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ARTICLE

Why Companies Lose In Gig Worker Class Cert. Cases

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The gig economy is ascendant. As companies and workers alike seek greater flexibility in labor arrangements, employers have increasingly shifted their workforces from employees to independent contractors. But this transition carries legal risk for companies, as demonstrated by two recent federal court rulings from California and New Jersey.[1]

These rulings are part of a growing trend: Courts are certifying large classes of workers who claim that they have been misclassified as independent contractors, allegedly resulting in lost compensation, other damages and potential statutory penalties.

When these classes are certified, companies face significant pressure to settle the claims for significant sums — even when the companies have strong defenses on the merits — because the risk of a classwide judgment is too great.

Thus, the battle over class certification often becomes the key inflection point in worker misclassification cases. And courts are overwhelmingly siding with the workers at this stage, rejecting companies' arguments against class certification.

This article examines why workers have gained the upper hand and how companies may try to level the playing field.

Class certification often turns on common questions versus individual questions.

At class certification, plaintiffs must show that common questions of fact or law predominate over individual questions.[2] Defendants, conversely, seek to establish that determining liability or damages will require different evidence for different class members, thus raising individualized issues, sometimes called mini-trials.

Potential individualized questions abound in worker misclassification cases. The substantive law varies by

jurisdiction, but most courts consider a variety of factors in determining whether a worker is an employee or an independent contractor.

For example, many states use the ABC test, which presumes that workers are employees unless the company can prove that:

- The worker is "free from control or direction over the performance of [his] service";
- The service is "outside the usual course of the [company's] business"; and
- The worker "is customarily engaged in an independently established trade, occupation, profession or business."[3]

Courts often consider many other factors as well.[4]

Companies typically focus on these factors at class certification, arguing that the evidence for certain factors will be different for each class member, such that individualized questions will predominate.

Recently, however, courts have repeatedly certified classes despite these arguments. These decisions show which arguments work — and which don't.

Companies' standardized contracts and policies create common questions of fact and law.

Two recent rulings demonstrate the challenges that companies face at class certification. In Roman v. Jan-Pro Franchising International Inc., decided by the U.S. District Court for the Northern District of California in August, the plaintiffs were janitors in California who alleged that the defendant, a cleaning company, violated certain labor laws by misclassifying the plaintiffs as independent contractors instead of employees.[5]

Likewise, in Bedoya v. American Eagle Express Inc., decided by the U.S. District Court for the District of New Jersey in August, the plaintiffs were delivery couriers in New Jersey who made similar claims against the defendant, a last-mile delivery company.[6]

The courts in both cases certified classes over the defendants' objections. The key finding in both decisions was that common questions of law or fact would predominate over individualized questions, primarily based on the companies' standardized contracts and policies.

In both cases, the courts identified a common question of whether the workers' service was outside the usual course of the defendant's business. Both courts ruled that this common question was capable of classwide resolution because all workers had similar job duties and were governed by the same contracts and policies, and the defendants' businesses were the same in relation to all workers.[7]

The courts also identified other common questions that would predominate, such as

- Whether the workers were customarily engaged in an independently established trade, occupation, profession or business;[8] and
- Whether the defendant exercised actual control over the workers.[9]

These questions were provable by common evidence, including the company's standardized contracts with the workers and companywide policies.[10]

Roman and Bedoya are just the latest rulings in a recent trend of class certification decisions that have found predominance of common issues based on company contracts and policies.

In March, for example, in Karl v. Zimmer Biomet Holdings Inc., the U.S. District Court for the Northern District of California approved a $7.4 million settlement between a medical device company and 266 of its sales

representatives based on misclassification claims.[11] The court granted class certification, ruling that common questions predominate because the "plaintiffs' theory of liability turns on [defendant's] written policies, common to their workforce."[12]

Courts in Iowa, California, Arizona and New Jersey have recently issued similar decisions, all relying on standardized, uniform contracts and policies between the company and the workers.[13]

Defeating Commonality?

These recent decisions show that a company faces an uphill battle at class certification when it uses uniform contracts and policies for its independent contractors. Given that companies often have valid business and legal reasons for standardizing their worker contracts and policies, how can they overcome these factors at class certification? Two recent cases suggest two possible strategies.

