

# NJ's Definition of 'Employee' Revives Sleepy's Class Suit

*Charles Toutant, New Jersey Law Journal*

May 13, 2015



The U.S. Court of Appeals for the Third Circuit has reopened a putative class action against mattress retailer Sleepy's in light of a January decision by the New Jersey Supreme Court that adopted a broad definition of who should be classified as an employee.

The appeals court vacated a district judge's summary judgment order dismissing the case and remanded it for rehearing in light of the state Supreme Court's adoption of what is known as the "ABC" test. The Third Circuit instructed the district court to apply the test to determine whether Sleepy's delivery workers are independent contractors or employees under the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law.

The case has drawn attention because it could curb the growing practice by employers of classifying workers as independent contractors.

"Because the New Jersey Supreme Court has adopted the ABC test and because the test is considered to be extremely strict, meaning it's very hard to demonstrate someone is an independent contractor, we really believe it's going to be very difficult for Sleepy's to prevail, if not impossible," said Harold Lichten of Lichten & Liss-Riordan in Boston, one of the lawyers representing the delivery workers in the Sleepy's case.

Anthony Marchetti Jr., another lawyer for the plaintiffs, said the Supreme Court ruling gives the plaintiffs in the Sleepy's case and other independent contractor cases an easier path to victory. He said the Supreme

Court ruling requires employers to establish that they have no control over the manner in which the worker performs the job, meaning they have no involvement in the method, manner and means by which the job is performed. In the Sleepy's case, the company dictates factors such as the uniform delivery workers wear and how they address customers, Marchetti said.

"With the ABC test in place, we don't think there's any way companies such as Sleepy's would be able to meet their burden of proof showing they have no control," Marchetti said.

Delivery workers for Sleepy's sign independent driver agreements and do not receive benefits from the company, according to court documents. Plaintiffs Sam Hargrove, Andre Hall and Marco Eusebio claimed in their class action that the agreements they signed were merely a way for Sleepy's to avoid paying them employee benefits. They seek to be paid overtime, health and pension benefits and family and medical leave.

U.S. District Judge Peter Sheridan of the District of New Jersey dismissed the case in March 2012, applying the common-law "right to control" standard, which looks at factors like the skill required to do the work, where it takes place, who sets the work schedule and how it is treated for tax purposes. The plaintiffs appealed, and the Third Circuit, recognizing that no New Jersey state appellate court had addressed the question, asked the Supreme Court to clarify what standard applies in such cases.

The Supreme Court said in January that the proper standard is the one used by the state Department of Labor, which was derived from the New Jersey Unemployment Compensation Act. Called the ABC test for its three parts, that test said an independent contractor must be free from direction and control in connection with performance of the service, the individual's service must be performed outside the usual course of business of the employer or outside the employer's place of business, and the individual must be customarily engaged in an independently established trade, occupation or profession as the service performed.

After the Supreme Court ruled, lawyers for Sleepy's asked the Third Circuit to affirm Sheridan's ruling, citing a 1971 U.S. Supreme Court case, *St. Regis Paper v. Unemployment Compensation Commission*, which held that a truck driver was not an employee under the ABC test. But the court rejected that claim. Lichten called employee misclassification "an epidemic in this country" and said it is "a really serious problem because it robs the government of millions, if not hundreds of millions, of dollars in taxes. It's a big issue."

Matthew Hank of Littler Mendelson in Philadelphia, representing Sleepy's, declined to comment on the case.

Contact the reporter at [ctoutant@alm.com](mailto:ctoutant@alm.com).

Read more: <http://www.njlawjournal.com/id=1202726321024/NJs-Definition-of-Employee-Revives-Sleepys-Class-Suit#ixzz3p1vwpdf5>