An Unfair Presumption in the Fair Labor Standards Act

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The Obama Administration's Department of Labor has made it a top priority to find and investigate instances of employee misclassification—that is, designating a worker as an independent contractor rather than an employee.[1] Proper classification is important because the Fair Labor Standards Act provides certain protections for employees—but not independent contractors—such as a minimum wage[2] and time-and-a-half overtime pay.[3] The Wage and Hour Division of the Department has called misclassification "one of the most serious problems facing affected workers, employers, and the entire economy."[4]

And it's been putting its money where its mouth is by increasing government-initiated investigations by almost 25% from 2009 to 2014.[5] Due to those increased efforts, the Department of Labor has collected almost 30% more in FLSA-related back wages in 2014 than it collected in 2009.[6] The Department has also partnered with the IRS and 26 states to try to better detect misclassification.[7]

While these efforts should be applauded in many cases, not every instance of misclassification is unreasonable. Federal courts apply a multi-factored test to determine an employee's status. The Seventh Circuit, for example, looks to the following six factors:

> (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in

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1 Noam Scheiber, *As His Term Wanes, Obama Champions Workers' Rights*, N.Y. TIMES, Aug. 31, 2015, http://www.nytimes.com/2015/09/01/business/economy/as-his-term-wanes-obama-restores-workers-rights html?_r=0.

2 Fair Labor Standards Act ("FLSA") § 6(a), 29 U.S.C. § 206(a) (2012).

3 FLSA § 7(a), 29 U.S.C. § 207(a) (2012).

4 *Misclassification of Employees as Independent Contractors*, DOL.GOV, http://www.dol.gov/whd/workers/misclassification/ (last visited Nov. 16, 2015).

5 *Working For A Fair Day's Pay*, DOL.GOV, http://www.dol.gov/whd/statistics/ (last visited Nov. 16, 2015) (citing a 23% increase in agency-initiated investigations from FY-2009 to FY-2014).

6 *Fair Labor Standards Act Back Wages*, DOL.GOV, http://www.dol.gov/whd/statistics/statstables htm#flsa (last visited Nov. 16, 2015).

7 *Misclassification of Employees as Independent Contractors*, *supra* note 4.

> equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; [and] (6) the extent to which the service rendered is an integral part of the alleged employer's business.[8]

Most other federal courts use the same factors, more or less.[9] But courts have also noted that they are not limited to only considering the six factors noted above and that the presence or absence of any factor is not dispositive.[10] In short, courts are essentially left to perform a totality-of-the-circumstances analysis with these factors as guideposts.

The consequence has been contradictory results. In *Secretary of Labor v. Lauritzen*, for instance, the Seventh Circuit held that workers harvesting pickles were employees,[11] while in *Donovan v. Brandel* the Sixth Circuit held that workers harvesting pickles were independent contractors.[12] The *Lauritzen* Court considered the following facts: (1) pickles were handpicked in the summer by migrant families often including their children many of whom return every season; (2) the migrant workers were engaged under a "Migrant Work Agreement" as prescribed by state law that includes a pay scale on a per pickle basis—based on a price paid by processors negotiated by the processor and the grower; (3) housing and equipment, except for work gloves were supplied and assigned by the grower; and (4) migrant families were assigned an individual plot of land from which to pick their crop, retaining power over when and how to pick it.[13] The *Brandel* Court considered facts that mostly paralleled *Lauritzen*: (1) pickles were handpicked during harvest season by migrant families including their children; (2) migrant families were assigned individual plots of land; (3) migrants were compensated under a contract that awards them 50% of the proceeds of the sale of the pickles—based on a price paid by processors negotiated by the processor and the grower; and (4) equipment was generally provided by the grower.[14] As the Seventh and Sixth Circuits came to different conclusions despite examining bodies of facts that were essentially equivalent, determining employment status under the employee-

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[8] Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1534–35 (7th Cir. 1987).

[9] *See, e.g.*, Donovan v. Brandel, 736 F.2d 1114, 1117 (6th Cir. 1984); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981).

[10] *See Lauritzen*, 835 F.2d at 1534; Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382 (3d Cir. 1985).

[11] *Lauritzen*, 835 F.2d at 1538.

