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Insights

Beware of the Illinois Employee who Insists on Independent Contractor Status

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Imagine that your company contracts with a salesperson, consultant, or other professional, who insists on an independent contractor arrangement. He wants to be free to accept other work opportunities. Your company accommodates by paying a daily rate for services, setting up a payment-upon-invoicing system, paying as a 1099 contractor, and signing a written contract stating your agreement that he is an independent contractor.

If that worker provides services at your place of business that are essential to your business, he is an employee under the Illinois Wage Claim Act (Wage Act). If he's not paid timely and completely, he will have a Wage Claim, not just a simple contract claim. The distinction is significant: the Wage Act imposes penalties of 5% per month (60% annually) from the date the unpaid wages were due, plus attorneys' fees. Additionally, any individual owners, directors, officers, or managing agents who "knowingly permit" the violation may be held personally liable – criminally and civilly. *See Stafford v. Puro*, 63 F.3d 1436 (7th Cir. 1995); *Johnson v. Western Amusement Corp.*, 510 N.E.2d 991, 991-94 (1987) (executive liable for failing to pay union benefits after company went bankrupt).

A recent decision by the Illinois Court of Appeals highlights that the nature of the arrangement – and not the parties' intentions – will determine whether a worker is an employee eligible to file a Wage Claim. The court in *O'Malley v. Udo*, 2022 IL App (1st) 200007 (Jan. 14, 2022), allowed a Wage Claim despite extensive efforts by both the consultant and the company to establish an independent contractor relationship when the consultant joined the company. The consultant refused an "employment" agreement, declined an offer of "employment," and insisted on a contractor relationship. They agreed that the company would pay the consultant's invoices at $1,000 per workday plus expense reimbursement. He was paid as a 1099 contractor. The company did not control, direct, or supervise the consultant's work. Both the company and the consultant made clear in their written agreement that they intended a contractor relationship. The consultant worked primarily from his Evanston home and not the company's home office in New York City, but he also traveled to marketing events for the company and was introduced as a manager.

When the company couldn't pay him, the consultant decided he was an employee after all and filed a claim under the Wage Act. The trial court relied on the expressed intention of the parties and found that the consultant was an

independent contractor who had no claim under the Wage Act. The Court of Appeals disagreed, noting that "a plaintiff's status under the Wage Act is not controlled by how the parties referred to themselves in their agreement." *O'Malley*, ¶ 48.

The language of the Wage Act defines employee expansively to include "any individual permitted to work by an employer in an occupation" and only excludes workers who meet all three of the following criteria:

> (1) has been and will continue to be free from control and direction over the performance of his work, both under his contract of service with his employer and in fact; and
> (2) performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees; and
> (3) is in an independently established trade, occupation, profession or business.

820 ILCS 115/2(1), (2), (3). The consultant could not satisfy either option of subsection (2), so he was an employee entitled to recover under the Wage Act. *O'Malley*, ¶ 58.

Work in "the usual course of business" for purposes of the first alternative under subsection (2), means services "necessary to the business of the employing unit" rather than "merely incidental" to that business. *O'Malley*, ¶ 51. The consultant was developing a financial product that was the primary business of the company and was soliciting investors for that product, among other business of the company. The consultant was thus performing work that was "necessary to" and therefore in the usual course of that business and not "outside the usual course of business." 820 ILCS 115/2(2).

The company also could not meet the second alternative for subsection (2) by showing that he performed work "outside all of the places of business of the employer." 820 ILCS 115/2(2). Although the consultant didn't work from the company's home base in New York City, he presented at company roadshows and traveled to meetings to pitch the company and its products, where they presented him as the managing director of the company. These locations were deemed to be "places of business" of the company because he performed necessary work there and was represented to others as an employee of the company in those locations. *O'Malley*, ¶ 57.

With its 60% annual penalty, personal liability of those who knowingly permit violations, and the employees' 10-year window to file suit, the Wage Act sounds a shrill warning to employers who would attempt a workaround, even when the worker insists on the independent contractor arrangement.

If you have questions regarding information found in this alert, please contact **Nancy J. Townsend** or another member of our **Employment Law Practice**.