WAGE AND OVERTIME QUARTERLY

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"Fighting For Fair Wages"

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JUDGES INCREASE SCRUTINY OF THE "INDEPENDENT CONTRACTOR" BUSINESS MODEL

Over the years, this *Newsletter* has spilled considerable ink discussing corporate abuse of the "independent contractor" business model. Unfortunately, too many workers are misclassified as independent contractors – rather than employees – even though their day-to-day work conditions are indistinguishable from the conditions encountered by full-fledged employees. Indeed, we often find independent contractors and employees working side-by-side performing the same work for the benefit of the same company.

Independent contractor misclasification can be extremely unfair to workers. Independent contractors, after all, are not entitled to basic workplace benefits such as: (i) matching FICA contributions; (ii) workers compensation and unemployment insurance; (iii) coverage under federal/state laws barring workplace discrimination, retaliation, and harassment; (iv) the right to unionization; and (v) the right to be paid a minimum wage and overtime compensation.

By classifying workers as independent contractors, corporations are able to shift the most basic business costs onto the backs of workers. For example, package delivery companies can require the worker to purchase or lease the delivery truck bearing the company's logo. It sure seems unfair to require workers, rather than the companies' owners, to bear such basic business risks and expenses.

Make no mistake: taxpayers, competing businesses, and working families are left holding the tab for independent contractor misclassification.

In recent years, the media has focused increased attention on the unfairness and societal costs of the independent contractor business model. And it appears that judges – like the general public – are growing more skeptical of the business model.

The increasing judicial skepticism is reflected in two recent developments:

New Jersey Supreme Court Adopts the "ABC Test"

In *Hargrove v. Sleepy's, Inc.,* 106 A.2d 449 (N.J. 2015), the New Jersey Supreme Court addressed the proper legal test for determining whether a plaintiff is an employee or an independent contractor under the state's Wage and Hour Law and Wage Payment Law. *See id.* at 453. The workers' cause was argued by Boston attorney Harold Lichten, who – as many readers of this *Newsletter* know – has had great success representing misclassified contractors.

On January 15, the *Hargrove* Court issued a unanimous opinion adopting the "ABC test." *See id.* at 463-65. Under the ABC test, a worker is presumed to be an employee unless the company can satisfy each of the following three requirements:

(A) the worker "has been and will continue to be free from control or direction over the performance of" the services provided"; and

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JUDGE THOMAS BLEWITT BRINGS HIS SKILLS TO PRIVATE MEDIATION AND ARBITRATION PRACTICE

Federal Magistrate Judge Thomas Blewitt recently resigned from the Middle District of Pennsylvania bench, where he presided with distinction since 1992. At his December 2014 retirement ceremony, judges and other members of the Middle District legal community recalled that Judge Blewitt was always – above all else – fair and open-minded. The ceremony included many recollections of the Judge's warmth, intelligence, and sense of humor.

His brother Justin – a longtime lawyer at the U.S. Attorneys Office – gave an especially moving tribute.

Judge Blewitt recently joined the roster of private mediators/arbitrators at JAMS, where his talents surely will be in high demand. Like hundreds of other lawyers who had the privilege of appearing in Judge Blewitt's courtroom, we thank him for his service and wish him well in his new endeavors.

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ABOUT WINEBRAKE & SANTILLO, LLC

Workers deserve to get paid for ***all time spent working***, and most workers are entitled to valuable ***overtime pay*** when they work over 40 hours in a workweek. Unfortunately, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and overtime laws.

Wage and overtime violations hurt working families. When a company violates the law, it should be held accountable. ***No one is above the law.***

Winebrake & Santillo, LLC believes workers pursuing their wage and overtime rights are entitled to the same high quality legal representation enjoyed by big corporations. We also understand that workers have a right to be treated with the same level of professionalism, courtesy, and respect accorded to corporate CEOs.

Winebrake & Santillo, LLC goes to Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Our attorneys have negotiated settlements in federal wage and overtime lawsuits worth many millions of dollars to workers and their families.

