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FLORIDA EMPLOYMENT LAW LETTER

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Vol. 24, No. 3
May 2012

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Health Care

The U.S. Supreme Court recently held hearings on the constitutionality of the health care reform law, and it's expected to issue a ruling this summer. In the meantime, the law is still in effect. At www.HRhero.com, you can find the following tools to help ensure your workplace is in compliance with the law:

- HR Sample Policy — Eligibility for Benefits, www.HRhero.com/lc/policies/513.html
- HR Sample Policy — Health and Welfare Benefits, www.HRhero.com/lc/policies/514.html

EMPLOYEE MISCLASSIFICATION

Does the cable guy work for himself? Contract language and FLSA disputes

Several current and former cable technicians filed suit under the Fair Labor Standards Act (FLSA) against Knight Enterprises, which performs installation services for cable television, Internet, and phone providers. The individuals claimed to be employees, but in a very close case, the "employer" had the matter dismissed by convincing a judge that they were actually independent contractors — and therefore not protected by the Act. We think the case offers some useful insight that can help you set up your workers' classifications in a way that will make them more difficult to challenge in court.

Legal background

Knight has a contractual relationship with Bright House Networks. Bright House is a national company that provides cable television, Internet, and IP voice services along the I-4 corridor in Florida. Knight is one of four companies that perform installation and repair services for Bright House customers in Manatee, Pasco, Pinellas, and Polk counties. Several current and former Knight technicians sued the employer under the FLSA. Knight was successful in getting rid of the case because of the way that it managed the technicians. However, the words it used to set up the contracts with the technicians also helped its argument.

The setup

Bright House gives work orders to Knight, which is responsible for making sure the orders get completed. The amount Bright House pays Knight varies depending on the job. If the work isn't up to Bright House's specifications, it has the right to reduce the compensation Knight receives. Bright House also requires Knight technicians to wear ID badges and uniforms with Knight's label, and although they are certified to do work for Bright House, it is not their employer.

Knight has individual contracts with each technician, and each contract requires the technician to provide a warranty for his work product, commit to insurance coverage, and agree not to compete with Knight once the relationship ends. The contracts further state that the technicians may employ others to help them do the assigned work. Knight pays the technicians a set amount per job, determines the amounts, and has the right to change the amounts.

The technicians admitted they provided and paid for their own vehicles, tools, safety equipment, commercial liability and car insurance, gas, necessary phone service, and taxes. Some of them worked as sole proprietors, while others banded together and formed their own corporation, which they used to collect

AGENCY ACTION

NLRB reports drop in cases during 2011. The National Labor Relations Board (NLRB) has released a summary of its activities during fiscal year 2011 that shows its total case intake was 24,990 during 2011 compared to 26,585 cases in fiscal year 2010, a 5.9 percent decrease in overall intake. Unfair labor practice case intake was down 5.1 percent, with 22,177 cases taken in 2011 and 23,381 in 2010. The report says the NLRB closed 84.7 percent of all representation cases within 100 days. It had set a goal for the year of closing 85 percent. The Board also reported it closed 72.5 percent of all unfair labor practice cases within 120 days (its goal was 71.2%) and 83.2 percent of all meritorious unfair labor practice cases within 365 days (the goal was 80.2%). A total of $60,514,922 was recovered on behalf of employees as back pay or reimbursement of fees, dues, and fines, with 1,644 employees offered reinstatement.

OSHA restructures whistleblower program. The federal Occupational Safety and Health Administration (OSHA) in March announced its Office of the Whistleblower Protection Program is now reporting directly to the agency's Office of the Assistant Secretary instead of to its Directorate of Enforcement Programs. The move represents a significantly elevated priority status for whistleblower enforcement, according to a statement from OSHA. The program now is overseen by Assistant Secretary of Labor Dr. David Michaels, who heads OSHA. The change is part of OSHA's plan for strengthening the enforcement of 21 whistleblower laws under its jurisdiction.

FedEx to pay $3 million to settle hiring discrimination charges. The U.S. Office of Federal Contract Compliance Programs (OFCCP) announced in March that it had entered into a conciliation agreement to resolve allegations of hiring discrimination by federal contractors FedEx Ground Package System Inc. and FedEx SmartPost Inc., both subsidiaries of FedEx Corp. The $3 million agreement concludes compliance reviews that spanned seven years and numerous FedEx facilities in multiple states. The agreement concludes the largest single financial settlement negotiated by the OFCCP since 2004.

