MODRALL SPERLING

LAWYERS

Employment Law Alert

In This Issue

Employment Law at Modrall Sperling

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperling has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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Guidance for New Mexico Employers: Misclassification of Independent Contractors

How a business classifies a worker has a dramatic impact on both the worker and the business. For example, in New Mexico, pay received by independent contractors is subject to gross receipts tax unless a statutory exemption or deduction applies to a transaction. Employee wages are exempt from gross receipts tax. Also, employees (as opposed to independent contractors) are entitled to minimum wage, potential overtime compensation, family and medical leave, unemployment and worker's compensation coverage.

Historically, the classification of workers as either employees or independent contractors was done generally by evaluating the nature and degree of an employer's control over the work being done. In other words, a worker who uses his own tools, is not subject to the employer's control or guidance in performing the work, pays his own business expenses, and performs a discrete project or set of tasks would be considered an independent contractor.

In 2015, the Department of Labor (DOL) adopted a new standard for the classification of workers as either independent contractors or employees under the Fair Labor Standards Act (FLSA). Department of Labor Administrator's Interpretation No. 2015-1, July 15, 2015. Over the past year, these new standards, which are called the "economic realities test," have received a lot of attention for imposing dramatic changes on how businesses classify their workers. The main complaint from many businesses is that the "economic realities test" makes it much more difficult for a business to properly classify a worker as an independent contractor, thereby imposing significantly more cost and commitment from businesses for their workers. The "economic realities test" uses six factors to determine whether a worker is an employee or an independent contractor, only one of which is the nature and degree of an employer's control over the worker. The six factors used in the "economic realities test" are:

1. Is the work an integral part of the employer's business?

For a construction company that frames residential homes, carpenters are *integral* to the employer's business because the company is in business to frame homes, and carpentry is an integral part of providing that service.

In contrast, the same construction company may contract with a software developer to create software that, among other things, assists the company in tracking its bids, scheduling projects and crews, and tracking material orders. The software developer is performing work that is *not integral* to the construction company's business, which is indicative of an independent contractor.

2. Does the worker's managerial skill affect the worker's opportunity for lost profit?

A worker provides cleaning services for corporate clients. The worker performs assignments only as determined by a cleaning company; he does not independently schedule assignments, solicit additional work from other clients, advertise his services, or endeavor to reduce costs. The worker regularly agrees to work additional hours at any time in order to earn more. In this scenario, the worker does not exercise managerial skill that affects his profit or loss. Rather, his earnings may fluctuate based on the work available and his willingness to work more. This lack of managerial skill is indicative of an employment relationship between the worker and the cleaning company.

In contrast, a worker provides cleaning services for corporate clients, produces advertising, negotiates contracts, decides which jobs to perform and when to perform them, decides to hire helpers to assist with the work, and recruits new clients. This worker exercises managerial skill that affects his opportunity for profit and loss, which is indicative of an independent contractor.

3. How does the worker's relative investment compare to the employer's investment?

A worker providing cleaning services for a cleaning company is issued a Form 1099-MISC each year and signs a contract stating that she is an independent contractor. The company provides insurance, a vehicle to use, and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings her own preferred cleaning supplies to certain jobs. In this scenario, the relative investment of the worker as compared to the employer's investment is indicative of an employment relationship between the worker and the cleaning company. The worker's investment in cleaning supplies does little to further a business beyond that particular job.

A worker providing cleaning services receives referrals and sometimes works for a local cleaning company. The worker invests in a vehicle that is not suitable for personal use and uses it to travel to various worksites. The worker rents her own space to store the vehicle and materials. The worker also advertises and markets her services and hires a helper for larger jobs. She regularly (as opposed to on a job-by-job basis) purchases material and equipment to provide cleaning services and brings her own equipment (vacuum, mop, broom, etc.) and cleaning supplies to each worksite. Her level of investments is similar to the investments of the local cleaning company for whom she sometimes works. These types of investments may be indicative of an independent contractor.

4. Does the work performed require special skill and initiative?

A highly skilled carpenter provides carpentry services for a construction firm; however, such skills are not exercised in an independent manner. For example, the carpenter does not make any independent judgments at the job site beyond the work that he is doing for that job; he does not determine the sequence of work, order additional materials, or think about bidding the next job, but rather is told what work to perform where. *In this scenario, the carpenter, although highly-skilled technically, is not demonstrating the skill and initiative of an independent contractor* (such as managerial and business skills). He is simply providing his skilled labor.

In contrast, a highly skilled carpenter who provides a specialized service for a variety of area construction companies, for example, custom, handcrafted cabinets that are made-to-order, may be demonstrating the *skill and initiative of an independent contractor* if the carpenter markets his services, determines when to order materials and the quantity of materials to order, and determines which orders to fill.

