

Don't Sleep on This New Jersey Employers: State Supreme Court Adopts More Stringent Test to Claim Independent Contractor Status

January 27, 2015 | Blog | By David Katz

VIEWPOINT TOPICS

- Employment

RELATED PRACTICES

RELATED INDUSTRIES

Recently, in *Hargrove v. Sleepy's, LLC*, the New Jersey Court issued a unanimous decision raising the bar for New Jersey employers seeking to classify individuals as independent contractors under New Jersey's Wage Payment Law (governing time and mode of wage payments) and New Jersey's Wage and Hour Law (governing minimum wage and overtime). The court adopted the so-called "ABC" test; a test derived from New Jersey's Unemployment Compensation Act and arguably the most stringent test for employers to uphold independent contractor classifications.

The ABC test presumes that an individual is an employee — and not an independent contractor — **unless** the company can show that the individual meets **each** of the following three elements:

- A. the enterprise neither exercised control over the individual, nor had the ability to exercise control in terms of the completion of the work; and
- B. the services provided were either outside the usual course of business or performed outside of all the places of business of the enterprise; and
- C. the individual has a profession that will plainly persist despite termination of the challenged relationship.

The failure to satisfy any one of these three criteria results in an "employment" classification.

Although the court acknowledged the similarities in the definition of "employee" under the FLSA and New Jersey's wage and hour laws, the Court rejected the FLSA's broader "economic realities" test, which is guided by six criteria, none of which is determinative. The court explained that the "economic realities" test contemplates a qualitative analysis of each case, which may yield a different result from case to case. By contrast, under the "ABC" test, the Court noted that the classification as an independent contractor requires that the employer demonstrate that the retained individual satisfies all three criteria, thus providing more predictability and casting a wider net than the "economic realities" test.

Given the different tests on the state and federal levels in the wake of the *Sleepy's* decision, it is now possible that companies may find themselves in the administratively-burdensome position of being able to show an independent contractor relationship under federal law but not under New Jersey's wage and hour laws. Employers operating on a multi-state basis will now have to consider how *Sleepy's* impacts their New Jersey operations.

It would not be surprising to see a spike in New Jersey claims for wage and hour violations in light of the lower burden for individuals to show that they are employees rather than independent contractors. New Jersey employers should therefore take this opportunity to audit how they currently use independent contractors. With an eye towards the "ABC" test, employers should carefully review their independent contractor agreements and how they are used in practice. Specifically, to ensure compliance with the more worker-friendly standard adopted in *Sleepy's*, employers should evaluate the extent of control or direction they exercise (or could exercise) over the workers, the location of the work, and type of work being performed.

Authors



David Katz