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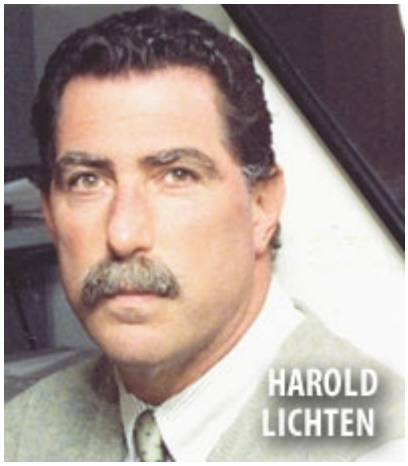

Independent contractor decision has lawyers wary

by: Eric T. Berkman

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CASE: Amero, et al. v. Townsend Oil Co., et al., Lawyers Weekly No. 12-350-08

COURT: Superior Court

ISSUE: Did an oil delivery company violate the Independent Contractor Law by classifying a driver - who provided his own truck and set himself up as his own corporation - as an independent contractor rather than as an employee?

DECISION: Yes, because the driver's services were part of the company's core business and because his services were subject to the complete direction and control of the company

Lawyers say a recent Superior Court opinion addressing the misclassification of workers as independent contractors highlights the contradictions and confusion plaguing employers as a result of the 2004 amendment of the Independent Contractor Law.

The Legislature amended the law - G.L.c. 149, §148B - to make it more difficult for employers to classify workers as independent contractors in order to avoid costs associated with overtime pay, unemployment benefits and workers' compensation.

In the case at issue, a Superior Court judge ruled that an oil delivery company had wrongly classified a driver as an independent contractor even though he provided his own truck and incorporated himself as his own company in order to limit his liability.

The plaintiff driver argued that the amended law required that he be classified as an employee because his services fell within the core business that the defendant company was engaged in and because he worked at the defendant's direction and control.

Judge Thomas R. Murtagh agreed, granting the plaintiff's motion for summary judgment.

The judge also found that even though the defendant's status as a motor carrier meant that its employees were exempt from statutory overtime requirements, the plaintiff was still entitled to overtime because the defendant gave it to other employees voluntarily.

Mark W. Batten, a lawyer at Proskauer Rose in Boston who represents employers in classification disputes, said the decision illustrates the problems the Legislature created by amending §148B to make Massachusetts an "outlier" in defining independent contractors.

"The direction Massachusetts and its courts are taking makes it more and more difficult to create legitimate independent-contractor relationships that otherwise pass muster under the federal [and common] law that's been in place for decades," he said. "In trying to correct some perceived abuses that arose in the area of construction and the Big Dig, Massachusetts has adopted a radical approach that attacks what are essentially legitimate independent-contractor relationships."

Also criticized was Murtagh's additional finding that because other employees were receiving overtime despite not being statutorily entitled to it, the plaintiff was entitled to it as well.

"To me, that's the most troubling part of this decision," said Brigitte M. Duffy, a Seyfarth Shaw lawyer in Boston who represents employers. "If you're paying overtime on a voluntary basis, perhaps because of market conditions so as to be competitive, you can certainly treat people differently."

Duffy added that the ruling "opens a big can of worms in the wage-and-hour world without a clear sense of reason behind it."

The seven-page decision is Amero, et al. v. Townsend Oil Co., et al., Lawyers Weekly No. 12-350-08.

Cause for concern or reaffirmation?

Kurt B. Fliegauf, a lawyer at Conn, Kavanaugh, Rosenthal, Peisch & Ford in Boston who - along with Andrew R. Dennington - represented the defendants, said the Massachusetts business community should be "very concerned" about the ruling, which his client plans to challenge.

"If it stands, then any company that contracts with another company to supply it with workers is now considered the workers' employer," he said. "So, if, for example, a law

firm goes and hires a temp agency to supply it with temporary lawyers, the law firm is now considered to be the employer of the temps. I think this would dry up the temp agency business."

Plaintiffs' counsel Harold L. Lichten, of Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan of Boston, called the ruling a "reaffirmation" of what the plaintiffs' bar has believed all along: that if workers are performing services that are part of a company's core business, they will be deemed employees as a matter of law.

