RHODE ISLAND LAWYERS WEEKLY

Employers toe fine line to avoid misclassification liability

Substance over form defining 'independent contractors'

By: Pat Murphy May 17, 2018

Employers have their work cut out for them if they want to ensure that workers they consider to be independent contractors do not at some point in the future have tenable grounds to claim they should have been classified as employees entitled to certain benefits, protections and rights to overtime pay.

The days of companies hiring people and simply labeling them independent contractors are over in Massachusetts, according to James W. Bucking, a management-side attorney at Foley Hoag in Boston. Bucking sees the key to future litigation as being whether the alleged independent contractor truly runs a business of his or her own.

"The dividing line is going to be between sham businesses forced upon a worker by the company and legitimate businesses that are really doing business," Bucking said. "The solo consultant who's a part-timer is done."

Barrington attorney Chip Muller chairs the Rhode Island Bar Association's Labor Law & Employment Committee. Muller said the fact that an individual may be defined as an independent contractor by an agreement with the employer matters little in misclassification cases.

"This wouldn't be such an angst-ridden area of the law if it were that simple," Muller said. "Courts tend to give that little weight, if any."

Litigation over alleged employee misclassification is one of the more active fields of litigation in the country, according to Bucking. He attributes the trend to two factors.

First, he points to the "new economy" in which companies increasingly look to outsource functions that in the past might have been a regular part of their business.

Second, though companies may view outsourcing as smart business, plaintiffs' attorneys and government regulators are more concerned than ever that such arrangements may be a means for avoiding protections and benefits afforded employees under state and federal law.

"Litigation comes in part because there are people using these [business] models, but it's coming in large part because the people using these models are getting sued or prosecuted by the government for treating the employees as independent contractors," Bucking said.

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>
> *— Michael A. Gamboli, Providence*

The ABC test

Distinguishing employees from independent contractors through litigation is a fact-intensive inquiry that could expose companies to unexpected liability, practitioners say.

In Massachusetts, the Legislature has codified a three-factor test for determining independent contractor status — commonly called the "ABC test" — in G.L.c. 149, §148B.

"The Massachusetts test presumes that anyone doing any kind of work is an employee," Bucking said. "That's the presumption going in, and then [the statute] puts the burden of proof on the company to meet three very specific standards in order to overcome that presumption."

Specifically, §148B creates a presumption that "an individual performing any service" is an employee unless the employer can show: "(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed."

Michael A. Gamboli, a management-side lawyer at Partridge, Snow & Hahn, calls Massachusetts' ABC test "extremely restrictive."

Defendants often have a hard time showing that the plaintiff performed work outside the regular course of the company's business, said Gamboli, who practices in Boston and Providence.

"The nightmare situation is where you have an accounting firm that needs to outsource accounting work to some independent contractors who may be taking on work a couple hours here or there," Gamboli said.

Bucking recently won a signal management-side victory in a misclassification case in Suffolk Superior Court, *Weiss v. Loomis Sayles & Co., et al.* The case involved an information technology consultant who claimed the defendant employer, a financial services company, misclassified him as an independent contractor. On April 10, Judge Christine M. Roach issued a ruling from the bench in which she granted Bucking's client a directed verdict.

After hearing the evidence, Roach applied the ABC test to find that no reasonable jury could conclude the defendant had misclassified the plaintiff as an independent contractor.

Specifically, the judge found Loomis carried its burden of showing that the plaintiff: (1) was free from Loomis' control and direction; (2) performed services for Loomis outside the company's usual course of business; and (3) "customarily engaged" in his own independent technology services business as a software engineer.

Like Gamboli, Bucking finds the second prong of the ABC test to be problematic and in need of clarification by the courts.

According to Bucking, that factor would appear to preclude a finding of independent contractor status whenever the plaintiff and the defendant are in the same business, such as when a large law firm brings in a smaller firm or solo practitioner to assist in a particular case.

"In our case, it ended up not mattering because software engineering is not financial services," Bucking said. "But there are a lot of cases where it's going to matter."

