



# Workplace Justice Project

## @ Loyola College of Law Clinic

The Workplace Justice Project's work is rooted in improving economic outcomes for working families by litigating claims to increase access to and fairness in the court system. We engage in policy research and vigorous advocacy that supports economic equity. And we educate on best practices that promote access, opportunity, and fairness in the workplace.

# Response to Business Perspective

- We agree that the current laws are confusing and applied inconsistently by both agencies and the courts
- Common ground – need for clear and consistent definitions across agencies
- Standards must be clearly understood by self-review
- Education on compliance with process for evaluation and correction
- Regular, consistent administrative audit, review, and action will drive compliance

- Businesses/employers have the responsibility for proper classification; a worker cannot “choose” to be classified as an independent contractor if their work is that of an employee
- Workers cannot waive or “choose” to disqualify themselves from the protections of employment
- Use of new technology or business models does not change the status where employers retain control over means and manner of work
- Just as definitions must be clear and consistently applied, penalties must be EFFECTIVE as deterrent to misclassification (or incentive to compliance)

# The Problem

# Misclassification of employees is contrary to the public policy of this state

Significant steps must be taken to make this public policy clear

- To employers
- To workers
  
- Through consistent application of rules
- Enforcement
- Through meaningful penalties for violators

# Profile of Affected Workers

**Earning Low Wages**

Construction

**Little Bargaining Power**

Staffing Agencies

**No Legal Representation**

Web Based Consultants

Home Health Care Agencies

Landscaping

Laborers/Service workers

# Multiple tests to determine Independent Contactor Status Create confusion

Unemployment *La. R.S. 23:1472 (E)*

Workers' Compensation "Hillman Test"

Tort liability "Hickman Factors"

# Inconsistent legal standards

## Ocampo

- Laborers asserted a claim under the LWPA against a general contractor and her home construction company
- Hired at hourly rate by the contractor
- No written contract
- Performed general labor and painting and other tasks as assigned by contractor on home remodeling project
- Required to provide contractor with updates throughout the day about the work
- Contractor instructed order in which tasks were to be completed
- Instructed when to start work every day; required to report to contractor at conclusion of each day
- Had to provide contractor with updates throughout the day about the work
- Needed permission to recruit another laborer to the project; laborer would be paid by general contractor

## Jeansonne

- Project Manager asserted a claim under the LWPA against a general contractor and his home construction company
- Paid by each home renovation project, rate of pay was determined by profits of each job; shared each job's losses with general contractor
- No written contract
- Project Manager held management position and did not perform labor
- Set her own schedule and hours
- Provided updates as needed
- Could hire subcontractors but needed general contractor's approval



# Costs of Misclassification

- Competitive disadvantage for employers that follow the law
- Businesses save as much as 30% of total labor costs when workers are misclassified as “independent contractors”
- Legislative Auditor estimated that the state lost approximately \$9 million in state income taxes and \$3 million in unemployment taxes through misclassification between 2014 and 2018
- Misclassified workers who are injured on the job and do not receive workers compensation cost significant, but unspecified, amounts for healthcare services provided through Medicaid and or uninsured emergency services
- Workers who are misclassified suffer lost wages in the form of unpaid overtime and reduced wage rates, and tax penalties
- Current remedies/penalties for misclassification do not include restitution to misclassified workers

# Recommendations

# Clear policy standards, education, enforcement

- Single standard, easily understood by businesses/employers and workers/employees
  - Presumption of employment *unless*
    1. Individual performing services has been and will continue to be free from control or direction of services/ *Does the business exert control over the individual's work?*
    2. Service provided by the individual is outside the usual scope of business or is performed away from the usual place of business */Is the work part of the business' core function? AND*
    3. The individual is customarily engaged in an independently established trade, occupation, profession, or business/ *Is this work usually done by an independent contractor, not a company employee?*

# Remedies must serve as deterrent and make workers whole

- Increase number and frequency of audits
- Information sharing and collaboration between agencies
- Increase education, but assess penalties for failure to comply – no “freebies” if violations are knowing or willful
- Penalties include disqualification/disbarment from state contracting
- Penalties must be significant to create deterrent
- Presumption of employment, especially where workers are providing direct services (e.g. home healthcare, service workers)
- In addition to penalties and payment of taxes and state benefits, restitution *must be paid to workers* (wages owed, tax penalties)

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