You Win Some, You Lose Some: A Review Of Some Recent Misclassification Decisions

Insights
3.22.18

At the forefront of mind of every gig economy company is the troublesome question of whether its workers are properly classified as independent contractors. Just search our blog for cases involving "misclassification" and you'll see dozens of examples of cases touching on this subject. It's always a good idea to stay on top of the latest decisions involving misclassification questions; for this reason, here's a review of three recent cases from across the country dealing with this issue. Two of them turned out favorably for businesses (you win some), and one of them turned out poorly (you lose some). Reviewing them will hopefully shed further light on the misclassification question and provide some guidance on operating your gig economy company.

You Win Some, Part One: Fence Builders
The first case comes from the Ohio Court of Appeals, where Jacob DeLong brought suit against Fence Solutions for allegations related to the question of whether he was improperly classified as a contractor. Just as with most state laws and most legal tests across the country, the court's March 1 decision noted that Ohio law boiled the misclassification test down to the key factual determination of "who had the right to control the manner or means of doing the work."

The court noted various factors that led it to conclude that DeLong was, in fact, a contractor:

- He signed an independent contractor agreement;
- He was responsible for furnishing his own labor, equipment, and tools;
- He was responsible for his own damages and repairs while completing his work;
- He was in charge of his own employees and subcontractors; and
- He controlled the hours he worked at a job site.

That said, there were at least two cringe-worthy facts that make it hard to believe that DeLong lost his case. First, the court noted that DeLong used to be an employee until the company switched him over to being a contractor in September 2015. That's usually a no-no; there are plenty of cases demonstrating that a company's decision to convert an employee to contractor status is a death knell to a misclassification case, especially if they continue to perform the same job before and after the transition. Second, the court said that the company's accountant continued to issue a W-2 to DeLong rather than a 1099 even after the transition to contractor status. This has got to be one of the rare

cases where this occurred and a court agreed that the worker was not misclassified. The court does not delve into the details during its opinion, but the "control" factors listed above obviously swayed its analysis and led it to ignore (or at least overcome) this major technical mistake on the part of the company.

Chalk this one up to an unlikely victory for the business. The lesson here, though, is that you should not blithely convert employees to contractors without working with counsel to ensure you are comfortable with the misclassification question. And certainly don't issued your contractors W-2's.

You Win Some, Part Two: "Fit" Models

The second case comes from a New York federal court. Eva Agerbrink worked as "fit" model, someone used by fashion designers and manufacturers to check the fit of clothes. She signed a three-year contract to work with a modeling agency, but after a little more than a year she brought suit against the agency claiming that she had been improperly classified as an contractor.

On March 14, the court ruled in the modeling agency's favor. Again, a series of factors led the court to conclude that she was not an employee and instead properly classified as an independent contractor:

- She set her own schedule, deciding when to work and who to work for;
- She also set her own rate and could charge what she wanted to charge for her services;
- She signed an independent contractor agreement;
- The agency offered her no training on how to do her job; and
- She paid her own expenses.

All in all, the court felt these factors demonstrated that she had significant entrepreneurial opportunities with her business relationship that was more akin to contractor status. In a bit of a twist from the typical legal test, however, the New York court applied the "economic reality" test to determine her status. The court noted that the "ultimate concern" in such a test hinged on whether she depended on the agency's business or whether she was in business for herself. It concluded that she was more of an "entrepreneurial businessperson" than a "passive employee" and ruled in the agency's favor.

Although there were a few factors that may have pointed in Agerbrink's favor—such as the fact that her job required little skill, and there was an open question as to how integral her work was to the agency's business itself—the court rejected her claim and ruled her to be a contractor.

You Lose Some: Paper Carriers

The final case, from a Massachusetts state appeals court, is a blow to businesses in the newspaper delivery industry but could also demonstrate possible weaknesses in any gig economy relationship involving the delivery of products. David King worked as a newspaper delivery person for GateHouse Media, using his own car to deliver up to 250 copies of the Patriot Ledger six days a week. After he

ended his service with the company, he brought suit and claimed he had been inappropriately designated as a contractor. A lower court judge ruled in his favor, but Gatehouse appealed the decision. The state court of appeals affirmed that decision in a February 27 ruling.

Demonstrating once again that each state operates under slightly different standards, the Massachusetts court looked to a three-part legal test developed to determine whether a worker is a contractor or employee:

1. Is the individual free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact?
2. Is the service is performed outside the usual course of the business of the employer?
3. Is the individual customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed?

A business would need to answer all three questions in the affirmative to prevail. This might look familiar to some of you; this is essentially the same "ABC" test that New Jersey applies in contractor misclassification cases, and that California is contemplating adopting to tighten its own contractor laws.

The court needed only to look to prong two of this three-part test. It noted that GateHouse was not just in the business of creating newspapers, but that it "published" them – which means dissemination to readers. "Indeed, an integral part of "publishing" a daily newspaper is making it immediately available to customers and potential customers, because in twenty-four hours or less much of its content will be largely obsolete and of limited, if any, interest to most readers<' the court said. "It is not too much to say that immediate availability to customers is a part of the product GateHouse sells."

In finding that delivery drivers performed their work as part of the usual course of business for the company, the court said that the business failed to meet at least one of the three essential prongs. "That GateHouse achieves such immediate availability through a variety of means — including direct carrier delivery to paper subscribers, bulk distribution by GateHouse employees to stores for resale to the stores' walk-in customers, and via the Internet — does not make carrier delivery any less a part of GateHouse's business," it said, "Rather, it reinforces the point that, one way or another, GateHouse goes to considerable lengths, six days per week, to put the Patriot Ledger quickly into the hands (and onto the screens) of readers."

In sum, it said, GateHouse's self-description as a newspaper publisher and distributor, and the manner in which it held itself out to the public and its drivers, supported the conclusion that the drivers performed services in the usual course of GateHouse's business, and therefore should have been classified as employees.

The final upshot from this case is that the location in which you conduct your business sometimes makes all the difference between whether you will walk away with a win or a loss. This same set of

facts might have won the day in the New York case or the Ohio case, but a crucial distinction in the applicability of the set of legal standards at play made the case turn differently.

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