

Fifth Circuit Holds Directional Drillers Are Independent Contractors

Article By:

Andrew P. Burnside

Greg Guidry

Ellen C. Rains

The U.S. Court of Appeals for the Fifth Circuit recently held that a group of directional driller consultants were independent contractors, not employees, in large part due to their highly specialized skills, degree of control over their own projects, and ability to control their profits and analyzed losses. In [Parrish, et al. v. Premier Directional Drilling, L.P.](#), No. 17-51089 (February 28, 2019), on appeal from the U.S. District Court for the Western District of Texas, the Fifth Circuit overturned the district court's award of summary judgment to the plaintiffs, citing the five factors of analysis set forth in the Supreme Court of the United States' decision in *United States v. Silk*, 331 U.S. 704 (1947).

Background

In May 2016, the plaintiffs filed a collective action under the Fair Labor Standards Act (FLSA) seeking unpaid overtime from Premier Directional Drilling, L.P. (Premier), which specializes in directional drilling for oil. Directional drilling is the process of drilling a well down a path that begins vertical to the surface, but then drills at an angle horizontal to the surface at what is known as a "kickoff point." Premier used both directional driller consultants (DDs) and measurement-while-drilling consultants (MWDs). An MWD takes measurements during the directional drilling process that are provided to the DD and provide a basis for the DD's work. A DD advises the company's driller on how best to effectuate the well plan that involves a directional drill, but because it is "contrary to Premier's policy to do so, DDs generally do not operate the drill."

The plaintiffs were all DDs working for Premier that were classified as independent contractors (ICs). Some of Premier's DDs were classified as employees and some as independent contractors. The plaintiffs alleged that they had been misclassified as ICs, and should have been classified as employees under the FLSA.

In July 2017, the parties filed cross-motions for summary judgment. In November 2017, the district court granted the plaintiffs' motion and denied Premier's motion. The district court used the five factors relating to employment-status determination, described by the Supreme Court in *United*

States v. Silk. Based on all the factors, the district court concluded that the plaintiffs were employees: “While there are certainly facts supporting the classification of [p]laintiffs as [ICs], the fact that employee DDs and IC DDs were treated the same, and supervised in the same manner, with no appreciable differences other than how they were compensated, factors most heavily in the [c]ourt’s analysis here.” Notably, the court did not make a willfulness finding, but it did apply the three-year period for calculating damages.

Following the district court’s decision, Premier appealed to the Fifth Circuit, challenging the three-year limitations period for awarding damages and arguing that no employer-employee relationship had existed with the plaintiffs.

***Silk* Factors**

In FLSA actions, courts primarily use the *Silk* factors to analyze whether an employment relationship exists. The Fifth Circuit stated that “[t]hose ‘five non-exhaustive factors’ are ‘(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.’”

Although no single factor is determinative, the court noted that “an assessment of the “economic dependence” of the putative employees [is] the touchstone for this totality of the circumstances test.”

Fifth Circuit Finds Directional Drillers Are Independent Contractors

Applying a de novo review, and looking at the first factor—“the degree of control exercised by the alleged employer”—the Fifth Circuit noted that this control factor favored independent contractor status. Premier argued that DDs were “free to accept or reject any project” and controlled their own work. The plaintiffs, by contrast, argued that Premier required DDs to comply with company policies and procedures, including one requiring DDs to obtain “special permission” to leave the work site. The court pointed out that Premier did not dictate how the plaintiffs completed their directional drilling calculations. With respect to their work schedules, DDs did not have assigned shifts and did not have to accept projects. On occasion, they turned down projects without any negative repercussions. Thus, the court found that the DDs exercised sufficient control over their work for this factor to weigh in favor of independent contractor status.

The Fifth Circuit ruled that the second factor—“the relative investments of the worker and the alleged employer”—favored employee status (a finding in agreement with the district court), but it “accord[ed] this factor little weight, in light of the nature of the industry and the work involved.” Here, Premier invested more money than the individual plaintiffs. Premier supplied MWDs to provide DDs with the required data to effectuate the well plan, which was critical to the DDs’ work. However, the court disregarded this factor in light of the other record evidence.

The district court had held that the third factor—“the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer”—weighed in favor of employee status. Premier relied on the plaintiffs’ tax returns, in which they reported business profits and expenses. Some of the claimed expenses and the profits were significant, although no plaintiff had lost money working with Premier. The Fifth Circuit highlighted Premier’s argument regarding a particular plaintiff’s other business venture, a goat farm, which offset \$190,000 in profits the plaintiff earned from Premier. The Fifth Circuit ruled that it could consider any losses sustained by the plaintiffs’ non-Premier work, such

as the goat farm, as part of the overall analysis of how dependent the plaintiffs were on Premier. The court held that the plaintiffs had enough control over their profits and losses for the third factor to support independent contractor status.

The fourth factor—“the skill and initiative required in performing the job”—was held by the district court to be “neutral,” but the Fifth Circuit found it favored independent contractor status. The court particularly noted that the plaintiffs were highly skilled personnel who had a great deal of discretion over their own tasks. The court also found that employee DDs and the plaintiffs had differences between them, such as the ability to turn down projects and the manner in which they requested time off. In weighing this factor, however, the court found that Premier had not shown strong evidence of the plaintiffs’ initiative compelling nonemployee status.

Finally, both the district court and the Fifth Circuit held that the last factor—“the permanency of the relationship”—favored independent contractor status. Citing Fifth Circuit precedent, the court found that few of the plaintiffs had worked for Premier for more than 10 months. The court also noted the plaintiffs’ skillset made them marketable in the industry and that “[s]uch a valuable skillset shows how the permanency of the relationship may, in reality, be not all that permanent.” As a result, the Fifth Circuit found that the plaintiffs were not tied to Premier, which favored independent contractor status.

Because the *Silk* factors are non-exhaustive, the Fifth Circuit also looked to the following additional factors: (1) the presence of an express agreement, (2) what the industry standard is for DDs, and (3) the purpose of the FLSA. The Fifth Circuit agreed with the district court’s determination that the existence of a contractual agreement should not be relied on as a factor. The Fifth Circuit stated that “the focus is on economic reality, not contractual language.” Next, the court considered the industry standard for DDs and held that the issue was best analyzed as a part of the totality of the circumstances, not as a separately analyzed factor. Lastly, the court rejected Premier’s argument that the FLSA was designed only to protect low-wage employees unlike the plaintiffs.

When reviewing all of these factors in the aggregate, the Fifth Circuit ultimately vacated the judgment of the lower court (rather than remanding), and rendered judgment for Premier.

Key Takeaways

Though this decision is favorable for employers in holding that they can classify highly skilled workers as both employees and independent contractors under the FLSA—and is potentially helpful in defending claims involving similar facts—employers should nevertheless consider whether to have workers of different classification and pay perform the same work since courts, federal and state agencies, and other authorities enforcing employment or tax laws may find that practice supports a finding of employee status. Employers should also understand that each case involving independent contractor misclassification will be dependent on the unique facts and circumstances of that case, and that small differences in the facts may result in different results.

© 2025, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., All Rights Reserved.

National Law Review, Volume IX, Number 84

Source URL: <https://natlawreview.com/article/fifth-circuit-holds-directional-drillers-are-independent-contractors>

