Published on *The National Law Review* https://natlawreview.com

Are Non-Emergency Transport Providers Employees or Independent Contractors? Jury Questions Exist, Eighth Circuit Holds

Article By:

David R. Golder

Reversing summary judgment in favor of the U.S. Department of Labor (DOL), the Eighth Circuit has held that jury questions exist as to whether the defendant employed drivers who provide non-emergency medical transport services or whether it properly classified those drivers as independent contractors. *Walsh v. Alpha & Omega USA, Inc.*, 2022 U.S. App. LEXIS 19431 (8th Cir. July 14, 2022). The Eighth Circuit has jurisdiction over the federal courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

Background

Alpha & Omega USA, Inc. d/b/a Travelon ("Travelon") engages drivers for non-emergency transportation of patients to and from medical appointments (known as special transportation services (STS)). Travelon provides vans and electronic tablets to the drivers and pays for some of their costs, such as internet service and vehicle insurance. Customers pay Travelon for the transportation services, which in turn distributes those payments to the drivers. However, drivers must pay Travelon a 35% commission for all weekly payments totaling $300 or more per week and a variety of expenses such as fees for dispatch services, insurance, vehicle lease and maintenance, and tablet rental. These fees are how Travelon generates its revenue.

Travelon assigns trips to drivers on the electronic tablets through an application called "MediRoutes," which monitors the drivers' locations and availability. Although Travelon establishes the hours during which dispatch services are available (M-F 5:00 a.m.-6:00 p.m., Sa 5:00 a.m.-4:00 or 5:00 p.m.), drivers may set their own schedules within these hours.

The company classifies and pays the drivers as independent contractors but, following an investigation, the DOL's Wage & Hour Division concluded that the drivers were in fact employees and sued the company on behalf of 21 drivers for minimum wage, overtime, and recordkeeping violations. On cross-motions for summary judgment, the trial court agreed with the DOL that the drivers were employees and awarded them both backpay and liquidated damages. Travelon appealed, and the Eighth Circuit reversed.

The “Economic Realities” Test

The FLSA guarantees a minimum wage for all hours worked and overtime for any hours worked over 40 per week for all covered, non-exempt employees. As the U.S. Supreme Court first noted more than 70 years ago, individuals who perform services for a company as an independent contractor are not afforded the FLSA’s minimum wage and overtime protections because they are not “employees.” The FLSA, however, says little about how to distinguish an employee from an independent contractor.

Over the years, both the courts and the DOL have developed similar, yet somewhat varying, standards and factors that should be used for determining whether an individual is an employee or an independent contractor. The standards developed seek to reveal the “economic reality” of the relationship between the employer and the individual, and are derived from six, non-exclusive factors originally presented by the Supreme Court in two cases on the same day, *United States v. Silk*, 331 U.S. 704 (1947), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

The Eighth Circuit has concluded (without actually deciding, it notes) that the economic realities test is the proper method for determining whether an individual is an employee or an independent contractor, and applies a six-factor test that closely mirrors the Supreme Court’s original version. Those six factors are:

(1) the degree of control exercised by the alleged employer over the business operations;

(2) the relative investments of the alleged employer and employee;

(3) the degree to which the alleged employee’s opportunity for profit and loss is determined by the employer;

(4) the skill and initiative required in performing the job;

(5) the permanency of the relationship; and

(6) the degree to which the alleged employee’s tasks are integral to the employer’s business.

The Circuit Court Decision

In reversing the trial court’s grant of summary judgment, the Eighth Circuit concluded that jury questions exist as to whether the drivers are employees or are independent contractors, particularly with respect to factors one (the employer’s degree of control), three (the drivers’ opportunity for profit or loss), and six (whether the drivers are integral to the employer’s business).

With respect to the employer control issue, the trial court concluded that Travelon exercised significant control by assigning trips, pressuring drivers to accept trips, regulating the times during which drivers could provide services, requiring them to obtain permission to take breaks, tracking them through GPS location monitoring, and requiring them to submit travel logs. However, the Court of Appeals noted that both the company’s owner and its long-time dispatcher testified that drivers were allowed to turn down trips without penalty. Moreover, a driver who claimed he felt pressured to accept assignments admitted that on occasion he declined trips without repercussion. Furthermore, the Court of Appeals found that drivers were able to, and did in fact, set their own schedules within the available service hours and could change their schedules daily. Additionally, the fact that the

company limited the available service hours was more an indication of “common sense” rather than control over the drivers, given that the drivers were providing *non-emergency* transportation services that rarely would be required outside of these hours.

As to the “opportunity for profit or loss” factor, Travelon set the drivers’ rates and facilitated trip assignments through the MediRoutes app, thereby limiting to some extent the drivers’ opportunity for profit or loss. Drivers, however, were able to earn additional income by, for example, transporting multiple customers at a time to make trips more profitable and by using their own vehicles and tablets rather than leasing them from the company. In addition, competing testimony existed over whether drivers could provide transportation services independent of Travelon, even while using Travelon’s vans.

As to the final factor – whether the drivers are integral to Travelon’s business – the DOL asserted that Travelon refers to itself as an STS provider, that is registered with Minnesota as an STS provider, and that its customers depend on the drivers to perform services. The Eighth Circuit, however, found that Travelon distinguishes itself from actual STS providers, instead describing itself as an “intermediary company that supports the drivers’ transportation businesses” by leasing vehicles and equipment to drivers and selling dispatch subscriptions. Thus, Travelon’s revenue is generated entirely from commissions and fees charged to the drivers, not from the fees paid by the passengers as would be the case with traditional STS providers.

Accordingly, the Court of Appeals concluded questions of material fact remain for a jury as to whether these three factors favor a finding of an employer-employee or employer-independent contractor relationship. Thus, the summary judgment ruling was reversed and the case remanded for trial.

National Law Review, Volume XII, Number 200