

State Law Can Override Control Test for Employment

Working Together

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Past articles in this blog have discussed the control test for establishing an employment relationship as opposed to independent contractor status, (see Lowe's post here and Employee or Independent Contractor post here.) Although government agencies such as the Department of Labor or IRS describe the test in various ways, the fundamental concept is control, and the employer's right to control can make an individual an employee rather than an independent contractor. An independent contractor contracts to produce the required result his way, usually with his own tools and largely to his own schedule; an employee produces the desired result subject to the orders and control of the employer over means and methods used.

But a recent decision of the U. S. Supreme Court, which engendered headlines for other reasons, featured a quirk of state law in Illinois that created employee status regardless of control. The federal Medicaid program funds state-run programs that provide in-home services for individuals who because of age, illness or disability might otherwise require institutionalization. The home health care service providers (called "personal assistants" in Illinois) are hired, directed and subject to firing by the person receiving care, known as the customer. The Illinois law explicitly states that the customer shall be the employer of the personal assistant. This is consistent with the traditional control test.

However, in 2003, the governor of Illinois issued an executive order, later codified as a public act by the Illinois Legislature, stating that while the customer retains the right to hire, supervise and fire, the personal assistant is nevertheless deemed to be a public employee "solely" for the purpose of coverage under the public labor relations act. The effect of this law was to allow a labor union to represent thousands of personal assistants, and ultimately to collect union dues from them, which were deducted directly from Medicaid payments. This payment of dues was challenged and eventually overturned on First Amendment grounds in the decision in *Harris v. Quinn*, decided on June 30, 2014.

Under the traditional control test, a personal assistant would not have been a state employee, which was acknowledged by one part of state law. However, another part of state law "deemed" the personal assistants to be state employees solely for the purpose of being aggregated into a bargaining unit for union representation. The experience of the Illinois personal assistants shows that a traditional and logical legal principle – in this case the control test to establish an employment relationship – can nevertheless be altered by the political process.

Posted in U.S. Supreme Court

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