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COMMENTARY

Casual Employment and Independent Contractors: A Multi-State Workers' Comp Assessment

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Although neighboring states with common business interests and similar legislative cultures, New Jersey, Pennsylvania, Delaware and New York differ in their treatment of independent contractors and employers/employees, for purposes of their workers' compensation rules and regulations. Among the many issues relevant for consideration include unemployment compensation benefits and President Joe Biden's recent edict regarding workers in the "gig economy." The classification tests are evolving, and in the minds of many, might suggest the need for uniformity. But ultimately, some regulations may be liberally construed to find employment where status as an employee was not previously contemplated. This factor will impact employers in many ways, most importantly, in their insurance purchasing decisions.

New Jersey

While the definition of an independent contractor defense for purposes of workers' compensation in New Jersey is defined in a relatively short passage in the act, the caselaw has forced this short passage into all kinds of contortions. Section 36 of the act states, "Casual employment, which shall be defined, if in connection with the employer's business, as employment of the occasion for which arises by chance or is purely accidental, or if not in connection with any business of the employer, as employment not regular, periodic or recurring … ." The defense of casual employment and independent contractor is equally strong and the courts have emphasized that distinguishing between the two is unnecessary.

The relative nature of the work test (the work is an integral part of the business and there is substantial economic dependence) consistently controlled the court's decisions until a unique case came along in June 2015. In *The Estate of Kotsovska v. Liebman*, the estate pursued a civil action against the purported employer clearly due to the fact that Myroslava Kotsovska had no dependents at the time of her death when she was accidentally run over by her elderly client. Under the relative nature of work test or control test, Saul Liebman would clearly have been deemed to be her employer. As her employer, there would have been absolutely no recovery due to employer immunity. In order to conclude that the estate could proceed with a civil action, the court failed to apply either the control test or the relative nature of the work test, but rather relied upon a 12-part test in the context of a law against discrimination claim (LAD). That test is quite stringent including requiring whether there is annual leave; whether there are accrued retirement benefits; and whether the employer pays Social Security taxes. Needless to say, the claim did not meet the 12-part test and, therefore, the $525,000 jury verdict was allowed to stand.

Since the decision in *Kotsovska*, the courts have gravitated back to the longstanding tests of either control and relative nature of the work.

Steering even further away from the 12-part test in *Kotsovska*, the Biden administration on May 5, 2021, blocked the Trump-era rule that would have made it easier to classify gig workers, who work for companies such as Uber, Lift and DoorDash as independent contractors. The potential shifting tide is to classify more people as employees in order to provide them with the protection of the Workers' Compensation Act.

That can be seen once again more recently in the Aug. 2, decision of the New Jersey Supreme Court in *East Bay Drywall v. Department of Labor and Workforce Development*, 2022 N.J. Lexis 671 where the workers, who could leave a job in mid-installation if they found a better job and the purported employer had no control over their work effort. The employer would have to meet all three prongs of the ABC test in order for these individuals to be deemed independent contractors, including the following: A) required control; B) required the employer to provide that the work being performed was outside the usual course of business for which the service was being performed; and importantly, C) required that the individual was customarily engaged in an independently established trade. The New Jersey trend appears to be clear; finding an employment relationship whenever possible.

Pennsylvania

In Pennsylvania, the test to determine whether a worker is properly categorized as an independent contractor or an employee is dependent on several factors. The factors include consideration of the terms of the agreement between the parties, the nature of the work or occupation, the skill required for performance, whether the one employed is engaged in the distinct occupation or business, which party supplied the tools, whether the payment is by the time or by the job, whether the work is part of the regular business or the alleged employer, and also the right to terminate the employment at any time. See *Hammermill Paper v. Rust Engineering*, 243 A.2d 389 (Pa. 1968). While the above factors are relevant to the inquiry, the Pennsylvania Supreme Court has outlined that the primary factor regarding whether a worker is properly categorized as an independent contractor—or as an employee—is the right to control either the work to be done or the manner in which the work is to be performed. See *Universal Am-Can V. Workers' Compensation Appeal Board (Minteer)*, 762 A.2d 328 (Pa. 2000). Control in an employment relationship exists where the alleged employer possesses the right to select the employee, the right and power to discharge the employee, the power to direct the manner of performance, and the power to control the employee. See *American Road Lines v. Workers' Compensation Appeal Board (Royal),* 39 A.3d 603 (Pa. Cmwlth. 2012).

