EMPLOYMENT

Misclassification of Employees as Independent Contractors: A Costly Mistake

By Mordy Yankovich

Misclassifying an employee as an independent contractor can be devastating to an employer. Employers can potentially be liable for, including but not limited to, back wages, overtime pay, liquidated damages, attorneys' fees and stark penalties for failure to withhold applicable taxes, pay workers compensation and unemployment insurance. Employers commonly make the mistake of assuming that self-classifying workers as independent contractor and issuing them a Form 1099 is determinative. That approach is faulty and can be costly.

Courts apply varied standards in determining whether an individual is an independent contractor or an employee. However, all courts focus on the actual functional relationship between the purported employer and the individual — especially the level of control the purported employer has over the individual — and not simply whether a 1099 is issued as opposed to a W-2.

In the context of coverage under the National Labor Relations Act, the National Labor Relations Board recently revised its standard for determining whether an individual is an independent contractor under the NLRA and, thus, not afforded its protections regarding unionizing. In *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), the NLRB reverted to its 2010 standard — known as the "traditional common law test" — in finding that a group of airport shuttle operators were independent contractors pursuant to the NLRA. In so doing, the NLRB overturned its 2014 decision in *FedEx Home Delivery*, 361 NLRB 610 (2014) (issued during the Obama presidency). The traditional common law test considers the following non-determinative factors: The extent of control the purported employer maintains over the individual; the method of payment; whether the purported employer or individual provides the supplies, tools, and work location; extent of supervision over the individual; whether the purported employer and the individual believe they created an employer/employee relationship; whether the work is part of the purported employer's regular business operations (i.e. working as an attorney at a law firm); length of employment/engagement; and skills required to perform the work.


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In analyzing these factors, the NLRB determined that the shared-ride operators were independent contractors. The NLRB reasoned that these individuals had significant entrepreneurial opportunity and control over the "manner and means by which [they] conduct their business." Specifically, the NLRB found determinative that the individuals purchased or leased their vans, controlled their own work schedules and working conditions, paid a monthly fee to the company and retained all fares collected.

Courts generally apply a modified version of this test when determining whether an individual is an independent contractor or employee, with the overall control the purported employer has over the individual being the dominant factor. *See Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217, 227 (2d Cir. 2008) (applying a 13 factor common law agency test to a Title VII and NYSHRL discrimination case with the most important factor being "the extent to which the hiring party controls the manner and means by which the worker completes her assigned tasks"); *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988) (applying five factor "economic realty test" to Fair Labor Standards Act matter); *Paiva v. Olympic Limousine, Inc.*, 270 A.D.2d 534 (3d Dept. 2000) (determined that employer "exercised direction and control over individuals' work to establish their status as its employees" requiring the employer to pay unemployment insurance contributions).

In order to avoid significant financial consequences, employers must consider these different factors in the context of the overall control exerted over workers, prior to classifying them as independent contractors.

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PERSONAL INJURY

Judicial Notice of Google Maps

By Paul Devlin

Assume you are reviewing a case that is coming up for trial. At this late juncture, you decide it would be helpful to have in evidence a satellite image of the intersection where a car accident occurred. You start thinking about the objections your adversary will make. Can your client really authenticate the satellite image? How do we know it is not mislabeled? Luckily, CPLR 4511 was amended effective Dec. 28, 2018. Section "c" now provides that the court shall take judicial notice of maps found online, satellite images, etc. The precise language of the statute is as follows.

> When judicial notice shall be taken based on a rebuttable presumption. Every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented. The presumption established by this subdivision shall be rebutted by credible and reliable evidence that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. A party intending to offer such image or information at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the request for judicial notice of such image or information, stating the grounds for the objection. Unless objection is made pursuant to this subdivision or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for objection otherwise required by this subdivision, the court shall take judicial notice of such image or information.


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What this means is if you want to be sure that your satellite image will be in evidence at trial, you must comply with the statute's requirements of serving notice of intent. You must serve the notice at least 30 days before trial and include the web address where the image may be inspected. Unless your adversary makes a timely objection, the court is mandated to take judicial notice of the digital evidence. The image is deemed to fairly and accurately portray that which it is being offered to prove, and the image is thereby admitted into evidence.

If you are opposing counsel and do not want the image in evidence, you must make a valid objection at least 10 days before trial unless you could not have discovered the evidence that your objection is based upon at trial. Some objections that come to mind are that the image was not taken on the date of the accident; the image was taken at a time of day or year that alters the appearance significantly from the time of the accident; or that the image is inaccurate for some other reason.

The statute is worded to encompass not only satellite images, but maps such as Google Maps and photographs such as Google Street View. Counsel seeking to use images or maps found online would be wise to serve notice well in advance of 30 days before trial. A logical milestone to trigger use of such images would be depositions. Once marked as exhibits and used for questioning at depositions, counsel may wish to serve notice immediately to ensure the images will be in evidence at trial. This may make life easier not only for use at trial, but also for summary judgment motions regarding liability.

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