

## INDEPENDENT CONTRACTOR ISSUES REMAIN ON THE FRONT BURNER

### Recent Developments Warrant Clubs' Attention

BY THOMAS LENZ

**T**he battle rages at both state and federal levels over worker misclassification and what some call "wage theft." The issue of misclassification crosses into many different workplace issues for clubs and other employers.

The issues affect whether an individual is entitled to the rights of an employee to minimum wage and other standards of wage and hour law. Also affected is whether payroll taxes must be paid. Additionally, whether a worker is entitled to the benefits provided to individuals considered employees in the workplace depends upon the details of classification.

In the event of a workplace injury, misclassification can impact whether one should use workers' compensation proceedings or, instead, state tort law. Misclassification can also deprive a worker of the rights of an employee under labor law. The National Labor Relations Board (NLRB) has challenged employers on the basis that the mere act of misclassification is itself an unlawful deprivation of workplace rights to discuss and take action on wages, hours, terms and conditions of employment, and membership in a labor union.

#### The Dynamex Case and the ABC Test

As many know, the Supreme Court of California adopted what is known as the ABC test in *Dynamex Operations West, Inc. v. Superior Court*, commonly known as *Dynamex*. The ABC

factors have heightened the bar to prove someone is an independent contractor (IC) rather than an employee. The particular detail that an individual is engaged in the same type of work as the club or business providing work is itself fatal to an IC finding. Thus caddies, golf and tennis pros on a club's golf course, massage therapists in a club's spa, trainers in a club's gym, and more may be easily found to be misclassified under the ABC test. Legislative efforts to modify or remove the ABC test in California remain in play.

The ABC test was adopted by California after origination in Massachusetts. Now, Senator Bernie Sanders (I-Vt.) has proposed labor legislation that would incorporate the ABC test as a matter of federal law. The bill also contains other elements that have been on labor's wish list for years, such as card check processes rather than secret ballot elections to determine union representation. Clubs will want to monitor this legislation.

#### NLRB Restores IC Standard

The NLRB recently decided the *SuperShuttle DFW, Inc.* case, which modified how the NLRB will define ICs for purposes of federal labor law. The NLRB in *SuperShuttle* focused on traditional factors rather than the ABC test. The NLRB highlighted the importance of whether alleged ICs has entrepreneurial opportunity, such as to do business

for multiple customers. In the case of clubs, it may matter whether an alleged IC is allowed to provide services for multiple clubs and, in fact, whether that occurs.

#### IC Arbitration vs. Litigation

Meanwhile, at the United States Supreme Court, rulings on arbitration created another new wrinkle. In the case of *New Prime Inc. v. Oliveira*, the issue was whether a trucking company could force a driver to arbitrate a dispute where the driver sought to litigate a lawsuit in court. The trucking company took the position that the driver was an IC and raised an arbitration agreement the driver signed in the company's defense. The Supreme Court ruled that the Federal Arbitration Act exempts "contracts of employment" from mandatory arbitration and, though the driver might be an IC in fact, he would not be forced to arbitrate. Thus, in a wave of case rulings supporting arbitration as a way to resolve workplace disputes, the Supreme Court left open the ability of ICs to sue.

The rules on independent contractor status will continue to develop. Because these rules are fact driven and develop separately at state and federal levels, politics and elections impact outcomes. Clubs should stay tuned to the development of rules where they operate and seek advice and training to address the potential risk areas unique to each club and individual.



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