Independent Contractor Laws Are Ignoring Economy's Evolution

By **Ron Holland, Ellen Bronchetti and Erik Christensen** (January 13, 2023)

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It was another turbulent year for the independent contractor test with what began as a tug of war between presidential administrations devolving into a battle royal as we move into 2023. At the fight's center: the U.S. Department of Labor.

This fight began with the outgoing Trump administration and incoming Biden administration. The Republican-led DOL rulemaking in favor of employers was met by the incoming Democratic administration in 2020 — seeking to unwind those changes in favor of employees and unions. The crux of the battle is the classification of independent contractors and the scope of joint employer relationships.

Amidst this ideological struggle, an important factor seems lost: the changing nature of our domestic economy and the need for policies reflecting, not punishing, this new reality. As a result, states and courts have entered the fray, attempting to normalize relationships between businesses and employees caught in the middle.

Under the Trump administration, the DOL abandoned the unweighted, six-factor economic realities test, replacing it with a five-factor independent contractor test of the same name.[1] This rule, which remains law for now, emphasizes the nature and degree of the worker's control over their work and the worker's opportunity for profit and loss factors over the remaining three:

- The amount of skill required for the work;
- The degree of permanence of the working relationship between the individual and the potential employer; and
- Whether the work is part of an integrated unit of production.[2]

The DOL, under the Biden administration, then sought to withdraw this rule and return the nation to the six-factor test.[3] However, this move was blocked by the U.S. District Court for the Eastern District of Texas on March 14, 2022,[4] resulting in the DOL engaging in further rulemaking on Oct. 13, 2022, to affect this change.[5] Adding fuel to the fire, the DOL also proposed a new rule threatening to expand joint employer liability to franchisors.[6]

The National Labor Relations Board also took action this year, entering into a memorandum of understanding with the DOL to conduct joint investigations to enforce against misclassification of employees as independent contractors.[7]

After doing so, the NLRB investigated XPO Logistics, finding their truck drivers, who owned or leased their own vehicles, were employees and not independent contractors.[8] The agency was unpersuaded by arguments that XPO, which coordinates shipping and transportation services for third parties, was the truckers' customer.

In the meantime, states and courts began taking matters into their own hands, with new challenges to independent contractors. The U.S. Supreme Court denied review of challenges to the U.S. Court of Appeals for the Ninth Circuit's decisions rejecting arguments of federal preemption for motor carriers[9] and journalistic carve-out challenges to California's A.B. 5, which retroactively adopted the so-called ABC Test for determining employee status.[10]

Notably, the Ninth Circuit also held that 7-Eleven Inc. franchise owners were properly classified as independent contractors and denied certification of their putative class.[11]

States also enacted various new independent contractor laws, including:

- Alabama S.B. 150, which ensures "marketplace contractors" are not considered employees under the state's wage and hour, unemployment insurance, and workers' compensation laws;[12]

- Georgia H.B. 389, creating a seven-factor independent contractor test;[13]

- Maryland S.B. 600, requiring residential service agencies receiving certain Medicaid reimbursement to report the number of personal care aides classified by these agencies as employees and independent contractors;[14] and

- Washington, Seattle Council Bill No. 120069, enacting a six-factor independent contractor test for persons working in Seattle, in whole or in part.[15]

These disparate approaches to the same issue reveal the root of the problem: a universal and continuing inability to adjust to the realities of the new economy. The simple truth is that gig work is here to stay. Another is that some people enjoy working as independent contractors.

The laws discussed above tend to take an all-or-nothing approach to this problem, but there is another way. Those favoring employee status take a very paternalistic view of workers who choose the flexibility of working as a contractor, while those favoring a more lenient test for contractors are failing to recognize the need for certain protections like workers compensation and unemployment benefits for displaced contractors.

New York City appears to have struck this balance in a combination of a 12-factor independent contractor test[16] and express protections for these contractors under its Freelance Isn't Free Act, which was set to apply statewide as of this year before it was

vetoed by Governor Hochul on Dec. 23, 2022.[17] The act gives certain independent contractors in the state the right to:

- A written contract regarding the terms of their engagement;
- Protections from retaliation;
- Access to legal support to aid in enforcing their rights;[18]
- Timely payment of all monies earned; and
- Additional damages for any independent contractor harmed under the act.

In essence, New York City sees that independent contractor status in our modern economy can be difficult to define. Rather than ignoring or outlawing the problem, the city created backstop protections for its freelance workers, ensuring they are paid and treated with dignity. We will have to wait to see how this model plays out, but it appears to have had great success in New York City since it was first implemented in 2016.

Other states and federal agencies may soon follow suit.

Conclusion

What began as a tug-of-war between presidential administrations has devolved into a battle royal with states, courts and federal agencies taking matters into their own hands while presenting black-and-white solutions to the evolving issues regarding freelance workers. Except New York City.

Perhaps their model will show the rest of the country the path forward, allowing the gig economy to thrive while ensuring protections for those workers.

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[1] https://www.federalregister.gov/documents/2021/01/07/2020-29274/independent-contractor-status-under-the-fair-labor-standards-act.

[2] This change eliminated "Investment in facilities for work" as one of the Economic Realities Test's prongs.

[3] https://www.federalregister.gov/documents/2021/03/12/2021-05256/independent-contractor-status-under-the-fair-labor-standards-act-withdrawal.

[4] Coalition for Workforce Innovation, Associated Builders and Contractors of Southeast Texas, et al. v. Marty Walsh, et al., Case No. 1:21-cv-00130-MAC (E.D. TX, 03/14/2022).

[5] https://www.federalregister.gov/documents/2022/10/13/2022-21454/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act.

[6] https://public-inspection.federalregister.gov/2022-19181.pdf.

[7] https://www.dol.gov/agencies/whd/flsa/national-labor-relations-board-mou.

[8] https://www.nlrb.gov/case/21-RC-289115.

[9] https://www.scotusblog.com/case-files/cases/california-trucking-association-inc-v-bonta/.

[10] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1172.html.

[11] Bowerman v. Field Asset Servs., 39 F.4th 652 (9th Cir. 2022).

[12] http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2022RS/PrintFiles/SB150-enr.pdf.

[13] https://www.legis.ga.gov/api/legislation/document/20212022/212229.

[14] https://mgaleg.maryland.gov/2022RS/bills/sb/sb0600E.pdf.

[15] http://seattle.legistar.com/LegislationDetail.aspx?ID=4940988&GUID=0D116E17-4243-4BC2-8696-EB57534EEA6F&Options=ID%7cText%7c&Search=&FullText=1.

[16] https://dol.ny.gov/independent-contractors.

[17] https://www.nysenate.gov/legislation/bills/2021/S8369.

[18] https://www.nyc.gov/site/dca/workers/workersrights/freelancer-workers.page.