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Be Aware of Potential Anti-Discrimination Protections for Independent Contractors

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Most sophisticated employers are aware that federal laws exist protecting the rights of employees to be free from certain kinds of discrimination and harassment in the workplace. But what about independent contractors? Independent contractors make up approximately 7% to 8% of the total American workforce. *See* Pirruccello, Jason E., *Contingent Worker Protection from Client Company Discrimination*, 84 Tex. L. Rev. 191, 204 (Nov. 2005). Does the law also protect independent contractors from discrimination or harassment while performing work under a contract? The answer is ... maybe.

The principal federal statutes that protect employees from discrimination - on the basis of race, sex, age, disability, *etc.* (namely, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act) - do **not** apply to independent contractors. Federal courts addressing that issue almost universally agree on that point. *See, e.g.*, *Bachir v. St. Agnes Medical Center*, No. 1:05-CV-01575-FVS-LJO, 2006 WL 1582247,at *2 (E.D. Cal. June 5, 2006) (heart surgeon suing hospital was independent contractor, not employee, and thus lacked standing to sue for race discrimination under Title VII). The reason is that these federal laws apply only to "employees," and independent contractors - who are in business for themselves - are by definition not employees, but instead are performing under contractual agreements with principals. Independent contractors thus lack standing to sue under these statutes in federal court, as an employment relationship would be necessary before they could do so.

However, obtaining a dismissal in a case filed by an independent contractor might not be so clear-cut.

For example, in one case brought by a former employee for age- and disability-based discrimination and retaliation, the plaintiff alleged that he was not given an opportunity to do the consulting work for his former employer which had been promised to him as part of a severance package. The company learned after the severance package was agreed to that the former employee filed a discrimination charge with the U.S. Equal Employment Opportunity Commission, and thus the company reneged on its promise to offer the consulting work. The company argued that the claim for retaliatory withholding of consulting work was baseless because the plaintiff lacked standing as an independent contractor. The United States Court of Appeals for the Seventh Circuit (covering Illinois, Indiana and Wisconsin) disagreed, holding that the retaliation claim did not arise from the plaintiff's status as a prospective independent contractor, but instead was a remnant of his former relationship as an employee. The Court of Appeals held that withdrawal of the severance promise, after the company learned of the discrimination charge, was sufficiently linked to the prior employment relationship to deter employees from exercising their statutory rights by filing discrimination charges. The retaliation claim was thus allowed to proceed. *See Flannery v. RIAA*, 354 F.3d 632, 641-43 (7th Cir. 2004).

In another example involving a financial advisor pursuing claims for age, gender and disability discrimination under Title VII, the ADA and the ADEA, the court held that given the circumstances of the case, there was a question of fact regarding whether the plaintiff was an employee or an independent contractor, and thus the defendant's motion to dismiss was denied, and the matter was allowed to move forward. It was not enough for the defendant to simply assert that the plaintiff had been an independent contractor, and not an employee, while at the company. *See Krieger v. American Express Financial Advisors*, No. 98-CV-0782E(F), 2000 WL 207119, at *5 (W.D.N.Y. Feb. 16, 2000).

Moreover, other legal causes of action might be available to independent contractors, even if federal anti-discrimination statutes like Title VII and the ADEA are not available.

For instance, an alternative to Title VII, known as "Section 1981" (42 U.S.C. § 1981), protects against race discrimination in the performance of contracts, generally. Section 1981 is often used in conjunction with Title VII for employment cases based upon race allegations, but it is also available outside of the employment context, and theoretically it is available in the context of contractual agreements between independent contractors and their principals. Section 1981 would not apply in the context of sex-, age-, or disability-based discrimination, but for an independent contractor alleging race-based discrimination or retaliation, this law has the potential for being the basis of a federal court claim, even though the independent contractor has never been an employee of the defendant.

For independent contractors alleging something other than race-based discrimination, possible legal recourse exists in the context of certain state laws. For instance, an independent contractor might be able to pursue a discrimination-based claim against a specific individual within a company the independent contractor is working for, by filing a claim for tortious interference with contract. An independent contractor could argue that a member of a principal company, with which he or she had a contract, intentionally interfered with the contractual arrangement by inducing or otherwise causing the principal to cease performing under the contract. The standard for this sort of claim is high, however; negligent interference with the contractual arrangement is not enough, and intent to interfere is specifically required.

An independent contractor could also potentially pursue a claim for intentional infliction of emotional distress under the law of many states. The standard for this sort of claim is even higher than the intentional interference claim, requiring the defendant to be "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." Restatement (Second) of Torts §46. For extreme cases, however, this law is available to aggrieved independent contractors, as well.

Finally, some states even imply a covenant of good faith and fair dealing into all contracts, including contracts between principals and independent contractors. While there is limited precedent for such a theory, the implied covenant of good faith and fair dealing could be deemed to extend to protection against discrimination in the performance of a contractual agreement with an independent contractor. *See Pirruccello*, 84 TEX. L. REV. at 215.

The important point for companies using independent contractors is that the non-employee status of such a workforce does not necessarily protect against all discrimination-based claims arising out of the relationship. While not entitled to all of the same protections offered by federal law to employees, independent contractors do have several avenues potentially available to them (under both federal and state law) for assertion of a legal right to be free from discrimination in the performance of their contracts. Indeed, it is not always clear whether a particular worker is an employee or an independent contractor. Companies should, therefore, when in doubt, consult an experienced employment attorney to assess individual situations.

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