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INDEPENDENT CONTRACTORS

Managing independent contractor class action is all about right to control

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Companies using form independent contractor agreements are easy targets for class actions pursued by parties claiming they should have been treated the same and afforded the same wage and hour protections as employees. That's because uniform contracts often spell out the right to control the work, which is the central question when analyzing employee status.

Control and deliver

Four newspaper carriers sued Antelope Valley Newspapers, claiming they were illegally treated as independent contractors. They claimed that they should have been treated as employees and that because they were not, Antelope Valley deprived them of wage and hour protections that are afforded to employees. Thus, the carriers alleged unpaid overtime, unlawful deductions, failure to provide breaks, and failure to reimburse for business expenses, as well as additional derivative claims. They sought to pursue their claims as a class action on behalf of themselves and all other carriers who were classified as independent contractors instead of employees.

The trial court ruled the carriers couldn't pursue their claims in a class

action because they didn't show they could establish that all of the carriers were employees, not independent contractors, by presenting evidence that was common to all of them. Particularly, the trial court disagreed that the carriers' employee status could be resolved on a common basis because of alleged variations in how carriers performed their work and how Antelope Valley exercised control over them. Thus, the trial court determined the case would require numerous individual mini-trials to determine how carriers performed their work and couldn't be managed as a class action.

The carriers appealed the trial court's ruling, and the court of appeal disagreed with the trial court in part. Antelope Valley then requested review by the California Supreme Court. The supreme court agreed that the trial court erred in denying class certification to the newspaper carriers. The court held that the trial court focused on the wrong legal criteria in denying class certification and that the matter had to be sent back for the trial court to reassess class certification using proper criteria.

Erroneous on both counts!

The California Supreme Court held that the trial court erroneously focused on two related issues:

- (1) The level of control actually exercised by Antelope Valley varied in degree; and
- (2) The control exercised over all carriers in the manner and means of delivering papers wasn't pervasive in regard to the entire group of carriers.

The supreme court found that the trial court lost sight of the key question in the analysis, which was whether Antelope Valley's right to exercise control varied and, if so, whether that would make the case unmanageable as a class action. The court emphasized that the key issue is whether the hirer has the same right to control the work, not the variation in how it exercises that right.

The court explained that evidence of Antelope Valley's right to control the carriers' work was the preprinted standard independent contractor agreement that governed the relationship. Though Antelope Valley used two form contracts during the relevant time period, they were substantially the same. The court further explained that at the class certification stage, the form contract was important because it set forth the extent of Antelope Valley's right to control what the carriers were to deliver and when and how it was done. Also, the contracts set forth Antelope Valley's right to terminate the contract.

The supreme court stated that the trial court "afforded only cursory attention" to the parties' agreement, when it should have focused on the agreement as the starting point for its analysis. Indeed, what mattered most was whether Antelope Valley's legal right to control was susceptible to classwide proof. However, the court noted that the analysis may go beyond the four corners of the agreement when the parties' course of conduct is relevant:

While any written contract is a necessary starting point, . . . the rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms. In deciding whether claims that hinge on common law employee status are certifiable, then, a court appropriately may consider what control is "necessary" given the nature of the work, . . . whether evidence of the parties' course of conduct will be required to evaluate whether such control was retained, and whether that course of conduct is susceptible to common proof—i.e.[.] whether evidence of the parties' conduct indicates similar retained rights vis-à-vis each new hire, or suggests variable rights, such that individual proof would need to be managed.

Thus, the trial court should have analyzed whether Antelope Valley actually had different rights with respect to each carrier. The supreme court sent the case back down to the trial court to assess whether Antelope Valley, despite the form contract it entered into with all carriers, actually had different rights with respect to each that would necessitate mini-trials.

Testing, one, two. Testing.

The supreme court confirmed that the primary test for determining whether a worker is an independent contractor or an employee depends on the right of control, but it also acknowledged that numerous secondary factors (e.g., method of payment, who supplies the tools and equipment, and the place of work) may also be considered.

However, the court cautioned that secondary factors should be assessed carefully. In a class action, the inquiry is whether the secondary factor at issue can be assessed on a classwide basis or whether it requires an individualized assessment for each new hire. Most important, if there are individual questions, they must carry significant weight in the overall inquiry.

Ayala v. Antelope Valley Newspapers, Inc. (California Supreme Court, 6/30/14).

Bottom line

Companies should carefully craft each independent contractor agreement with respect to the retained rights to control the contracted work in an effort to avoid pitfalls inherent in uniform agreements.

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