. And yesterday's news may mean we may actually have our wish granted.

In an interview with Bloomberg Law, Secretary of Labor Alexander Acosta told reporter Chris Opfer that the USDOL is looking at issuing amended regulations that would govern independent contractors in the context of the gig economy, finally recognizing that the 21st-century workforce deserves (and demands) a 21st-century regulatory framework. "The workforce is changing," Acosta told Bloomberg Law. "How we approach work is changing, and we need to start looking at our rules and recognize that what fit 20 or 30 years ago is not going to fit for the modern workplace."

So what do you need to know about this positive development?

When might this happen?
Acosta indicated that the USDOL is strongly looking at the issue of joint employment first, and is aiming to revise federal rules on that topic. Once that issue is addressed, he said the agency will then turn to the classification issue. The joint employment topic has already gained significant momentum as the NLRB just issued a proposed rule last week to tighten the legal standard and make it harder for workers to claim they are joint employees of more than one employer; the USDOL will most likely follow the NLRB's lead on that front and build on whatever is finally developed there. Look for the joint employment topic to be addressed by the middle of 2019, and the misclassification proposed regulations to be unveiled next summer.

What might a misclassification rule look like?
Although we might not know what shape it will take, we can expect that any rule issued by this USDOL to be friendly towards businesses and hiring entities, making it harder for workers to prevail in misclassification cases. In all likelihood, the proposed rule would look somewhat like some of the state laws passed in the past few years creating a misclassification safe harbor for transportation network companies and other gig businesses. Typically, these state laws confirm that, that when a worker finds a job through a website or mobile app, the worker is considered an independent contractor as long as the company does not control the worker's schedule, does not prohibit the

worker from working elsewhere (even for direct competitors), and enters into a written contractor agreement.

How will this affect worker-friendly state court laws?

In sum: it won't. A federal regulation like this would not have the power to overturn state court cases (such as California's *Dynamex* decision that adopted the notorious ABC test), but would simply impact interpretation and enforcement of federal laws that intersect with the misclassification question. In fact, some posit that the creation of a looser federal standard might push employee-friendly states to adopt their own tighter rules more closely aligned with the ABC test.

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