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NEW JERSEY SUPREME COURT DECIDES INDEPENDENT CONTRACTOR DEFINITION UNDER WAGE HOUR LAWS IS THE SAME AS THAT IN STATE UNEMPLOYMENT STATUTE

By Mark Tabakman

On January 14, 2015, the New Jersey Supreme Court in *Hargrove v. Sleepy's, LLC* (Dkt. No. A-70-12), resolved the issue of when an individual may be properly classified as an independent contractor under the New Jersey Wage Payment Act (WPA) and the New Jersey Wage Hour Law (WHL) and held that the “ABC” test governs. Under the “ABC” test, services performed by an individual are deemed to be employment unless the following is shown:

- A. that the individual has been and will continue to be free from control;
- B. that the services provided are either outside the usual course of business...or performed outside of all the places of business of the enterprise; and
- C. that the individual is customarily engaged in an independently established trade, occupation, profession or business.

The Court noted that both of New Jersey’s wage and hour laws failed to define employee or independent contractor or to set forth the standards to be utilized in such analyses. The Court then examined the plain language of the laws, and the

implementing regulations of both laws and concluded that deference should be given to the position of the New Jersey Department of Labor and Workforce Development (NJDOL), as it was the agency charged with interpreting and enforcing these laws. On that basis, the Court concluded that the same test, under both laws, should be utilized to determine whether or not an employment relationship existed.

In holding that the “ABC” test governs, the Court rejected the common law “right to control” test and the “economic realities” test because the “right to control” test, as the Court noted, is incompatible with the legislature’s goal of ensuring economic security, and the “economic realities” test, as the Court noted, could lead to inconsistent results.

The “ABC” test, which is the test supported and utilized by the NJDOL, by requiring that each element be satisfied, facilitated, as the Court posited, “greater income security” for workers, the underlying purpose of both laws at issue. The “ABC” test presumes that an employment relationship exists and places the burden on the employer to prove differently. The last prong (i.e., independently established business), is where

the issue is joined most of the time and where (often) most of the cases flounder for the putative employer. Accordingly, the *Hargrove* decision has decidedly and emphatically increased the coverage and protection of New Jersey's wage and hour laws in favor of "employees."

Businesses in New Jersey that presently utilize or are considering use of independent contractors would be well advised to contact experienced employment counsel to ensure compliance with the Court's holding.

For more information about this alert, please contact Mark Tabakman at 973.994.7554 or mtabakman@foxrothschild.com or any member of the firm's Labor & Employment Department.



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