Classifying Workers as Independent Contractors Continues to Be A Tricky Situation

In most situations, an employer's right to control the details of an individual's work, appearance, job duties, work schedule and other details will dictate whether the worker is an employee or an independent contractor.

If your company controls the details and the worker does not have meaningful discretion in how he/she completes the work, it has generally been the rule that the worker will be found to be an employee and not an independent contractor. The right to control is the common law test, according to the California Supreme Court's decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). See *Level of Control Dooms Employer in Lawsuit* from the August 21, 2014, *HRCalifornia Extra*.

But, different tests for independent contractors have been used and there is no set definition for all purposes.

Now, a California court of appeal has issued an opinion allowing workers in a class action lawsuit to rely on a Wage Order's expansive definition of "employee" to bolster their claim that they were misclassified as independent contractors.

This case further muddies the waters regarding exactly who is an independent contractor. The court's ruling suggests that it will be more difficult to defeat an independent contractor misclassification claim when the claim involves allegations of Wage Order violations, such as failure to pay required minimum wage or overtime. *Dynamex Operations West, Inc. v Superior Court of Los Angeles,* 2014 WL 5173038 (Oct. 15 2014)

Delivery Drivers Sued

The case involved delivery drivers for a courier and delivery service. The drivers used to be classified as employees but were converted about 10 years ago to independent contractor status. Two drivers challenged that reclassification on behalf of a class of 1,800 other drivers. The class argued that they should have been classified as employees and that the misclassification resulted in the unlawful denial of overtime, among other violations.

Engage, Suffer or Permit

The court of appeal held that the independent contractor test will vary depending on the type of wage-and-hour claim alleged.

According to the court, any claims brought under the Wage Order should not use the common law right of control test but should instead look at the Wage Order definition of "employ" and "employer." In this case the applicable Wage Order was Wage Order 9 (transportation) which defines "employ" as "to engage, suffer, or permit to work," and defines "employer" as any person "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person."

This test is much easier for a worker to meet. The lower court basically allowed the drivers to argue that they met the test for employment so long as Dynamex knew the drivers were providing services or negotiated the rates paid to drivers. Dynamex argued that using this test basically eliminates independent contractors in California, but the court disagreed.

The court found that for determining class certification:

- Claims falling within the scope of the Wage Order, such as unpaid overtime and failure to provide itemized wage statements, should use the “engage, suffer or permit to work” standard — a much broader test.
- Claims outside of the Wage Order, such as claims for reimbursement for rental vehicles, should use the common law right to control test.

Conclusion

This case causes uncertainty for employers in an area where there continues to be heavy class action litigation. The case suggests that employers that are used to examining their independent contractor relationships in terms of right to control now need to rethink these relationships.

Moreover, this case is part of a growing trend toward a more expansive definition of employer and employee – and greater liability for companies that contract for labor. See, for example, information about the new labor contractor liability law, Labor Contractor (AB 1897) - Fact Sheet.

On the other hand, the reasoning in this case is questionable, and the case may be appealed to the California Supreme Court.

Best Practices

- Consult legal counsel before hiring an independent contractor and ensure that legal counsel reviews the contract and any related policies or procedures.
- Reclassification of workers from employees to independent contractor status is fraught with risk. Examine what has actually changed in the relationship to warrant reclassifying current employees as independent contractors.
- If your business could not exist without a worker or workers, then assume that the worker is an employee, not an independent contractor.

Employee Retirement Triggers Final Pay Obligations

California Labor Code section 202 requires that employers pay employees their final wages, including accrued and unused vacation or paid time off (PTO), in a timely fashion: immediately in the case of an involuntary termination, and within 72 hours of an employee voluntarily “quitting” without notice.

A ruling in a recent case has indicated that for purposes of section 202, a “retirement” constitutes a quit. *McLean v. State of California*, 228 Cal.App.4th 1500 (2014)

Final Pay Requirements

Janis McLean worked for the state of California as a deputy attorney general. She retired on November 16, 2010. She alleged that she did not receive her final paycheck for wages and accrued, unused vacation within 72 hours of her retirement date, in violation of Labor Code section 202.

Labor Code section 202 contains three requirements relevant to McLean’s case:

- An employer must pay final wages within 72 hours of the date the employee quit , or pay immediately at the time of resignation if the employee gives 72 or more hours’ notice (this requirement applies to private and state employers;

- A state employer must, upon request by an employee, transfer unpaid wages into a state sponsored supplemental retirement plan. This transfer must be made within 45 days of the last day of employment; and
- A state employer must transfer any wages that the employee elects to defer to the following calendar year by February 1 of that next year.

McLean alleged that the state of California did not comply with any of these requirements. She requested relief pursuant to Labor Code section 203, which grants employees waiting time penalties: If an employer fails to pay final wages pursuant to section 202, the employee continues to earn one day of wages for every day the payment is late, up to 30 days.

Retiring or Quitting?

The state of California argued that it was not required to comply with the requirements of section 202 because that section only applies to employees who "quit." Specifically, the section reads: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter …."

The remainder of the code section frequently uses the word "quit" in describing the separation of employment.

The state of California argued that McLean did not "quit," she "retired" and, therefore, section 202 did not apply. The trial court agreed with the state and McLean filed an appeal.

The appellate court consulted a variety of legal and non-legal dictionaries, and noted that all of the definitions of "quit" seemed to encompass the definitions that describe retirement, noting "all the definitions speak to leaving a job."

The state of California argued that the general definitions were not applicable in McLean's case because in civil service, there are three very distinct categories for employees who leave employment: resignation, termination and retirement. It would therefore be consistent for the state to treat employees differently under each of these three categories.

Additionally, the state pointed out that the language of section 202 specifically refers to "quitting" and "retiring" separately in one of its subsections: "when a state employee quits, retires, or disability retires from employment …." As a result, the state argued, the Legislature intended that "quitting" and "retirement" should be treated differently.

The court disagreed, noting that although McLean's case involved state employment, section 202 applies to employers in the private sector as well. It would be inappropriate to interpret that code section using definitions that are utilized solely or primarily in civil service.

Instead, the court held that a retirement is considered a "quit" for purposes of section 202, and triggers the timely payment of final wages requirements.

Lessons for Employers

Although *McLean* involved a state employee, the court stated that its ruling applies to private sector workers as well. Employers should review their final pay policies to comply with this decision:

- Ensure that all wages, including accrued, unused vacation, are paid:
    - Immediately upon involuntary termination;

    - Within 72 hours of a voluntary resignation without notice; or
    - On the employee's last day of employment for a voluntary resignation with 72 or more hours' notice.
- For final pay purposes, treat employees who are retiring the same as employees who voluntarily resign.
- Consult legal counsel if you believe you have not paid an employee final wages in a timely fashion.