

Independent Contractors

Five Key Independent Contractor Legal Developments in 2017—and What to Expect in 2018 (Part I of II)



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2017 was notable for a shift in the law of independent contractors. Part 1, below, discusses five key legal developments from 2017 you should be aware of. Part 2, which will follow tomorrow, offers readers predictions of what lies ahead in 2018 in this area of the law. Both parts offer takeaways designed to maximize IC compliance and minimize exposure to IC misclassification liability.

1. Two state Supreme Court decisions show that the courts are more willing to recognize IC status

Although many businesses understand that there is a dizzying array of state and federal tests for independent contractor status, businesses in 2017 continued a trend over the past 10 years where they are making greater use of independent contractors despite the uncertainties in the law and the risk of misclassification. One of the most challenging tests for IC status is the so-called ABC test, which is most prevalent among state unemployment and workers' compensation laws. About half of the states have ABC laws governing IC status, but each state interprets their laws differently than other states. Two state Supreme Courts in 2017 fine-tuned their ABC tests to make the use of ICs more attainable for companies.

In March 2017, the Connecticut Supreme Court [concluded](#) that a business does not fail the "C" prong of the ABC test, which requires that a worker is "customarily engaged in an independently established trade, occupation, profession or business," simply because the worker chooses to provide services only to a single company, especially where the contractor has the freedom to provide services to other companies.

In June 2017, the Vermont Supreme Court [held](#) that a Limited Liability Company (LLC) is a distinct legal entity; therefore, an owner of an LLC is not an individual under the ABC test when the state seeks to assess unemployment taxes upon a business. These types of decisions by the highest courts in two states signal a greater recognition that state IC laws should not be applied mechanically with a pre-ordained determination that the workers in question are employees.

2. FedEx and Uber scored big wins in 2017

Far more than any two companies in the nation, FedEx and Uber have for years occupied the headlines regarding their use of independent contractors. 2017 was a pretty good year for both of those companies in terms of legal developments.

FedEx Ground has been the subject of more independent contractor misclassification lawsuits than any other U.S. company. The overwhelming number of those lawsuits involved claims for allegedly unpaid employee business expenses, wages, and benefits, and most of them that were resolved by the courts unfavorably to the company.

Two such court decisions were issued by the [Ninth](#) and [Seventh](#) Circuits, which concluded that the wording in FedEx's own IC agreement created an employment relationship as a matter of law. This led FedEx to [settle](#) for nearly \$500 million almost all of its scores of class actions. In 2017, however, FedEx prevailed on what many believe to be the most important legal challenge it faced – a unionization effort by the Teamsters to organize its Ground Division drivers.

In March 2017, the United States Court of Appeals for the D.C. Circuit issued a decision striking down a ruling by the National Labor Relations Board that single-route Ground Division drivers were employees and not independent contractors. This was the [second](#) time that FedEx sought review by the U.S. Court of Appeals where the NLRB had sided in favor of the Teamsters and held that FedEx drivers were employees who could be represented by a union.

In Uber's case, it received perhaps its most meaningful success not before a court but before an arbitrator. Uber has used mandatory arbitration agreements in its independent contractor agreements for several years. In February 2017, a well-regarded former judge issued an [arbitration decision](#) finding that the preponderance of the evidence favored Uber's position that, under the California wage laws, drivers who use the Uber app have more in common with independent contractors than employees. While this arbitration decision is not binding on other drivers, it is likely to have significant impact on decisions by other arbitrators in arbitrations brought by drivers.

3. The Trump Administration appears to be leveling the playing field for businesses using ICs

Toward the end of the Obama Administration, the U.S. Department of Labor issued [enforcement guidelines](#) under the Fair Labor Standards Act that conveyed its view that the Labor Department disapproved of the use of independent contractors. Those guidelines seemed to [disregard](#) the Labor Secretary's comment that while some companies have misused the IC classification, "there's an important place for independent contractors" in the U.S. economy. It did not take long for the Trump Administration's new Secretary of Labor, Alexander Acosta, to withdraw that formal guidance on ICs – he did so only six weeks after being confirmed by the Senate.

As [reported](#) on June 7, Secretary Acosta had issued a [press release](#) earlier that day announcing that the former guidance was being withdrawn. But the Secretary did not signal that businesses can now use ICs without repercussion; rather, he stated that the "legal responsibilities of employers under the Fair Labor Standards Act" remain unchanged. Secretary Acosta also noted that his department will "fully and fairly enforce all laws within its jurisdiction."

