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PERSPECTIVE

ERISA and the gig economy

By James P. Baker

The California Supreme Court recently made a sweeping change to California's gig economy. In *Dynamex Operations West, Inc. v. Superior Court*, 2018 DJDAR 3856 (April 30, 2018), the court ruled that in deciding whether a worker is an employee or an independent contractor, the employer must begin by presuming that the worker is a common law employee. Workers may be classified as independent contractors only if they meet all three of the following criteria:

1. The worker is free from the control and direction of the hiring business in connection with the performance of the work;

2. The worker performs work that is outside the usual course of the hiring entity's business; and

3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Although the *Dynamex* ruling is limited to classifying workers under California's wage orders, its practical effect will be much broader. Employers commonly use one definition of employee for wages, hours and working conditions, including employee benefit plan eligibility.

The impact of the *Dynamex* decision on employee benefit plans that are subject to the Employee Retirement Income Security Act of 1974 is an open question. It will turn on the language found in each of those plans.

"Although '[a]n ERISA plan is a contract,' *see Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 783 (7th Cir. 2005), 'ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans,' *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 985 (9th Cir. 1997). We therefore 'apply contract principles derived from state law … guided by the policies expressed in ERISA and other federal labor laws.' *Id*." *Gilliam v. Nevada Power Co.*, 488 F.3d 1189, 1194 (9th Cir. 2007).

Intuit reports that independent contractors, temporary employees and part-time employees account for almost 34 percent of the total U.S. workforce. Collectively, these groups of workers have been termed "gig economy" or the "contingent workforce." The workers have been the subject of a whole new set of rules and treatment by businesses. Perhaps most significantly, contingent workers typically agree to work without company-sponsored employee benefits in exchange for higher pay or more flexibility in their work schedules.

Both ERISA and the Internal Revenue Code generally permit employers to exclude contingent workers from participation in employee benefit plans. Unfortunately for employers, however, the legal status and the rights of contingent workers — particularly in connection with exclusion from employee benefit programs — remain in a state of flux.

ERISA and the Gig Economy

Gig economy workers have been chasing after employer-sponsored employee benefits for over twenty years. Believe it or not, Microsoft was the target of one of the first gig worker ERISA lawsuits. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (en banc). In the end, the *Vizcaino* plaintiffs settled for $96.9 million — *and that was in 2001*.

The primary named plaintiff in the *Microsoft* decision, Donna Vizcaino, began working for Microsoft Corporation as a "freelance" production editor in 1987. Vizcaino, as a "freelancer," signed two form agreements stating that she was an independent contractor. In those agreements, Vizcaino agreed she was not eligible for Microsoft employee benefits, she would purchase her own employee benefits and that she would pay her own employment taxes. After beginning her work at Microsoft, however, Vizcaino came to the conclusion that the only real difference between her job and the jobs of "regular" employees was not what they did, but what they received. "Regular" employees received pension, stock purchase and other employee benefits. Vizcaino did not.

In 1989 and 1990, the Internal Revenue Service conducted an audit and decided that, as a matter of law for employment tax purposes, the "freelancers" were employees rather than independent contractors. After the IRS made this determination, the freelancers claimed they were entitled to participate in Microsoft's employee benefit plans. Microsoft disagreed, and the freelancers then asked Microsoft's plan administrator to determine whether they were eligible for these benefits. Not surprisingly, Microsoft's plan administrator determined that the freelancers were ineligible. The plaintiffs then commenced this litigation.

Retirement Benefits

The 9th U.S. Circuit Court of Appeals stated the earlier decision of the plan administrator that the freelancers were ineligible for benefits under the retirement plan was obviously wrong, because Microsoft had now conceded that in light of the IRS audit the freelancers were, in fact, employees.

Stock Plan Benefits

The freelancers also contended that they were entitled to immediate participation in Microsoft's stock purchase plan. The 9th Circuit ruled that the stock purchase plan had been offered by Microsoft to all "employees." As such, the freelancers were aware of it, even if they were not aware of the plan's exact terms, and their work for Microsoft gave them a right to participate in it. The 9th Circuit agreed that the freelancers were entitled to retroactively participate in the employee stock purchase plan as a matter of law.

There is some good news. ERISA still preempts state laws. 29 U.S.C. Section 1144. As such, *Dynamex* does not determine whether a worker is an employee for purposes of participation in an ERISA-regulated employee benefit plan. If the ERISA plan says "all employees" can participate, then the *Dynamex* decision may govern which "employees" participate. Because ERISA plans are governed by federal law, they look to the IRS multi-factor test for determining who is an employee. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), accord *Burrey v. Pacific Gas & Elec. Co.*, 159 F.3d 388 (9th Cir. 1998). It is therefore important to review each ERISA-regulated plan to see how each defines eligibility to participate.

In the wake of *Microsoft*, many plans adopted protective language stating that plan eligibility will not be extended retroactively to individuals who are initially hired as independent contractors even if a court or other administrative agency later determines they are employees.

For example, many ERISA plans have some form of "Miscrosoft" exclusionary language stating:

"The following Employees are automatically excluded from eligibility to participate in the Plan:

"1. Any individual who is a signatory to a contract, letter of agreement, or other document that acknowledges his or her status as an independent contractor or leased employee not entitled to benefits under the Plan or any individual who is not otherwise classified by the Employer as a common law employee, even if such independent contractor or other individual is later determined by a court or administrative agency to be a common law employee."

Proceed with caution. Many ERISA-regulated arrangements are ignored until it is too late — when someone sues.

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