It's also a "warning shot" that employers who misclassify workers will suffer serious penalties, he added.

"Under [G.L.c. 149, §148B], the statute we won under, there are both treble damages and an attorney-fee provision," said Lichten, noting that the damages have not yet been determined in the case.

He also emphasized that the decision should not be viewed as simply a plaintiff-friendly ruling, predicting that many employers will welcome the ruling as well.

"[Misclassification of employees as independent contractors] puts companies who play by the rules at an incredible competitive disadvantage," Lichten said. "So those companies will likely applaud this since they have as much incentive as plaintiffs' attorneys to make sure competitors do not improperly cut costs that way."

But Fliegauf said that if the ruling stands, it will turn "black-letter corporate law" on its head.

"The appellate courts have been very clear that an individual cannot incorporate and get the benefits of incorporation and then ask the court to disregard the corporation when it suits them," Fliegauf said, asserting that the plaintiff's own corporation hired 10 employees and took out workers' comp insurance, a detail not mentioned in the ruling. "Plus, the statute refers to the hiring of a person, not to the hiring of a company to hire workers."

Classification dispute

Plaintiff Hughes Amero began driving a fuel delivery truck for defendant Townsend Oil Co. in December 2000.

Under his original contract, the plaintiff agreed to deliver fuel oil during peak seasons through 2003. The plaintiff provided his own truck, which he insured himself.

The contract classified the plaintiff as an independent contractor and called for him to be paid per gallon of fuel delivered while other drivers, which the defendant classified as employees, were paid hourly and received overtime.

At some point during the initial contract period, another of the defendant's contract drivers advised the plaintiff that he could incur personal liability if he got into an accident unless he incorporated as his own business.

The plaintiff subsequently incorporated as Hughes Motor Transportation Co. Inc., through which he entered into a second contract to run through 2008.

In January 2005, the plaintiff fell while refueling his truck. The defendant denied him compensation for medical expenses and costs incurred finding a replacement driver, presumably on the ground that he was an independent contractor rather than an employee.

The parties later terminated the contract, and the plaintiff sued the defendant in Superior Court.

In a motion for summary judgment, the plaintiff argued that the defendant violated the Independent Contractor Law by misclassifying him as an independent contractor when he was, in fact, an employee.

He also claimed the defendant violated the Massachusetts Wage Law by failing to pay him overtime he would have earned had he been classified as an employee.

Statutory violation

Murtagh found that, even under the pre-2004 standard, the plaintiff would have been considered an employee since he was completely under the defendant's direction and control.

Though the plaintiff was not paid hourly and had to provide and insure his own truck, the judge noted, the defendant required him to paint the truck with its company logo, dictated where and when he delivered fuel, and determined how much to charge a customer.

"From the record, there appears to have been absolutely no difference between the duties of the drivers [the defendant] characterized as ‘employees' and those it characterized as ‘independent contractors,'" said Murtagh, adding that the defendant's "contractors" had to sign agreements not to deliver fuel for any other New England entity.

Under the amended statute, the plaintiff's status as an employee was even clearer, the judge said.

"Prong two of the [statutory] test requires that the service rendered by the contractor be outside the usual course of business of the person for whom the service is performed," Murtagh said. "Here, the bulk of [the defendant's] business is fuel oil delivery and that was the service [the plaintiff] provided."

Murtagh also found that the plaintiff did not necessarily become an independent contractor by incorporating as his own company.

"[The plaintiff's company] had no control over where or to whom [the plaintiff] made deliveries," said the judge. "Nothing in the record suggests that [the company] was anything more than a shell corporation ... so as to limit [the plaintiff's] potential liability for on the job accidents while also providing him with some tax savings."

Finally, the judge agreed with the plaintiff's assertion that "under the Massachusetts Wage Law an employer that offers overtime pay to some of its employees may not avoid paying overtime to others simply by reclassifying them as independent contractors."

Accordingly, Murtagh said, the plaintiff was entitled to summary judgment on his Wage Law and Independent Contractor Law claims.

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