DOL launches tools to fight improper unemployment payments. The U.S. Department of Labor (DOL) has launched the Fraud Tips and Leads Gateway, a new online tool that gives the public a portal to report fraud. The DOL says it will help states act quickly to investigate leads and prosecute bad actors. Also, the DOL is publishing what it calls consumer-friendly material that highlights the most common mistakes claimants make and what businesses can do to avoid the negative tax implication of improper payments. ✤

their earnings from Knight. Additionally, techs can partner up to complete work, and at least one pair decided for itself how to split the money earned.

Generally, "lead" technicians with the most experience are put in charge of distributing the work orders. Although the amount of work varies from week to week and seasonally, the techs typically work six days a week. They can transfer work orders among themselves, request more work if desired, and use the system to get more work and more convenient vacation time based on the amount of time they have performed work for Knight.

In this case, the technicians' day-to-day schedule involved coming into the office between 6:30 a.m. and 7:15 a.m. to get their route, work orders, and equipment. They then turned in the previous day's documentation and unused equipment and went into the field. If a technician was late, his work would be given away. If a technician lost equipment or failed to complete the job according to Bright House's guidelines, Knight would pay him less money as a penalty.

Factors of dependency

To decide employee classification under the FLSA, courts look at "all of the surrounding circumstances" and ask the following question: Are the alleged employees (in this case, the technicians) so dependent on the company (Knight) that, "as a matter of economic reality," they should be protected by the FLSA? Basically, one question — Are the workers so dependent that they must be treated as employees? — is asked, and it can be answered using only a certain criterion (what the "economic reality" is) in a certain context (the surrounding circumstances of the whole activity).

Those requirements sound complicated enough to make your head spin. Fortunately, there are six factors you can use to evaluate the "economic realities." They are:

(1) the nature and degree of the employer's control over the manner in which the work is to be performed;

(2) the alleged employee's opportunity for profit and loss based on his managerial skills;

(3) the alleged employee's investment in equipment or materials or employment of helpers;

(4) whether the service rendered requires a special skill;

(5) the permanency and/or duration of the working relationship; and

(6) the extent that the service performed is an integral part of the employer's business.

You can also look at each factor and ask, "Based on what things look like in this context, does it seem like the alleged employee is dependent on me (as an employer)?" Let's flesh out the concepts really quickly. If the following scenarios pertain to

a particular individual, then he likely will be viewed as dependent on you and thus an employee:

(1) You control the worker in the same way that employees typically are controlled (*e.g.,* regarding reprimands, suspensions, and termination).

(2) The worker can't make a lot of money simply by doing his job well (*e.g.,* he doesn't earn commissions or make more money if he performs the job quickly).

(3) You give him all the tools he needs to do the job (*e.g.,* a company car or equipment that must be signed out).

(4) The job being performed doesn't require a lot of specialized skill (*e.g.,* harvesting crops or serving food as opposed to creating websites or performing blood transfusions).

(5) An individual who works for you year-round (as opposed to seasonally) is prohibited from working for anyone else without risking termination.

(6) The worker performs a job that is an integral part of your business (*e.g.,* making outgoing calls — as opposed to cleaning the office — at the phone bank you manage).

Why were they independent contractors?

In this case, the court decided that the Knight technicians were independent contractors. Generally, the control factor is discussed the most because before the days of the FLSA, courts traditionally decided the employee-independent contractor question by scrutinizing

FLORIDA NEWS IN BRIEF

Governor signs Florida Drug Free Workplace Act into law. On March 20, Governor Rick Scott signed into law House Bill (HB) 1205, most of which is devoted to amending Florida's law governing employers' rights and responsibilities in drug testing their employees. The legislation follows an executive order signed by Scott one year ago. The order, which asks state employers to start randomly drug testing their employees, was put on hold by the Scott administration in response to several lawsuits challenging its constitutionality. When the governor signed the new law, he initially said he would ask state agencies to immediately begin the new drug-testing regime. However, he quickly backtracked, and his general counsel released a memo stating that implementation of both the legislation *and* the executive order will be placed on hold until the lawsuits are resolved.

