GOVERNMENT RELATIONS POLICY POSITION PAPER

Independent Contractors & the Implications of a Gig Economy

The Issue

As discussions continue at both the federal and state levels about the future of how people work, we have seen an increased focus on the gig economy[1]. These gig workers typically have independent contractor relationships with companies that permit them to work for a short period of time with flexible hours, but without some of the traditional benefits that accompany employment relationships. Therefore, the focus of policymakers has been spurred in large part by the perception that these independent contractor business models are taking advantage of their workers. In an effort to minimize the ability of some models to do so, models like ours – where the independent contractor status is critically important to both LPL and our advisors – may be impacted.

Current Status

PRO Act

Our country's growing gig economy has increased the federal government's focus on app-based contract workers, such as rideshare drivers and food delivery persons, and whether they should be classified as employees. In March of 2021, the U.S. House of Representatives passed the Protecting the Right to Organize (PRO) Act. The bill contains a rigid ABC test for determining the worker's classification. This test, which we have seen adopted in Massachusetts and California but not by the federal government, would dramatically expand the population of workers that are classified as employees and therefore are able to organize for purposes of unionizing. Unlike in California, the bill does not contain a carve-out for financial services. Our advocacy efforts have focused on seeking a carve-out for financial professionals, using the precedent of California.

The PRO Act is now pending action in the Senate, where it has 47 co-sponsors, not the 60 needed for passage. Even if the bill is enacted, it only expands the definition of employees for a narrow purpose: who can unionize. Therefore, it does not impact the independent contractor status in other contexts and should not impact a financial advisor's business. However, we remain concerned with the continued use of this rigid ABC test to determine independent contractor status without a carve-out for financial professionals.

Department of Labor's Worker Classification Rule

In May 2021, the Department of Labor (DOL) under the Biden Administration published a final rule formally and immediately withdrawing the previous Administration's independent contractor rule. Because that rule had not gone into effect prior to the presidential transition, the DOL was able to freeze implementation of the rule, delay its effective date, and ultimately rescind the rule.

Effective May 6, 2021, the DOL started to rely on the previous interpretation of the longstanding multifactor test established by judicial precedent to enforce the Fair Labor Standards Act (FLSA). Therefore, rescinding this rule will not have any impact on your status as an independent contractor.

Recently, the DOL's Wage and Hour Division announced that it will be reviewing independent contractor status under the FSLA with the goal of issuing a new rule proposal later this summer or in the early fall. While the Administration in general may seek to take a more expansive approach toward the definition of employment, it is important to keep in mind that with respect to these particular regulations (which address wage and hour issues),

[1] The gig economy is defined as a labor market characterized by the prevalence of short-term contracts or freelance work as opposed to permanent jobs.

the DOL is constrained by existing law and cannot radically change the definition of employment under this statute.

State Activity

The independent contractor issue has also gained interest at the state level from coast to coast.

California: In 2019, the California Supreme Court unanimously announced a new test (commonly referred to as the ABC test) for determining whether a worker is an employee or an independent contractor in *Dynamex Operations West, Inc. v. Superior Court of Lost Angeles.* The ABC test adopted by the *Dynamex* Court presumes that all workers are employees and it places the burden on the business to establish the elements necessary to classify a worker as an independent contractor under the newly adopted three-part ABC test. Under this ABC test, a worker will be deemed an employee unless the business establishes that:

A) the worker is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

B) the worker performs work that is outside the usual course of the hiring entity's business; **and**

C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

All three prongs of the test must be true for a worker to be properly classified as an independent contractor. In 2019, the California legislature adopted a professional services exemption to the ABC test for securities brokers/dealers or investment advisors and their agents, and representatives who are registered with the SEC, FIRNA or the State of California.

Massachusetts: In 2004, the Commonwealth amended the Massachusetts Independent Contractor Law (which has limited application) to establish a presumption that workers are employees unless the business demonstrates independent contractor status by satisfying each element of a three-part ABC test. In 2018, Massachusetts' Supreme Judicial Court Chief Justice called worker misclassification a "serious problem both in our Commonwealth and across the nation" and urged the Massachusetts legislature to adopt a uniform scheme for the classification of workers. *In July of 2020 the Attorney General announced a lawsuit against Uber and Lyft that would enforce the Independent Contractor Law. This has renewed legislative interest in worker classification as well as a ballot initiative in November 2022 to seek an exemption to the existing law for app-based drivers.*

A number of other states, including New York, New Jersey, Colorado, Washington and Illinois have also examined bills to implement the ABC test on workers for purposes of wage and hour laws. However, so far, they have failed to gain traction. If states continue to act on this issue, resulting in a lack of uniformity, Congress may have a greater sense of urgency to enact a federal standard.

LPL Position

The vast majority of LPL Financial advisors choose to affiliate with LPL because of its independent contractor model – they intend to be independent contractors and find this to be a beneficial business model. With the continued growth of the gig economy, we anticipate that the Biden Administration and Congress will continue to focus on the classification of workers. While independent broker-dealers have not been directly targeted by any proposed bills, we remain concerned at attempts to use the problematic and rigid ABC test to classify workers without an exemption for financial services professionals.

LPL believes that the current safe harbor for defining independent contractors has functioned effectively for over 30 years. LPL will continue to monitor this issue, and we will strongly advocate for the ability of independent broker-dealers and financial advisors to classify as independent contractors. LPL will continue to be vigilant and

engaged in these policy discussions so that lawmakers are made aware of the distinction between app-based gig economy workers and independent financial advisors.

This material was prepared by LPL Financial.