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Expert Analysis

Labor and Employment Law: Independent Contractor Tests

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An issue that routinely arises in the labor field is whether a worker is an "independent contractor" or an "em-ployee." Misclassification of workers as independent contractors can have serious consequences, so companies must exercise caution when treating someone as an independent contractor. One problem, however, is that the test for employment status varies depending on which law is involved. Thus, it is possible for someone to be an independent contractor under some laws but an employee under others. This article provides a brief overview of the different tests.

Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) defines the word "employee" as "any individual employed by an employer." 29 U.S.C. §203(e)(1). The FLSA also includes a definition of "employ" as "suffer or permit to work." Id. §203(g). "This latter definition…stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992) (citations omitted). See also *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (noting the "expansiveness" of the definition).

The test for whether a person is an employee or an independent contractor under the FLSA is one of "economic realities," with five non-exclusive areas of focus:

> (1) The degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Meyer v. United States Tennis Ass'n, 2015 U.S. App. LEXIS 11037, *2 (2d Cir. June 29, 2015) (quoting *Brock v. Superior Care*, 840 F.2d 1054, 1058-59 (2d Cir. 1988)).

Formal control does not "require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control….Control may be restricted or exercised only occasionally…." *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. 1999).

> The test for employment status varies depending on which law is involved. Thus, it is possible for someone to be an independent contractor under some laws but an employee under others.

New York Labor Law

The New York Labor Law (NYLL) defines "employee" as "any person employed for hire by an employer in any employment." N.Y. Labor Law §190(2).

> [T]he critical inquiry [under the New York Labor Law] in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results. Factors … include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule.

Bynog v. Cipriani Group, 1 N.Y.3d 193, 198 (2003). Incidental control over the results without "direct supervision or input over the means used to complete the work" does not establish an employment relationship. *Bhanti v. Brookhaven Mem'l Hosp. Med. Ctr.,* 260 A.D.2d 334, 335 (2d Dept. 1999). Cf. *Glatt v. Fox Searchlight Pictures*, __ F.3d __, 2015 U.S. App. LEXIS 22977, at *9 (2d Cir. July 2, 2015) ("Because the statutes [FLSA and NYLL] define 'employee' in nearly identical terms, we construe the NYLL definition as the same in substance as the definition in the FLSA.").

ADEA, Title VII and the ADA

The Age Discrimination in Employment Act (ADEA) defines "employee" as "an individual employed by any employer." 29 U.S.C. §630(f). Title VII and the Americans with Disabilities Act (ADA) both define "employee" as "an individual employed by an employer." 42 U.S.C. §2000e(f); 42 U.S.C. §12111(4). (The only difference being "an" versus "any" before "employer.") Notably, these statutes do not include the second part of the definition found in the FLSA, i.e., that "employ" means "to suffer or permit to work," so the definition is narrower than under the FLSA.

The test under all three statutes is the common law test, with the "greatest emphasis on the hiring party's right to control the manner and means by which the work is accomplished." *Frankel v. Bally*, 987 F.2d 86, 90 (2d Cir. 1993) (ADEA case)

The other factors that courts may consider include:

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party

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> has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 89 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)). This analysis also applies under Title VII, *Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217, 226 (2d Cir. 2008), and the ADA, *Pastor v. Partnership for Children's Rights*, 2012 U.S. Dist. LEXIS 140917, at *5 (EDNY, Sept. 27, 2012).

State Law, City Code

The Executive Law does not define "employee." It does, however, provide that "employee" excludes "any individual employed by his or her parents, spouse or child, or in the domestic service of any person except…." Exec. Law §292(6).

The test is whether the putative employer "exercises either control over the results produced or over the means used to achieve the results. Minimal or incidental control over one's work product without the employer's direct supervision or input over the means used to complete it is insufficient to establish a traditional employment relationship." *Scott v. Massachusetts Mutual Life Ins. Co.*, 86 N.Y.2d 429, 433 (1995) (citations and quotations omitted).