5. Is the relationship between the worker and the employer permanent or indefinite?

An editor has worked for an established publishing house for several years. Her edits are completed in accordance with the publishing house's specifications, using its software. She only edits books provided by the publishing house. This scenario *indicates a permanence to the relationship* between the editor and the publishing house that is indicative of an employment relationship.

Another editor has worked intermittently with fifteen different publishing houses over the past several years. She markets her services to numerous publishing houses. She negotiates rates for each editing job and turns down work for any reason, including because she is too busy with other editing jobs. This *lack of permanence* with one publishing house is indicative of an independent contractor relationship.

6. What is the nature and degree of the employer's control?

A registered nurse who provides skilled nursing care in nursing homes is listed with Beta Nurse Registry in order to be matched with clients. The registry interviewed the nurse prior to her joining the registry, and also required the nurse to undergo a multi-day training presented by Beta. Beta sends the nurse a listing each week with potential clients and requires the nurse to fill out a form with Beta prior to contacting any clients. Beta also requires that the nurse adhere

> to a certain wage range and the nurse cannot provide care during any weekend hours. The nurse must inform Beta if she is hired by a client and must contact Beta if she will miss scheduled work with any client. In this scenario, the degree of control exercised by the registry is indicative of an employment relationship.
>
> Another registered nurse who provides skilled nursing care in nursing homes is listed with Jones Nurse Registry in order to be matched with clients. The registry sends the nurse a listing each week with potential clients. The nurse is free to call as many or as few potential clients as she wishes and to work for as many or as few as she wishes; the nurse also negotiates her own wage rate and schedule with the client. In this scenario, the degree of control exercised by the registry is not indicative of an employment relationship.

— Department of Labor Administrator's Interpretation No. 2015-1, July 15, 2015.

In January, 2016, the New Mexico Department of Workforce Solutions entered into a Memorandum of Understanding (MOU) with the US DOL, which allows both departments to, among other things, share information related to State and Federal laws, conduct coordinated investigations, and conduct formal cross training of investigators.

Many courts outside of New Mexico have recently used the "economic realities test" and the new DOL/FLSA guidelines to determine whether a worker has been misclassified as an independent contractor by his employer. Although New Mexico courts have not yet analyzed the issue, other courts have found misclassifications under the "economic realities test" and have imposed significant penalties on those businesses who have misclassified their workers.

Despite the attention that the new "economic realities test" has received, and despite the New Mexico Department of Workforce Solutions' recent MOU with the DOL, New Mexico statutes and agencies have not adopted the "economic realities test." For example:

- **Unemployment Compensation**

With respect to Unemployment Compensation, New Mexico law defines a non-employee as one who established by a preponderance of the evidence that:

- Such an individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact;
- Such service is outside the usual course of business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of service.

1978 NMSA § 51-1-42 (F)(5); *See also, Solar Age Mfg., Inc. v. Employment Sec. Dept*. 1986-NMSC-012, 103 N.M. 780, 714 P.2d 584.

- **Workers' Compensation**

A worker's entitlement to Workers' Compensation benefits in New Mexico is governed by the "right to control test." *Harger v. Structural Services, Inc.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324. The "right to control test" focuses on "whether the principal exercised sufficient control over the agent to hold the principal liable for the acts of the agent." *Korba v. Atlantic Circulation, Inc.*, 2010-NMCA-029, ¶5, 148 N.M. 137, 139, 231 P.2d 118, 120.

- **Taxation and Revenue**

Finally, the New Mexico Taxation and Revenue Department accepts the determination of employee or independent contractor status made by the Internal Revenue Service, which evaluates the degree of control an employer exerts over a worker or project. *See* 1978 NMSA 7-3-2 (defining "employer" and "employee" for the purposes of the Withholding Tax Act).

It is unclear how the new DOL/FLSA regulations will apply to business in New Mexico. New Mexico common law and statutory authority have not yet recognized or applied the DOL's "economic realities test," but the amount of worker misclassification litigation around the country under the FLSA continues to increase. At a minimum, New Mexico employers who categorize workers as independent contractors should be mindful of the DOL's "economic realities test."

If you are a business facing issues related to the proper classification of workers, please contact Anna E. Indahl at Anna.Indahl@modrall.com or by calling 505-848-1800.

Update on Medical Marijuana and Employment Law in New Mexico

The United States District Court for the District of New Mexico recently clarified the issue of whether employers need to accommodate medical marijuana usage by employees with disabilities pursuant to the New Mexico Human Rights Act (NMHRA). In *Garcia v. Tractor Supply Co.*, --- F.Supp.3d ---, No. CV 15-00735 WJ/WPL, 2016 WL 93717 (D.N.M. Jan. 7, 2016), appeal dismissed (Mar. 25, 2016), the Court held that employers do not need to accommodate medical marijuana use under the NMHRA.

