

Employers in Control: Fifth Circuit Sheds New Light on Independent Contractor Test

On February 28, 2019, the U.S. Court of Appeals for the Fifth Circuit issued an employer-friendly opinion, clarifying the level of “control” an employer may exercise over its independent contractors under the Fair Labor Standards Act (FLSA). The ruling comes as a boon to many employers seeking clarity on whether — and to what extent — they may supervise and apply their policies to independent contractors without converting them into employees.

Background Facts

In 2016, a group of independent contractors working as directional drilling consultants (DD) at Premier Directional Drilling brought a lawsuit against the company, claiming they were improperly classified and should be considered employees. *See Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369 (5th Cir. 2019). The plaintiffs in this lawsuit alleged that as a result of this misclassification, they failed to receive overtime compensation under the FLSA. *Id.*

Significantly, the plaintiffs noted that the company classified some DDs as independent contractors and some as employees, despite having “essentially the same job duties.” *Id.* The employer’s vice president agreed, “the only difference between an [Independent Contractor DD] and an employee [DD] ... is their ability to turn down work [a]nd negotiate their pay.” *Id.* Some of the plaintiffs had previously been employed as DDs, classified as employees, but were converted to independent contractors in 2015 due to “a drastic downturn in the oilfield industry and [the employer] was forced to significantly reduce its workforce ...” *Id.*

Both employee and Independent Contractor DDs were told where to work, when to work, and what equipment could be used. *Id.* Additionally, all DDs were required to undergo mandatory safety training, comply with the employer’s drug and alcohol policy, ensure they had fire retardant clothing, and to confirm that they were “supervised by a coordinator, but also perform[ed] their task with little to no intervention.” *Id.* As part of their job duties, DDs advised “the oil company’s driller how best to effectuate the” drilling plan in order to “target oil ‘thousands of yards below ground and up to several miles distant from the drilling rig location.’” *Id.*

While employee DDs were paid a salary plus a day bonus for each day on the job, a car allowance, a per diem, and benefits, independent contractor DDs were paid “by the job, but receive mileage for travel.” *Id.* Both independent contractor DDs and employee DDs could be elevated to a higher pay classification based upon experience, which was a decision made by management. *Id.* Finally, the employer did not use a bidding system to hire contractors; rather, it directly contracted particular contractors by “call[ing] to offer the project” but occasionally the contractors would call and “request work, even if paid less.” *Id.*

Given the similarities in job duties of the employee and independent contractor DDs, the trial court granted summary judgment in favor of the plaintiffs’ claim that they were misclassified as independent contractors. The trial court evaluated each of the “five non-exhaustive factors” used to determine independent contractor status including: “(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.” *Id.* In sum, the trial court found the first and fourth factors (employer’s degree of control and requisite skill) to be neutral, the second and third factors (relative investments and opportunity for profit/loss) in favor of employee status, and the fifth factor (permanence of relationship) in favor of independent contractor status. *Id.* The point “most heavily” weighing into the trial court’s analysis was “the fact that employee DDs and IC DDs were treated the same, and



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supervised in the same manner, with no appreciable differences other than how they were compensated ...” *Id.*

Fifth Circuit's Opinion

On appeal, the Fifth Circuit reversed the ruling of the trial court and rendered judgment in favor of the employer. Specifically, the Fifth Circuit found the first, third, fourth, and fifth factors in favor of independent contractor status, with only the second factor (relative investments) in favor of employee status.

In significant part, the court’s analysis reiterated when evaluating independent contractor status, “the focus is on an assessment of the economic dependence of the putative employees ... **[e]ach [independent contractor factor] must be applied with that ultimate notion in mind.**” *Id.* (emphasis in original). “Stated differently, it is not what [plaintiffs] *could* have done that counts, but as a matter of economic reality what they actually *do* that is dispositive ... The controlling economic realities are **reflected by the way one actually acts.**” *Id.* (internal citations omitted) (emphasis in original).

Degree of Control

With this in mind, the Fifth Circuit turned its analysis to the level of control actually exercised by the employer. The court found that the independent contractor DDs exercised greater control because they worked on a project-by-project basis, and the contractors, on occasion, “turned down projects without negative repercussion.” *Id.*

While plaintiffs argued they were required to comply with company policies and procedures, were prohibited from subcontracting their work, and that the company controlled where and when they needed to report for duty, and provided a drilling plan specifying “what equipment will be at the drill [and] who can operate the drill,” the court did not find this persuasive.

