



## **Special Report** **States Enact Legislation Having a Mixed Effect on** **Independent Contractors**

Continuing the trend of recent years, independent-contractor status has remained a focus of state lawmakers during the first half of 2016. This continued attention has resulted in several recently enacted bills that will have a mixed effect on independent contractors and their clients.

Thus far this year, generally helpful bills have been enacted that clarify the independent-contractor status of workers in the on-demand/sharing economy and define important terms. At the same time, some states are moving in the opposite direction. A potentially harmful bill was enacted that urges a study to investigate worker misclassification, and it is uncertain how other new laws will affect the determination of an individual's status. A discussion of each newly enacted law follows.

### **I. States Enact Legislation Providing Increased Clarification of Worker Classification**

#### **A. Clarifies Worker Classification in the Sharing Economy**

Several states clarified the independent-contractor status of individuals who obtain client opportunities through technology platforms, known as the on-demand or sharing economy.

This overall helpful legislation comes in two forms, namely bills narrowly focused on *transportation network company drivers* (e.g., individuals who drive for ride-sharing companies such as Uber and Lyft), and broader bills that apply to individuals who use a technology platform to obtain access to clients seeking service providers of any type, which the bills call *qualified marketplace contractors*.

##### **i. Transportation Network Companies**

Mississippi, West Virginia and Utah became the latest states to enact legislation that clarifies the independent-contractor status of transportation network company drivers.<sup>1</sup> Lawmakers in Mississippi and West Virginia adopted a five factor test to determine a driver's independent-contractor status, while the Utah legislation provides that transportation network company drivers are statutory independent contractors.

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1. During the 2015 legislative session, legislation was enacted in Arkansas (S.B. 800), Indiana (H.B. 1278) and North Carolina (S.B. 541) that clarified the independent-contractor status of transportation network company drivers.

## The Five Factor Test

Legislation enacted in Mississippi, H.B. 1381, and West Virginia, H.B. 4228, provide that a transportation network company driver is an independent contractor relative to a transportation network company (“TNC”) so long as the following five factors are satisfied.

1. The transportation network company does not prescribe specific hours during which a transportation network company driver must be logged into the transportation network company's digital platform;
2. The transportation network company imposes no restrictions on the transportation network company driver's ability to utilize digital platforms from other transportation network companies;
3. The transportation network company does not assign a transportation network company driver a particular territory in which to operate;
4. The transportation network company does not restrict a transportation network company driver from engaging in any other occupation or business; and
5. The transportation network company and transportation network company driver agree in writing that the driver is an independent contractor of the transportation network company.

West Virginia Governor Earl Ray Tomblin (D) approved H.B. 4228 on March 15, 2016. The law specifies that a transportation network company driver’s independent-contractor status applies for worker’s compensation purposes.

Mississippi Governor Phil Bryant (R) signed H.B. 1381 into law on April 4, 2016. This law does not specify the purpose for which the independent-contractor status applies.

## Statutory Independent Contractors

Legislation enacted in Utah, as S.B. 201, amends the state’s Transportation Network Company Registration Act by treating a transportation network company driver as an independent contractor relative to a TNC, and not its employee.

For purposes of the Transportation Network Company Registration Act, a transportation network company driver is an individual who:

- (a) pays a fee to a transportation network company, and, in exchange, receives a connection to a potential passenger from the transportation network company;
- (b) operates a motor vehicle that:
  - (i) the individual owns, leases, or is authorized to use; and
  - (ii) the individual uses to provide transportation network services; and
- (c) receives, in exchange for providing a passenger a ride, compensation that exceeds the individual’s cost to provide the ride.

Governor Gary Herbert (R) signed S.B. 201 into law on March 28, 2016.

## **ii. Qualified Marketplace Contractors**

Lawmakers in Arizona recently enacted H.B. 2652, which clarifies the independent-contractor status of individuals in the broader on-demand/sharing economy. It provides that for purposes of state and local laws, regulations or ordinances, including workers' compensation and unemployment, a qualified marketplace contractor ("QMC") will be treated as an independent contractor relative to a qualified marketplace platform ("QMP") so long as the following three criteria are satisfied.

