As Other States Throw Up Roadblocks, Tennessee Makes Changes To Boost Gig Economy

Insights
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This blog is littered with posts talking about the various states that are intent on creating a California-like legal test that would make it supremely challenging to classify workers as independent contractors. We've done several on New York alone, and that state's efforts to adopt the ABC Test for themselves, just like California did with AB-5. And we've covered New Jersey. Meanwhile, Illinois, Wisconsin, Oregon, and Washington all seem like they might be the next California copycat.

But here in Tennessee, things just got better for gig economy businesses. When the clock struck midnight on the new year in the Volunteer State, businesses heralded a new flexible misclassification test that provides more of a balance between the interests of employers and workers. As of January 1, 2020, the state's new law now calls for the implementation of the classic 20-factor test to determine whether a worker is a contractor or an employee. It specifically overturned the more hard-and-fast approach previously taken by the Tennessee courts that only called for an examination of six factors.

The 20 factors to be examined are listed below. But the important thing to know is that these factors are flexible and permit a wide variety of business arrangements to be structured in a way that meets legal muster. As opposed to California-like bright line rules that provide little consideration for the needs of businesses, the new Tennessee test provides a good balance and should encourage more innovation and growth in the state when it comes to the burgeoning gig economy.

20-Factor Test

1. Instructions: If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status;
2. Training: Worker training indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status);
3. Integration: Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status;
4. Services rendered personally: If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status);

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5. Hiring, supervision, and paying assistants: If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status;
6. Continuing relationship: A continuing relationship between the worker and the person for whom the services are performed indicates employee status;
7. Set hours of work: The establishment of set hours for the worker indicates employee status;
8. Full time required: If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status;
9. Doing work on employer's premises: If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere;
10. Order or sequence test: If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status;
11. Oral or written reports: A requirement that the worker submit regular reports indicates employee status;
12. Payment by the hour, week, or month: Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status;
13. Payment of business or traveling expenses: If the person for whom the services are performed pays expenses, this indicates employee status;
14. Furnishing tools and materials: The provision of significant tools and materials to the worker indicates employee status;
15. Significant investment: Investment in facilities used by the worker indicates independent contractor status;
16. Realization of profit or loss: A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor;
17. Working for more than one firm at a time: If a worker performs more than de minimis services for multiple firms at the same time, that generally indicates independent contractor status;
18. Making service available to the general public: If a worker makes his or her services available to the public on a regular and consistent basis, that indicates independent contractor status;
19. Right to discharge: The right to discharge a worker is a factor indicating that the worker is an employee; and

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20. Right to terminate: If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, that indicates employee status.

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