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

Misclassified Maintenance Worker Figures to Clean Up: Judge Holds He Was Not an Independent Contractor

Article By:

Litigation Practice Group

Staffing flexibility and efficiency. Reduced liability for federal and state employment laws. Cost savings. There are many reasons why companies use independent contractors. But the bottom line is that these benefits, particularly in today's economy, can make the difference between remaining competitive in the market place and falling behind. As a result, many employers push the envelope, classifying individuals as independent contractors when they are truly regular employees. Government agencies like the U.S. Department of Labor (the "DOL") and the plaintiffs' bar have taken notice and are challenging employers who break the rules. A recent case in the Northern District of Illinois, *Bulaj v. Wilmette Real Estate & Mgmt. Co.*, N.D. Ill. Oct. 21, 2010, highlights some of the mistakes employers make and the risks associated with misclassifying employees as independent contractors.

Bulaj worked for Wilmette, a property management firm, for over 12 years as a building maintenance worker. After losing his job in 2008, Bulaj filed a lawsuit claiming that he worked 66 hours per week and that Wilmette failed to pay him overtime, in violation of the Fair Labor Standards Act (the "FLSA") and Illinois state law. The Court granted summary judgment to Bulaj, finding that he was improperly classified as an independent contractor. Unable to dispute the key allegations, Wilmette essentially had no defense to the allegations.

While some of the mistakes Wilmette made suggest that the company made no real effort to comply with the law, the case is nonetheless instructive. Following a six-factor test used by the Seventh Circuit Court of Appeals (Illinois, Indiana and Wisconsin), the Court cited the following factors in finding Bulaj to be an employee rather than an independent contractor:

· Bulaj was engaged in the core work of Wilmette's business. As a maintenance worker charged with the upkeep and repair of the buildings managed by Wilmette, Bulaj was doing what the company does, as opposed to a graphic designer, for example, engaged to create a new corporate logo. As the judge noted, Wilmette would likely lose customers if the buildings it managed fell into disrepair because Bulaj did not do his job.

· Wilmette treated Bulaj like an employee, setting his schedule, monitoring the quality of his work, and disciplining him whenever his work fell below the company's expectations. And while Bulaj came to the position with prior experience in skilled trades like carpentry and plumbing, much of the

work he performed was basic janitorial work that did not require any special training or abilities.

· Bulaj had no opportunity for profit or loss as part of the engagement, as he received a regular salary every two weeks.

· Bulaj worked in the same capacity for more than 12 years, during which Wilmette withheld federal and state taxes from his paychecks and reported his earnings on a W-2 rather than a 1099 Form.

Employers would do well to recognize that loyalty and tenure mean little when employment relationships end. Oftentimes, contractors themselves are fine with being classified as such—until something goes wrong and the relationship ends. Bulaj, for example, worked in this capacity for 12 years—apparently without complaint or concern—until he was fired in 2008. Then he sued. Employers should never assume that their classification decisions are risk free simply because nobody has objected to them or filed suit in the past. Even a long-term, model employee may turn around and sue when the relationship sours or ends. There are no guarantees.

What to do? There is a series of factors that one can evaluate and assess to determine whether someone should be classified as an employee or independent contractor. Because the potential liability can be significant, it is best to be proactive and review any questionable classification decisions before the DOL comes calling or a lawsuit is filed. A simple audit can be conducted for far less than it would cost to respond to a lawsuit. Short of that, there are several steps companies can take, including:

· **Put it in writing.** Make sure you enter into a written agreement with anyone who will be performing services as an independent contractor, and include in that agreement all the appropriate bells and whistles.

· **Use "real" contractors.** If the individual has his or her own business, with an office, company name, business cards and the like, the greater the likelihood that person will not be viewed solely as your employee. By the same token, do not preclude him or her from working for other companies. The contractor should have his or her own tools; if you are providing the tools and supplies, or reimbursing him or her, that suggests the person is an employee, not a contractor.

· **Keep your distance.** Although you can and should insist upon a certain level of service, refrain from trying to oversee the day-to-day functioning of contractors as far as the methods used to reach the end result for which you contracted with them. Do not insist they perform the work on your premises, or work specific hours. Do not discipline them or give them formal performance evaluations.

· **Compensate appropriately.** Structure the arrangement so the worker has an opportunity for profit or loss rather than paying an hourly rate or salary.

· **Use common sense.** Do not give them business cards for your company. Do not invite them to your employee-only holiday party. Issue a 1099, rather than a W-2. Do not retain former employees as contractors and do not allow the agreement to renew automatically at the end of each term.

· **Be realistic and trust your gut.** If the contractor will be doing "the business of your business" and there really is no way around it, there simply may not be any way to use the individual as a contractor without violating the law. The question then becomes how much risk you can tolerate.

National Law Review, Volume I, Number 31