WAGE AND OVERTIME QUARTERLY

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IT'S TIME TO TAKE A STAND AGAINST THE MISCLASSIFICATION OF EMPLOYEES AS "INDEPENDENT CONTRACTORS"

This edition of the *Wage and Hour Quarterly* is dedicated entirely to an illegal practice that costs America's taxpayers and working families billions of dollars every year: **The misclassification of employees as "independent contractors."**

Tens of millions of workers are classified as "independent contractors." So it's no surprise that Trial Lawyers and workplace justice advocates regularly encounter this huge segment of the American workforce. Unfortunately, we often fail to evaluate whether these purported "independent contractors" have been misclassified.

For example, a workers compensation lawyer might end her case evaluation upon determining that an independent contractor's injury was not work related. This is unfortunate, since the individual might be entitled to thousands of dollars in unpaid wages and benefits due to the Boss's misclassification of her employment status.

Regardless of your practice area, common sense enables you to identify potential independent contractor misclassification cases. In a nutshell, if it seems like the Boss is exerting significant ***control*** over the worker's day-to-day work activities, the potential for misclassification exists. At this point, you can either: (i) analyze the worker's circumstances in more detail (applying some of the principles described in this Newsletter) or (ii) refer the client to The Winebrake Law Firm, knowing that we ***always*** treat workers with dignity and respect and ***always*** pay a fair referral fee.

As explained at pages 2-3, the Boss has many reasons to misclassify his workers as independent contractors. One of the most significant reasons is to avoid paying time-and-one-half overtime compensation for work performed in excess of 40 hours during the workweek. The Fair Labor Standards Act ("FLSA"), which is the federal overtime law, does not cover independent contractors. However, a worker does not lose his overtime rights just because the Boss labels him an "independent contractor." The FLSA is a law of "striking breadth,"[1] and company labels mean almost nothing. As one appellate court has observed, the FLSA contains "the broadest definition [of employment] that has ever been included in any one act."[2]

Whether an employer truly is an independent contractor under the FLSA depends on the "economic realities" of her work experience, not the language of her employment contract. The Third Circuit Court of Appeals has instructed Pennsylvania district courts to apply a six-factor test to determine whether a worker has been properly classified as an independent contractor.[3] The six factors include:

(1) the extent of the company's control over performance of the work;
(2) the worker's opportunity for profit or loss depending upon her managerial skill;
(3) the worker's investment in equipment or materials required for her task and her employment of helpers;
(4) whether the service rendered requires a special skill;
(5) the permanence of the working relationship; and
(6) whether the service rendered is an integral part of the company's business.

Applying factors such as those listed above, federal courts frequently invalidate the Boss's abuse of the "independent contractor" classification. For example, in one recent case, New Orleans workers who repaired telecommunications and cable lines

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in the wake of the Hurricane Katrina disaster alleged that they were misclassified as independent contractors. The Fifth Circuit Court of Appeals held that the workers were employees entitled to FLSA overtime benefits. The Court emphasized that the workers were employed full-time and exclusively for the defendant employer, were economically dependent on the defendant employer, and did not have any meaningful opportunity to operate their own businesses.[4] This is just one of the hundreds of independent contractor misclassification cases that have been successfully litigated in the federal courts.

The Winebrake Law Firm has successfully litigated FLSA independent contractor cases. For example, we recently obtained a settlement on behalf of 13 satellite dish installers who sought overtime pay, alleging that they were misclassified as independent contractors. In another case, we obtained a settlement for over 20 janitors who were classified as contractors. We currently are pursuing a lawsuit in a Texas federal court on behalf of over 25 medical product sales representatives who were classified as independent contractors. And we represent over 30 allegedly misclassified delivery drivers in another case pending in a Pennsylvania federal court.

If you represent workers who you believe may have been misclassified as independent contractors, don't hesitate to give us a call.

[1] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).
[2] Zheng v. Liberty Apparel Co., Inc., 355 F.3d 61, 69 (2d Cir. 2003).
[3] See Martin v. Selker Brothers, Inc., 949 F.2d 1286, 1293 (3d Cir. 1991) (citing Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376, 1382 (3d Cir. 1985).
[4] See Cromwell v. Driftwood Electrical Contractors, Inc., 2009 U.S. App. LEXIS 22389 (5th Cir. Oct. 12, 1009).

EXPLORING THE SCOPE OF THE "INDEPENDENT CONTRACTOR" RIP-OFF

When the Boss misclassifies a worker as an "independent contractor" ("IC"), he does so at the expense of the worker, the worker's family, American taxpayers, and competing companies. Here's how:

- ***Workers' Compensation Benefits:*** The IC classification enables the Boss to avoid paying for workers' compensation insurance. This is all well and good until a work injury devastates the worker's family and reaps havoc on our health care system.

- ***Overtime Pay:*** As already discussed, the IC classification enables the Boss to avoid paying time-and-one-half overtime pay under the FLSA. As such, IC abuse circumvents the FLSA's policy of reducing unemployment by creating a financial disincentive against overtime work. Meanwhile, the Boss obtains a competitive advantage over law-abiding competitors.

- ***Family Medical Leave:*** ICs are not covered by the Family and Medical Leave Act ("FMLA"), which allows an employee up to 12 weeks of unpaid leave to care for herself or an ailing family member.

