Colorado Supreme Court: Independent Contractor Status Dependent on Totality of the Circumstances

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The Colorado Supreme Court ruled yesterday that determining whether a worker is "customarily engaged in an independent trade, occupation, profession, or business" in order to be deemed an "independent contractor" under Colorado's unemployment insurance benefits laws requires an evaluation of the totality of the circumstances surrounding the relationship between the worker and the putative employer. In two companion cases, the Court rejected a stringent, single-factor test for determining whether a worker is an employee or independent contractor for purposes of unemployment insurance tax liability and benefits. Reversing decades of case law, the Court ruled that no single factor is dispositive of an employer-employee relationship. Instead, courts and agencies may consider nine factors enumerated in a statute pertaining to independent contractor agreements, as well as "any other information relevant to the nature of the work and the relationship between the employer and the individual." *ICAO v. Softrock Geological Servs.*, 2014 CO 30; *Western Logistics, Inc. v. ICAO*, 2014 CO 31.

Putative Employer Must Prove Independent Contractor Status

Under the Colorado Employment Security Act (CESA), employers must pay unemployment taxes on wages paid to employees, but not on compensation paid to independent contractors. Similarly, employees are entitled to collect unemployment insurance benefits under the CESA whereas independent contractors are not. Putative employers bear the burden of proving that workers are independent contractors, not employees, for purposes of the CESA.

In order to establish that a worker is an independent contractor, a putative employer must prove that the individual (i) is free from control and direction in the performance of his or her service, and (ii) is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. C.R.S. § 8-70-115(1)(b). The CESA does not define what must be shown to satisfy the second part of this test.

2012 Court of Appeals Decisions on the Single-Factor Test

For years, the Colorado Division of Employment and Training and most courts have applied a single-factor test, rejecting claims that workers are independent contractors, and thus ineligible for unemployment insurance benefits, where they do not provide similar services to others while working for the putative employer. It has not mattered, for instance, whether the workers were directed or controlled by the putative employer, whether they maintained separate business entities, whether they set their own hours, whether they were trained by the putative employer, whether they were paid an hourly or fixed rate, whether they provided their own equipment, whether they had their own offices, or whether they advertised their own businesses. If they did not provide similar services to others while working for the putative employer, they were almost always deemed to be employees for purposes of receiving unemployment insurance benefits.

In 2012, one division of the Colorado Court of Appeals reaffirmed this decades-old case law effectively mandating a single-factor test. *Western Logistics, Inc. v. ICAO*, 2012 COA 186. Another division of the Court of Appeals, however, rejected the stringent, single-factor test, holding for the first time that agencies and courts must instead apply a multi-factor test to determine whether an individual "is customarily engaged in an independent trade, occupation, or business related to the service performed." *Softrock Geological Servs. v. ICAO*, 2012 COA 97. In *Softrock*, the Court of Appeals stated that the factors to be considered in the "customarily engaged" inquiry are the nine factors set forth in statutory section 8-70-115(1)(c), which defines evidence that must be included in an independent contractor agreement to create a presumption that a worker is an independent contractor rather than an employee. In March 2013, the Colorado Supreme Court agreed to hear the appeals in both the *Western Logistics* and *Softrock* cases in order to finally determine the appropriate test for deciding whether a worker is customarily engaged in an independent business for purposes of the CESA.

Single-Factor Test No Longer Dispositive

In its decision yesterday, the Supreme Court concluded that the appropriate test for courts and agencies to apply is a totality of the circumstances test that looks at all the relevant factors bearing upon the relationship between a worker and his or her putative employer. The Court rejected the stringent, single-factor test used in *Western Logistics* and numerous other cases, finding that relying on a single factor – *i.e.*, whether a worker provides similar services to others at the same time he or she works for the putative employer – is unfair to putative employers because it leaves the independent contractor determination up to the unpredictable

decisions of workers. For instance, it ignores the putative employer's own intent regarding the working relationship, and also ignores whether workers even desire to find other work in the same field.

In its decision, the Court broadly adopted the Court of Appeal's approach in *Softrock*, concluding that the statutory factors should be considered in determining whether a worker is engaged in an independent business under the CESA. However, the Supreme Court went even further, holding that other factors may also be relevant to this determination. The Court rejected "a rigid check-box type inspection," and opted instead for a fact-specific inquiry into the nature of the working relationship between a worker and his or her putative employer where no single factor is dispositive of the worker's status.

Interestingly, just last week, yet another division of the Colorado Court of Appeals anticipated the Supreme Court's ruling in these two cases, concluding that virtually any relevant circumstances may be considered in weighing independent contractor status. The decision rejected both the *Western Logistics* single-factor test and the *Softrock* multi-factor test that limited the determination to just those factors specifically delineated in statute. See *Visible Voices, Inc. v. ICAO*, 2014 COA 63.

Many Factors May Determine Independent Contractor Status

The Supreme Court's new totality of the circumstances test is very helpful to putative employers because it allows them to prove independent contractor status based on the entire working relationship between the worker and the putative employer. A putative employer seeking to prove that a worker is an independent contractor engaged in an independent business or trade may now produce evidence bearing upon the nine factors set forth in statute, showing that the putative employer did *not*:

1. Require the worker to work exclusively for the putative employer; except that the worker may choose to work exclusively for that business for a finite period of time specified in the independent contractor agreement;
2. Establish a quality standard for the worker; except that the putative employer can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the worker as to how the work will be performed;
3. Pay a salary or hourly rate but rather a fixed or contract rate;
4. Terminate the worker during the contract period unless the worker violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
5. Provide more than minimal training for the worker;
6. Provide tools or benefits to the worker; except that materials and equipment may be supplied;
7. Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;
8. Pay the worker personally but rather makes checks payable to the trade or business name of the worker; and
9. Combine the putative employer's business operations in any way with the worker's business, but instead maintains such operations as separate and distinct.

The putative employer may also invoke other evidence not set forth in the statute, but nonetheless relevant to whether the worker maintains an independent trade or business. As suggested in recent cases, these factors include, but are not limited to, whether the worker:

- Maintains an independent business card, listing, address, or telephone;
- Has a financial investment in the project or risks suffering a loss;
- Uses his or her own equipment on the project;
- Sets the price for performing the project;
- Employs others to complete the project; or
- Carries liability insurance.

Although we have yet to see how the courts and agencies will apply this new totality of the circumstances test, putative employer should try to satisfy as many of these factors as possible in order to establish that workers are independent contractors, not employees. Putative employers should also continue to use independent contractor agreements that satisfy all the statutory factors needed to create a presumption that workers are independent contractors. However, there is now no limit to the types of evidence putative employers may invoke to establish independent contractor status, and putative employers are no longer bound by the outdated rule that workers must always offer their services to others at the same time the work for the putative employer in order to be considered independent contractors.

If you have any questions about using independent contractors or satisfying this new test, please contact me at (303) 295-8121 or at bjwilliams@hollandhart.com, or feel free to reach out to another member of our Labor and Employment Practice Group.