Worker Classification Continues to Be Hot-Button Issue

By Julie Levinson Werner and Alessandra M. Moore

On Aug. 2, 2022, a unanimous New Jersey Supreme Court in *East Bay Drywall, LLC v. Department of Labor & Workforce Development* issued a ruling that provides further guidance on the classification of a New Jersey worker's employment status. This ruling, seen as a win for employees, sheds light on the now somewhat obsolete prong C of the infamous ABC test while simultaneously revealing the high burden employers must meet to classify their workers as independent contractors.

Businesses throughout the United States continue to struggle with classification issues, as it seems like the law has not caught up with the business reality of how many workers and companies prefer to operate. California's AB5 has received the most attention on this subject, but New Jersey and a handful of other states also follow the ABC test in assessing whether a worker is an employee or an independent contractor.

The Infamous ABC Test

New Jersey, like California, Massachusetts, and several other states, apply the ABC test in determining whether a worker is an employee or an independent contractor. Under the ABC test, a worker is an employee and not a contractor unless all three prongs of the test have been satisfied as follows:

(A) The worker must be free from control or direction over their performance.

(B) Either the service performed by the worker must be outside the usual course of the business for which such service is performed or such service must be performed outside all the places of business of the enterprise for which such service is performed.

(C) The worker must customarily be engaged in an independently established trade, occupation, profession, or business.

In *East Bay Drywall*, a drywall installation business hired workers on a per-job basis, similar to the way many gig and app-based businesses hire staff in our current business environment. The workers were free to accept or decline East Bay's offer, and some workers left mid-installation if they found a better job. The workers were also free to provide services to other businesses at the same time. The company provided the workers with the materials necessary to complete the project, but the workers needed to use their own tools.

Under these facts, the New Jersey Supreme Court found that despite the appearance of an independent contractor relationship, East Bay's workers were actually employees and the company was required to make payment to the state's unemployment and temporary disability funds.

As support for prong C, East Bay cited testimony from its principal that "he believed the subcontractors worked for other contractors, that sometimes a subcontractor would leave the job before it was completed, and that the subcontractors were free to accept or decline work." The company also provided certificates of insurance and business entity registration information for most of the entities, showing they were separately incorporated and carried their own insurance.

The Supreme Court determined that the information East Bay had provided was insufficient to prove the entities' independence, despite the initial appearance of an independent contractor relationship. First, the Court noted that looking at the value of refusing to accept

or complete work is limited because, like an employee, even an independent contractor is not free from the pressure to accept a job–everyone must somehow make a living. The Court concluded that relying solely on a worker's ability to accept or decline a job as part of an employment characterization is unfair and futile because it does little to differentiate employees and independent contractors.

Second, even wholly dependent employees may choose to work for another employer or may abruptly resign from their position. It is increasingly common for a worker to provide services to more than one entity at the same time, even if on a part-time, "side gig" basis. As such, classifying someone as an independent contractor solely because they work for multiple businesses is similarly unreasonable and ignores the realities of present-day employment.

Finally, and perhaps most notably, the Court observed that the insurance certificate and business registration forms, despite showing separate entities, did "not elucidate whether the disputed entities were engaged in independent businesses separate and apart from East Bay." The Court went on to state that business practices requiring workers to assume the appearance of an independent business in name only "could give rise to an inference that such a practice was intended to obscure the employer's responsibility to remit its fund contribution as mandated by the state's employee protections statutes."

According to the New Jersey Supreme Court, businesses that are duly registered but entirely dependent on one client are not independent contractors in and of themselves. As illustrated in *East Bay Drywall*, something more must be shown to distinguish workers from independent contractors. Simply asking a worker to form an LLC, obtain their own insurance, or make another business on paper does not alone dictate whether a worker is considered an independent contractor.

The Proposed Worker Flexibility and Choice Act

To cope with the realities of the changing workforce, a new bill called the Worker Flexibility and Choice Act is pending in Congress. This bill attempts to answer the country's calls for a 21st-century solution to the hybrid job classification for gig economy workers. If passed, the Worker Flexibility and Choice Act would create a third category of worker beyond just "employee" and "independent contractor." As workplaces and the relationships between workers and businesses continue to evolve, particularly in a gig economy, the efforts of the bipartisan bill sponsors here are notable.

We regularly counsel companies on how to navigate the complexities of worker classification issues. Please contact any member of the Lowenstein Sandler Employment Counseling & Litigation practice group if you have questions about this decision or the classification of your workforce.

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