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Overtime To "Independent Contractors"???

Welcome to the new "economic reality"
of the Pennsylvania Minimum Wage Act

by

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Pennsylvania employers, to varying degrees, employ the use of independent contractors in conducting business on a routine basis. The reasons for this practice range from the need for specialized services to the desire to avoid tax, salary and overtime headaches of hiring employees for relatively small business operations. The dividing line between what constitutes an employee versus an independent contractor can be somewhat fuzzy depending upon the arena in which the issue arises, i.e., workers' compensation, unemployment compensation, Bureau of Employer Tax Operations, etc. Thanks to a ruling on a case of first impression by the Pennsylvania Commonwealth Court, in the context of the Pennsylvania Minimum Wage Act of 1968, 43 P.S. §101-333.115 (the "Act"), there are no fuzzy lines or numbers.

In Commonwealth Court of Pennsylvania, Department of Labor & Industry, et al. v. W. Stuber, et al., the Pennsylvania Commonwealth Court ruled for the first time that a determination of one's status as an employee or independent contractor under the Minimum Wage Act will be governed by the "economic reality" standard developed and promulgated by Federal Courts in determining similar issues under the Fair Labor Standards Act of 1938, 29 U.S.C. §§201-291 (FLSA). The Stuber case involved an employer (Stuber) who was found by a Common Pleas Court judge to have violated the Minimum Wage Act by failing to make overtime payments totaling \$1,276.40 to a worker whom the employer hired as an "independent contractor", but was later found by the court to qualify as an employee under the Act. The initial difficulty faced by the Common Pleas Court in reviewing the case was the absence of any Pennsylvania case law establishing a standard to determine a worker's status as an employer or independent contractor under the Minimum Wage Act. The Common Pleas Court ultimately settled upon adopting the federal "economic reality" test in ruling against the employer, and the Commonwealth Court affirmed.

The "economic reality" test evaluates one's status as an employee versus an independent contractor against the backdrop of six considerations, which include: (1) the degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss depending upon managerial skills; (3) the alleged worker's investment in equipment or material required for the tasks or the employment of helpers; (4) whether the service rendered requires special skills; (5) the degree of permanence of the working relationship; and (6) the extent to which the work is an integral part of the employer's business. The Commonwealth Court noted that adoption of the "economic reality" test was proper given the fact that the Pennsylvania Minimum Wage Act mirrors the FLSA, and both laws have the same purpose: to protect employees who do not have real bargaining power. The Commonwealth Court also noted that in applying the test, no single factor should be outcome determinative; instead, a totality of the circumstances approach should be adopted by Pennsylvania courts.

Upon evaluating the facts of the Stuber case in accordance with the "economic reality" test, the Commonwealth Court made the following observations: (1) the worker was trained by the employer and had never gone into business for himself; (2) the employer controlled where the worker worked, set his hours and supervised him; (3) the worker had no opportunity to make a profit or suffer a loss and performed no services for anyone else during the relevant time period; (4) the worker relied solely on the income received from the employer; (5) the worker did not possess any special skills; and (6) the worker was integral to the employer's business operations. Taken as a whole, the Court noted that these factors satisfied considerations 1, 2, 4, 5 and 6 of the "economic reality" test. The Court reached this conclusion despite the fact that the worker signed documentation (pre-employment) waiving his status as a worker and consenting to independent contractor status. In so doing, the Court noted that "merely because a worker initially called the particular arrangement something different, does not mean that there was no employer/worker relationship." The Court further noted that no worker could waive his or her status as a worker.

Employers who “regularly” employ independent contractors should immediately have their counsel review these arrangements against the backdrop of the Stuber case. Anyone having questions or wishing to receive a copy of the Stuber case, should contact Attorney James Ellison at jellison@rhoads-sinon.com.



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