The wage and overtime laws are complicated. Don't hesitate to contact ***Winebrake & Santillo, LLC*** for a ***free consultation*** if you believe the wage and overtime rights of you or one of your clients may have been violated. Your clients never pay a fee unless they recover; and ***we always pay a fair referral fee.***

JUDGES INCREASE SCRUTINY OF THE "INDEPENDENT CONTRACTOR" BUSINESS MODEL *Continued from Page 1*

(B) the worker's services fall either "outside the usual course of" the company's business or are "performed outside of all the [company's] places of business;" and

(C) the worker "is customarily engaged in an independently established trade, occupation, profession or business."

Id. at 458.

The ABC test adopted in *Hargrove* will be difficult for many companies to satisfy. That's why several groups representing corporate interests filed briefs arguing against the ABC test. But, in the Court's view, these arguments could not overcome the fundamental fact that the ABC test "fosters the provision of greater income security for workers, which is the express purpose of both the [Wage Payment Law] and [Wage and Hour Law]." *Id.* at 315.

Going forward, New Jersey is likely to be a major battleground in the effort to eliminate independent contractor abuse.

FedEx Under Attack

Over the past ten years, numerous cases have been filed against FedEx Ground Package System ("FedEx") challenging the company's business model of classifying thousands of package delivery drivers as non-employee independent contractors. Our firm has handled a few of these cases, and, in the process, we've been privileged to work with some really great Trial Lawyers.

The FedEx cases are working their way through the appellate courts, and, so far, the results generally have been very good for working families.

The most recent decision came from the Atlanta-based Eleventh Circuit Court of Appeals in a case entitled *Carlson v. FedEx Ground Packaging System, Inc.,* 2015 U.S. App. LEXIS 8810 (11th Cir. May 28, 2015). There, the Circuit unanimously reversed the trial judge's summary judgment finding that the drivers were independent contractors. The Circuit's opening paragraph is worth repeating:

> For customers who are regularly visited by the ubiquitous white trucks of FedEx Ground, with their familiar purple and green logos, the usual concern is whether packages are picked up on schedule and delivered on time. If asked, a good number of those customers would probably say that they believe (or reasonably assume) that the drivers of those white trucks are employed by FedEx. The law, however, sometimes has a funny way of making hard what would otherwise seem intuitively simple, and that is the case with the legal status of FedEx's 'drivers. The drivers who work for FedEx in Florida say they are employees, while FedEx maintains that they are independent contractors, and the resolution of that dispute is critical to a class action lawsuit filed by those Florida drivers against FedEx. Applying Florida law, we conclude that, on this record, the issue is one for a jury to resolve.

Id. at *2.

Carlson came on the heels of *Craig v. FedEx Ground Packaging Systems, Inc.,* 335 P.3d 66 (Kan. 2014), the highly-anticipated decision in which the Kansas Supreme Court unanimously held that FedEx delivery workers are employees under the state's wage laws. After an extensive opinion, the *Craig* Court summarized that "FedEx has established an employment relationship with its delivery drivers but dressed that relationship in independent contractor clothing." *Id.* at 92.

Finally, in *Slayman v. FedEx Ground Packaging System, Inc.,* 765 F.3d 1033 (9th Cir. 2014), and *Alexander v. FedEx Ground Packaging System, Inc.,* 765 F.3d 981 (9th Cir. 2014), the San Francisco-based Ninth Circuit Court of Appeals held that FedEx delivery drivers are employees under Oregon and California law. The *Alexander* Court summarized:

> As a central part of its business, [FedEx] contracts with drivers to deliver packages to its customers. The drivers must wear FedEx uniforms, drive FedEx-approved vehicles, and groom themselves according to FedEx's appearance standards. FedEx tells its drivers what packages to deliver, on what days, and at what times. Although drivers may operate multiple delivery routes and hire third parties to help perform their work, they may do so only with FedEx's consent. FedEx contends its drivers are independent contractors under California law. Plaintiffs, a class of FedEx drivers in California, contend they are employees. We agree with plaintiffs.

Id. at 984.

