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## The Concept Of Independent Contractor Is Under Assault—Especially In California

Robert S. Cooper

The traditional working classification of independent contractor, as we have known it, may soon go the way of the dinosaur, the horseless carriage, and the telegraph. Although perhaps your gardener, pool man or family accountant can still call themselves independent contractors, the recent developments of the last decade suggest that if this classification is to survive at all, it will be greatly transformed or minimized in its use. This is especially true in the new on-demand businesses such as Uber and many others that are being besieged by class action lawsuits as well as attacks from state and federal regulators. Consider the following recent events and trends:

- The state of California recently (in 2012) amended the Labor Code to add stiff penalties for misclassification of workers. Labor Code sect. 226.8 proscribes penalties of not less than \$5,000 and not more than \$15,000 for each violation in addition to any other penalties or fines permitted by law, and not less than \$10,000 and not more than \$25,000 for each violation, if the Labor and Workforce Development Agency or a court issues a determination that the violation was deemed a *willful misclassification*; this statute provides no private right of action but can be the basis for an LWDA action;
- California's Employment Development Department (EDD), which is responsible for enforcing employment taxes such as Unemployment Insurance (UI), State Disability Insurance (SDI) and Personal Income Tax (PIT) against employers, conducts thousands of tax audits across the state, often issuing assessments that assume a company's numerous vendors are misclassified employees, and putting the burden on the companies to prove otherwise. These tax assessments have resulted in multi-millions of dollars in assessments for back taxes against California employers.<sup>1</sup>
- The trucking industry, long a haven of owner-operator truckers running their own businesses, has been transformed by the clean truck rules at the ports of Los Angeles and Long Beach, which outlawed all but the newest trucks from entering the ports. This resulted in many truckers leasing newer trucks from employers who still needed them to haul goods for their customers—but the trucking companies and truckers have been besieged by class action lawsuits attempting to claim that they are misclassified employees. Various adverse court decisions have further chilled the independent contractor title for these truckers. (*People ex rel. Harris v. Pan Anchor Transportation* (California Supreme Court 2014) [Unfair Competition case alleging that truck drivers misclassified as independent contractors is not preempted by federal law]; *Garcia v. Seacon Logix, Inc.*, (190 Cal.Rptr. 2015) [Port of Long Beach truck drivers are employees, not independent contractors].
- Just weeks ago (June 16, 2016) FedEx agreed to pay \$240 million to settle claims from delivery drivers in 20 states who said they were incorrectly classified as independent contractors. A federal judge awarded \$37.2 million in attorneys' fees to class counsel for FedEx drivers in a separate \$227 million settlement with drivers in those states, one of a slew of lawsuits in approximately 40 states against FedEx.
- Uber recently was forced to pay nearly \$100 million in one of many class action suits against it alleging mis-classification of its driver agents, although it was not required as part of the settlement to re-classify its agents. Similar class actions have been filed in droves against other on-demand service companies across the nation.

One of the problems fueling the independent contractor hotbed of legal activity is that the traditional common law test, the so-called "right- to-control-test" outlined by the California Supreme Court 25 years ago in *S.G. Borello & Sons v. Dept. of Industrial Relations* (1989) 48 cal.3d 341) offers no bright-line answer to classifying workers. The court summarized that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has a right to control the manner and means of accomplishing the result desired..." The Court further stated that the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because [t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities..." However, the Court also recognized a range of some eight (8) other secondary factors taken from other precedents, including whether the principal supplies the tools and instrumentalities, the length of time for which the services are to be performed and others. For its part, when assessing the misclassification issue, the EDD utilizes the control test, but adds its own factors as well, and ultimately their test includes some 23 separate factors to analyze whether workers have been misclassified as independent contractors.

The federal test, called the "suffer or permit to work" test, is far stricter, and in July 2015, the U.S. Dept. of Labor issued Administrator's Interpretation No. 2015-1, which concluded that "[i]n sum, most workers are employees under the FLSA's broad definitions..."

Another problem is that, while companies like utilizing independent contractors to save paying for insurance, expenses, benefits and employment lawsuits, state and federal governments don't want to be denied tax revenues generated by employees, and unions want all workers to be employees, so that they can potentially be unionized, and generate dues.



Obviously, in the current environment, companies that utilize independent contractors need to be extremely careful as to how much control they exercise over these workers. But also, especially in light of the explosive growth of on-demand companies, state legislatures should step up to both clarify the law and protect these burgeoning businesses, which are growing because consumers want them, and because many workers love the freedom to make money on their own schedules and outside of the traditional workplace.



*Robert Cooper is a Shareholder and Co-Chair of the Firm's Labor & Employment Practice Group in Los Angeles. He can be reached at 213.891.5230 or [rcooper@buchalter.com](mailto:rcooper@buchalter.com).*

<sup>1</sup> In 2007, the state of California collected \$40.3 million in assessments on employment tax fraud, \$18.5 million in Labor Code citations and \$11.9 million in payroll tax assessments.