HB 1205 may apply to you even if you aren't a state employer. You may know that as an employer, you can qualify for discounts on your workers' compensation and employers' liability insurance by participating in a drug-free workplace program as long as you meet the requirements for the program set by Florida law. Here's the minor change: The state now wants you to know that you have to comply with the program requirements only "at a minimum."

Bottom line. You can rest assured that if you maintain a drug-free workplace program that is broader in scope than the requirements set out by state law (those requirements haven't changed, by the way), you will still qualify for workers' comp and/or liability insurance discounts.

***Orange you glad you wore a blue shirt today*?** In March, a group of 14 employees were fired under pretty unique circumstances. The employees, who worked for a law firm that represents banks in mortgage-related lawsuits, had regularly been wearing orange shirts on Fridays for the purpose of looking like a group when they went out after work. On March 16, they were all called into a conference room at the firm's office. An executive stated it was his understanding that there was some kind of protest going on, and for that reason, they were all fired. The employees immediately explained the nonprotesting reason for their clothing. Nevertheless, after a brief powwow outside, management returned to the room and stated that the decision stood. As you probably know, Florida is an at-will-employment state, meaning you can fire employees for any reason at all so long as the reason isn't illegal.

Begin Act 2. On April 13, eight of the employees filed a complaint with the National Labor Relations Board (NLRB) alleging that the law firm committed an unfair labor practice by retaliating against them for their concerted activity. The National Labor Relations Act (NLRA) prohibits you from discriminating against employees who engage in protected concerted activities.

Now you might be thinking that this lawsuit is frivolous because the employees weren't actually protesting, but think again. The NLRB is authorized to require employers to reinstate employees and provide back pay when the employees are terminated based on a *mistaken belief* that they were engaging in a protest. Assuming the truth of the events reported in the media, the employer may be guilty of committing an unfair labor practice.

Bottom line. Even if you think you're protected because you're in an at-will state, it's always best to call your labor attorney for advice before you terminate someone. If not, you might find yourself in trouble. ✤

WORKPLACE TRENDS

Political talk makes its way to workplace. A survey from career website CareerBuilder has found that 36 percent of workers surveyed reported they discuss politics at work, and 23 percent of those who have discussed politics at work reported they have had a heated discussion or fight with a coworker, boss, or someone else higher up in the organization. One in 10 workers said their opinion about a coworker changed after they discovered that person's political affiliation, with most stating it changed for the negative. The survey found that men were more likely to share political opinions or commentary at the office than women. Forty-four percent of men were found to discuss politics at work compared to 28 percent of women. Men were also more likely to report an altercation with a coworker over opposing political views (25% compared to 19% of women). Workers age 55 and older were the most likely to discuss politics at work, while those under 25 were the least likely.

Survey finds more paid time off for special circumstances. The Benefits USA 2011/2012 survey from Compdata Surveys shows that while the recession has caused employees to put in longer hours, many companies are offering paid time off for special circumstances that may help employees maintain their work-life balance. The survey found that 33.3 percent of the companies surveyed offer paid time off for a death in the family. Thirty-three percent of companies offer paid time off for jury duty, and 17.2 percent offer paid days for military leave. Employees receive paid time for maternity leave, paternity leave, or adoption leave at a rate of 8.6 percent. Paid time off is offered for family illness at 5.1 percent of the companies surveyed.

Job absence rate hits 10-year low. Employers saw employee absenteeism drop in 2011, according to a survey of 344 U.S. employers conducted by Bloomberg BNA. Through 2011, median rates of unscheduled employee absences (excluding long-term absences and partial days out) averaged 0.6 percent of scheduled worker days per month. They are down from the 0.8 percent levels observed in 2010 and 0.7 percent in 2009. The 2011 rate is at a 10-year low, well below the absence rates of 1.3 percent or more observed from 1985 to 2006.

Mass layoffs down in February. Employers implemented 1,293 mass layoffs in February involving 119,463 workers, seasonally adjusted, as measured by new filings for unemployment insurance benefits during the month, the U.S. Bureau of Labor Statistics (BLS) reported in March. Each mass layoff involved at least 50 workers from a single employer. Mass layoff events in February decreased by 141 from January, and the number of associated initial claims decreased by 10,457. ✤

control-related issues. Clearly, Knight exercised "control" over its techs. Specifically, the technicians:

- were penalized financially if their work didn't meet Bright House's specifications;
- had to get approval if a customer wanted more work done than what was in the work order;
- had to log into a computer system, wear ID badges, and adhere to predetermined routes;
- were required to work full-time, six days a week; and
- stopped getting work without notice if the volume of work declined.

