Legal Opinion Letter

Vol. 25 No. 10 April 29, 2016

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Eleventh Circuit Reins in NLRB's Mischaracterization of Independent Contractors as "Employees"

by John J. Park, Jr.

On February 3, 2016, the US Court of Appeals for the Eleventh Circuit rejected an attempt by the National Labor Relations Board (NLRB) to convert independent contractors into employees for purposes of unionization. In *Crew One Productions v. NLRB*, the court, per Judge William Pryor, held that local free-lance stagehands were not the employees of their referral agency. This decision turned on the common law of agency, something that is well settled in the NLRB context, but not applied to claims under other statutes.

Because the facts were undisputed, the Eleventh Circuit considered only whether the NLRB correctly applied the law to the facts. The free-lance stagehands submit questionnaires to Crew One, which maintains them in a database. Event producers "ordinarily" contract for a specified number of stagehands with Crew One and pay Crew One an hourly rate for each stagehand. Stagehands are free to accept an invitation or to decline it, and they are free to accept non-Crew One work on their own.

While Crew One requires the stagehands to wear a hard hat and work boots, the only item of equipment that Crew One provides is a reflective vest marked "Crew One." That vest serves the producers' interests of safety and security. Crew One also informs stagehands that when they are offered a concert load-in job, event producers expect them to help with the load-out. Crew One maintains workers' compensation insurance coverage, but the producers pay for it. Stagehands offered the opportunity to work at a concert or other event first report to Crew One for check in. Once that is done, they "report exclusively to tour personnel, except that stagehands must sign out with Crew One to record their time of departure."[1]

Stagehands must sign an "Independent Contractor Agreement" in order to be added to the database. In addition, they must complete a W-9, which the IRS characterizes as the "first step" for the company when it has "made the determination that the person [it is] paying is an independent contractor."[2] Crew One neither has an employee handbook, nor does it reimburse stagehands for incidental expenses, withhold taxes, or offer benefits.

The controversy arose when a union asked the NLRB to appoint it as the bargaining representative of the Crew One stagehands. The NLRB regional director decided that the stagehands were employees, not independent contractors, and directed a certification election. The NLRB denied review of the regional director's decision. After Crew One refused to bargain and was found guilty of an unfair labor practice, it petitioned for review.

The Eleventh Circuit granted Crew One's petition for review, denied the NLRB's cross-petition, and vacated the Board's decision. Applying the common law of agency[3] and reviewing the NLRB's legal conclusions, the court

[1] *Crew One Productions v. NLRB*, 811 F.3d 1305, 1309 (11th Cir. 2016).
[2] *See Forms and Associated Taxes for Independent Contractors,* IRS, https://www.irs.gov/Businesses/Small–Businesses–&Self–Employed/Forms–and–Associated–Taxes–for–Independent–Contractors.
[3] *Crew One Productions*, 811 F.3d at 1310-11 (applying the criteria in § 220(2) of the Restatement (Second) of Agency).

John J. Park, Jr. (Jack Park) is Of Counsel to the Atlanta, GA office of Strickland Brockington Lewis LLP and was Deputy Attorney General for the State of Alabama from 1995 to 2006.

found that the NLRB made several errors. Significantly, the court concluded that the event producers and touring crews, not Crew One, controlled the manner, means, and details of the stagehands' work.[4]

In addition, the court found that the Board erred in its treatment of Crew One's failure to withhold taxes, its weighing of the signed Independent Contractor Agreements, its weighing of the absence of any negotiations about pay, and the fact that the work performed is that of the producers, not Crew One. With respect to the withholding of taxes, the court noted that, while other Circuit Courts thought differently about the weight to give this factor, the Eleventh Circuit considers it a "strong indication" of independent-contractor status.[5] It also explained that the Board should have considered what weight to give the signed Independent Contractor Agreements, noting that they reflected the parties' intent. The court observed that granting the agreements less weight because each stagehand had to sign one "is not a valid defense to the formation of the agreements" and should not have undercut their significance.[6] Finally, the Eleventh Circuit found that the Board correctly applied the law with respect to three factual findings in favor of independent-contractor status. When all of the factors were added up, only one factor favored employee status.

The parties agreed that review of the Board's decision was to be done in the light of the common law of agency. As the court said, "It is well settled that the common law of agency governs status determination."[7] Even so, the decisions of the regional director and the Board were improperly expansive readings of that common law.

The *Crew One* decision should prove influential when other courts examine NLRB independent-contractor decisions.[8] It is unlikely, however, to impact cases involving the Department of Labor's (DOL) determinations under the Fair Labor Standards Act (FLSA). DOL's Wage and Hour Division has declared that "most workers are employees" under the FLSA. It explains, "The FLSA's definition of employ as 'to suffer or permit to work' and the later-developed 'economic realities' test provide a broader scope of employment than the common law control test."[9]

The effect of DOL's determination can be seen in a recent decision by the U.S. District Court for the Northern District of Georgia involving exotic dancers.[10] There, the court distinguished *Crew One*, pointing out that it involved the National Labor Relations Act (NLRA), not the FLSA. It stated, "[T]he FLSA economic realities test is derived from the broad "suffer or permit to work" definition contained in the FLSA itself, 29 U.S.C. § 203(g), and neither the NLRA nor the Restatement (Second) of Agency employs a standard nearly that broad."[11]

The classification of a worker as an employee or an independent contractor has become a major point of contention at both the state and federal levels. The use of independent contractors provides businesses with critical flexibility at a time when profit margins are shrinking and human-resources costs are rising. Individual workers benefit from such an arrangement as well, as they are unencumbered by an employment relationship and are free to become entrepreneurial and seek work from other employers too. Aggressive regulators, armed with expansive readings of multi-factor tests, can frustrate these efforts, dragging individual independent contractors back into the status of employees.

Judge Pryor's *Crew One* decision sends the important and timely message that when agencies like NLRB misinterpret or misapply their authority on worker categorization, courts can and should step in to check the agency's excesses.

---

[4] *Id.* at 1311 (citing *NLRB v. Associated Diamond Cabs, Inc.*, 702 F. 2d 912, 919 (11th Cir. 1983)).
[5] *Id*. at 1312 (citing *Associated Diamond Cabs*, 702 F. 2d at 924, n.3).
[6] *Ibid*.
[7] *Id*. at 1310.
[8] Even so, courts reviewing the NLRB's application of the multi-factor test in § 220(2) of the Law of Agency can reach different conclusions. *See*, *e.g.*, *Lancaster Symphony Orchestra v. NLRB*, No. 14-1427 (D.C. Cir. Apr. 19, 2016).
[9] Administrator's Interpretation No. 2015-1, United States Dep't of Labor, Wage and Hour Division (July 15, 2015), at 1, 2.
[10] *Hanson v. Trop, Inc.*, ___ F. Supp. 3d ___, 2016 WL 861347 (N.D. Ga. 2016).
[11] *Id*. at * 7.

 ISBN 1056 3059