1. All or substantially all of the payment for the services performed by the qualified marketplace contractor is related to the performance of services or other output.
2. The services performed by the qualified marketplace contractor are governed by a written contract executed between the qualified marketplace contractor and a qualified marketplace platform.
3. The written contract required by paragraph 2 of this subsection provides for all of the following:
  - (a) That the qualified marketplace contractor is providing services as an independent contractor and not as an employee.
  - (b) That, pursuant to paragraph 1 of this subsection, all or substantially all of the payment paid to the contractor shall be based on the performance of services or other output.
  - (c) That the qualified marketplace contractor is allowed to work any hours or schedules the qualified marketplace contractor chooses. If the qualified marketplace contractor elects to work specified hours or schedules, a contract may require the qualified marketplace contractor to perform work during the selected hours or schedules.
  - (d) That the qualified marketplace contract does not restrict the contractor's ability to perform services for other parties.
  - (e) That the qualified marketplace contractor bears all or substantially all of the qualified marketplace contractor's own expenses that are incurred by the qualified marketplace contractor in performing the services.
  - (f) That the qualified marketplace contractor is responsible for the taxes on the qualified marketplace contractor's own income.
  - (g) That the contract and the association created by the contract may be terminated without cause by either party to the contract at any time on reasonable notice given to the other party.

For these purposes, a QMC is a person that enters into an agreement with a qualified marketplace platform to use the qualified marketplace platform's digital platform (e.g., web-based or smartphone application) to obtain access to third party customers seeking their services. A QMP is a person that operates a digital platform, which enables qualified marketplace contractors to gain access to third party customers seeking their services.

The new law also addresses relationships that occurred prior to its effective date – August 6, 2016 – by retroactively treating a QMC as an independent contractor so long as the QMC and the QMP satisfy the compensation and contractual requirements listed above. Governor Doug Ducey (R) approved H.B. 2652 on May 12, 2016.

## **B. Defines what it Means to “Knowingly” Misclassify a Worker**

The Maryland unemployment statute was amended by S.B. 90, to define “knowingly,” in the context of a current-law provision stating that “If the Secretary [of Labor] determines that an employing unit has *knowingly* failed to properly classify an individual as an employee, the employing unit shall be subject to a civil penalty of not more than \$5,000 per employee.”<sup>2</sup> For these purposes, the new law defines the term *knowingly* to mean “having actual knowledge, deliberate ignorance, or reckless disregard for the truth.” Governor Lawrence Hogan (R) signed S.B. 90 into law on May 10, 2016.

Prior to Governor Hogan’s approval of S.B. 90, it was uncertain how the “knowingly” standard would be interpreted for purposes of this civil penalty.

## **II. Legislation Could Have a Negative Impact on Independent Contractors**

Indiana enacted a bill, S.B. 20, that will “urge” its legislative council “to assign to the interim study committee on employment and labor . . . or another appropriate interim study committee during the 2016 legislative interim” the following topics:

- (i) employee misclassification;
- (ii) payroll fraud; and
- (iii) the use of independent contractors.

These topics arguably suggest that the study committee is being asked to take a skeptical look at the use of independent contractors.

The legislative council, through its subcommittees, conducts studies on specified topics and, based on its findings, can recommend legislation.

Governor Mike Pence (R) signed S.B. 20 into law on March 23, 2016.

It is unclear by the use of the term “urge” whether such a study will be conducted. Laws generally *mandate* action; they do not typically *urge* it. Nonetheless, S.B. 20 may foreshadow legislative proposals regarding independent contractors and worker misclassification.

## **III. Legislation With an Uncertain Effect on the Determination of a Worker’s Independent-Contractor Status**

### **A. Legislation Permits Individuals to Declare their Independent Business Status**

Arizona independent contractors may execute a declaration of independent business status, which establishes a rebuttable presumption of independent-contractor status for purposes of state labor laws, including workers’ compensation and unemployment. This optional process was introduced as H.B. 2114 and enacted by Governor Doug Ducey (R) on May 12, 2016.

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2. Md. LABOR AND EMPLOYMENT Code Ann. § 8-201.1(e).

To establish a rebuttable presumption of independent-contractor status under the new law, an individual must execute a declaration of independent business status by signing and dating it, and their clients must act in a manner that is substantially consistent with the terms of the declaration. A declaration of independent business status must substantially comply with the following form:

This declaration of independent business status is made by (contractor) in relation to services performed by the contractor for or in connection with (contracting party). The contractor states and declares the following:

1. The contractor acknowledges that the contractor operates the contractor's own independent business and is providing services for or in connection with the contracting party as an independent contractor.
2. The contractor acknowledges that the contractor is not an employee of the contracting party and the services rendered for or in connection with the contracting party do not establish any right to unemployment benefits or any other right arising from an employment relationship.
3. The contractor is responsible for all tax liability associated with payments received from or through the contracting party and the contracting party will not withhold any taxes from payments to the contractor.
4. The contractor is responsible for obtaining and maintaining any required registration, licenses or other authorization necessary for the services rendered by the contractor.
5. The contractor acknowledges at least six of the following:
  - (a) That the contractor is not insured under the contracting party's health insurance coverage or workers' compensation insurance coverage.
  - (b) That the contracting party does not restrict the contractor's ability to perform services for or through other parties and the contractor is authorized to accept work from and perform work for other businesses and individuals besides the contracting party.
  - (c) That the contractor has the right to accept or decline requests for services by or through the contracting party.
  - (d) That the contracting party expects that the contractor provides services for other parties.
  - (e) That the contractor is not economically dependent on the services performed for or in connection with the contracting party.
  - (f) That the contracting party does not dictate the performance, methods or process the contractor uses to perform services.
  - (g) That the contracting party has the right to impose quality standards or a deadline for completion of services performed, or both, but the contractor is authorized to determine the days worked and the time periods of work.
  - (h) That the contractor will be paid by or through the contracting party based on the work the contractor is contracted to perform and that the contracting party is not providing the contractor with a regular salary or any minimum, regular payment.
  - (i) That the contractor is responsible for providing and maintaining all tools and equipment required to perform the services performed.

