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Second Circuit "Drives" Forward Classification of Workers as Independent Contractors

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In an April 2017 decision, the Second Circuit affirmed the dismissal of a proposed class action brought by New York-area "black car" drivers, workers providing high-end transportation services in limousines and other upscale vehicles. *See Saleem v. Corp. Transportation Grp., Ltd.*, 854 F.3d 131 (2nd Cir. 2017). These drivers had sued their employer for violations of the Fair Labor Standards Act (FLSA), alleging they were improperly classified as independent contractors. The New York district court, however, found the drivers were properly classified as independent contractors under the FLSA, and the Second Circuit agreed.

But how might this holding affect employers and employees? This article provides a summary of the Second Circuit's reasoning and the practical implications of the decision.

The Road Ahead for Employers: Classifying Workers as Independent Contractors

Saleem sets a path for employers to follow if they want their workers classified as independent contractors.

The plaintiffs in *Saleem*, a group of a dozen drivers employed by Corporate Transportation Group, Ltd. (CTG) and nearly a half-dozen others employed by CTG's affiliates, claimed they were improperly classified and thereby denied overtime payments in violation of the FLSA.

The New York district court had followed the Second Circuit's application of a totalities of the circumstances test, which addressed the "ultimate concern" of whether, as a matter of "economic reality," the drivers depended upon the Defendants' business for the opportunity to render service or were instead businesses in and of themselves.

The Second Circuit's Reasoning

In finding the black car drivers were independent contractors, the Second Circuit also relied on the economic realities test, considering multiple factors and the totality of circumstances related to the drivers' own control of the services they offered.

The Second Circuit addressed those factors relevant to separating employees from independent contractors in the context of the FLSA first set out in *United States v. Silk*, 331 U.S. 704, 713 (1947), but noted the factors were "merely aids to analysis . . ." The court explained that the factors must be used to clarify the economic reality of the arrangement at issue and that relevant FLSA precedent cautions against the factors with a mechanical application.

In *Silk*, the Supreme Court decided whether truck drivers in two consolidated cases constituted "employees" for the purpose of the Social Security Act, setting out the following factors: (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business.

Saleem has expounded upon the factors, noting that it is not what a plaintiff could have done that counts, but what they actually do as a matter of economic reality that is dispositive. To that point, the Second Circuit noted that the plaintiffs could pick up non-CTG clients and had other autonomy in their schedules. Evidence showed that the drivers provided rides for multiple, competing black car companies, rather than driving for CTG or its affiliates only. Moreover, the plaintiffs regularly drove personal clients and picked up passengers via street hail, despite apparent prohibitions against this practice.

The court was persuaded heavily by the drivers' ability to toggle between different car companies and personal clients and their ability to decide how to do so as to increase their own profits. Because drivers were afforded the opportunity to decide how best to obtain business from CTG's clients, the court believed the drivers' profits increased through their own "initiative, judgment, and foresight" − all of which were considered qualities of the typical independent contractor. The court found that despite any "control" CTG exerted over certain aspects of the drivers' business (such as negotiating fares and providing drivers with institutional clients), the plaintiffs retained economic status that could be and was traded to other car companies, and thus, as a matter of economic reality, the drivers merely generated income from the defendant companies.

The Take-Away

The Second Circuit's reasoning and discussion of the economic realities test in *Saleem* offers guidance to employers wishing to classify their workers as independent contractors. Courts may now take a more holistic view of the employment relationship in determining independent contractor status, shying even farther away from allowing any one factor of the *Silk* "economic realities" test to be dispositive.

Practically speaking, for those companies that want their workers to be considered independent contractors, the facts in *Saleem* offer a model: give workers control of their schedules and allow workers to serve clients of your company and others; providing institutional clients to your workers who offer services may not mandate an "employee" classification.

Along with implications under the FLSA (the statute at issue in *Saleem*), the independent contractor classification has other favorable implications for companies. For example, that classification may limit the scope of liability an employer could face for the negligent actions of their workers. Employers hoping to gain this and other benefits regarding classification should "shift gears" and follow the "road paved" by *Saleem*.