First, contractual language that allows for greater worker autonomy may defeat a finding of commonality. In Salter v. Quality Carriers Inc., the company's contracts "required that the Independent Contractor Drivers perform their contractual obligations in a 'safe and prudent manner' with 'reasonable diligence, speed and care.'"[14]

According to the U.S. District Court for the Central District of California's 2021 ruling in Salter, because these provisions were immensely broad and did not actually mandate any specific behavior, the contracts alone could not provide common answers regarding the company's degree of control over the drivers — and the court denied class certification on that basis.[15]

Second, companies may consider avoiding the misclassification question altogether at class certification, focusing instead on other liability issues if possible. In Bowerman v. Field Asset Services Inc., the U.S. Court of Appeals for the Ninth Circuit in July ruled that it "need not decide whether common evidence can prove that [defendant] has a uniform policy of misclassifying its vendors."[16]

Even if the plaintiffs were employees instead of independent contractors — and thus entitled to overtime and reimbursement of business expenses — the plaintiffs had no classwide, common evidence that each class member actually worked overtime or incurred business expenses. Because answering those questions would require highly individualized inquiries, class certification was inappropriate.[17]

Conclusion

The independent contractor labor model can make good business sense. But the recent wave of class certification rulings in misclassification suits shows the risk of this approach.

Losing at class certification often raises the specter of seven-figure judgments and, in some states, statutory penalties of $5,000 to $15,000 per violation. And the legal landscape will soon tilt even further toward workers under the U.S. Department of Labor's new independent contractor rule.

Companies should carefully consider these risks when structuring their workforce — and they should not count on defeating misclassification suits at class certification.

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[1] Roman v. Jan-Pro Franchising Int'l, Inc., 2022 U.S. Dist. LEXIS 137190 (N.D. Cal. Aug. 2, 2022); Bedoya v. Am. Eagle Express, Inc., 2022 U.S. Dist. LEXIS 147119 (D.N.J. Aug. 17, 2022).

[2] See Fed. R. Civ. P. 23(b)(3). Most states have similar requirements for class certification.

[3] Bedoya, 2022 U.S. Dist. LEXIS 147119, at *21-22.

[4] For example, certain wage claims in California rely on the following factors: "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." Roman, 2022 U.S. Dist. LEXIS 137190, at *32.

[5] Roman, 2022 U.S. Dist. LEXIS 137190, at *2-3.

[6] Bedoya, 2022 U.S. Dist. LEXIS 147119, at *1.

[7] See Bedoya, 2022 U.S. Dist. LEXIS 147119, at *26 (identifying "fairly abstract questions — about the nature of the service provided, the usual course of business of the employer, and whether the service was performed at the employer's place of business — that do not vary by individual" (quotation marks omitted)); Roman, 2022 U.S. Dist. LEXIS 137190 at *29 (identifying "common policies [that] will help to adjudicate the misclassification question" and ruling that "defendant's statements on its website and advertisements [are] equally applicable to all unit franchisees").

[8] Bedoya, 2022 U.S. Dist. LEXIS 147119, at *28.

[9] Id. at *22-26.

[10] Id. at *22-23.

[11] Karl v. Zimmer Biomet Holdings Inc., 2022 U.S. Dist. LEXIS 39166 (N.D. Cal. Mar. 4, 2022).

[12] Id. at *11.

[13] Cervantes v. CRST Int'l, Inc., 2022 U.S. Dist. LEXIS 105781, at *30-31 (N.D. Iowa June 14, 2022); Sales v. United Rd. Servs., 2022 U.S. Dist. LEXIS 93373, at *12-15 (N.D. Cal. Mar. 28, 2022); Lacross v. Knight Transp. Inc., 2022 U.S. Dist. LEXIS 5362, at *14-15 (D. Ariz. Jan. 11, 2022); Portillo v. Nat'l Freight, Inc., 336 F.R.D. 85, 94-95 (D.N.J. 2020).

[14] Salter v. Quality Carriers, 2021 U.S. Dist. LEXIS 109280, at *21-29 (C.D. Cal. Apr. 9, 2021).

[15] Id.

[16] Bowerman v. Field Asset Services Inc., 39 F.4th 652, 662 (9th Cir. 2022).

[17] Id.

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