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Beyond Karshan: Tackling bogus self-employment through comprehensive legal testing

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Background

- Research developed through PhD Thesis studying employment models of pilots and cabin crew across Europe.
- Identified bogus self-employment as a key concern of trade unions and as a feature of less "traditional" forms of employment in the sector.
- Building on this I developed an EU-focused model to identify potential cases of bogus self-employment.
- Test developed based primarily on CJEU jurisprudence with academic sources and national cases considered.
- Not exhaustive!

Reinventing the wheel?

- Tests do already exist in Ireland (e.g. Revenue, DSP) but they focus solely on Karshan, and, in my view, do not encapsulate the supremacy of EU law nor breath of *jurisprudence*.

- While the definition of self-employment varies by Member State, there is extensive *jurisprudence* on this issue from the CJEU.

- The intention is to create a tool for practitioners (or employers/workers) to help identify the possibility of bogus self-employment in specific employment situations

- This is due to the overarching consideration that each case must be heard on its individual merits and other national/sectoral regulation may also exist in this space.

The Test

1. Is the contractor providing a service in exchange for a defined remuneration? (Risak, 2008)
2. Is the contractor operating under the direction of another body/company? (Allonby, C-256/01)
3. Do they have control over the place, time or content of their work? (FNV, C-413/13)
4. Can they increase their income by sub-contracting to another company? (Yodel, C-692/19)
5. Can they increase their income by working additional hours? (Yodel, C-692/19)
6. Can they individually negotiation their pay/fees? (Allonby, C-256/01)
7. Is there an ability to outsource their work to a substitute? (Doherty, 2004/Countouris, 2007)
8. Is there a mutual obligation on one body/company to provide work, and the contractor to carry out said work? (Karshan)
9. Does the contractor share an economic risk with the company? (FNV, C-413/13)
10. Does the contractor form an integral part of the undertaking? (Tanton, C-22/98)
11. Are there ancillary elements to provide an element of control such as uniform, secondary work, etc.? (Karshan)

Conclusion

- What is considered bogus self-employment, and what is considered legitimate self-employment is constantly evolving.
- While is it welcome to see government bodies begin to take a stance on bogus self-employment (even if it is only for tax or social welfare purposes!) the issue will evolve.
- The “implementability” of the test is still being worked on.
- Maybe a traffic light or point system?

Thank you for listening!

Feedback and questions welcome!