- ***Unemployment Benefits:*** ICs are not entitled to unemployment benefits. Thus, by misclassifying employees as ICs, the Boss avoids unemployment insurance payments at the clear expense of working families.

- ***The Right to Unionize:*** The National Labor Relations Act ("NLRA") gives employees the right to join a union without risk of retaliation. But IC's have no such protection, and companies that misclassify employees as ICs gain an unfair advantage over their law-abiding competitors.

- ***Protection from Unlawful Discrimination:*** IC's are not covered by our Nation's most fundamental anti-discrimination laws, such as Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. What a great tragedy for misclassified ICs and what an affront to our core principles.

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- ***Employer Health and Welfare Benefits:*** Many companies provide employees with fringe benefits like pension plans and health insurance. But ERISA, the federal law overseeing employee benefit plans, does not apply to ICs, and, as such, companies routinely deny health and retirement benefits to ICs.

- ***Social Security and Medicare Payments:*** The IC classification enables the Boss to circumvent FICA withholdings and, most significantly, the employer's share of these basic social welfare programs.

In view of the above, IC abuse is nothing short of tragic for the American worker and for us as a society. How can we allow millions of American families to be improperly and unnecessarily denied our Nation's most basic workplace rights?

YO, WORKERS' COMPENSATION LAWYERS: WHAT ARE YOU WAITING FOR?

A worker's compensation lawyer calls our firm and proudly explains that the WC Judge just deemed his injured client to be illegally classified as an "independent contractor." Due to the lawyer's skill, diligence and persistence, the client finally will receive the worker's compensation benefits he deserves. Now it's time to go after all that unpaid overtime. This will be a "slam dunk."

WRONG!!! Under federal and Pennsylvania overtime laws, workers' claims for unpaid overtime can only extend back **three years**. So if you've waited for you injured client's case to work its way through the worker's compensation system, ***you've waited too long***. Most of your client's unpaid overtime recovery will be time-barred.

So don't wait. Get that overtime case filed immediately upon learning of the "independent contractor" misclassification. The workers' compensation case and the overtime case can proceed on parallel tracks. Moreover, a favorable finding in the overtime case will ***enhance*** the wage entitlement in the workers' compensation case.

MEET OUR FIRM'S NEWEST ATTORNEY: MARK GOTTESFELD

We are very pleased to announce that Mark Gottesfeld has joined our law firm. In May 2009, Mark graduated *cum laude* from Drexel School of Law, where he served as Editor of the *Drexel Law Review*. He is admitted to the Pennsylvania, New Jersey, and New York bars, and, during law school he served as a Judicial Intern to Pennsylvania Superior Court Judge Jack A. Panella. After graduating from law school, Mark worked for the Philadelphia law firm of Saltz, Mongeluzzi, Barrett & Bednesky, P.C. We are delighted that Mark has joined our fight for fair wages.

SUPPORT THE EMPLOYEE MISCLASSIFICATION PREVENTION ACT

Some of the troubles discussed in this Newsletter can be fixed by passage of the Employee Misclassification Prevention Act (the "Act"), which was introduced in April 2010 in the United States Senate. The Act currently sits in the Senate's Committee on Health, Education, Labor, and Pensions. Pennsylvania Senator Robert Casey is one of the Act's co-sponsors.

If passed, the Act will amend the FLSA to require companies to keep records of all individuals (regardless of their IC classification) who perform labor or services for the company and notify all individuals of their employment classification and their rights under the law. The Act also contains other important provisions, such as making it unlawful for a company to discharge or otherwise discriminate against any individual who complains about his/her IC classification and doubling the amount of liquidated damages a misclassified IC can recover in court.

Senator Tom Harkin (D-Iowa), who chairs the Senate Committee and supports the Act's passage, has correctly observed that IC misclassification "cheats workers out of important labor protections, like the right to overtime pay and worker's compensation, and robs federal and state governments of desperately needed tax revenues." Chairman Harkin believes the Act will "level the playing field for responsible employers who play by the rules." Let's hope he's right.

Please contact your Senators and Congressperson and tell them that you support the Employee Misclassification Prevention Act!!!

QUARTERLY QUOTE

"The obligation to earn one's bread presumes the right to do so. A society that denies this right cannot be justified, nor can it attain social peace."

Pope John Paul II, 1991

ABOUT THE WINEBRAKE LAW FIRM

Workers deserve to get paid for ***all time spent working***, and most workers are entitled to valuable ***overtime pay*** when they work over 40 hours in a workweek. Yet, every year, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and hour laws.

Wage and overtime violations hurt working families. When a company violates the law, it should be held accountable. ***No one is above the law.***

The Winebrake Law Firm believes workers pursuing their wage and overtime rights are entitled to the same high quality legal representation enjoyed by big corporations. We also understand that workers have a right to be treated with the same level of professionalism, courtesy, and respect accorded to corporate CEOs.

The Winebrake Law Firm goes to Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Our attorneys have negotiated settlements in federal wage and overtime lawsuits worth millions of dollars to American workers and their families.

The wage and overtime laws are complicated. Don't hesitate to contact ***The Winebrake Law Firm*** for a ***free consultation*** if you believe the wage and overtime rights of you or one of your clients may have been violated. Workers never pay a fee unless they recover.

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