



The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

FLASH NO. 26

CORRECTING THE TEST, NOT THE ANSWERS

A recent late-July decision from the Washington Supreme Court has attempted to clarify the proper test for worker status under the Washington Minimum Wage Act ("MWA"). Instead, the Court may have simply muddled the waters for those seeking a road map for determining worker classification for minimum wage applications in the Evergreen State.

Three former FedEx drivers filed a class action suit in 2004 against FedEx, claiming employee status and seeking unpaid overtime wages and uniform expenses. The trial court gave the jury hybrid instructions, telling them to focus on the right to control in light of economic-dependence issues. This resulted in a ruling that the drivers were independent contractors, not employees. The drivers cried foul, and upon appeal the Court of Appeals reversed the judgment, affirming in part and reversing in part. FedEx then appealed to the Washington Supreme Court on three issues. For our purposes here, we will focus on just one of those – evaluating which test governs the determination of worker status under the MWA. FedEx argued that the common law right-to-control test was controlling, while the drivers contended that the economic-dependence test was really correct.

The Supreme Court said that both parties had a sound interpretation of the statutory definition of employee under the MWA. The Court then turned to the MWA's legislative history because of the ambiguity in the definition. Since the MWA is based on, and essentially the same as, the Fair Labor Standards Act of 1938 ("FLSA"), it should be interpreted the same way.

Federal courts had rejected the right-to-control test and embraced the economic-dependence test when MWA was enacted. Calling it a "remedial legislation" needing "liberal construction" (meaning it should favor classification as an employee), the Court chose the economic-dependence test with its broader, more inclusive definition of employee than the right-to-control. Ultimately, the correct question is "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself."

However, that is not the final word, because the Washington Supreme Court also upheld the Court of Appeals' opinion that, on remand, the trial court can use its own discretion to determine if there are good reasons to not use the FLSA economic-dependence factors under the MWA. Essentially, this gave the trial court free reign (within reason) to use whatever test it wants to use to determine worker status.

Confused and frustrated yet? In light of this, your company's best defense is to continue to concentrate on making sure that independent contractor relationships are in tip-top shape. Right to control issues, as well as economic dependence issues, should be examined carefully. And as always, make sure that your day-to-day actions and your contractual terms match up as well. We here at Benesch are always available to assist with a review of your program to make sure it is current and taking into account new developments.

Additional Information

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