

L a b o r & E m p l o y m e n t
A L E R T

AUGUST
2007

YOUR INDEPENDENT CONTRACTOR COULD BE AN EMPLOYEE UNDER NEW JERSEY LAW

The New Jersey Supreme Court recently found that a person classified as an independent contractor by the employer and affirmed by the contractor could qualify as an “employee” under New Jersey law, and therefore, have all of the protections available to him under New Jersey’s Conscientious Employee Protection Act (CEPA). This decision reflects the Court’s continued willingness to expand the coverage of employee protection laws to non-traditional work relationships.

In *D’Annunzio v. Prudential Insurance Company of America*, D’Annunzio served as Prudential’s chiropractic medical director under a consulting agreement arrangement that stated:

“[t]he relationship between Prudential and the Medical Director is that of independent contractor. The Medical Director will maintain his own private practice and provide Medical Director services on a part-time basis. . . . None of the provisions of this agreement are intended to create or be construed as creating any agency, partnership, joint

venture or employer-employee relationship. As an independent contractor, [t]he Medical Director will have the sole responsibility for the payment of all self-employment and application Federal state and local taxes.”

Both parties had the right to terminate the relationship without cause with sixty days’ notice, and Prudential had the option of terminating the agreement immediately if D’Annunzio committed a material breach.

D’Annunzio claimed that he reported to Prudential managers what he perceived to be illegal activities of other Prudential employees, and because of his reporting, Prudential terminated his consulting agreement in violation of CEPA. Prudential claimed that CEPA applied to “employees” only, and not to independent contractors. Although the plain language of CEPA extends protection to “employees” only, CEPA defines “employee” as “any individual who performs services for and under the control

(continued on page 2)

(continued from page 1)

and direction of an employer for wages or other remuneration.” D’Annunzio alleged that CEPA applied to him because Prudential exerted extensive control over his activities and time.

The Court agreed with D’Annunzio that he met the definition of “employee” under CEPA because of Prudential’s level of control and work integration. Facts the Court emphasized were: 1) Prudential required D’Annunzio be on location every day – not only to perform his own work, but to be available to other professionals performing tasks and for consultation and educational purposes; 2) Prudential controlled D’Annunzio’s daily activities in such minute detail that “he was a veritable ‘cog’” in Prudential’s operations; 3) Prudential required substantial time demands that interfered with D’Annunzio’s ability to run his private practice; and 4) D’Annunzio’s duties included “numerous administrative tasks” performed in accordance with Prudential’s protocols in order to further Prudential’s business plan and to advance Prudential’s operation.

Schnader’s Analysis

D’Annunzio shows that New Jersey courts continue to apply employee protection laws in the most liberal way possible to support the laws’ remedial objectives. Such laws not only include CEPA, but other employee protection laws as well, including New Jersey’s Law Against Discrimination. Although some cases are clear-cut, such as the electrician that you find in the

phone book to fix an outlet in your office cafeteria will likely not have protections under CEPA, while the 30-year employee you make an “independent contractor” who will continue working the same hours and duties as before will likely be covered, there are many shades of grey in between. And although the Court provides various tests and factors to determine whether a person is an “employee” or not under these laws, courts will continue reviewing each case on a fact-specific basis. Unfortunately, the result will likely be an increase in litigation that will last longer because fact-specific cases are not usually ripe for early dismissal. ♦

For further information, please contact Schnader attorneys:

Scott J. Wenner
(212) 973-8115
swenner@schnader.com

Michael J. Wietrzychowski
(856) 482-5723 or (215) 751-2823
mwietrzychowski@schnader.com

* * *

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.