- (j) That the contractor is responsible for all expenses incurred by the contractor in performing the services.
6. The contractor acknowledges that the terms set forth in this declaration apply to the contractor, the contractor's employees and the contractor's independent contractors.

In addition, H.B. 2114 clarifies that any supervision or control that a company exercises over an independent contractor for the purpose of complying with a Federal or Arizona statute, rule, code, or licensing requirement, may not be considered in determining an individual's worker-status for purposes of Arizona labor laws.

While at first glance it may appear that this law is beneficial to independent contractors and their clients, its effects will likely vary among different industries. Industries in which many independent contractors become aware of this opportunity and execute a qualifying declaration may find the law helpful. On the other hand, individuals in other industries might not learn about the program and not satisfy its numerous requirements.

Additionally, the bill excludes certain companies operating in licensed professions and occupations (e.g., nursing, real estate agents, security guards, health professionals, and massage therapy) from relying on the presumption of independent-contractor status.

Due to the uncertain likelihood that independent contractors will qualify for this new presumption, it is helpful that an individual is not required to execute a declaration of independent business status to establish an independent contractor relationship with a client. An individual's failure to execute a declaration does not create a presumption of employee status and is not admissible to deny the existence of an independent contractor relationship.

#### **B. Legislation Requires the Development of Guidance Regarding the Process to Determine a Worker's Status**

Pursuant to a recently enacted bill, S.B 179, the Colorado Department of Labor and Employment ("Department") will be required to develop guidance and clarify the processes for determining whether a worker is an employee or independent contractor for unemployment purposes. The bill was introduced because the General Assembly found that it is more cost effective for the Department and in the best interest of Colorado businesses to increase education regarding worker classification and improve the process of determining a worker's status.

By way of background, Colorado follows an "AB Test" to determine a worker's status for unemployment purposes. The test provides that an individual is an independent contractor only if:

- it is shown to the satisfaction of the division that such individual is free from control and direction in the performance of the service, both under his contract for the performance of service and in fact; and
- such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

C.R.S. 8-70-115(1)(b).

S.B. 179 requires the Department to develop guidance on the factors used as evidence to establish that an “individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service.” Additionally, the new law requires the Department to:

- (b) CLARIFY THE PROCESS BY WHICH AN EMPLOYER OR INDIVIDUAL MAY SUBMIT FURTHER INFORMATION IN RESPONSE TO A DETERMINATION BY THE DEPARTMENT AND PRIOR TO AN APPEAL;
- (c) ESTABLISH AN INDIVIDUAL TO SERVE AS A RESOURCE FOR EMPLOYERS BY PROVIDING GUIDANCE ON:
  - (I) THE PROPER CLASSIFICATION OF WORKERS;
  - (II) AUDIT FINDINGS; AND
  - (III) OPTIONS FOR CURING OR APPEALING AN AUDIT;
- (d) ESTABLISH INTERNAL METHODS TO IMPROVE THE CONSISTENCY AMONG AUDITORS; AND
- (e) ESTABLISH AN INDEPENDENT REVIEW OF A PORTION OF AUDIT AND APPEAL RESULTS AT LEAST TWICE A YEAR TO MONITOR TRENDS AND MAKE IMPROVEMENTS TO THE AUDIT PROCESS.

The requirement that the Department develop guidance for the factors used to establish the elements of the AB Test and to clarify the processes regarding the determination of an individual’s worker status, could provide helpful clarification; but the guidance also could make it more difficult to establish that an individual is an independent contractor. It will not be known whether the guidance will be helpful in this regard, or not, until it is issued. Companies that do business with independent contractors in Colorado would be well advised to become engaged in this regulatory process.

Colorado Governor John Hickenlooper (D) signed S.B. 179 into law on June 10, 2016. It will be effective on August 10, 2016.

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If you have any questions or comments concerning the foregoing, please let us know at [info@iecoalition.org](mailto:info@iecoalition.org).