Employer Fleeced By Naked Dancers

Insights
8.01.12

(Labor Letter, August 2012)

Perhaps only two types of people could walk into an adult-entertainment establishment and ask "I wonder if these dancers are properly paid in accordance with the Fair Labor Standards Act?" The first would be plaintiffs' attorneys. The second would be agents from the Department of Labor.

Ordinarily, any discussion concerning minimum wage and overtime law may appear interesting to only a slightly larger audience of persons. It probably goes without saying that a movie such as "Magic Mike and the Independent Contractors" would gross even less at the box office than "Harry Potter and the Chamber of Commerce."

Still, should you or your business be interested? To determine this, ask yourself two questions. First, does anyone perform services for or in your business? Second, do you pay them wages? If the answer to the first question is yes, the FLSA should interest you. If the answer to the second question is either yes or no, the FLSA should still interest you.

The Potential Pitfalls of Misidentifying Employees
As seen from the experience of the proprietors of the Club Onyx in Atlanta, any employer who utilizes workers as independent contractors should pay particular attention. In a recent action, the club was forced to agree to pay over $1.5 million to strippers after a federal court concluded they misidentified the women as independent contractors. *Clincy v. Garaldi South Enterprises, et al.*

The case was brought by a group of dancer/entertainers who sued their employer alleging that they had been misidentified as independent contractors rather than employees for purposes of the FLSA. Rather than pay wages as would be due employees, the defendants required the strippers to pay a fee to the club for the privilege of dancing as non-employees. The decision potentially placed millions of dollars at stake.

The trial court in *Clincy* agreed to a two-part approach. In other words, it permitted proceedings to first explore only the question of whether the dancers were employees or independent contractors under the FLSA. After a large, and presumably expensive, amount of discovery, it ruled them employees. At the second stage of the proceeding, the court was to determine whether any FLSA defenses applied and, if not, the amount of any damages owed. Prior to the trial on the second issue, the defendants settled the action. They agreed to pay a $1.55 million settlement to the class of

strippers. Notably, if the defendants failed to make a timely scheduled payment, the amount owed would basically double to $3 million.

The decision in *Clincy* dealt with one particular strip club in one location. While it might seem of limited interest to other types of business, the decision actually provides a number of potentially universal lessons for all employers. To begin with, the nature of the defendants themselves is, well, revealing. The CEO's of two of the corporate defendants were *personally* sued as well. And that was not necessarily a mere harassing maneuver by the strippers. Rather, in certain instances, the FLSA provides for individual liability as well.

How The DOL Figures Things Out

Equally revealing is the fact that the court's decision took 56 pages to reach its conclusion on the employee-versus-independent contractor issue. In other words, the question requires a detailed analysis of multiple factors. In *Clincy*, the club required the strippers to enter into specific "Independent Contractor Agreements." But while such a step is definitely recommended, it is not the only factor. Put it this way: "dancers" may be called "exotic entertainers." That does not necessarily mean they are not strippers. Labels are important, but they do not always control.

In its analysis, the court considered factors ranging from whether the club recruited dancers (it did not) to the interview process (dancers underwent a "body check" for tattoos or stretch marks). It noted the application process, involving a two-dance audition evaluated by club management. If successful in the audition, the entertainer needed to obtain an individual entertainment license, specific to the Club Onyx and issued by the City of Atlanta. The court also exhaustively examined the rules of the club as well as the claim that patrons actually paid the dancers rather than the club paying them.

In short, the "employee or independent contractor" decision is never one that can be determined without careful analysis. Instead, courts often determine the answer by examining the economic realities of the relationship between the putative employee and putative employer. The court in *Clincy* looked to a number of factors. These included: 1) the nature and degree of the alleged employer's control over the work; 2) the alleged employee's opportunity for profit or loss depending on her managerial skill; 3) the alleged employee's investment in equipment required for the task, or her employment of workers; 4) whether the services required a special skill; 5) the degree of permanency and duration of the working relationship; and 6) the extent to which the services rendered are integral to the alleged employer's business.

None of these factors is exclusively the deciding one. Ultimately, the *Clincy* court determined an employee-employer relationship existed given the club's control over the work, the entertainer's opportunity for profit and loss, the entertainer's relative investment and lack of specialized skill, and the integral nature of nude entertainment to the club's business.

At The End Of The Dance

Again, application of these factors can be a complex inquiry. For each, specialized rules of law explain how they apply to a particular situation. If your business utilizes independent contractors, it's worthwhile to have their status examined for FLSA purposes. Further, enlisting the assistance of an attorney may help ensure that you not only comply with the law, but will assist your business in reaching its goals. In fact, other legal opinions on the issue involving the employment status of exotic dancers suggest methods that Club Onyx could have employed to avoid liability.

The next time you see a construction worker you may well ask yourself whether the person is an employee or independent contractor. If you are a patron of adult entertainment establishments, you may join the exclusive crowd that wonders whether dancers are being treated properly under the FLSA. A court found that the Club Onyx answered this question incorrectly. Don't let your business do the same.

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