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Employment Law Letter

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Labor & Employment Practice Group

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Employee vs. Contractor Is Still a Complex Question

Some time ago, the U.S. Department of Labor announced a focus on what it saw as a workplace trend, namely the characterization of people performing functions that are an integral part of the employer's business (not plumbers or IT consultants) as independent contractors. The DOL said it was targeting businesses that used such misclassification in order to save on payroll taxes and employee benefits. Many human resources administrators took a crash course in the so-called ABC test in order to accurately assess whether their contractors were properly characterized as such.

However, they have since learned that the test is not easy to apply, and the results are not always black or white. Is the worker subject to the employer's "direction and control" in the performance of his or her work? In many cases the answer is "yes and no." Is the work done outside the employer's place of business? That answer is likely clearer, unless of course the work of the employer is done largely at customer locations. Is the worker "customarily engaged in an independently established trade, occupation, profession or business?" This last question, which is part C of the ABC test, is easy to answer affirmatively in the case of a plumber or IT consultant, but not necessarily in other situations.

Take the case of an appraisal company that hired individual automobile appraisers, and treated them as independent contractors. In a dispute over whether the business should be making payroll tax payments on the compensation of the appraisers, the Connecticut Labor Department determined that while they met parts A and B of the independent contractor test, they failed part C, because they didn't currently have any other active customers. A trial court judge agreed, and said they were employees.

However, when the case ended up in the Connecticut Supreme Court, the justices had a different view. They said that having other active customers was only one of ten factors to consider in determining whether the appraisers conducted independent businesses, including using their own supplies and equipment, and holding themselves out to the public as separate entities. When all ten factors were considered, they said, the appraisers passed part C of the test.

Independent contractor status has other consequences beyond payroll taxes. For example, only employees have the right to unionize, not independent contractors. That determination is made by the NLRB, but the courts don't always agree with them either.

Just last month, a federal appeals court ruled that FedEx drivers who work out of a delivery terminal in Hartford are independent contractors, thus overturning an NLRB determination that those drivers were employees entitled to unionize. The judges chided the Board for arguing that the court should reach a different result than it did a few years earlier in a similar case involving FedEx drivers in Massachusetts.

Our advice to employers is to make very sure that workers who are involved in a central element of their business can pass the ABC test with flying colors before labeling them as independent contractors. A 51-49 case can very easily go the wrong way, and defending litigation over this issue can be time-consuming and expensive, even if you ultimately prevail.

Recent S&G Website Publications

Executive Orders Regarding Immigration
Published February 2, 2017

President Trump Issues March 6th Executive Order Revising Travel Ban
Published March 8, 2017

Starting May 1, 2017 USCIS Will Issue Redesigned Green Cards and Employment Authorization Documents
Published April 19, 2017

Immigration matters are changing rapidly, so we have created a page to keep our clients apprised of changes as they happen. Please visit **shipmangoodwin.com/immigrationupdates** *and sign up to receive email alerts as they are posted.*

Visit our award-winning Connecticut Employment Law Blog, **www.ctemploymentlawblog.com**

When Are You Liable For Supervisory Misconduct?

We have reported more than once on cases where a well-meaning employer gets into trouble because one of its supervisors engages in discriminatory or otherwise illegal conduct. This includes liability under the "cat's paw" theory, where management action based on a good faith judgment is tainted by the improper motivation of a supervisor. An example would be a reduction in force where employees affected are those with low performance ratings, but one of those ratings is made by a supervisor whose evaluation of a subordinate is negatively affected by the fact that she spurned his advances.

But is the employer always liable for the inappropriate conduct of a supervisor? Not always. A New London Superior Court judge recently tossed out a lawsuit against Walmart by an employee who was videotaped by a supervisor as she used the restroom. The video was then posted on Facebook. The employee sued Walmart for discrimination, negligent supervision and infliction of emotional distress. However, the judge said that there was no evidence that the misconduct was based on gender, that the employer had reason to be aware of the potential for misconduct, or that it had any intent to harm her.

This case may be an exception, however. Only a few weeks later a federal judge refused to dismiss a lawsuit against the Yale School of Medicine brought by a post-doctoral fellow who alleged sexual harassment by a professor. The judge noted that the plaintiff had complained about the professor to her department chair, who had returned her to work in his laboratory. The key here, of course, is that Yale had reason to be aware of the problem.

Our advice has always been to tackle such problems head-on, and never to sweep them under the rug or look the other way. It is particularly important, however, to assure that this message is heard up and down the chain of command. In the Yale case, the department head should have reported the problem to the dean of faculty, or better yet, to human resources. It's a message that can't be repeated too often.

No "Tip Credit" For Delivery Drivers

The question of whether pizza delivery drivers can be paid a reduced minimum wage because they frequently receive gratuities from customers may not seem like a big deal (unless of course you're a pizza delivery driver), but the operator of Domino's pizza franchises in southeastern Connecticut has taken the issue all the way to the state's Supreme Court.

Connecticut's "tip credit" regulations allow for payment of less than the statutory minimum wage to "service employees" delivering food or beverages to seated patrons, because

they frequently receive tips that substantially increase their compensation. Although this credit historically has been applied only to bartenders and waitstaff, the pizza franchise operator argued that its delivery drivers perform essentially the same function, namely delivering food to customers.