But the court saw each of those control methods as typical parts of a contractual relationship, not an employment relationship. Work-quality enforcement, for example, was based on the warranty provisions of the contract: A technician didn't get "fired" for doing bad work, but he was punished financially under the terms of the contract. Further, the fact that the workers had to wear a uniform and an ID badge didn't affect the economic reality of their relationship with Knight because it was merely part of Knight's contract with Bright House.

As to being denied work, the technicians' contracts stated that Knight's decision to provide work to any technician was completely within its discretion. Under the contract, the techs were responsible for the way they performed the work, including doing so without defects, complying with safety standards, selecting and assigning their own employees, and paying their taxes. For the court, that was enough to show that ultimately, Knight didn't control the technicians.

The rest of the factors went pretty quickly for the court. Regarding opportunities for profit and loss, the technicians' work rates increased in line with their skill level, allowing them to pursue more work and make more money, and they could "up sell" additional products and services at the job site to boost earnings. Their competence allowed them to avoid financial penalties and thus increase profitability and get to the next job more quickly based on their speed in filling out paperwork. Additionally, techs banded together to do jobs, and some even incorporated in the interest of getting jobs completed and earning money more efficiently. Thus, the profit/loss factor favored a ruling that the techs were independent contractors.

Further, the techs invested heavily in equipment and materials; they individually spent between $300 and $5,000 on equipment. Some purchased commercial liability and auto insurance, and one claimed $1,200 in telephone expenses in 2006. The court noted that those kinds of expenses "are of a type not normally borne by employees." And even though none of the techs employed helpers, the court specifically noted that they had the right to do so under their contracts. The court ruled that the investment and "hired help" factors favored a ruling that the technicians were independent contractors as well.

On the "specialized skill" factor, the court was willing to take some shortcuts. After noting that the technicians not only installed cable television (seen as a relatively low-skill job) but

also installed and repaired high-speed Internet and digital voice systems (a higher-skill job), the court said that the fact that the techs had been used by Knight for such a long time showed that they must have some level of specialized skill, which supported a ruling that they were independent contractors. (See why the FLSA can be frustrating? The court divided its analysis into the separate factors but seemed to combine the skill factor and the "permanency and duration" factors together, which may seem confusing.)

Meaning of the factors, redux

The court decided that the first four factors seemed to answer the dependency question in a way that favored a ruling that the technicians were independent contractors. You might find it interesting that the court went in the other direction on the last two factors: (1) The techs had been working for only Knight for a while, making it difficult for them to hold down any other job while working full-time for Knight, and (2) the work they did for Knight was integral to Knight's fulfillment of its contractual relationship with its main customer, Bright House. The last two factors supported a finding that the technicians were *employees*, but that wasn't the court's final ruling. *Scantland v. Jeffry Knight, Inc.*, 2012 U.S. Dist. LEXIS 43407 (M.D. Fla., March 29, 2012).

Bottom line

There are a number of things you can do to help create working relationships that reflect "independent contracting" and not "employment." First and foremost, you should write your contracts in a way that gives the other party as much personal freedom and discretion as possible. In this case, the contracts stated the techs could hire their own help — even though they didn't actually do that. Further, the contracts made it clear that the quality of the technicians' work was controlled by Knight's ability to penalize them *financially* for breaching the contract (as opposed to an employer's right to fire an inadequate employee).

Protecting yourself and your workers' classifications isn't something that is accomplished simply by following a 1-2-3 set of steps; it requires critical thinking and foresight. This journey into the intricacies of an FLSA classification determination should help you develop the awareness necessary for you and your labor and employment attorney to deal with problems as they arise and hopefully head them off in advance.

➥ *You can catch up on the latest court cases involving independent contractors, the FLSA, or any other employment topic in the subscribers' area of www.HRhero.com, the website for Florida Employment Law Letter. Just log in and use the HR Answer Engine to search for articles from our 50 Employment Law Letters. Need help? Call customer service at (800) 274-6774.* ✤

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