



Labor and Employment News Alert

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Ninth Circuit Clarifies Independent Contractor Test

Employers face various risks and penalties if they misclassify employees as independent contractors. With the Department of Labor's announcement that it has made enforcement of misclassification of independent contractors a top priority in 2011, it is more important than ever for employers to correctly classify their workers. A Ninth Circuit decision announced earlier this week made that task somewhat easier by clarifying the standard that applies when analyzing whether a worker is an independent contractor for purposes of most federal statutes governing employment. Under the standard announced by the court, the key factor is "the hiring party's right to control the manner and means by which the product is accomplished."

In Murray v. Principal Financial Group, Inc., ___ F.3d ___, 2010 WL 290251 (9th Cir. July 27, 2010), plaintiff Patricia Murray, a career insurance agent for the defendant insurance company, sued claiming sex discrimination in violation of Title VII. The Ninth Circuit affirmed dismissal of her suit because she was an independent contractor, not an employee, and thus Title VII did not apply to her.

The Court also took the opportunity to clarify the appropriate test to use when analyzing whether a worker is an independent contractor under federal statutes like ERISA and Title VII. The court acknowledged that previous case law had created confusion, by using three different formulations of the test.

The Ninth Circuit clarified that "there is no functional difference between the three formulations" and that, going forward, the common law test articulated by the Supreme Court in Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992) will apply. The heart of the Darden test is "the hiring party's right to control the manner and means by which the product is accomplished." Under this test, the key factors used to determine the correct classification are:

- the skill required;
- the source of the instrumentalities and tools;
- the location of the work;
- the duration of the relationship between the parties;
- whether the hiring party has the right to assign additional projects to the hired party;
- the extent of the hired party's discretion over when and how long to work;
- the method of payment;
- the hired party's role in hiring and paying assistants;
- whether the work is part of the regular business of the hiring party;
- whether the hiring party is in business;
- the provision of employee benefits; and
- the tax treatment of the hired party.

Applying these factors to Murray, the court cited several facts that supported her classification as an independent contractor. These included that she was free to operate her business as she saw fit without day-to-day intrusions; she decided when and where to work; she scheduled her own time off; and she was paid by commission only. Even though Murray's relationship with Principal had some indicia of an employee-employer relationship, such as entitlement to some benefits and a long-term relationship, these facts were not sufficient to overcome the strong indications that she was an independent contractor.

Although the Ninth Circuit's clarification of the test for determining independent contractor status is a welcome development, it only applies to federal statutes and is subject to interpretation in specific cases. Should you have any questions about the application of Murray to your workforce, or any other labor or employment-related matter, please do not hesitate to contact us.

The **Riddell Williams Labor and Employment Group** helps businesses comply with labor and employment laws and resolve disputes with employees. Our practice consists of four primary areas: counseling, litigation, training, and traditional labor law.

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