The Labor Commissioner didn't buy it. Neither did a Superior Court judge nor, just a few days ago, the Connecticut Supreme Court, which devoted more than 20 pages of analysis to the issue.

Interestingly, the discussion did not focus so much on the wording of the regulation as on the logic behind it. On its face, the tip credit is limited to those serving food or drink to customers seated in bars or restaurants, but neither the Labor Commissioner nor the judges stopped there. Pizza drivers only spend a few brief moments with customers, and have little opportunity to form the kind of relationship that influences gratuities. Most of their time is spent driving or interacting with whoever dispatched them.

The Supreme Court was also influenced by the fact that the tip credit regulations have been in effect for decades without challenge, and without any action by the General Assembly to change them through legislation. So now you know you can tip your pizza delivery driver without any impact on his or her base wage rate.

Who Qualifies For UC Is Sometimes a Tossup

Employers don't often contest decisions on whether their former employees are eligible for unemployment benefits, in part because most employers don't pay for those benefits themselves. When they do contest an award of benefits, it's presumably because they feel strongly about it. However, even in what may seem like clear cases, the outcome is anything but certain.

Take for instance a recent decision about a New Britain man who was scheduled for jury duty, but when it was cancelled took the day off without informing his supervisor of the cancellation. When he was fired, he was denied jobless benefits due to willful misconduct. However, when he took the matter to court a judge said he was entitled to benefits because his employer had no rule or policy stating that if jury duty was cancelled, the employee had to report for work. An appellate court reversed that result, but who knows what the Supreme Court might do?

Maybe it's because the unemployment rate has dropped to nearly normal, but the state also seems to be getting more lenient with regard to employees who quit work because they don't like their working conditions. A front page story in a recent edition of the Connecticut Law Tribune discusses the case of a nurse in a New Britain nursing home who quit when she found she would be assigned to work with paralyzed patients, which required more physical effort than working with other patients. The history of that case is instructive.

When she first filed for unemployment compensation she was denied, because working with disabled patients was simply part of her job. An appeals referee upheld the denial. However, the Board of Review found the nurse had "good cause" to leave her job, and awarded benefits. The employer took the matter to court, but the judge upheld the decision of the Board of Review.

Our opinion is that the lawyers quoted in the Law Tribune are

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correct, in that the state is becoming more liberal in the awarding of unemployment compensation benefits. However, the outcome in any given case is still difficult to predict, in part because concepts like "good cause" mean different things to different people.

Legal Briefs
and Footnotes

Union Contract Helps Employer: Who knew that having a union contract might be beneficial to an employer? That's what the Town of Cromwell found out when a terminated police officer filed a wrongful discharge lawsuit. The judge dismissed the complaint because the police officer had failed to exhaust his administrative remedies. Specifically, he failed to pursue a claim under the grievance and arbitration provisions of his union contract. Now it is presumably too late for him to do so.

Arbitrator Can't Reinstate Coach: When a New Haven baseball coach who was also a teacher failed to report improper conduct by an assistant, he was transferred to a teaching assignment in a different school, and terminated from his coaching position. The matter ended up before an arbitrator who decided the offense didn't warrant either the transfer or the dismissal. The Board of Education went to court, where a judge upheld the arbitrator's decision with respect to the teaching position, but not the coaching job. A Connecticut statute specifically says that a challenge to the dismissal of a coach in a public school district can only be taken up with the local or regional board of education, so in this case the arbitrator exceeded her authority.

"Public Policy" Theory Limited: In our last issue we reported on an employee who convinced a judge that allowing his supervisor at Schaller Auto World to accept shipments of guns at work created an unsafe workplace in violation of public policy. That argument doesn't always work, however. Another judge has dismissed a claim by a special education teacher in Windham that her workplace was unsafe because her class included students with behavior issues and even criminal histories. The judge said these risks are inherent in the employer's mission, which she should have known when she accepted the position.

Retaliation Can Be Expensive: We've said many times that retaliation against employees who report or claim to be the victims of discrimination can be as bad or worse than the discrimination itself. The latest lesson involves a $5.5 million jury verdict against Walmart, including $5 million in punitive damages. The jury found the plaintiff had not been discriminated against himself, but was targeted for termination in a RIF after complaining that Walmart was systematically eliminating African-American managers from its Connecticut stores. The verdict will likely be trimmed through judicial review, but it's an eye-opener nevertheless.

Workers Comp for Cops: Police officers and firefighters get a special deal when it comes to workers compensation. They're covered from when they leave their "place of abode" until they return to it. A New Haven cop claimed that guaranteed him benefits when he left his house to go to work and walked to his car parked on the street. He injured his back when he dropped his car keys and bent over to pick them up. The City claimed he hadn't yet left his abode and therefore wasn't covered for his injury, and the Compensation Review Board agreed. However, a divided Supreme Court has now awarded benefits, despite a dissent that said the injury occurred before the officer left his "place of abode."

Save the Date:

Sexual Harassment Prevention Training
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