

Employee Benefit ■ Plan Review

New Jersey Supreme Court Rules on Worker Classification Under the “ABC Test”

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In *East Bay Drywall, LLC v. Department of Labor & Workforce Development*,¹ the New Jersey Supreme Court recently upheld a determination by the Department of Labor and Workforce Development (the “Department”) that 16 workers (individuals and business entities) were misclassified as independent contractors, even though East Bay had provided business registrations and insurance certificates for the workers in question.

BACKGROUND

By way of background, East Bay is a drywall installation business that hires installers on a per-job basis. The Department conducted a routine audit and determined that 16 of East Bay’s workers were improperly classified as independent contractors, instead of employees, and thus directed the company to pay unemployment and temporary disability benefit contributions for these misclassified workers. East Bay challenged the audit results and requested a full evidentiary hearing, which was held before an administrative law judge in the Office of Administrative Law (“OAL”).

At the hearing, East Bay’s principal, Benjamin DeScala, testified that once a project bid was accepted, East Bay contacted workers who were free to accept or decline East Bay’s offer of work, and some had even left mid-project if they found a better opportunity. DeScala

explained that some workers had told him they had worked for other businesses, but he did not provide any evidence to support that claim.

DeScala also stated that before hire, workers must provide to East Bay an up-to-date certificate of liability insurance and tax identification number to ensure they are independent entities. East Bay provided workers with materials to complete the drywall installation, but the workers used their own tools and arranged for their own transportation. Although East Bay did not direct how the work was performed, the company remained responsible for the finished product.

After the hearing, the OAL reversed the Department’s assessment as to 13 of the 16 workers, finding they were properly classified as independent contractors. Nonetheless, the commissioner of the Department, who is responsible for the final agency decision (and thus free to accept or reject the OAL decision), agreed with the initial Department decision that all 16 workers had been misclassified as independent contractors, in part because East Bay had failed to show the workers “existed independent of East Bay,” under Part C of the “ABC test” (discussed below).

East Bay appealed that decision, and, on appeal, the appellate court held that only five of the 16 installers were misclassified, finding the requirement that the workers provide insurance

certificates significant in demonstrating independence from East Bay. The Department then appealed as to the remaining 11 workers, and the New Jersey Supreme Court granted certification.

THE ABC TEST

As discussed below, the Supreme Court upheld the commissioner's determination and found that all 16 workers were misclassified, under the ABC test, which is used to determine employment status for purposes of the unemployment compensation law.

Under this test, the court explained a worker is presumed to be an employee, unless all of the following three factors are satisfied:

- (A) The worker is free from an employer's direction and control.
- (B) The worker's services are outside the employer's usual course of the business or the work is performed outside the employer's place of business.
- (C) The worker is customarily engaged in an independently established trade, occupation, profession, or business.

THE SUPREME COURT'S DECISION

The Supreme Court explained the ABC test is "fact-sensitive," and a factfinder must assess the "true nature of the relationship," rather than simply look at an employment contract and payment method. In reaching its decision,

the court did not consider Parts A and B of the above test, instead focusing its analysis solely on Part C, i.e., whether the workers could maintain their own business separate and apart from East Bay. The court discussed several factors that come into play when assessing this requirement, such as, but not limited to, the "duration and strength" of the workers' business, the number of employees and volume of business, and the extent of resources and equipment. The court found that East Bay did not provide sufficient evidence to establish such independence and thus could not meet Part C of the test.

The court further explained many of the insurance certificates provided to East Bay by the workers showed coverage for only one of three years of the audit period. The business registrations obtained for the entities, for the most part, showed the businesses had only one member and were without any other employees. In addition, many of the business registrations provided had been revoked before the audit period due to reporting failures. There was also no evidence the workers advertised or maintained independent business locations.

For all of these reasons, the court upheld the commissioner's finding that East Bay had failed to demonstrate the workers' independence under Part C of the test, and that the 16 workers were not properly classified as contractors. Accordingly, the case was remanded

back to the Department for a proper calculation of back-owed contributions.

CONCLUSION

Employers should continue to be mindful that the burden of establishing that a worker is an independent contractor rests on the employer, and that it may be difficult to establish Part C of the ABC test, even where, as in *East Bay*, many workers had registered business entities and insurance certificates. As such, employers should continue to assess when and whether to use independent contractors and take all necessary steps to ensure compliance with all legal requirements, in that regard. 🌟

NOTE

1. https://www.njcourts.gov/attorneys/assets/opinions/supreme/a_7_21.pdf.

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