In sum, the tide finally appears to be turning in favor of workers' who challenge independent contractor abuses. The next several years are going to be filled with many important court battles defining the legal limits of the independent contractor business model.

QUARTERLY QUOTE

"Every man is a king so long as he has someone to look down on."

(Sinclair Lewis, It Can't Happen Here)

THIRD CIRCUIT COURT OF APPEALS HOLDS DRIVERS ENTITLED TO OVERTIME PAY

In March 2015, the Philadelphia-based Third Circuit Court of Appeals issued a very favorable decision in *McMaster v. Eastern Armored Services, Inc.,* 780 F.3d 167 (3d Cir. 2015). Our firm has been representing the workers in this case for over three years, so the outcome is especially satisfying to us. Andy Santillo argued the appeal and did an excellent job.

In *McMaster*, an "armored car" security company refused to pay its drivers extra overtime premium compensation for hours worked over 40 per week. The company maintained a "mixed fleet" of vehicles. Some of the vehicles were "commercial motor vehicles" weighing over 10,000 pounds, while others were non-commercial vehicles weighing less than 10,000 pounds. The company asserted that the drivers were not entitled to overtime premium pay under the FLSA's Motor Carrier Exemption. *See* 29 U.S.C. § 213(b)(1).

The Third Circuit appeal addressed the extent to which the Motor Carrier Exemption applies to drivers who, like our clients, drove ***both*** commercial and non-commercial vehicles as part of their job. The Court explained that the exemption does not apply to employees who spend part of their time driving non-commercial vehicles. Such employees, the Court held, are entitled to overtime premium pay.

The *McMaster* decision resolved a thorny issue of first impression within The Third Circuit and, going forward, should enable thousands of drivers within the Circuit to seek and obtain overtime pay.

PHILIP LEVINE: THE WORKERS' POET

Since the publication of our last *Newsletter*, our nation lost Philip Levine, the brilliant poet whose titles include *What Work Is* (National Book Award in 1991) and *The Simple Truth* (Pulitzer Prize in 1994). Levine was 87 when he died this February.

Levine grew up in Detroit and spent his formative years working in the city's auto plants and factories. He wrote beautifully about the dignity of the American worker. As he explained in one interview: "I saw that the people that I was working with … were voiceless in a way. . . . In terms of the literature of the United States they weren't being heard. Nobody was speaking for them. And . . . I took this foolish vow that I would speak for them and that's what my life would be. And sure enough I've gone and done it. Or I've tried anyway."

Our firm has purchased 25 copies of Levine's 1991 collection entitled *What Work Is*. Be sure to email Pete Winebrake (pwinebrake@winebrakelaw.com) if you'd like a free copy. Meanwhile, here is the complete text of the title poem:

We stand in the rain in a long line
waiting at Ford Highland Park. For work.
You know what work is — if you're
old enough to read this you know what
work is, although you may not do it.
Forget you. This is about waiting,
shifting from one foot to another.
Feeling the light rain falling like mist
into your hair, blurring your vision
until you think you see your own brother
ahead of you, maybe ten places.
You rub your glasses with your fingers,
and of course it's someone else's brother,
narrower across the shoulders than
yours but with the same sad slouch, the grin
that does not hide the stubbornness,
the sad refusal to give in to
rain, to the hours of wasted waiting,
to the knowledge that somewhere ahead
a man is waiting who will say, "No,
we're not hiring today," for any
reason he wants. You love your brother,
now suddenly you can hardly stand
the love flooding you for your brother,
who's not beside you or behind or
ahead because he's home trying to
sleep off a miserable night shift
at Cadillac so he can get up
before noon to study his German.
Works eight hours a night so he can sing
Wagner, the opera you hate most,
the worst music ever invented.
How long has it been since you told him
you loved him, held his wide shoulders,
opened your eyes wide and said those words,
and maybe kissed his cheek? You've never
done something so simple, so obvious,
not because you're too young or too dumb,
not because you're jealous or even mean
or incapable of crying in
the presence of another man, no,
just because you don't know what work is.