Legal and Regulatory Considerations: Nonstandard Work and Interface with Workers’ Compensation Laws

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Classic Legal Classifications of Work

.... Employee

.... Independent Contractor

.... "Casual Employment"

.... Volunteer work

> Primacy in workers' compensation (WC) of the "employee" categorization

Distinguishing Standard Work from NonStandard Work

John Howard, M.D., J.D, *Nonstandard Work Arrangements and Worker Health & Safety*, 60 AM. J. INDUS. MEDICINE 1 (2017)

(A) Standard Work: The Industrial Model

The Craft Model

Distinguishing Standard Work from NonStandard Work

(B) Nonstandard Work

.... Temporary/Staffing Company Workers
.... Leased Workers
.... Workers in the Gig Economy
.... Individual Entrepreneurs

Temporary/Staffing Company Workers

Majority approach is to treat the temporary worker as an employee of the agency, particularly where the agency has secured the workers' compensation policy of insurance. In such instances, the agency client is typically conceived of as a joint employer with the agency and hence gains immunity from tort liability. If the agency has not secured insurance, the agency client, which has presumably exerted control over the worker, will be deemed the employer and may also be potentially liable in tort.

~ Ex.: *Wedeck v. Unocal Corp*., 69 Cal.Rptr.2d 501 (Cal. Ct. App. 1997).

Leased Workers (Workers of Professional Employer Organizations or PEOs)

Majority approach, as with temporary agencies, is to treat the leased employee as an employee of the PEO, particularly where it has secured the workers' compensation policy of insurance. In such instances, the PEO client is typically conceived of as a co-employer with the PEO and hence gains immunity from tort liability. If the PEO has not secured insurance, the PEO client, which has presumably exerted control over the worker, will both be deemed the employer and may also be liable in tort.

....The Model PEO Act (www.NAPEO.org), actually refers to "co-employment."

....Several states have adopted the model act or variations on the same to govern leased employment.

~ Ex.: *Diamond Woodworks v. Argonaut Ins. Co*., 135 Cal. Rptr. 736 (Cal. Ct. App. 2003).

Gig Economy Workers

.....Invariably conceived of by app-based enterprises as independent contractors.

.....Little authority exists on the issue, but agencies (*e.g.*, that of Alaska) and injured worker advocates/legal representatives have asserted that, for workers' compensation purposes, an enterprise like Uber maintains such control over workers that an employer-employee relationship exists.

~ National Employment Law Project, POLICY BRIEF: ON-DEMAND WORKERS SHOULD BE COVERED BY WORKERS' COMPENSATION (June 2016).

~ Bradley Smith, *Holding a Square Peg and Choosing Between Two Round Holes: The Challenge Workers' Compensation Law Faces with Uber and the Sharing Economy*, LEX & VERUM, p.17 et seq. (May 2016), available at www.NAWCJ.org.

Individual Entrepreneurs

The self-employed have always existed, but self-employment is a model of work said by some to be on the rise (e.g., those laboring in the "Maker's Movement"). As to this latter category, such workers appear to be bona fide self-employed individuals – but their retention of assistants on a regular, or even intermittent, basis again raises the issue of the employer-employee relationship.

~ *See generally* Kennedy & Giampetro-Meyer, *Gearing up for the Next Industrial Revolution: 3D Printing, Home-Based Factories, and Modes of Social Control,* 46 LOYOLA CHICAGO LAW REVIEW 955 (2015).

~ Carrie Lane, *The Self-Assembled Career*, THE HEDGEHOG REVIEW (Spring 2016).

~ Charles Heying, *Portland's Artisan Economy,* THE HEDGEHOG REVIEW (Spring 2016).

Legal Tests Distinguishing Employee from Independent Contractor

A. Predominant Test: Retention of Control in the Putative Employer

~Ex.: *Hanson v. Transportation General, Inc*., 716 A.2d 857 (Conn. 1998) (where taxicab enterprise had materially *divorced itself of control* over cab driver, he *would not* be considered an employee in wake of his work-related death).

B. Subsidiary Test: Relative Nature of the Work

~Ex. *Kertesz v. Korsh*, 686 A.2d 368 (N.J. Super. 1996) (where sheetrock hanging enterprise, short of its own employees on townhouse construction job, subcontracted work to an independent sheet rock worker, the latter would be deemed an employee in the wake of his work-related injury).

How Can/Has Workers' Compensation Law Respond(ed)?

A. Inclusion is possible
   CO: Presumptive inclusion of independent contractors;
   PA: Inclusion of volunteer firefighters.

B. Exclusion is possible
   AK: 2017 exclusion of Uber drivers;
   PA: Exclusion of casual workers not engaged in a business enterprise

C. "Statutory Employment"
   Longstanding features of WC laws that oblige an enterprise that contracts out an essential aspect of its work to a subcontractor be responsible for the injuries sustained by employees of the latter.

~ *Six L's Packing Co. v. WCAB (Williamson),* 44 A.3d 1148 (Pa. 2012).
~ *Zwick v. WCAB (Popchocoj*), 106 A.3d 251 (Pa. Commw. 2014)
~*Oakwood Hebrew Cemetery v. Spurlock*, 1992 WL 441851 (Va. Ct. App. 1992).

How Can/Has Workers' Compensation Law Respond(ed)?

D. Laws governing temporary work/leased employment

E. WC policy endorsements to cover non-employees (*e.g.*, "voluntary" comp)

F. Statutory/regulatory action against misclassification (Massachusetts, New York, Florida)

G. *Ad hoc* solutions: The NYC Black Car Fund

H. (a Postscript): European Union Court ruling about Uber
See Hamza Shaban, *Could Europe's Uber ruling affect the future of the gig economy?*, THE DAILY HERALD (Dec. 23, 2017), http://www.dailyherald.com/business/20171223/could-europes-uber-ruling-affect-the-future-of-the-gig-economy