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Federal Court Revives Class Action Lawsuit Based on Employee Misclassification

By Matthew J. Feery

Earlier this month, [a federal appellate court used](#) a recent New Jersey Supreme Court decision to revive a putative class action lawsuit based on alleged employee misclassification, and in doing so it provided a reminder to employers doing business in New Jersey that their employee classifications should be reexamined in light of recent clarification in the law.

As we [have written about](#) previously, Sleepy's LLC is a mattress and bedding company with distribution centers in New Jersey. Sleepy's contracts with individuals and delivery companies to provide delivery services to its customers. Each individual and/or customer entered into an Independent Driver Agreement with Sleepy's. Those agreements stated that the individuals were independent contractors and not Sleepy's employees.

In 2010, a number of individuals sued Sleepy's on behalf of a putative class of employees, claiming that the company had misclassified them as independent contractors when they were really employees, thereby denying them the protection of myriad laws, including the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law. A federal district court eventually ruled in favor of Sleepy's, holding that the individuals were not employees under the "right to control" test set forth in the 1992 Supreme Court case *Nationwide Mutual Insurance Co. v. Darden*.

On appeal, however, the United States Court of Appeals for the Third Circuit quickly realized that neither the New Jersey Supreme Court nor any New Jersey state appellate court had ever decided what the proper test was for determining whether someone is an independent contractor or employee under New Jersey's wage and overtime laws. The federal appellate court therefore asked the New Jersey Supreme Court to take up the matter to answer a single question: What is the proper test to apply?

On January 15, 2015, the state supreme court [gave its unanimous answer](#): The proper test to determine whether someone is an independent contractor under the state's wage payment and overtime laws is not the *Darden* "right to control" test used by the federal district court but rather the "ABC" test.

Under the "ABC" test, an individual is assumed to be an employee unless the employer can show that:

(A) The individual has been and will continue to be free from control or direction over the performance of the service being performed, both under the individual's contract of service and in reality; and

(B) The service being performed is either outside the usual course of the employer's business, or is performed outside of all the places of business of the employer for which such service is performed; and

(C) The individual is customarily engaged in an independently established trade, occupation, profession or business.

According to the New Jersey Supreme Court, the failure to meet any one of these three criteria will result in a finding that an individual is an employee.

With the answer finally in hand, the Third Circuit turned back to the merits of the plaintiffs' appeal. However, because the federal district court never discussed the application of the ABC test to the plaintiffs' claims, the Third Circuit reversed its decision in favor of Sleepy's and remanded the case back to the district court to apply the proper test to the plaintiffs' claims.

For those employers utilizing independent contractors in New Jersey or with pending litigation regarding alleged employee misclassification, the *Sleepy's* case should act as a wake-up call to re-analyze employee classifications under the proper ABC test. Wage and hour litigation has been and remains a "hot topic" in employment law due to the increase in litigation over employee classification and unpaid overtime, and as *Sleepy's* shows, the legal

landscape is still changing. For additional evidence look no further than the recent announcement by the Department of Labor that it had submitted, for impending publication, new proposed regulations for the Fair Labor Standards Act. Those new regulations are expected to narrow the "white collar" exemptions relied upon by employers to exempt wide classes of employees from the Fair Labor Standard Act's overtime requirements. It will still be some time before those proposed regulations go into effect, but employers should begin reviewing their classifications now lest they be caught sleeping when the changes come.

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