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SUPREME COURTS DELIVER A MIXED BAG FOR EMPLOYERS

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The United States Supreme Court and the the New Jersey Supreme Court recently decided important wage and hour decisions - one good for employers - the other bad.

Hargrove

First the bad employer decision: the New Jersey Supreme Court raised the bar for companies in New Jersey to classify persons as independent contractors rather than employees under the New Jersey Wage and Hour Law ("WHL") and Wage Payment Law ("WPL"). An employer who misclassifies a worker is subject to statutory penalties and litigation exposure for not providing workers wage rights commensurate with an employment relationship, such as overtime pay and regular pay intervals. Historically, many companies in New Jersey followed the federal test under the Fair Labor Standards Act ("FLSA"), for determining whether an individual is an employee. However, in *Hargrove v. Sleepy's, LLC*, (A-70-12) (072742)(Decided Jan. 14, 2015), the New Jersey Supreme Court confirmed that companies in New Jersey are required to follow the "ABC" test established by the New Jersey Department of Labor per the New Jersey Unemployment Compensation Act. A key difference is that the "ABC" test presumes that a person seeking the protection of the WHL or WPL is an employee, not an independent contractor. The burden is on the purported employer to demonstrate that each identified factor is satisfied in order to permit classification as an independent contractor. If even a single factor is not met, the individual cannot be classified as an independent contractor.

In *Hargrove*, the plaintiffs delivered mattresses to customers of defendant Sleepy's, LLC. Sleepy's classified them as contractors. Plaintiffs filed suit asserting that they are employees of Sleepy's and have been denied wage entitlements. Plaintiffs asserted that the Independent Driver Agreement signed by each of them was a ruse to avoid payment of wage entitlements. They alleged that this misclassification violates New Jersey state wage laws.

The United States District Court for the District of New Jersey applied the factors for defining an employee under the Employment Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001-1461, and found the plaintiffs were not employees. On appeal, the United States Court of Appeals for the Third Circuit filed a petition with the New Jersey Supreme Court to have certified a question of law pursuant to Rule 2:12A-1. The Court of Appeals posed the following question: "Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, *N.J.S.A.* 34:11-4.1, et seq., and the New Jersey Wage and Hour Law, *N.J.S.A.* 34:11-56a, et seq.?" The Supreme Court granted the petition. 214 N.J. 499 (2013).

The WPL governs the time and mode of payment of wages due to employees, such as the twice monthly mandate for nonexempt employees. The WHL establishes New Jersey's minimum wage and overtime pay rights for non-exempt employees. While both WHL and WPL define "employee," "employer," and "employ," they are not defined identically. As such, "various tests derived from various sources have been used to distinguish between an employee and an independent contractor and thereby determine which individuals fall within the protection of various remedial statutory provisions." *Hargrove v. Sleepy's*, at *4.

Following a detailed analysis of both statutes and the varying tests used to determine independent contractor status under different laws, including the common law "control test," the New Jersey Supreme Court determined that the same test as in the New Jersey Unemployment Compensation Law should be used for claims brought under both the WHL and WPL - the "ABC" test.

The "ABC" test presumes an individual is an employee unless the employer can demonstrate the following proofs about the individual:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J.S.A. 43:21-19(i)(6).

"The failure to satisfy any one of the three criteria results in an 'employment' classification." *Hargrove v. Sleepy's*, at *6 (citing *Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor*, 125 N.J. 567, 581 (1991)). In other words, if the company cannot satisfy <u>all</u> three criteria, the individual will be classified as an employee rather than an independent contractor under

the WHL and WPL, with commensurate wage entitlements.

Key Takeaways from Hargrove

Now more than ever, companies with employees in New Jersey must analyze their policies and practices on classifying independent contractors. Misclassification can expose employers to statutory penalties and significant litigation exposure. A proper analysis should include a review of company policies, contracts with independent contractors, supervisor training, and policy implementation. If there is a contract relationship that is vulnerable to an employee classification, the company should promptly devise a plan to move into compliance. Companies with multiple-state workforces must take care not to overlook New Jersey's "ABC" test for those contractors located in New Jersey.

Integrity Staffing Solutions

As for the good employer decision: in a 9-0 decision the United States Supreme clarified what is compensable time under the *FLSA in Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513 (Dec. 2014).

Two former employees of Integrity Staffing filed a collective action against the company for violation of the FLSA. Integrity Staffing provides warehouse staff to Amazon. Plaintiffs retrieved and packaged products for shipping to Amazon.com customers. The plaintiffs had to go through a security screening when leaving each day to prevent theft. Employees were not compensated for that time, which they alleged required approximately 25 minutes each day. The collective action was brought on behalf of similarly situated warehouse employees.

The employees argued that the time required for the daily security screening should have been compensable because the security screening was only for the benefit of their employer. Therefore, they claimed that they deserved compensation for the time for security screening. Integrity Staffing argued that the time was non-compensable, as it was postliminary - after the work day.

The United States Supreme Court held that in order to describe an employee's compensable activity as "integral and indispensable to the principal activities that an employee is employed to perform," the activity must be intrinsic to the principal activities for which the employee was hired, and one that requires performance and cannot be dispensed with. In *Integrity Staffing Solutions*, the employees were not employed for the purpose of undergoing security screening, but rather to retrieve and package products for delivery. Therefore, the screening itself was not "integral or indispensable" to the principal duties of the employees in the warehouses. The Court noted that even if the employer stopped conducting security screenings, the employees still could have done the work for which they were employed. The Court also stated that tests from other cases examining whether the activity was "required by an employer" or for its benefit are much too broad.

This clarification on postliminary time under the FLSA has nation-wide reach. In time, the New Jersey Supreme Court may provide guidance on whether a similar analysis will apply to postliminary activities under the NJ WHL.

In sum, the past two months have been mixed for employers. The *Hargrove* and *Integrity*

Staffing Solutions decisions illustrate the ever changing wage and hour guidance the courts are providing employers, and the difficulty at times of reconciling employer wage and hour mandates between federal and state laws.
