Schaffer Law, LLC
Labor and Employment Law

Independent Contractor Test Gets Easier to Meet Under Connecticut Law

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The Connecticut Supreme Court recently released an opinion making it easier to meet the independent contractor test under Connecticut law. Southwest Appraisal Group v Administrator, Unemployment Compensation Act. The Connecticut Department of Labor traditionally followed the ABC test in determining whether a worker was an employee or independent contractor for unemployment compensation purposes. Part C of the test requires an employer to prove that the worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service provided to the employer. One element of that test was whether the worker had customers beyond the employer. The Supreme Court, however, has now held that while the number of customers may be considered there is no minimum requirement that a worker have multiple customers to be considered an independent contractor.

More specifically it stated, "we conclude that evidence of the performance of services for third parties is not required to prove part C of the ABC test, but rather is a single factor that may be considered under the totality of the circumstances analysis governing that inquiry."

In the instant case, the employer was engaged in appraising damage claims for various insurance companies. To do so, it contracted with various independent appraisers who performed the appraisals on a flat fee basis. While some of these subcontractors had multiple clients, others worked exclusively for the employer. Regardless of the number of customers each had, they all were required to obtain and pay for a state license, professional liability insurance,

and equipment. The employer did not provide them with any benefits, training, office space, uniforms, or business cards. The appraisers each had their own home office, were given flexibility in performing their duties, and were not subject to tax withholdings. They were issued a form 1099 at year-end, instead of a W-2. All bore the risk of making a profit or loss.

The lower court had ruled in favor of the Department of Labor, who argued that the appraisers who worked solely for the employer were economically dependent on it, and would not survive without that single client. Therefore, they were not "customarily engaged in an independent business," and thus flunked part C of the test.

In reversing the lower court, the Supreme Court noted that part C of the test seeks to discern whether a worker is wearing the hat of an employee of the employing company, or is wearing the hat of his own independent enterprise." In making that determination, the ruling makes clear there is no specific requirement that a worker have more than one client. Instead, regulators must use a totality of the circumstances test and consider a number of factors in addition to the number of clients. These include: (1) the existence of state licensure or specialized skills; (2) whether the putative employee holds himself or herself out as an independent business through the existence of business cards, printed invoices, or advertising; (3) the existence of a place of business separate from that of the putative employer; (4) the putative employee's capital investment in the independent business, such as vehicles and equipment; (5) whether the putative employee manages risk by handling his or her own liability insurance; (6) whether services are performed under the individual's own name as opposed to the putative employer; (7) whether the putative employee employs or subcontracts others; (8) whether the putative employee has a saleable business or going concern with the existence of an established clientele; (9) whether the individual performs services for more than one entity; and

(10) whether the performance of services affects the goodwill of the putative employee rather than the employer.

While the number of customers still counts when making the analysis and becomes more significant when other indicia of independence is lacking, it no longer is a per se requirement of meeting prong C of the ABC test.

Employers should remain cautious, however, when it is the sole employer of the putative independent contractor as federal laws enforced by the U.S. Department of Labor, EEOC, and IRS use different tests that focus more on direction and control, along with the economic realities of the relationship, and those regulators may come to different conclusions when an employer is the worker's sole source of income.

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