Another similar change in the law of independent contractors took place at the National Labor Relations Board this past year. In November 2017, President Trump appointed a new General Counsel to the National Labor Relations Board following the expiration of the term of Richard Griffin, the General Counsel who was appointed by President Obama. Peter Robb, the new General Counsel, quickly discarded a number of Griffin's initiatives, including Griffin's August 2016 Advice Memorandum dealing with independent contractors.

Griffin's Advice Memo had been viewed as an endorsement of the view that misclassification of employees as independent contractors was, in and of itself, a violation of the National Labor Relations Act. A [close reading](#) of the Advice Memo reveals that while it never quite reached that conclusion, it nonetheless laid the groundwork for an extension of the law that would have created a "misclassification-plus" type of unfair labor practice. That expansive view of the NLRA is no longer in effect under the new General Counsel.

4. Most legislative initiatives no longer seek to curtail the use of independent contractors

Whereas the overwhelming number of legislative initiatives over the ten years prior to 2017 involved efforts to curtail the misclassification of independent contractors, most of the legislative action in 2017 sought to recognize the importance of independent contractors and the emergence of the gig economy.

On May 15, 2017, a New York City law called the Freelance Isn't Free Act went into effect. That [local law](#) created rights for independent contractors who have not been paid the fees to which they are entitled.

Another new law in 2017 recognizing that independent contractor relationships should be encouraged rather than curtailed arose in the context of the ride-sharing industry in Florida. In May 2017, the Governor of Florida signed the Transportation Network Companies Act ([HB 221](#)). That law designates drivers for ride-sharing companies in the on-demand economy as independent contractors provided the transportation network company meets four criteria that were already being met by the major ride-sharing companies including Uber and Lyft. The new law essentially created a [safe-harbor](#) from IC misclassification liability for those companies.

Two bills were introduced in Congress that sought to facilitate the use of independent contractors. The New Economy Works for Guarantee Independence and Growth (NEW GIG) Act of 2017 ([S. 1549](#) and [H.R. 4165](#)) was introduced in both houses of Congress. This bill, if enacted, would create a safe harbor for income and employment tax purposes where contractors meet certain criteria. The Portable Benefits for Independent Workers Pilot Program Act ([H.R. 2685](#)), if enacted, would [create](#) a \$20 million fund for states, local governments, and non-profit organizations to study "broad innovation and experimentation with

respect to portable benefits” for independent workers.

Not all legislative action sought to facilitate the use of independent contractors. North Carolina enacted the Employee Fair Classification Act ([SB 407](#)), which became effective December 31, 2017. That law creates a new Employee Classification Section within the North Carolina Industrial Commission to, among other things, receive and act upon complaints of IC misclassification.

5. IC Misclassification class actions continue to produce multi-million-dollar settlements

Although the landscape of independent contractor law is becoming more hospitable for many companies, the bulk of businesses that use ICs remain targets for class and collective actions under state and federal wage payment laws, minimum wage and overtime laws, and employee expense laws. 2017 saw a host of large settlements, including (to name just a few) court approval of a [\\$27 million settlement](#) between Lyft and drivers who use that app; an [\\$8.75 million settlement](#) between Postmates and couriers who make deliveries using that company's app; a [\\$5 million settlement](#) between nine San Francisco nightclubs and exotic dancers; a [\\$4.65 million settlement](#) between Instacart and shoppers who shop, purchase, and deliver groceries to customers at their homes and businesses through Instacart's app; and a [\\$1.48 million settlement](#) between Atlas Van Lines and truck and moving drivers.

Takeaways

Although the playing field may be leveling out a bit for businesses, the risk of independent contractor misclassification liability remains substantial and the cost can be prohibitive, especially from class action lawsuits and administrative proceedings. Each and every company that uses independent contractors as a key part of its business model or to supplement its workforce should ask the following questions:

- Does our business model lend itself to the use of independent contractors?
- If so, are our IC relationships structured in a manner that maximizes compliance with applicable state and federal laws governing independent contractors?
- Does the language in our IC agreements minimize misclassification risk, or does it actually create liability?
- Have we implemented our independent contractor relationship in a manner that is consistent with a valid IC relationship?
- What can we do to make our IC relationships even more defensible to class action lawsuits and administrative proceedings?

An increasing number of businesses have used a process such as [IC Diagnostics™](#) to answer those and related questions, and to help restructure, re-document, and re-implement their IC relationships in a manner that is customized to their business model, while enhancing their IC compliance. Those types of steps require an investment of time and resources, but a more level playing field means a company has a better shot at minimizing its IC risks, not that companies can ignore the need to heighten their IC compliance.

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