The court noted that the “DDs had to work in concert with the rest of the drilling operation [and] make adjustments to the [drilling] plan given what the drill experiences in real time[.]”

Therefore, the employer “had to know when DDs would be on-site [and] they could not show up at the drill site whenever they pleased.” *Id.*

Further, the court held “although plaintiffs were provided an already-designed [drilling] plan, they made that plan work.” *Id.* The employer “did not dictate how plaintiffs completed the directional-drilling calculations.” *Id.* Submitting their reports in a mandatory format — the Fifth Circuit noted — was simply “good-client service.” *Id.*

Likewise, the Fifth Circuit did not find the employer’s prohibition on subcontracting to be dispositive and noted that “it is not unreasonable for a company to want to hire a specific person. This is especially the situation when the IC is being hired for his advanced skill and specialized expertise.” *Id.*

As for mandatory compliance with the employer’s policies and procedures, the Fifth Circuit found that “requiring everyone working at an oil-drilling site to be educated on safety protocol, and not be under the influence of illegal drugs, is required for safe operations.” *Id.* Indeed, the Occupational Safety and Health Act requires the employer to “furnish ... a place of employment ... free from recognized hazards ... likely to cause death or serious physical harm to [its] employees... In that sense, an IC could be a hazard.” *Id.* Thus, mandatory “safety training and drug testing, when working at an **oil-drilling site**, is not the type of control that counsels in favor of employee status.” *Id.* (emphasis in original).

Relative Investments

After delving deeply into whether the employer actually controlled its contractors’ work, the Fifth Circuit discussed the remaining factors for determining independent contractor status. Specifically, both the trial court and the Fifth Circuit held the second factor (relative investments of the worker and the alleged employer) was in favor of employee status. In this regard, however, the Fifth Circuit gave “this factor little weight, in light of the nature of the industry and the work involved” because “[o]bviously [an oil company] invested more money at a drill site” compared to on-site workers. *Id.*

Opportunity for Profit or Loss

In determining “the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer[.]” the Fifth Circuit noted, “[a]lthough [the employer] had a set pay schedule for ICs based on their experience, plaintiffs made decisions affecting their expenses.” Specifically, independent contractor DDs did not receive any pay from the employer when they were not working on one of its projects, unlike the employee DDs, “who were paid even if they were not working on a project.” *Id.* The Fifth Circuit held that because “the work was on a project-by-project basis ... [t]his counsels heavily in favor of IC status; and, in this instance, it persuasively counsels in favor of it.” *Id.*

Skill and Initiative Required

With regard to the skill and initiative required for the job, the Fifth Circuit found that the independent contractor DDs were highly skilled. The court explicitly “decline[d] to require [independent contractors] to be more skilled than their employee counterparts.” By way of analogy, the Fifth Circuit noted a “company with a highly-skilled general counsel can still hire an outside lawyer as an [IC], even if the general counsel is a more skilled lawyer[. Thus,] in the light of their complicated work, weighs heavily in favor of IC status.” *Id.*

Permanency of Relationship

The fifth and final factor evaluated by the court was “permanency of the relationship” between the employer and putative contractor. Here, the court agreed with the trial court finding this factor weighs in favor of IC status based upon the length of time the plaintiffs worked for the employer. *Id.* Although no bright-line rule exists, (and the Fifth Circuit explicitly declined to adopt one), it noted “where a plaintiff works for a defendant for ten months, the engagement begins to resemble an employment relationship[.]” *Id.*

Employer Takeaways

Determining whether a worker is truly an independent contractor requires an individualized assessment. Key factors that the Fifth Circuit — and other courts around the country — have continued to interpret for this assessment include: the degree of control exercised by the employer, the comparative financial investment, the worker’s opportunity for profit or loss, the level of skill and initiative required for the job, and the permanency of the relationship.

Although no single factor is determinative, this decision serves as important guidance for employers — especially in the Fifth Circuit — to keep in mind the overall economic dependence of the contractors weighs heavily across each factor to be analyzed. For example, the Fifth Circuit, in this case, found the contractors’ ability to turn down work and that they were paid on a per project basis was more important than the fact other employees performed the same job and were classified differently. The Fifth Circuit also repeatedly emphasized these are economic realities, not economic hypotheticals. Stated differently, it is not what contractors **could** have done that counts, but as a matter of economic reality what they actually **do** that is dispositive. The greater the economic freedom the worker has, the more likely the worker will be considered properly classified as an independent contractor.
