Independent Contractor Status

The Issue

Our nation's fiscal state has assumed a permanent spot at the top of the Congressional agenda, with tax reform discussions spurring many ideas to address the nation's growing deficit. In these ongoing fiscal debates, Republicans call for reductions in federal spending while Democrats press for additional revenues through the tax code. One issue related to this debate – which is critically important to LPL – is the preservation of independent contractor status for our financial advisors.

Current Status

In recent years, there have been several attempts to legislate on the independent contractor issue. In the 113th Congress, Representative Erik Paulsen (R-MN) introduced the *Independent Contractor Tax Fairness and Simplification Act* which would, among other things, establish standards for determining employment status. This bill failed to advance, as did related legislation in the 114th Congress – the *Fair Playing Field Act* – introduced in both the House and Senate by Representative Jim McDermott (D-WA) and Senator Sherrod Brown (D-OH). While the Senate version of this bill explicitly exempted broker-dealers from coverage (a victory for the financial services industry), the House bill did not contain similar language. In July 2018, Senator John Thune (R-SC) introduced S.1549 – the *New Economy Works to Guarantee Independence and Growth (NEW GIG) Act*, which would create a safe harbor allowing workers to be categorized as independent contractors, if certain objective tests are met.

Our country's growing gig economy[1] has increased focus on contingent workers and raised concerns around the need to properly classify these workers. While there are occasional hearings on the gig economy, Congress has not yet taken meaningful action in this space.

Furthermore, the absence of up-to-date studies on the size of the contingent workforce has further impeded legislation. Following requests from members of the Senate, the federal government recently released new figures on the size of the short-term, non-salaried workforce, which had not been measured since 2005. In June 2018, the Bureau of Labor and Statistics released a new report on the size of the gig economy finding that in May 2017, 3.8 percent of workers – 5.9 million persons – were contingent workers, or those who did not expect their job to last, or who held temporary jobs. The survey also identified workers who had various alternative work arrangements, finding that there were 10.6 million independent contractors – 6.9 percent of total employment – in May 2017. Department of Labor Secretary Alexander Acosta has called the new data a "starting point for many conversations we need to have about the economy."

The independent contractor issue has also gained interest at the state level. Earlier this year, the California Supreme Court unanimously announced a new test for determining whether a work or an employee or an independent contractor in *Dynamex Operations West, Inc. v. Superior Court of Lost Angeles.* The *Dynamex Court* presumes that all workers are employees instead of independent contractors; it places the burden on the entity classifying an individual as an independent contractor, requiring it to show that such classification is proper under a newly adopted "ABC test." Under this "ABC test," a worker will be deemed an employee for wage order purposes unless the employer provides: a) that the worker is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; b) that the worker performs work that is outside the usual course of the hiring entity's business; and c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. Each of these requirements must

[1] The gig economy is defined as a labor market characterized by the prevalence of short-term contracts or freelance work as opposed to permanent jobs.

be met in order for a court to recognize that a worker has been properly classified as an independent contractor.

Given that the *Dynamex* standard differs from the law in most states, the lack of uniformity amongst the states resulting from this decision could lead to increased motivation for federal legislation.

LPL Position

LPL financial advisors choose to affiliate with LPL because they choose the independent contractor model – they intend to be independent contractors and find this to be a beneficial business model. We are concerned that overbroad legislation could inadvertently jeopardize our advisors' status. Although legislation aimed at cracking down on companies who misclassify employees as independent contractors has not achieved traction in the past – and independent broker-dealers have not been directly targeted by this proposed legislation – we continue to see this as a risk because classifying more workers as employees would increase government revenue in the form of payroll taxes.

LPL believes that the current safe harbor for defining independent contractors has functioned effectively for over 30 years. LPL will continue to monitor this issue, and we will strongly advocate for the ability of independent broker-dealers to classify financial advisors as independent contractors. LPL will continue to be vigilant and engaged in these policy discussions so that lawmakers are made aware of the distinction between gig economy workers and independent financial advisors.