Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

New Jersey Adopts the "ABC" Test for Independent Contractors and OSHA Announces New Reporting and Recordkeeping Rules for U.S. Employers

Under Test Endorsed by New Jersey Supreme Court, Employers Bear Burden of Proving That Workers Are Independent Contractors

In a recent decision with significant implications for New Jersey employers, the New Jersey Supreme Court held in *Hargrove v. Sleepy's* that the so-called "ABC" test governs the classification of employees and independent contractors under two key New Jersey employment statutes: the Wage Payment Law ("WPL"), which governs the timing and mode of payment of employee wages, and Wage and Hour Law ("WHL"), which obligates employers to pay minimum wages and overtime.

In its decision, which it issued on January 14, 2015, the Court declined to adopt the test used to determine employee-independent contractor classifications under the Fair Labor Standards Act ("FLSA") – the arguably more nebulous "economic realities" test – on the basis that the ABC test provides greater predictability and income security for workers. As a result, employers must separately analyze whether to classify workers as employees or independent contractors under the WPL and WHL, on the one hand, and under the FLSA, on the other.

The ABC test begins with the presumption that a worker is an employee, thereby placing on the employer the burden of proving otherwise. In order to do so – *i.e.,* in order to demonstrate that the worker is actually an independent contractor – the employer must satisfy all three prongs of the ABC test. Specifically, it must show that:

Jan
2015

1. The worker "has been and will continue to be free from control or direction over the performance" of the work he or she is responsible for;

2. Such work "is either outside the usual course of business for which [it] is performed, or that [it] is performed outside of all the places of business of the enterprise for which [it] is performed"; and

3. The worker "is customarily engaged in an independently established trade, occupation, profession or business."

Dramatic 2015 Expansion of OSHA's Recordkeeping Rule

Effective January 1, 2015, OSHA's Recordkeeping Rule applies to a dramatically broader range of employers throughout the United States. Industries that are newly required to keep records of occupational injuries and illnesses on an OSHA 300 Log include bakeries, automobile dealers, automotive parts stores, lessors of real estate, activities related to real estate, facilities support services, services to buildings and dwellings, ambulatory health care services, specialty food stores, beer, wine, and liquor stores, and commercial and industrial machinery and equipment rental and leasing establishments.

Further, ALL EMPLOYERS, including those that are still exempt from OSHA's expanded Recordkeeping Rule (such as legal services and offices of physicians and dentists), must now report any work-related hospitalization of any employee and have other expanded OSHA reporting obligations.

Previously, all employers had to report all work-related fatalities and all work-related hospitalizations of three or more employees to OSHA.

Now, all employers must report the following events to OSHA:

- All work-related fatalities
- All work-related in-patient hospitalizations of one or more employees
- All work-related amputations
- All work-related losses of an eye

Employers must report work-related fatalities within 8 hours of finding out about them and for any in-patient hospitalization, amputation, or eye loss, employers must report the incident within 24 hours of learning about it.

For further information, we are providing links to two OSHA FACT SHEETS concerning these developments:

https://www.osha.gov/recordkeeping2014/OSHA3746.pdf

https://www.osha.gov/recordkeeping2014/OSHA3745.pdf

Guidance for Employers

In the wake of *Hargrove*, New Jersey employers must carefully scrutinize their policies, procedures, and contracts – including those with referral agencies – to ensure that, under the ABC test, each of their workers is properly classified. Failure to do so will expose employers to costly litigation and penalties under the WPL and WHL. For guidance on how to efficiently and effectively review and, if necessary, revise existing policies, procedures, and contracts, employers should consult counsel.

Our Employment & Labor Law Group can also counsel employers around the nation on how best to fulfill their new (or existing) OSHA recordkeeping and reporting requirements. Please do not hesitate to contact us if you have any questions or if we can be of assistance.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

David I. Rosen, Esq.
Chair, Employment and Labor Practice Group
drosen@sillscummis.com | (973) 643-5558

Galit Kierkut, Esq.
Client Alert Editor
Member, Employment and Labor Practice Group
gkierkut@sillscummis.com | (973) 643-5896

Charles H. Kaplan, Esq.
Client Alert Author
Member, Employment and Labor Practice Group
ckaplan@sillscummis.com | (212) 500-1563