Background

The Lynn and Erin Compassionate Use Act, § 26-2B-1 NMSA et seq., legalizes the appropriate use of medical marijuana in New Mexico. The purpose of this law is to "allow the beneficial use of medical cannabis … for alleviating symptoms caused by debilitating medical conditions." § 26-2B-2 NMSA. All marijuana usage remains illegal under federal law. This conflict created confusion for employers because the Americans with Disabilities Act (ADA) and the NMHRA require employers to accommodate their employees' serious medical conditions unless an accommodation would impose an undue hardship on the employer.

Until recently, New Mexico law provided no guidance as to whether employers needed to accommodate off-site medical marijuana use that does not negatively affect job performance, i.e. by ignoring positive drug tests of card-carrying employees who produce adequate work. New Mexico public policy on medical marijuana was seemingly inconsistent. In *Vialpando v. Ben's Auto. Services*, 2014-NMCA-084, the Court of Appeals held that an employer must reimburse an injured worker for medical marijuana under the Workers' Compensation Act. But in *Smith v. Presbyterian Healthcare Services*, D-202-CV-201403906 (New Mexico state court), the court held that an employer could fire a medical marijuana using employee for failing a drug test where the employee did not inform the employer of her disability or request an accommodation. This case did not resolve whether employers need to accommodate off-site medical marijuana use for employees who do request accommodations.

New Decision: Garcia v. Tractor Supply Company

In *Garcia v. Tractor Supply Company*, the District of New Mexico federal court held that employers do not need to accommodate off-site medical marijuana use under the NMHRA.

In that case, an employee suffering from HIV/AIDS, a "serious medical condition" under the NMHRA, applied for a job at Tractor Supply Company. During the interview process, Mr. Garcia informed Tractor Supply Company both of his HIV status and of his participation in the New Mexico Medical Cannabis Program. Tractor Supply Company hired Mr. Garcia, but quickly discharged him

after he tested positive for cannabis during a routine drug test.

The court's holding had two main parts. First, the court analyzed New Mexico state law. It reasoned that Tractor Supply Company did not terminate Mr. Garcia "because of or on the basis of his serious medical condition. Testing positive for marijuana was not because of Mr. Garcia's serious medical condition (HIV/AIDS), nor could testing positive for marijuana be seen as conduct that resulted from his serious medical condition. Using marijuana is not a manifestation of HIV/AIDS." While the Court acknowledged that medical marijuana is compensable under New Mexico workers' compensation laws, it was more persuaded by Tractor Supply Company's practical argument that if Mr. Garcia prevailed, it would need to modify its drug policy for each state with unique laws on marijuana legalization, decriminalization, or authorization for medical use.

Second, on grounds of federal preemption, the court held that requiring employers to accommodate medical marijuana use under the NMHRA would conflict with the federal Controlled Substances Act ("CSA"). The court reasoned, "[t]o affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes." In other words, just because New Mexico's state laws exempt medical marijuana users from liability under state criminal law, this does not mean that New Mexico employers must accommodate medical marijuana use while its use is still prohibited under federal law.

While it remains possible that New Mexico state courts could decide this issue another way, *Garcia v. Tractor Supply Company* provides employers with some clarity while awaiting guidance from state courts on this issue.

If you have questions regarding medical marijuana under New Mexico law, please contact Emily Chase-Sosnoff at emily.chase-sosnoff@modrall.com or 505-848-1800.

How the New FLSA Regulations May Impact You and Your Company

The United States Department of Labor ("DOL") published its updated Fair Labor Standards Act ("FLSA") overtime regulations on May 18, 2016. The new regulations increase the salary requirements for employees who are Administrative, Professional, Outside Sales and Computer Employees by changing the threshold salary requirements for the white collar exemption under the FLSA. The DOL has not updated these salary requirements since 2004, allowing employees who made $455 per week (approximately $23,660) to qualify for the white collar exemption under the FLSA. In the final rule, this salary requirement is now doubled—entitling many employees who make less than $913/week (or $47,476) per year to be paid overtime wages. The new rule also increases the exempt under the FLSA—and, thus, not entitled to overtime wages. As discussed in our May 2016 issue of the *Employment Law Alert*, the new regulations define and limit the use of FLSA exemptions for Executive, salary requirements for Highly Compensated Employees from $100,000 per year to $134,004 per year. These new requirements go into effect on **December 1, 2016**.[1]

Since 1940, the DOL's regulations have generally required that in order to be exempt from overtime under the FLSA under the exemptions for Executive, Administrative and Professional Employees, the worker must:

1. be paid a predetermined and fixed salary that is not subject to reduction because of variations in

the quality or quantity of work performed "salary basis test");
2. the amount of salary paid must meet a minimum specified amount ("salary level test"); and
3. the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations ("duties test").[2]

The new regulations update the salary requirements in this analysis by setting the minimum salary, as of December 1, 2016, to $913/week ($47,476 per year) for employees for Executive, Administrative and Professional Employees. The regulations, however, make no changes to the duties test. As a result, the following elements must generally be satisfied for employees to qualify under each of these exemptions:

Executive Exemption:

- The employee must be paid on a salary basis, at a rate not less than $913 per week ($47,476 per year);
- The employee's primary duty must be managing the enterprise, or managing a recognized department or subdivision;
- The employee must regularly direct the work of at least two or more full-time employees (or their equivalent);[3] and
- The employee must have authority to hire or fire employees, or his/her suggestions concerning hiring, firing, advancements, promotions or other staff changes must be given particular weight.

