WILK AUSLANDER

Wilk Auslander LLP
1515 Broadway
New York, NY 10036

T 212 981 2300
F 212 752 6380
wilkauslander.com

EMPLOYEE OR INDEPENDENT CONTRACTOR? SDNY HOLDS ECONOMIC REALITIES AND CONTROL ARE KEY

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By: Natalie Shkolnik
Julie Cilia

What is the difference between an employee and an independent contractor? This is a complex and critical question that may arise in a variety of contexts, such as investigation by governmental agencies, tax return preparation, and litigation. While a survey of all relevant considerations is beyond the scope of this article, we focus here on two tests that the United States District Court for the Southern District of New York ("SDNY") recently employed in litigation brought under the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.* and the state New York Labor Law ("NYLL"), §§ 190 *et seq.*

The Economic Realities Test

As the SDNY recently reiterated in *Hart v. Rick's Cabaret Int'l, Inc.*, No. 09 Civ. 3043(PAE), — F. Supp.2d —, 2013 WL 4822199, at *4-5 (S.D.N.Y. Sept. 10, 2013) ("*Hart*"), *reconsideration denied in part by Hart v. Rick's N.Y. Cabaret, Int'l, Inc.*, No. 09 Civ. 3043(PAE), — F. Supp. 2d — (S.D.N.Y. Nov. 18, 2013), the Second Circuit in *Brock v. Superior Care*, 840 F.2d 1054 (2d Cir. 1988) articulated an "economic realities" test that includes the following five factors for determining whether an individual is an employee versus an independent contractor under the FLSA:

(1) "the degree of control exercised by the employer over the workers";
(2) "the workers' opportunity for profit or loss and their investment in the business";
(3) "the degree of skill and independent initiative that is required to perform the work";
(4) "the permanence or duration of the working relationship"; and
(5) "the extent to which the work is an integral part of the employer's business."

Hart at *5. None of these factors is in itself dispositive. *See id.* Application of the economic realities test requires analysis of "the totality of the relevant circumstances." *Id.* (internal quotation marks omitted).

The Common Law Test

Although some federal courts have also applied the economic realities test to determine whether a worker is an employee under the NYLL, others follow the "common law" test developed in state court, which focuses heavily on the degree of control that the employer exercises. *See id.* at *16 (citing, *e.g.*, *Irizarry v. Catsimatidis*, 722 F.3d 99 (2d Cir. 2013); *Browning v. Ceva Freight, LLC*, 885 F. Supp.2d 590 (E.D.N.Y. 2012); *Velu v. Velocity Express, Inc.*, 666 F. Supp.2d 300 (E.D.N.Y. 2009); *Bynog v. Cipriani Group, Inc.*, 1 N.Y.3d 193, 770 N.Y.S.2d 692, 802 N.E.2d 1090 (2003) ("*Bynog*")). As the *Hart* court noted, the New York Court of Appeals in *Bynog* identified the following five factors for determining control under the common law test:

(1) "[w]hether the worker ... worked at his/ her own convenience;"
(2) "[w]hether the worker ... was free to engage in other employment;"
(3) "[w]hether the worker ... received fringe benefits;"

(4) "[w]hether the worker … was on the employer's payroll;" and
(5) "[w]hether the worker … was on a fixed schedule."

Hart at *16. These factors are not exhaustive, however, and New York courts often consider additional factors as well. *See id.* (citing cases considering, among other things, requirements to wear a uniform and to follow company procedures, employer's authority to decide the timing and selection of jobs, employer's right to fire employee, and existence of central dispatch system).

The "overarching issue" under the common law test is the degree of control exercised by the purported employer. *Id.* at *17.

