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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Does requiring a contractor to wear uniforms, display decals on his vehicle, submit to screening and drug tests, or agree to a non-compete clause transform the status of an independent contractor into an employee for purposes of Ohio workers' compensation law?

Many times in this space, we have considered cases where the principal issue is whether an individual is an employee or an independent contractor for purposes of workers' compensation coverage. Generally, the inquiry is whether the alleged "employer" retained the right to control the manner and means of doing the work. *Bostic v. Connor*, 37 Ohio St.3d 144, 145 (1988) If an employer reserves the right to control the manner and means of doing the work, as well as the result, then an employer-employee relationship is created. But if an employer only specified the result and the worker determines the manner and means, and independent contractor relationship will generally be found to exist. *Id.* The Supreme Court of Ohio, in *Bostic*, also provided several factors that should be considered by courts in making this determination. Recently, this issue was considered by the Tenth Appellate District in a case involving three issues which raise questions under *Bostic*: the issuance of decals and uniforms, the requirement that a contractor undergo drug testing and employment screening, and the existence of a non-compete agreement.

Barcus v. Buehrer, 2015-Ohio-3122, concerned a claimant who was a truck driver injured while delivering freight for a logistics company. The claimant alleged that despite the existence of a written independent contractor agreement, he was in fact an employee of the company and entitled to workers' compensation benefits. The claimant applied for benefits, but the claim was opposed by the company and denied at every level of the administrative process. The claimant perfected a R.C. 4123.512 appeal to common pleas court, where the trial judge granted the company's motion for summary judgment, finding that he was an independent contractor because he had a written contract, controlled the means and matter of his work, and was treated at all times as an independent contractor. The claimant appealed to the Tenth District, arguing that the trial court erred in its application of *Bostic* and its failure to find genuine issues of material fact for trial.

The Tenth District affirmed, finding that the claimant was clearly an independent contractor based upon the same factors cited by the Supreme Court in *Bostic*, including that the claimant provided his own truck and tools, had a written contract, was paid by the job and given an IRS Form 1099, and identified himself as an independent contractor for tax purposes. While the claimant purchased occupational accident insurance through the company, this was done for convenience purposes only. The Court considered several arguments concerning "means and manner" – that the company dictated 4 hour windows during which deliveries were to be made and gave the driver a list of deliveries every day – but the Court rejected the argument that this was *de facto* direction and control, noting that the contractor still controlled the route to take even if his choices were limited by the schedule. The Court also rejected a requirement that the claimant purchased a radio as an indicator of an employment relationship, noting that the claimant chose the radio and bought it himself. The Court spent more time on three factors that it

concluded could be weighed in favor of an employment relationship: 1) the requirement that all persons hired by the claimant be subject to screening and drug testing; 2) claimant was required to display decals from the company on their truck and wear a uniform with the company's name and logo; and 3) the contractor agreement included a 6 month non-compete provision after termination of the relationship. Ultimately, the Court concluded that the first two were arguably required to comply with federal regulations and did not demonstrate control necessary to establish an employer relationship, while the third was simply an effort by the company to protect its business interests. The Court did seem to question whether the branding requirements were required by regulations and not an effort to confuse customers as to whether the drivers are employees, but also noted that the company had a right to maintain professional and competitive services.

Barcus contains a thorough application of the *Bostic* factors in a trucking and logistics setting. It is notable for two points – first, that even with the existence of a very detailed independent contractor agreement, the Industrial Commission and courts will still consider all of the *Bostic* factors; and any contractor who seeks to impose branding (such as uniforms and decals) on independent contractors does so at its peril.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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