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New Jersey Supreme Court Set to Rule on Definition of "Independent Contractor"

by Mark E. Tabakman

The New Jersey Supreme Court will soon issue a ruling in a critical wage-and-hour employment law case, *Hargrove v Sleepy's, LLC*, Dkt. No. 072-742 *("Sleepy's")*. In *Sleepy's*, on which the Court heard oral argument on March 17, 2014, the Supreme Court is expected to resolve the issue of when an individual may be properly classified as an independent contractor under the New Jersey Wage Payment Act and the New Jersey Minimum Wage Act. The Court took this case after the U.S. Court of Appeals for the Third Circuit certified the question to the Court in August 2013. The Third Circuit recognized that the "determination of whether individuals are employees or independent contractors for purposes of New Jersey law may well have a significant impact on the tax revenue collected by the State of New Jersey." Accordingly, it certified to the Court the following questions of law: "Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A.§ 34:11, et seq., and the New Jersey Wage and Hour Law, N.J.S.A.§ 34:11-56a, et seq.?"

The History. The plaintiffs contended that the Sleepy's drivers were employees that the business improperly classified as independent contractors. The plaintiffs filed claims under New Jersey state wage-and-hour laws, as well as common law claims of unjust enrichment and breach of contract. Plaintiffs also filed claims under the federal Family & Medical Leave Act ("FMLA") (sick time) and the Employee Retirement Income Security Act ("ERISA"). On March 29, 2012, in a summary judgment proceeding, Judge Peter Sheridan, District of New Jersey, ruled that the plaintiffs were independent contractors and dismissed the Complaint. The plaintiffs appealed and the certified questions followed.

The Facts. Sleepy's is a New York-based mattress retailer that provides delivery services to its customers. Sleepy's contracted with delivery companies or with individuals to deliver mattresses, beds, pillows, and mattress pads to its customers. Sleepy's referred to its contracts with delivery individuals as Independent Driver Agreements ("IDAs").

The IDAs classified the deliverers as "independent contractors" and stated that the delivery companies' personnel were "not employee(s) of Sleepy's." The relationship between Sleepy's and its deliverers was non-exclusive. Sleepy's was not obligated to request, and no signatory to an IDA was obligated to provide, delivery services for Sleepy's. That is, deliverers could turn down delivery requests from Sleepy's. A deliverer was free to use its vehicles and/or personnel to perform deliveries for other companies. However, Sleepy's prohibited deliverers from having merchandise from other companies on the truck while making Sleepy's deliveries. Additionally, Sleepy's provided training materials to anyone who drove or worked as a helper on a truck making Sleepy's deliveries. The training materials set forth several requirements for trucks used for Sleepy's deliveries.

Deliverers had to procure Sleepy's products from one of Sleepy's six distribution centers (*e.g.* Robbinsville, New Jersey) and had to supply their own trucks, which they were responsible for insuring and maintaining. Sleepy's provided deliverers with scanners, known as Agentek, which Sleepy's required drivers to use during the course of their day. The scanners enabled Sleepy's to monitor where trucks were located at any given time of the day. Deliverers were required to enter each delivery as it was made into the scanners after each stop.

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A deliverer was responsible for hiring, firing, and paying its personnel and bearing its own business expenses. However, in order to work on a truck making Sleepy's deliveries, an individual had to consent in writing to a background check paid for by Sleepy's and individuals working on a Sleepy's delivery had to wear a Sleepy's uniform. Failing the background check disqualified an individual from participating in any Sleepy's delivery although the deliverer could continue to employ the individual provided the individual did not perform deliveries for Sleepy's.

Further, Sleepy's reserved the right to audit trucks to ensure compliance with its rules. It also reserved the right to alter drivers' schedules as it deemed appropriate, in order to accommodate a customer's request, and maintained a policy which imposed penalties upon deliverers for failure to make assigned stops in the assigned order. In addition, Sleepy's had the authority to terminate a deliverer at its discretion.

The District Court's Reasoning. The district court applied the test set forth in *Nationwide Mutual v. Darden*, 503 U.S. 318 (1992), where the U.S. Supreme Court determined the factors to be considered in defining an "employee" under ERISA. *Darden* utilized general common law of agency since Congress did not legislate any other definition when enacting ERISA and adopted a "totality of the circumstances" standard. The District Court then applied *Darden* factors to the facts before it, finding that the employer convincingly demonstrated that the plaintiffs were independent contractors. The court relied on the following: (1) each plaintiff set up its own business entity; (2) each entered into an IDA; (3) each maintained its own business records; (4) each hired its own workers; (5) each maintained a relationship with the IRS as a business entity; (6) each purchased its own trucks and maintained vehicle insurance and obtained motor vehicle registrations from state authorities; and, (7) each paid its own expenses.

Plaintiffs vigorously contended that Sleepy's exercised extensive control of the deliverers' activities. The court rejected these "control" contentions, finding that these requirements (*e.g.* background checks) were designed to promote customer satisfaction and safety in a competitive business.

Analysis. The New Jersey Administrative Code states "that the criteria identified in the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A)(B)(C) and interpreting case law will be used to determine whether an individual is an employee or independent contractor for purpose of the Wage Hour Law." This is the infamous "ABC" test. Under this test, services are deemed to be employment unless it is shown that: (a) such individual has been and will continue to be free from control; (b) such service is either outside the usual course of business … or performed outside of all the places of business of the enterprise; and, (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business. All three criteria must be met; this test has historically been very difficult for a putative employer to satisfy.

The parties in this case have strenuously argued a number of different theories pressing for the adoption of various definitions for "independent contractor," *e.g.* "relative nature of the work," but they spend little time analyzing *this* test, which is likely to be the most relevant. This is a standard already engrafted into the New Jersey Wage and Hour Law, by the DOL's adoption (though regulation) of the same test utilized by a "sister" agency under the DOL umbrella. The Court has had several occasions to consider what constitutes an independent contractor in an unemployment context and it is likely that the Court will synthesize its judicial interpretations under the Unemployment Law into the New Jersey Wage and Hour Law and adopt an interpretation consistent (if not identical) to that it has adopted under the Unemployment Law.

The first two prongs of the A-B-C test are often "easily" hurtled by the putative employer. The third prong is where the issue is almost always joined and where the putative employer often becomes in the DOL's view, the *actual* employer. How the New Jersey Supreme Court assesses that third prong will set a new legal standard for employers within the state and will be influential in how federal courts in the Third Circuit views future analogous wage-and-hour cases. Businesses and their counsel should keep an anxious eye out for the Court's decision.

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