[12] *Brandel*, 736 F.2d at 1120.

[13] *Lauritzen*, 835 F.2d at 1532–34.

[14] *Brandel*, 736 F.2d at 1120.

contractor test appears unpredictable.

Because of that unpredictability, employers are left to play a guessing game that has severe penalties. If a court determines that an employer owes a worker back wages, then the employer may also have to pay liquidated damages equal to the amount of compensatory damages.[15] Congress has afforded employers two statutory defenses. First, an employer is immune from paying both back wages and liquidated damages if it proves that it acted "in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation [of the Administrator of the DOL Wage and Hour Division], or any administrative practice or enforcement policy of [that Division] with respect to the class of employers to which [it] belonged."[16] Second, courts have discretion to award reduced or no liquidated damages if the employer's "action was in good faith and [if it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]."[17]

Those defenses are better than nothing. But, the first—reliance on administrative statements—merely avoids obscene unfairness, and the second—showing good faith—puts the burden on the wrong party. As noted above, applying the test to determine a worker's status is difficult and often unpredictable. In such circumstances employers shouldn't be penalized, nor should employees receive a windfall. Moreover, less than one third of those that received back wages in 2014 were low-wage employees.[18] No matter how wealthy an employee is, she should receive the amount of compensation that she has earned, but it is unfair to employers to make them pay when reasonable minds could disagree about a worker's status. In one case, for example, an employer whose workers installed cable in people's homes was required to pay $737,133 in back wages and an equal amount in liquidated damages after a district court determined that the cable installers were employees.[19] The court so held despite the fact that two other federal courts had previously held that cable installers were independent contractors.[20] Although the employer was not

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15 FLSA § 16(b), 29 U.S.C. § 216(b) (2012).

16 Portal To Portal Act § 10(a), 29 U.S.C. § 259(a) (2012).

17 Portal To Portal Act § 11, 29 U.S.C. § 260.

18 *Working For A Fair Day's Pay*, *supra* note 5.

19 *See* Solis v. Cascom, Inc., No. 3:09-cv-257, 2011 WL 10501391 (S.D. Ohio Sept. 21, 2011).

20 *See* Chao v. Mid-Atlantic Installation Serv., 16 Fed. App'x 104 (4th Cir. 2001); Dole v. Amerilink Corp., 729 F. Supp. 73 (E.D. Mo. 1990). Even if *Mid-Atlantic Installation* and *Amerilink* are distinguishable from *Cascom*, an employer shouldn't be forced to pay liquidated damages when there are contradictory holdings regarding the same types of workers. Cascom, Inc. is now out of business. *Judge finds Ohio-based Cascom*

relying on an agency decision, these cases could signal to a reasonable good-faith observer that cable installers were not employees.

Congress can repair the situation by shifting the burden from employers—who now need to prove that they acted in good faith to avoid liquidated damages—to the one bringing suit—who would need to prove that the employer acted in bad faith in order to receive liquidated damages.[21] Liquidated damages should be a special assessment against bad actors rather than a routine punishment for those acting reasonably (even if absent-mindedly). The problem is worsened by the Department of Labor engaging in "strategic enforcement"[22] to single out industries where violations are more likely, such as food service and the garment industry.[23] While this is probably a positive use of prosecutorial discretion generally, it actually exacerbates the problem of unduly burdening defendants because restaurants and dry cleaners are rarely the types of businesses that can afford to hire the legal help needed to affirmatively prove good faith. Rather than sock small businesses with crushing liquidated damages in the typical misclassification case where reasonable minds could differ, workers determined to be employees should simply get the back wages that they earned.

Inc. liable for nearly $1.5 million in back wages, damages to employees misclassified as independent, DOL.GOV, http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Midwest/20130829 xml (last visited Dec. 16, 2015).

[21] There is already a statutory provision that provides for a penalty—namely, extending the statute of limitations by a year—if an employer *willfully* misclassified a worker. *See* Portal To Portal Act § 5(a), 29 U.S.C. § 255(a). My modest suggestion is to also—and only—penalize employers by assessing liquidated damages if the misclassification was willful.

[22] *Working For A Fair Day's Pay*, *supra* note 5.

[23] *Misclassification of Employees as Independent Contractors*, *supra* note 4.