Similarly, the New York City Administrative Code does not define "employee." A person's status under the Administrative Code "'depends on factors, including, inter alia, the hiring party's right to control the work, whether the hiring party provides the hired party's benefits, the duration of the parties' relationship, and how payment is made.'" *Dominguez v. Gruber*, 2014 N.Y. Misc. LEXIS 2340, at *7 (N.Y. County May 20, 2014) (quoting *Hopper v. Banana Republic*, 2008 U.S. Dist. LEXIS 13503, at *8 (S.D.N.Y. Feb. 25, 2008)).[1]

Unemployment Insurance

The Unemployment Insurance Law defines "employment" as "any service under any contract of employment for hire, express or implied, written, or oral…." NYLL §511(1)(a).

The test for employment status differs depending on whether the worker in question is a professional or not. For professionals, the test is "overall control." "[P]rofessional services do not lend themselves to such control" over the details of the work and the results produced, so the courts look to "evidence of control over important aspects of the services performed other than results or means." *In the Matter of Concourse Ophthalmology Associates*, 60 N.Y.2d 734, 736 (1983).

The test for non-professionals is the "control-over-means-and-results" test. *Matter of Empire State Towing & Recovery Assn.*, 15 N.Y.3d 433, 438 (2010). Under the "control-over-means-and-results" test, "[a]n employer-employee relationship exists when the evidence shows that the employer exercises control over the results produced or the means used to achieve the results." *Empire State Towing*, 15 N.Y.3d at 437. "[C]ontrol over the means is the more important factor to be considered. Thus, incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship." *In re: Ted is Back Corp.,* 64 N.Y.2d 725, 726 (1984). "Occasional observation" of the worker without "any resulting impact on the means or results" does not result in control. *Matter of Cohen (Classic Riverdale, Inc.–Commissioner of Labor)*, 2016 N.Y. App. Div. LEXIS 1209, at *4 (3d Dept. Feb. 18, 2016).

Workers' Compensation

The definition of "employee" under the Workers' Compensation law is quite lengthy:

> "Employee" means a person engaged in one of the occupations enumerated in section three of this article or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his or her employment away from the plant of his or her employer; …any individual performing services in construction for a contractor who does not overcome the presumption of employment as provided under section eight hundred sixty-one-c of the labor law;…any individual performing services in the commercial goods transportation industry for a commercial goods transportation contractor who does not overcome the presumption of employment as provided under section eight hundred sixty-two-b of the labor law; …and shall not include domestic servants except as provided in section three of this chapter, and except where the employer has elected to bring such employees under the law by securing compensation in accordance with…this chapter.

Workers' Comp. Law Art. 1 §2(4).

Historically courts have used one of two tests to determine employment status, but they now apply a hybrid test.

> [T]he recent trend [however] has been… to employ a combination of the factors in both tests….Under [the common law control] inquiry, four factors are assessed: (1) The direct evidence of the owner's right to or exercise of control; (2) The method of payment; (3) The extent to which the owner furnishes equipment; and (4) Whether the owner retains the right to discharge.… Under [the "relative nature of the work"] analysis we look to …(1) The character of the claimant's work; (2) How much of a separate calling that work is from the owner's occupation; (3) Whether it is continuous or intermittent; (4) Whether it is expected to be permanent; (5) Its importance in relation to the owner's business; and (6) Its character in relation to whether or not the claimant should be expected to carry his own accident insurance burden. As noted, more recent decisions have employed elements of both of these tests, finding an employer/employee relationship when but a few, and sometimes even only one, of these factors are satisfied.

Commissioners of State Ins. Fund v. Lindenhurst Green & White Corp., 101 A.D.2d 730, 731 (1st Dept. 1984). See also *Commissioners of State Ins. Fund v. F & V Distrib. Co.*, 67 A.D.3d 624, 625 (2d Dept. 2009) (finding drivers to be independent contractors under either test); *Szabados v. Quinn*, 156 A.D.2d 186, 186 (1st Dept. 1989) (factors include right of control, whether the worker employs assistants, provides his or her own materials and equipment, and the independent nature of the contractor's business).

Conclusion

Before engaging an individual as an independent contractor, potential "employers" should review the day-to-day requirements of the position to be sure the arrangement satisfies all of the above-discussed tests.

1. There is scant case law under the Administrative Code because of Section 8-102(5), which excludes from the definition of "employer" anyone with fewer than four employees, and provides that "[f]or purposes of this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer."