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IC Classification, Co-Employment and Class Actions: The Links and How To Avoid Them

Moderator: Barry Asin, President, Staffing Industry Analysts

Guest Speaker:
Eric Rumbaugh, Partner, Labor and Employment Law Practice Group
Michael Best & Friedrich

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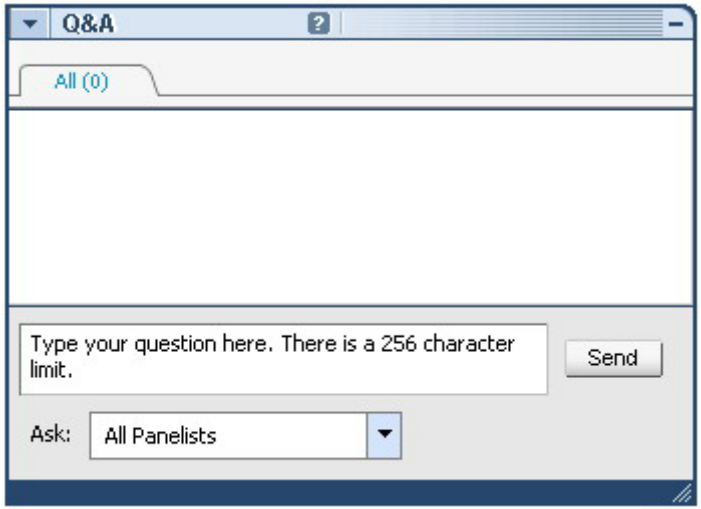

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Our Speakers Today

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Labor and Employment Law
Practice Group,
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Recognizing Misclassification Risk:

Introduction

- Worker misclassification is a high stakes issue
  - New legislation and heightened scrutiny have increased risks of misclassifying workers as ICs
  - Classification standards supersede contractual agreement
- Misclassification can have steep costs
  - Penalties, litigation expenses, and settlements can escalate quickly
  - State and federal trend is moving ICs into employee status
- Enforcement escalation at odds with social trend toward independent work style
  - Multiple parties can contest classification for a variety of reasons
  - Businesses caught in the middle

Misclassification Common Denominators

- Internal adoption/system avoidance
- Head counts/term limits
- Taxes/FUTA

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Recent Developments in Class Action Law

Class Actions Recent Developments

- Recent Class Action Decisions have favored Employers
  - *Dukes v. Wal-Mart* – the Supreme Court reversed certification of the largest sex discrimination class action in U.S. history
  - *AT&T Mobility v. Concepcion* – the Supreme Court held that arbitration agreements that bar class claims are valid

Class Actions Certification

- Class Certification – *Dukes v. Wal-Mart*
  - In *Dukes v. Wal-Mart*, the Supreme Court reversed certification of the largest sex discrimination class action in U.S. history
  - The decision gave renewed life to the requirement that plaintiffs establish common questions of law or fact when seeking to certify a class action
  - A proper class must present both a common question, *and*, more importantly, a common answer to the question of "why was I disfavored?"
  - Plaintiffs must present "convincing proof" to support their contentions, instead of simply relying on allegations in a complaint
  - After *Dukes*, Plaintiffs will have to narrow their class definitions

Class Actions Certification

- Implications of *Dukes* for Employers
  - Employers may delegate authority to local managers without concern that the delegation, in and of itself, will form the basis for a class action complaint
  - Employers should make sure to enforce their EEO policies
  - Employers should be aware that senior executives' memos or emails setting forth corporate policy may be the evidence that determines whether a company-wide or region-wide class action is appropriate
  - Employers should be aware of their workplace demographics – better to learn about adverse statistical evidence from internal review than through the filing of a class discrimination complaint
  - Employers should be concerned about "groups" of unclassified workers

Class Actions Arbitration Agreements

- Arbitration Agreements – *AT&T Mobility v. Concepcion*
  - In *AT&T Mobility*, the Supreme Court held that arbitration agreements that bar class claims are valid, and federal law preempts state laws that bar such agreements
  - AT&T maintained a contract with consumers pursuant to which disputes between AT&T consumers would be resolved through a multi-step arbitration process. The arbitration clause did not permit class action claims
  - Plaintiffs argued that AT&T's agreement was unenforceable under California law
  - The Supreme Court held the Federal Arbitration Act (FAA) preempts California law and found that AT&T's arbitration clause was enforceable

Class Actions Arbitration Agreements

- Implications of *AT&T Mobility* for Employers:
  - *AT&T Mobility* has greatly increased the potential usefulness of arbitration agreements in employment contracts
  - Employers can now have some confidence that they may avoid class litigation (such as discrimination and wage claims) through use of arbitration agreements
  - After *AT&T Mobility*, businesses will want to review existing arbitration agreements and consider adding language to bar class action claims
  - Businesses not currently using arbitration agreements will want to reevaluate that decision now

Class Actions Sources

- Well-Known Source of Class Actions:
  - Unemployment Audits

Class Actions Sources

- Well-Known Source of Class Actions:
  - Wage and Hour Claims

Class Actions Sources

- Well-Known Source of Class Actions:
  - Employee Benefits

Class Actions Sources

- Well-Known Source of Class Actions:
  - Unionized Trades

Class Actions Sources

- Well-Known Source of Class Actions:
  - Background Checks

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Background Checks: A Potential Source of Contingent Labor Class Action Litigation

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Background Checks

- Employers and Staffing Agencies have legitimate interests in screening their workers through background checks
- Some screening practices may, however, attract scrutiny from the Equal Employment Opportunity Commission ("EEOC")
- For example, the EEOC has recently shown renewed interest in preventing discrimination based on credit or criminal record checks
- Applicants have also been directly filing suits against Staffing Agencies based on hiring decisions
- In these suits, the Plaintiffs likely never worked for the staffing agencies they are suing

EEOC and Background Checks

- *EEOC v. Freeman*, No. 09-CV-2573 (D. Md. filed Sept. 30, 2009)
  - EEOC alleged that a company engaged in nation-wide pattern of unlawful discrimination based on background checks
  - Poor credit history – African-American applicants
  - Criminal history – African-American, Hispanic and white male applicants
  - The EEOC investigation was triggered by a single complaint from an African-American woman who alleged the company discriminated against her based on credit history

Outsourcing Background Checks

- *Lamdin v. Aerotek Commercial Staffing, et al.*, 2010 U.S. Dist. Lexis 105306 (E.D. Tenn. Sept. 30, 2010)
  - Staffing firm terminated a worker based on the results of a background check
  - Background check report contained false information, including inaccurate statements that the worker had been convicted of a felony and had served jail time
  - Court ruled that the worker could not sue the staffing firm under the Fair Credit Reporting Act (FCRA) because the staffing firm was not a Consumer Reporting Agency

Background Checks and Class Actions

- *Henderson, et al. v. MDT Personnel, LLC*, 2011 U.S. Dist. Lexis 85561 (N.D. Ill. Aug. 1, 2011)
  - Plaintiffs filed putative class action against temporary staffing agency after they were denied employment
  - Staffing agency procured consumer credit reports on the Plaintiffs from an outside agency and informed the Plaintiffs that they were not eligible for employment based on the reports' indications that the Plaintiffs had criminal records
  - Plaintiffs alleged that the staffing agency violated the Fair Credit Reporting Act (FCRA) by failing to provide Plaintiffs with copies of their consumer reports and a written description of their rights under FCRA or an opportunity to dispute the accuracy of the information in the reports
  - The court denied the staffing agency's motion to dismiss for lack of standing

Background Check Action Steps

- Demographics/Statistics
- Substantial Relationship
- FCRA
- State Law Issues

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Recent Co-Employment Case Law

Co-Employment Outsourcing

- *Ling Nan Zheng v. Liberty Apparel Co.*, 617 F.3d 182, 2010 U.S. App. LEXIS 16478 (2d Cir. 2010), *cert. denied*, 2011 U.S. LEXIS 3481 (U.S. May 2, 2011)
  - In *Zheng*, a garment company outsourced manufacturing work to a factory that subcontracted work from several companies
  - The garment company regularly sent quality control representatives to the subcontractor's factory to supervise the workforce
  - A jury found that Liberty was a joint employer with the subcontractor
  - The Court of Appeals for the Second Circuit held that the issue of joint employer status was properly sent to the jury (rather than determined by the judge), and U.S. Supreme Court recently denied *certiori*

Co-Employment Outsourcing

- *Lepkowski v. Telatron Mktg. Group, Inc., et al.,* 2011 U.S. Dist. LEXIS 9388 (W.D. Pa. Feb. 1, 2011)
  - Plaintiff was one of 200 call center employees who worked exclusively for the same client company
  - Plaintiff alleged violations of the FLSA, including failure to compensate for time spent logging into computer systems
  - Plaintiff filed suit against the call center and its client company and sought class certification
  - In response, the client company successfully argued that under the FLSA "economic realities" test it was not the worker's " joint employer"
  - In its decision, the district court focused on the "totality of circumstances" and applied factors used in other circuits to reject the plaintiff's joint employer theory
  - Conditional class certification was granted against the call center

Common Law Employer

- *Blue Lake Rancheria v. United States*, 2011 U.S. App. Lexis 16530 (9th Cir. Aug. 11, 2011)
  - In *Blue Lake Rancheria*, an Indian tribe sought refund of Federal Unemployment Tax Act (FUTA) taxes paid by an employee leasing company wholly owned by the Tribe
  - The client companies supervised the leased employees on a day-to-day basis, but the Tribe's employee leasing company paid their wages, provided benefits, and performed other HR functions
  - The employee leasing agency paid wages for approximately 39,000 works
  - The Court found that the employee leasing agency was the workers' common law employer, and under an exception for Indian tribes, was not required to pay FUTA taxes

Common Law Employer

- Employments Status Indicators in *Blue Lake Rancheria*
  - The Court looked to the factors in *CCNV v. Reid* (a 1989 Supreme Court decision) as well as Treasury Regulations 31.3306(i)-1(b) to determine whether the workers were common law employees
  - The client companies supervised the leased employees on a day-to-day basis, however:
    - the workers were under the will and control of both the employee leasing agency and the client company
    - the employee leasing agency set and paid wages, and provided benefits
    - the employee leasing agency retained the right to recruit, screen, hire, reassign and terminate the workers
  - The Court found that these, as well as additional factors, demonstrated that the employee leasing agency was the common law employer
  - The Court also noted that a worker may be a common-law employee of both a staffing agency and a client company, but it did not reach this issue in the case

Action Items

- Classification Action Items:
  - Adoption
  - Visibility
  - *Dukes* Action Items
  - *AT&T Mobility* Action Items
  - Background Check Action Items
  - Unemployment Compensation Action Items
  - Employee Benefit Action Items

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Questions & Answers

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