A recent decision by the Commonwealth Court in *Berkebile Towing & Recovery v. Workers' Compensation Appeal Board*, 254 A.3d 783 (Pa. Cmwlth. 2021) emphasized that the right to control is the preeminent factor in the court's analysis. In the case, the claimant, a tow-truck driver, entered into a written contract specifying his relationship as that of an independent contractor (specifically denying the existence of an employee relationship). Further, the facts of the case establish that the claimant was paid by the job, that he had the ability to decline jobs, and that the truck he used was leased to him. Despite these factors supporting the establishment of an independent contractor relationship, the court found that an employee relationship existed as the court's analysis focused on Berkebile Towing's ability to control the claimant. The court found that Berkebile Towing exercised significant control over how the drivers could and could not use the trucks (prohibiting the use of the trucks for calls from other towing companies), found that the trucks were adorned with large decals showing "Berkebile Towing" with inconspicuous stickers indicating that the trucks were leased to the drivers (which cut against the purported lease arrangement), found that the driver had no ability to set rates, and found that Berkebile Towing exercised dominion over the claimant's day as all his work came from Berkebile Towing rendering the claimant essentially on call for a 24/7 basis. This case emphasizes that while numerous factors are at play, the most significant factor for determining whether a worker is categorized as an independent contractor or an employee in Pennsylvania is dependent upon the employer's right to control either the work to be done or the manner in which it is performed. Employers should note that unless they are truly ceding control to the worker, an employment relationship might be found, implicating the need to have correct Pennsylvania workers' compensation coverage in place.

Delaware

Delaware has adopted the Restatement (Second) of Agency Section 220 to determine whether a claimant is an employee or independent contractor under the Delaware Workers' Compensation Act. The Restatement (Second) offers out 10 nonexclusive factors to analyze whether an employer-employee relationship exists. Those factors include the following:

- the extent of control which, by the agreement, the master may exercise over the details of the work;
- whether or not the one employed is engaged in a distinct occupation or business;
- the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- the skill required in the particular occupation;
- whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- the length of time for which the person is employed;
- the method of payment, whether by the time or by the job;
- whether or not the work is a part of the regular business of the employer;
- whether or not the parties believe they are creating the relation of master and servant; and
- whether the principal is or is not in business.

In analyzing these factors, Delaware courts have given significant weight to extent of "control" an alleged employer exerts over a claimant's work. See *Fisher v. Townsends,* 695 A.2d 53, 59 (Del. 1997). Even though the issue of control only appears at item one on the above list, it is an undercurrent that runs through the rest of the nine factors. To the extent the employer controlled the time,

method, and manner of the claimant's work, rather than merely defining the parameters of the claimant's work product, the claimant may be deemed an employee. See *Cumpston v. McShane*, 2009 Del. Super. LEXIS 191 (May 15, 2009). Yet Delaware courts have found that no individual factor is outcome determinative. Rather, it is the "facts and circumstances" of each case that establish the existence of the parties' relationship. See *Falconi v. Coombs & Coombs*, 902 A.2d 1094 (Del. 2006).

Delaware employs a similar test to assign liability between two employers for claims arising out of the Workers' Compensation Act. Here, which employer has the "right to control" the claimant will determine who employed the claimant. See *Lester C. Newton Trucking v. Neal*, 204 A.2d 393, 395 (Del. 1964).

The Delaware Industrial Accident Board has jurisdiction over the Workers' Compensation Act and the Delaware courts will defer to the board's decision, provided it is supported by substantial evidence and free from legal error. Once again, employers need to ascertain the importance of right to control in comparison to preserving an independent contractor relationship.

New York

In New York, the test to determine whether an employer-employee relationship exists is a factual issue for the Workers' Compensation Board. The relevant factors in making such a finding include the right to control the work, set the work schedule, the method of payment, the furnishing of equipment, the right to discharge and the relative nature of the work at issue. See *Matter of Bugaj v. Great American Transportation*, 20 A.D.3d 612 (3rd Dept. 2005). No one factor is dispositive and the result can turn on the basis of any one or a combination of the factors. See *Matter of Gregg v. Randozzo,* 216 A.D.2d 747 (3rd Dept. 1995).

There are, however, two industries carved out by statute, where a presumption of employment exists. For cases involving the construction or trucking industry, the common-law employment test does not apply and the burden of proof is on the presumptive employer to disprove employment. Pursuant to Labor Law Section 861-c or 861-b (Fair Play Act) any person performing services for a construction contractor or trucking entity (where vehicles are greater than 10,001 pounds), will be classified as an employee unless the person is a separate business pursuant to the "ABC" test, of which each the following is required:

(a) the individual is free from control and direction in performing or in the case of claim involving trucking, the job, both under his or her contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

For most cases involving the Fair Play Act the most difficult element to prevail for the purpose of proving an independent contractor relationship is part "B," where the service must be outside of the usual course of business for which the service is performed.

As long as there is substantial evidence to support a finding of either employment or independent contractor, the Appellate Division will not disturb the board's determination. See *Simonelli v. Adams Bakery*, 286 A.D.2d 805 (3rd Dept. 2001).

In Closing

Recent cases on this issue remind us of the protective approach the Biden administration took to provide workers with wage and related protections, and to include as many individuals as possible under the employer/employee umbrella of protection by way of state workers' compensation laws. What employers must realize going forward is that attempts to classify employees as independent contractors are going to be significantly scrutinized. This is even more important in this four-state area in which employees often move among states. We would not be surprised if the New Jersey "ABC" test or something similar bleeds into the workers' compensation system of many states, and significantly raises the bar for the independent contractor defense. But the common thread of control—or lack of it—seems to remain the best defense at the present time.

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