

Duff on Hospitality Law

"Economic Realities" Test Determines Worker Status in Washington

By Diana Shukis on 3.22.11 | Posted in Employment Law

In today's post, HT&T team member [Diana Shukis](#) (Employment and Litigation) discusses the appropriate test, as determined by a recent Washington state appellate court decision, to decide whether a worker is an independent contractor or an employee.

History: In 2004, three FedEx drivers filed a class-action suit against the company on behalf of themselves and approximately 300 other drivers for payment of overtime wages (under the [Washington Minimum Wage Act](#) ("MWA")) and reimbursement of uniform expenses (under the [Washington Industrial Welfare Act](#)). Although the drivers had signed contracts with FedEx stating they were "independent contractors," their complaint alleged that they were actually "employees." The trial court split the case into two phases (liability and damages). On the liability issues, the jury decided that the drivers were independent contractors, effectively ending the case. The drivers appealed and Division I of the Washington Court of Appeals reversed; finding that the trial court had incorrectly instructed the jurors to decide based on FedEx's "control" or "right to control" the manner in which the drivers performed their work.

Overview of the Decision: In reversing the trial court, the court of appeals stated that the proper standard in Washington for determining whether a worker is an independent contractor or an employee is the "economic realities" standard. It is the same standard used by most federal courts for the purposes of determining employee status under the federal [Fair Labor Standards Act](#) ("FLSA"). The "economic realities" test includes six factors:

1. Permanence of the working relationship between the parties;
2. Degree of skill the work entails;
3. Extent of the worker's investment in equipment or material;
4. Worker's opportunity for profit or loss;
5. Degree of the alleged employer's control over the worker; and
6. Whether the service rendered by the worker is an integral part of the alleged employer's business.

In reaching this conclusion, the court noted that the MWA is patterned after the FLSA. The court also noted that the Washington State Department of Labor and Industries uses six similar, but not identical, factors when determining whether a worker is an employee or an

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independent contractor.

The court of appeals also confirmed that the belief of the parties as to whether a worker is an independent contractor or employee is not a relevant factor to be considered.

The upshot: It is critical that Washington businesses properly classify workers as employees or independent contractors. If a worker is mistakenly classified as an independent contractor when she does not meet the test, the business can face significant liability down the road, including in the areas of employee benefits, wage and hour violations, and tax issues. With the recent *FedEx* decision, Washington businesses now have more clarity on what factors to examine in deciding whether a worker is properly an employee or independent contractor.

Please feel free to email [Diana](#) if you'd like additional information, or would like to review the case.

Tags: Act, contractor, Economic Realities, Economic Realities Test, employee, employee status, Fair, Fair Labor Standards Act, independent, independent contractor standard, Industrial, Labor, Minimum, standard, Standards, status, Test, Wage, Washington, Washington Industrial Welfare Act, Washington Minimum Wage Act, Welfare