SEPTEMBER 30, 2015

THE NLRB'S WAR AGAINST INDEPENDENT CONTRACTORS STATUS CONTINUES

The National Labor Relations Board ("NLRB") continues its efforts to find employee status for individuals historically considered to be independent contractors. In *Sisters' Camelot,* a decision issued on September 25, 2015, the Board reversed an administrative law judge's finding that canvassers hired by a non-profit organization for fundraising purposes were independent contractors.

WHAT WERE THE FACTS?

In 2014, the NLRB redefined its analysis for determining whether individuals are employees, protected by the National Labor Relations Act, or independent contractors, unprotected by that law. The new standard made it much more likely to find employee status than the standard that had previously applied. *Sisters' Camelot* demonstrates the NLRB's willingness to reach for a finding of employee status using this standard. In that case, the canvassers:

- Signed independent contractor agreements;
- Were issued 1099s;
- Could elect whether to work on any given day and were not required to notify the organization of their plans;
- Received commissions based on the contributions they received;
- Were generally not subject to in-person supervision while working on their assigned routes;
- Were rarely "disciplined" or "terminated";
- Were not guaranteed any minimum compensation and did not receive benefits;
- Worked varying lengths of time for the organization, commonly having gaps as they pursued other opportunities; and
- Could solicit on behalf of other organizations when they were not soliciting for *Sisters' Camelot.*

Applying its new independent contractor analysis, the NLRB reversed the administrative law judge's finding the canvassers to be employees based on many of the factors listed above. The NLRB focused on generally more mundane issues including:

- The canvassers compensation was not negotiable;
- When the canvassers chose to work they did so at times and locations determined by the organization;
- The canvassers had no proprietary interest in the canvassing operation;
- The canvassers used the organizations tools and transportation;
- The canvassers had to keep detailed records of their canvassing; and
- The canvassers provided the vast majority of the funding for the non-profit organization.

EMPLOYER CONCERNS

A review of the NLRB's decision in this case makes it clear that the line between employees and independent contractors is moving away from independent contractor status. While the new standard incorporates many of the factors that had been applied in the past, in this case, even when applying those factors which continue to apply, the NLRB reversed the administrative law judge's findings to find independent contractor status.

WHAT TO DO

If you have not already acted, audit your use of independent contractors. As discussed in previous articles, both the Department of Labor and the IRS have also decided to crack down on employers who improperly classify their employees as independent contractors. (See our

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related blogs: DOL Says Most Workers are Employees not Independent Contractors; Independent Contractors of Employees – IRS Gives Employers Something to Consider; Worker Misclassification Issues – How are Hospitals at Risk?; and Joint Employment – NLRB Broadly Redefines the Standard.) Consequently, an incorrect classification of independent contractor status can have ramifications well beyond the National Labor Relations Act.If you have any questions, please contact Bruce Bagdady at bbagdady@hallrender.com or your regular Hall Render attorney.

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