Application In Hart

In *Hart*, the plaintiffs were exotic dancers who alleged that the strip club where they worked, as well as related corporate entities, had violated the FLSA and NYLL by, among other things, failing to pay them minimum wage. A main issue in the case was whether the plaintiffs were "employees" under the FLSA and NYLL and thus covered by those statutes; the defendants claimed that the plaintiffs were independent contractors, not employees. After applying the "economic realities" test with respect to the FLSA and the "common law" test with respect to the NYLL, the court held that the plaintiffs were indeed employees under both statutes.

Under the Court's analysis, every "economic realities" factor but one weighed in favor of the plaintiffs. First, the club exercised "significant control" over the plaintiffs by, among other things, regulating their behavior while in the club, including things like chewing gum, attitude, and cell phone use, (ii) setting requirements regarding when the plaintiffs could be scheduled to work, (iii) setting procedures for them to check in and out of the club, (iv) setting a range of fees that they were required to pay, (v) imposing a strict dress code, and (vi) regulating the method and manner in which the plaintiffs could dance and their floor conduct. Additionally, it was the club, not the plaintiffs, that controlled the way the club operated, for example by being in charge of advertising, hiring dancers, setting prices, providing sound and light, setting the club's theme, and setting limits regarding to what music the plaintiffs could dance. The club also managed certain aspects of the plaintiffs' lives, such as by instructing certain dancers to lose weight if they wished to continue to perform at the club.

Second, the club made a far greater investment than the plaintiff dancers and exercised "a high degree of control over" the plaintiffs' opportunities for profit where it was the defendants' responsibility to set the club's location and business hours; determine aesthetics and décor; pay wages to staff; pay for sound and light equipment, furniture, repairs, maintenance, and supplies; provide advertising for the club; and spend millions in operational fees. The plaintiffs, in contrast, were merely responsible for paying for their clothes and makeup, paying a "House Fee" for performing at the club nightly, and tipping the supervising "house mom," management, and the DJ.

With respect to the third *Bynog* factor, the Court pointed out that the club did not require dancers to have any formal dance training or experience as a stripper and rejected the defendants' argument that dancers' efforts to cultivate customers rose to the level of "skilled" work.

The fourth "economic realities" factor — "the permanence or duration of the working relationship" — was the only one that weighed in favor of the defendants. Dancers at the club had no specified end date or contract-completion date and were free to be employed elsewhere. However, this factor was "entitled to only modest weight," the Court noted, pointing out that the plaintiffs' freedom to work elsewhere and lack of permanent status was no different from that of many other workers who are undeniably employees under the FLSA, such as waiters, ushers, and bartenders.

Fifth, the Court rejected as "totally unpersuasive" the defendants' argument that the club's restaurant, bar, and televisions attracted customers: "No reasonable jury could conclude that exotic dancers were not integral to the success of a club that marketed itself as a club for exotic dancers."

Having determined that the plaintiffs were employees under the FLSA, the Court then turned to the plaintiffs' status under the NYLL. It held that the first common law test *Bynog* factor weighed in favor of the plaintiffs given that, if dancers did not show up to perform at the club at least three days a week, the club had the discretion to discipline them. The second, third, and fourth factors, however, weighed in favor of the defendants given that (i) dancers were permitted to work elsewhere; (ii) they did not receive health, retirement, or similar benefits from the club, and (iii) they were never on the club's payroll. Nonetheless, the Court held, these factors were entitled to only "modest weight." For example, dancers did not receive benefits or W-2s because the club treated them as independent contractors. Thus, "[t]o assign this factor much weight would effectively allow any employer to control, under New York law, a worker's status simply by labeling her an independent contractor and denying her employee benefits."

Noting that New York courts look beyond the five *Bynog* factors, with control being the most important consideration, the Court held that the record reflected the club's "substantial control" over the plaintiffs through written guidelines (until February 2010); threats of disciplinary action; fines; standards for dancer conduct, dress, and performance style; and the setting of minimum prices to be charged to customers for performances. The Court held that, whether these indicia of control were viewed separately or in combination with the first and fifth *Bynog* factors, they served to "comfortably establish employee status under the NYLL."

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