Article

Regulations cause offshore companies to examine independent contractor status

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The utilization of independent contractors in the offshore industry is, and has been, more than common place. Those serving as independent contractors prefer the status with the freedom and opportunities it permits. The companies utilizing independent contractors benefit as well, with many basing their operations on a business model relying upon them. Although the case discussed here refers to an onshore oilfield, the issue of contract labor is very relevant to the offshore oil and gas market.

Unfortunately, the acceptability of independent contractor utilization depends on the philosophies and pre-dispositions of the federal government administration in public office at the time. During the course of the past six and one-half years, the Obama administration has implemented stricter regulations affecting companies utilizing independent contractors. Current Secretary of the US Department of Labor (DoL) Tomas Perez is publicly on record stating that the misclassification of employees as independent contractors is pervasive and, more significantly, that such misclassification is "used intentionally by employers to...avoid various laws designed to create protections in the workplace." The DoL, in turn, has vigorously pursued investigations and prosecutions against various companies and their individual owners in an effort to re-classify as many independent contractors as employees as possible.

The tactics employed by the DoL have not always been appropriate and, in large measure, have been employed relied upon the vast treasury and powers of the federal government. In many cases, companies have been forced into re-classification simply as a consequence of their inability to afford a defense. In some cases, the re-classification has later caused insolvency because an employee-based system is undesirable to many independent contractors, who then subsequently seek other opportunities and/or because the business model is no longer fiscally viable.

In July of this year, two events pertaining to the utilization of independent contractors occurred which are of rather substantial significance. Although not chronological, the DoL published its Administrator's Interpretation No. 2015-1, which further narrowed the circumstances under which it would interpret a proper independent contractor classification. Additionally, on July 2, 2015, the United States Fifth Circuit Court of Appeals entered an opinion in Gate Guard Services, LP; Bert Steindorf v. Thomas E. Perez, Secretary, Department of Labor; Cause No. 14-40585 in the United States Court of Appeals for the Fifth Circuit (also known as GGS). The opinion said that the DoL to have been in "bad faith" for investigating and prosecuting an energy service company which used independent contractors.

In the GGS case, the DoL relied upon one of its investigators who, prematurely and without sufficient facts and evidence, determined that GGS had misclassified its oil field gate attendants as independent contractors as opposed to employees. Both the direct and indirect impact of this interpretation resulted in imposition of a $6.2-million assessment to GGS to compensate the gate attendants for overtime. Notably, both the assessment and the requirement that these people be considered employees in the future would result in the insolvency of GGS and the ruination of its business model. Regrettably, the hierarchy within the DoL approved the investigation and threatened prosecution of GGS absent the latter's complete capitulation. Rather than await

prosecution initiated by the DoL, GGS pursued a declaratory judgment in federal court seeking a determination to the effect that the DoL opinions were mistaken and its efforts misplaced.

The Federal District Court agreed with GGS and determined that the facts and previous case precedent dictated that GGS's gate attendants were properly classified as independent contractors. Moreover, the Federal District Court further found that the DoL was not "substantially justified" in prosecuting GGS in the first instance and that its counsel abused the judicial system with its unprofessional tactics, tactics concerning which GGS perceived as being adopted for the sole purpose of pushing the company to comply.

Thereafter, the DoL chose to appeal to the Fifth Circuit, the appellate court serving a level below the United States Supreme Court. Notably, the DoL did not appeal the classification of GGS's gate attendants as independent contractors, thereby agreeing to the finding and admitting its error concerning misclassification allegations. Instead, the DoL appealed only the Federal District Court's finding of not "substantially justified" and attempted to overturn the award of attorneys' fees to GGS. The Fifth Circuit found on July 2, 2015 that not only was the DoL not "substantially justified," but that it acted in bad faith both with respect to its investigation, as well as its prosecution of GGS. The award of attorneys' fees was intended to provide some compensation to GGS for its suffering through the investigation and litigation processes compelled by the DoL's overzealous actions.

The DoL does not appear to be inclined to moderate its clear direction to attempt to transform as many workers as possible from independent contractor status to employee status despite clear judicial interpretation. Courts generally have long utilized what is characterized as the "economic realities" test in order to determine independent contractor versus employee status. Factors such as supervision and control, relative investment, opportunity for profit or loss, skill and initiative, and permanency of the employment relationship are considered by courts.

Essentially, the DoL through its recent Administrator's Interpretation references the "economic realities" test, but subjects it to further limitation with the intention of reducing the instances when an independent contractor status would result. The obvious and intended purpose of the DoL in publishing its opinion and interpretation is to bolster its re-classification efforts by suggesting that its opinion interpretation is clear and consistent with case precedent.

The Administrator's Opinion is nothing more than an agency opinion. Its publication occurred without the formal rule-making process being invoked or note-and-comment period occurring. It is not binding law, nor is there any requirement that the courts adopt it in whole or in part. As the GGS Fifth Circuit Opinion more than suggests, the opinion of the DoL may be found to be misguided or, as regards to the Administrator's Opinion, overly expansive in support of a zealous effort to convert independent contractors to employees.

All companies engaged in the offshore industry, as well as other industries periodically or consistently utilizing independent contractors, should be aware of the DoL's pre-disposition to not only consider independent contractors as employees, but to actively pursue an agenda requiring re-classification. Knowledge of the "economic realities" test and its parameters is essential, as is the substance of the Administrator's Opinion. Only under these circumstances can a decision be responsibly made to resist the urgings of the DoL to re-classify. If such a decision is made, encouragement is most certainly available by way of the Fifth Circuit's Opinion regarding GGS.

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