Administrative Exemption:

- The employee must be paid on a salary basis, at a rate not less than $913 per week ($47,476 per year);
- The employee's primary work duty must be performing office or non-manual work that is related to management or general business operations; and,
- The employee's primary duty must include the exercise of discretion and independent judgment in significant matters for the business.

Professional Exemption:

- The employee must be paid on a salary basis, at a rate not less than $913 per week ($47,476 per year);
- The employee's primary work duty must be performing work which requires advance knowledge, which is considered work that is predominantly intellectual in nature and requires a consistent exercise of discretion and judgment;
- The advance knowledge must be in a field of science or learning; and
- The advance knowledge must customarily be acquired through a prolonged course of specialized education or intellectual instruction.

Computer Professionals:

- The DOL's comments to the new regulations explain that hourly computer employees who earn at least $27.63 per hour and perform certain duties are not impacted by the salary requirements in the new regulations.
- However, salaried computer workers are exempt under the FLSA only if they satisfy the above listed requirements for Executive, Administrative or Professional employees – including the above salary requirements. *See* 81 Fed. Reg. 99, 32457, n. 115 (May 23, 2016).

Outside Sales:

- Door-to-door or outside sales employees are not impacted by the new salary regulations, as long as the employees properly qualify for this exemption under

the other DOL requirements. *See* 81 Fed. Reg. 99, 32514.[4]

The Use of Nondiscretionary Bonuses and Incentive Payments:

- The new regulations specifically allow nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of this new salary requirement. However, in order for these bonuses and incentive payments to count towards a portion of the DOL established salary level, the payments must be paid on a quarterly or more frequent basis.[5]
- These bonuses need to be set on objective standards. Examples given by the DOL include bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed commission formula.
- Discretionary bonuses which are given based on the employer's sole discretion cannot be used to satisfy the new FLSA salary requirements.

Scheduled Increases to the New Salary Levels:

- Every three years the minimum salary requirements will increase. The first increase will take place on January 1, 2020, with the next automatic update taking place on January 1, 2023.

Payments on a Fee Basis:

- The DOL has determined that employees who would otherwise qualify for the above-listed exceptions may also be paid on a fee basis in lieu of a salary. This would occur for example when an employee has a contract to perform a particular task in exchange for a specified fee.
- To determine whether the fee satisfies the new FLSA salary requirements, the DOL will look at the amount of time (i.e., number of hours) the employee spent working on the job and determine whether or not the employee was paid at least $913 per week based on the fee provided for in the contract. *See* 81 Fed. Reg. 99, 32551, amended 29 C.F.R. § 541.605.

The DOL has instructed that employers will have a range of options when responding to the new salary requirements. Employers may:

- Increase employee salaries for employees who clearly meet the above-listed duties tests and are likely to work overtime hours;
- Retain current salary levels and pay overtime wages, which equal one and a half times the employee's regular rate of pay for any overtime hours worked;
- Retain current salary levels and reduce or eliminate the amount of hours employees currently work;
- Reduce or change employee salaries and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or
- Utilize some combination of the above.

In the event your company believes that it will now have several employees who are entitled to overtime wages under the new regulations, it will be important to track the time each of those employees work. The DOL does not require employers to use time clocks to record employee time. However, employers are specifically mandated to keep time records for each non-exempt worker. Those time records must accurately record the number of daily hours worked by non-exempt employees. This process may prove challenging for employees who have historically been paid on a salary basis, especially for busy or hard-working employees who tend to work beyond their scheduled hours or during lunch breaks.

For guidance concerning tracking hours or the above-listed exemptions, please contact Jennifer L. Bradfute at Jennifer.Bradfute@modrall.com or by calling 505-848-1800.

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[1] Please note that this date is a correction to our May 2016 post concerning the new FLSA regulations.

[2] DOL, Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees (May 2016).

[3] *See also* DOL, Fact Sheet #17B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA) (July 2008).

[4] *See also* DOL, Fact Sheet #17F: Exemption for Outside Sales Employees Under the Fair Labor Standards Act (FLSA) (July 2008).

[5] *See* DOL, Final Overtime Rule Questions and Answers, available at https://www.dol.gov.