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>
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Multi-factor approach

Gamboli characterized the Massachusetts ABC test as an "affirmative defense," with the employer having to prove each of the statutory factors to establish a plaintiff's independent contractor status.

On the other hand, Rhode Island and a number of other states follow a multi-factor approach for determining independent contractor status.

According to Gamboli, though the multi-factor approach encompasses the ABC factors, those factors are not the "be all and end all."

"The court balances the various factors to reach the decision it thinks is the right decision," Gamboli said.

The common-law test employed in Rhode Island to a large degree tracks the multi-factor test used under the Fair Labor Standards Act, which examines factors such as the extent to which the services rendered are an integral part of the company's business, the permanency of the relationship, and the company's degree of control over the worker.

"You're looking at control, you're looking at the tools used, the mode of work, the location of the work, and whether the employee's expertise falls within the company's expertise," Muller said.

Though Rhode Island law is similar to the FLSA in that it looks at a number of different factors, Gamboli said the standard could be considered broader than the FLSA in that the factor that weighs most heavily is the employer's right to control the means and manner of someone's work.

"A lot of times you'll have the employer say [it doesn't] really control the means and manner of what the person does, that [the individual] sets the schedule and as a practical matter make all the decisions," Gamboli said. "But a court may kick back on that and say that doesn't matter; it matters that [the employer has] a right to exercise control."

Gamboli said it is essential to have a simple one- or two-page contract that clearly spells out that the individual is an independent contractor, even if a court may not find it dispositive. The agreement should also include an arbitration clause that includes a class-action waiver.

"It's my experience that courts are enforcing mandatory arbitration agreements when they're part of a bargained-for contract," Muller said.

Gamboli noted a series of cases before the U.S. Supreme Court to determine whether class-action waivers are enforceable, but said the prudent course is to write them into independent contractor agreements. He added that it is important to put those class-action waivers within the agreement's arbitration clause.

"If I have that waiver included as part of an arbitration clause, there's a good chance it will be enforced because of the mere power of the Federal Arbitration Act," Gamboli said.

California, New Jersey on board

The California Supreme Court on April 30 adopted Massachusetts' version of the ABC test in *Dynamex Operations West, Inc. v. Superior Court*. The class action was brought by two delivery drivers of Dynamex, a nationwide same-day courier and delivery service.

The plaintiffs claimed that Dynamex misclassified them and other delivery drivers as independent contractors, depriving them of the protections of a state wage order applicable to the transportation industry.

In upholding the trial judge's class certification order, the court adopted what in essence is Massachusetts' ABC test for determining whether workers should be classified as employees or independent contractors for purposes of California wage orders.

Boston class action employment lawyer Shannon Liss-Riordan became a member of the California bar two years ago and now spends almost as much time litigating in California as she does in Massachusetts. Liss-Riordan sees *Dynamex* as a game-changer.

"The fact that California now has an ABC test like we have in Massachusetts is going to mean much stronger protections for California," she said. "And I also think that, because California is such a large and influential state, it may well cause other states to take notice and consider adopting an ABC test."

In fact, New Jersey got the jump on California.

Liss-Riordan pointed out that her partner, Harold L. Lichten, successfully argued for the adoption of an ABC test for wage cases in New Jersey. The New Jersey Supreme Court in a 2015 case, *Hargrove v. Sleepy's LLC*, adopted a modified version of the ABC test derived from the that state's unemployment compensation statute.

Liss-Riordan commended the California Supreme Court for recognizing in *Dynamex* "the way independent contractor classifications have been abused, which have led to many workers not receiving the protections of employees and many companies being able to get away with building entire business models off of using contractors rather than employees."

She went on to call the ABC test a "very powerful" one that provides a far more clear-cut analysis in distinguishing between independent contractors and employees than the various multi-factor tests in most states and under federal law.

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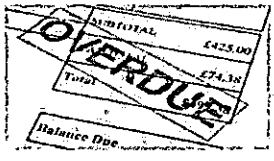

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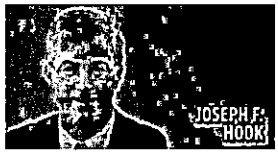

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