

July 17, 2013



Ola A. Nunez, Esq.

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## New Jersey's Supreme Court to Determine Proper Test for Independent Contractor Misclassification Suits under Wage and Hour Laws

By Ola A. Nunez

Many companies are aware of the financial benefits associated with utilizing independent contractors, such as saving on payroll taxes, worker's compensation insurance, and company-paid benefits. On the other hand, misclassifying a worker who should be an employee as an independent contractor can lead to serious and costly consequences, including liability for back taxes (which can be doubled), penalties and interest, overtime pay, and employee benefits, and can even expose the company to claims arising under a number of employment laws. Unfortunately for companies that seek to avoid such consequences, as well as expensive and protracted litigation, there is no universal definition for "independent contractor." Rather, whether a worker is an independent contractor involves consideration of multi-factor, fact-sensitive tests, and the applicability of any given test varies among jurisdictions and among various statutes within any given jurisdiction.

This issue can be even more perplexing when it has been presented with respect to a particular statute for the first time, as was recently encountered by the United States Court of Appeals for the Third Circuit in *Hargrove v. Sleepy's LLC* while considering an appeal of a decision by the New Jersey federal district court that found that the plaintiffs at issue were independent contractors. The lawsuit was brought by three plaintiffs, individually and on behalf of a

putative class of delivery truck drivers, against Sleepy's, a company that contracts with individuals and delivery companies to provide delivery services to its customers. The plaintiffs claimed that Sleepy's had misclassified them as independent contractors rather than employees and, in doing so, denied them the benefits and protections they would have otherwise been entitled to as employees under various federal and state statutes, including the Employee Retirement Income Security Act ("ERISA"), the federal Family and Medical Leave Act, and the New Jersey Wage Payment Law. Additionally, they claimed they were not paid overtime in violation of the New Jersey Wage and Hour Law.

The District Court for the District of New Jersey reached its decision that the plaintiffs were independent contractors after applying the twelve-factor "right to control" test set forth by the United States Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). The "right to control" test involves considering the following twelve factors:

1. the skill required;
2. the source of the instrumentalities and tools;
3. the location of the work;
4. the duration of the relationship between the parties;
5. whether the hiring party has the right to assign additional projects to the hired party;
6. the extent of the hired party's discretion over when and how long to work;
7. the method of payment;
8. the hired party's role in hiring and paying assistants;
9. whether the work is part of the regular business of the hiring party;
10. whether the hiring party is in business;
11. the provision of employee benefits; and
12. the tax treatment of the hired party.

On appeal to the Third Circuit, the plaintiffs argued that another test should be applied because New Jersey state courts have rejected the "right to control" test as the exclusive test for employment status. The plaintiffs suggested alternate tests that could be applied, including the "hybrid test" set forth in a New Jersey Appellate Division decision, *Pukowsky v. Caruso*, 711 A.2d 398 (N.J. Super. Ct. App. Div. 1998), which involved a claim brought under the New Jersey Law Against Discrimination, and the "ABC test," which has almost exclusively been applied to claims arising under the New Jersey Unemployment Compensation Act.

As a comparison to the "right to control" test, the "hybrid test," which also considers twelve factors, blends the "right to control" test with the "economic realities" test (used in all claims brought under the Fair Labor Standards Act).

In contrast to the "right to control" and "hybrid" tests, the "ABC test" involves only three criteria, which requires the party challenging the employer-employee relationship to show that:

1. the worker has been and will continue to be free from control or direction over the performance of the service;
2. the service is either outside the usual course of the employer's business, or the service is performed outside of all the places of business of the employer for which the service is performed; and
3. the worker is customarily engaged in an independently established trade, occupation, profession or business.

The Third Circuit noted that "[n]either the New Jersey Supreme Court nor any other New Jersey appellate court has previously determined which employment test applies to claims that arise under the New Jersey Wage Payment Law or the New Jersey Wage and Hour Law." Since the Third Circuit recognized that the "determination of whether individuals are employees or independent contractors for purposes of New Jersey law may well have a significant impact on the tax revenues collected by the State of New Jersey," it petitioned the New Jersey Supreme Court for certification of the following question of law: "Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, *N.J.S.A. § 34:11-4.1, et seq.*, and the New Jersey Wage and Hour Law, *N.J.S.A. § 34:11-56a, et seq.*?"

While the Third Circuit and employers with workers in New Jersey eagerly await the New Jersey Supreme Court's decision of whether they will answer this question, companies who utilize the services of independent contractors should seek legal advice, if appropriate, to ensure that they are not misclassifying independent contractors under the specific statutes applicable in the jurisdictions where they operate.

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