Curtain Falls On Action Brought By Exotic Dancers

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A federal case filed in Wisconsin by a class of exotic dancers against a group of defendants was dismissed recently, in a decision by a federal judge which provides substantive and procedural lessons to be learned for employers across the country facing federal and state wage and hour lawsuits.

The exotic dancers sued several clubs and various individuals under the Fair Labor Standards Act ("FLSA"), alleging that the dancers were not paid proper wages because they were misclassified as independent contractors when they should have been treated as employees. A group of defendants — those with overlapping interests in the clubs where the dancers performed — moved for summary judgment, alleging that they did not directly retain the exotic dancers as employees or independent contractors and, even if they had, they would not have had an employment relationship with these exotic dancers as a matter of law.

In addressing whether the moving defendants could be classified as employers, US District Judge James D. Peterson criticized the FLSA definition of employer as "somewhat circular and not particularly helpful." The FLSA defines the term employer as including "any person acting directly or indirectly in the interests of an employer in relation to an employee. " 29 U.S. Code § 203(d). Judge Peterson noted, with some frustration, that the statute simply "uses the word it is defining in the definition." As reflected in countless federal cases, the key question in the analysis of whether an individual could be an employee is whether the defendant "exercised control over the worker."

In response to the comprehensive arguments set forth by the moving defendants, Judge Peterson noted the spotty factual and legal responses of the plaintiffs. As to the exotic dancers' failed efforts to demonstrate that the moving defendants are joint employers, Judge Peterson noted, that "none of the dancers allege that any of the moving defendants directed them to perform at the resort, or otherwise exercise control over them." The dancers failed to address the key question, mainly whether the moving defendants exercised control over them. Rather, the plaintiffs focused on the moving defendants' ownership interests in the clubs where the exotic dancers performed, which was insufficient. "Plaintiffs cite no authority for the view that common ownership by the same individuals is sufficient to render otherwise separate companies joint employers."

As to the second matter before the Court, mainly whether moving defendants, even if they had a direct relationship with plaintiffs, should have considered the exotic dancers to be their direct employees, plaintiffs failed in that regard.

In responding generally to the motions brought by moving defendants, Judge Peterson stated that the exotic dancers made no effort to distinguish between the moving defendants and which particular party exercised what type of control.

Under the FLSA, "employees are those who as a matter of economic reality are dependent upon the businesses to which they render service." U.S. Department of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987). As cited by Judge Peterson, courts should be guided by six non-exclusive factors when addressing this question:

- the degree of the alleged employers' control as to the manner in which the work is to be performed;
- the alleged employer's opportunity for profit or loss depending upon his managerial skill;
- the alleged employer's investment in equipment or materials required for his tasks or his employment of workers;
- whether the service rendered requires a special skill;
- the degree of permanency and duration of the working relationship; and
- the extent to which the service rendered is an integral part of the alleged employer's business.

This exacting analysis is performed in state and federal courts throughout the country, as actions under the FLSA and matters relating to taxation have proliferated in recent years. In this particular case, however, what is often a very difficult analysis was made easier because the plaintiff's arguments were so flawed in that "they put in no facts about a particular defendant's control over them …"

The Takeaway

Not every employer, or alleged employer, will be fortunate enough to escape liability on motion because the papers submitted by an adversary are so flawed. Perhaps the facts did not exist here, or perhaps they were not adequately asserted, but these employers were fortunate. The foregoing tests provide a cautionary tale for all those who might be joint employers unwillingly exposed to liability under the FLSA or other statutes, or for employers who have independent contractors who might be employees as a matter of law. An occasional reexamination of your business relationships can reduce, if not eliminate, potential liability as a joint employer or as an employer of persons misclassified as independent contractors.