EMPLOYMENT

Misclassification of Employees as Independent Contractors: A Costly Mistake

By Mordy Yankovich

Misclassifying an employee as an independent contractor can be devastating to an employer. Employers can potentially be liable for, including but not limited to, back wages, overtime pay, liquidated damages, attorneys' fees and stark penalties for failure to withhold applicable taxes, pay workers compensation and unemployment insurance. Employers commonly make the mistake of assuming that self-classifying workers as independent contractor and issuing them a Form 1099 is determinative. That approach is faulty and can be costly.

Courts apply varied standards in determining whether an individual is an independent contractor or an employee. However, all courts focus on the actual functional relationship between the purported employer and the individual — especially the level of control the purported employer has over the individual — and not simply whether a 1099 is issued as opposed to a W-2.

In the context of coverage under the National Labor Relations Act, the National Labor Relations Board recently revised its standard for determining whether an individual is an independent contractor under the NLRA and, thus, not afforded its protections regarding unionizing. In *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), the NLRB reverted to its 2010 standard — known as the "traditional common law test" — in finding that a group of airport shuttle operators were independent contractors pursuant to the NLRA. In so doing, the NLRB overturned its 2014 decision in *FedEx Home Delivery*, 361 NLRB 610 (2014) (issued during the Obama presidency). The traditional common law test considers the following non-determinative factors: The extent of control the purported employer maintains over the individual; the method of payment; whether the purported employer or individual provides the supplies, tools, and work location; extent of supervision over the individual; whether the purported employer and the individual believe they created an employer/employee relationship; whether the work is part of the purported employer's regular business operations (i.e. working as an attorney at a law firm); length of employment/engagement; and skills required to perform the work.

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In analyzing these factors, the NLRB determined that the shared-ride operators were independent contractors. The NLRB reasoned that these individuals had significant entrepreneurial opportunity and control over the "manner and means by which [they] conduct their business." Specifically, the NLRB found determinative that the individuals purchased or leased their vans, controlled their own work schedules and working conditions, paid a monthly fee to the company and retained all fares collected.

Courts generally apply a modified version of this test when determining whether an individual is an independent contractor or employee, with the overall control the purported employer has over the individual being the dominant factor. *See Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217, 227 (2d Cir. 2008) (applying a 13 factor common law agency test to a Title VII and NYSHRL discrimination case with the most important factor being "the extent to which the hiring party controls the manner and means by which the worker completes her assigned tasks"); *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988) (applying five factor "economic reality test" to Fair Labor Standards Act matter); *Paiva v. Olympic Limousine, Inc.*, 270 A.D.2d 534 (3d Dept. 2000) (determined that employer "exercised direction and control over individuals' work to establish their status as its employees" requiring the employer to pay unemployment insurance contributions).

In order to avoid significant financial consequences, employers must consider these different factors in the context of the overall control exerted over workers, prior to classifying them as independent contractors.

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LGBTQ

LGBTQ Pride — Not a Political Posture or Legal Position, but a Celebration of Ourselves

By Christopher Chimeri

June 28, 1969, known worldwide as the beginning of the Stonewall Riots, marked the "turning point" of what many credit as the commencement of the modern-day gay rights movement. But, those involved in the historic may-lay do not relate this to any pending "landmark" court case, proposed legislation, or even a political platform at large. Instead, gay pride events, the most common of which are annual parades, have little, if anything, to do with politics or law. While the annual celebrations may incorporate some reference to current legal happenings and political discourse that at the time cannot be ignored, these international assemblies, most often held in June each year, commemorate for all a celebration of self. Were this a political question, one would be hard-pressed to distill the question beyond the "right to BE."

The LGBTQ community includes all races, genders, creeds, and groups and lest there be any doubt in this regard, I invite one to poll a sample of participants at a gay pride event about any specific legal or political question, in response to which answers would uniformly and unequivocally range (as it similarly would in a sampling of non-LGBTQ citizens) from a blank stare to a much more detailed and impassioned set of beliefs on either side of the political aisle. Democrats, Republicans, young, old, black, white and everyone in between come together not in spite of, but because of these differences to celebrate the collective "we," the fact that we are from all walks of life with a single common thread — that we were born this way.

Proof positive that gay pride parades are not "political" events is found in the very history of the Stonewall Riots, which began as pushback toward law enforcement in New York City during an attempt to raid a gay bar. The historic event, simplified and distilled due to word count restrictions here and with no disrespect to the original Stonewallers, came when for decades prior (and after) police raided gay bars as underworld activity. They arrested "associates" involved in homosexual activity, not for drugs, violent crimes and or for any other criminal reason for which arrests are legally intended, but rather, the common thread was that arrestees' liberty was taken for simply being gay. The patrons at Stonewall Inn on that fateful day decided to impactfully announce that they would not be outlawed for embracing their fullest "selves."

Christopher Chimeri

What does this have to do with, or why does it belong in, "The Suffolk Lawyer?" The Hon. Chris Ann Kelley and I co-chair the Bar Association's LGBTQ Law Committee, whose mission statement includes: "to educate members of . . . the public on legal issues affecting the LGBTQ community and to promote full and equal participation in the legal profession by members of differing sexual orientations and gender identities; and to promote justice in and through the legal profession for the LGBTQ community." In furtherance of that portion of our mission statement, the committee requested of the Bar Association's board permission to participate in the Long Island LGBTQ Pride Celebration in Long Beach this year, in part in honorable recognition of the 50th Anniversary of Stonewall, but more so apropos as the next logical step in expanding the Bar Association's almost unanimously approved acceptance message mentioned above, and to do so beyond the four walls of 560 Wheeler Road.

It became apparent that there was a contingent of "opposition" on the board, manifesting such opposition with a claimed "concern" that with SCBA-sanctioned participation in a pride event, we were "taking a political stance." The lesson learned, which lesson connotes its own symbolic importance, is that many still believe that the assembly of LGBTQ people at an event is, in itself, political in nature. So, I pondered, is one's right to exist political? Surely, it is not. The founding documents of our great country laud our right to freedom of assembly and expression, and the host of personal liberties that define what it is to be American far predate even the faintest political hint of "gay rights issues." Lest there be any doubt about the non-political nature and purpose of a pride event, one need only look to a sampling of attendees to find that the crowd includes those who define as "red" and "blue" alike, some are married, some single, races come together as one and the same, a growing number of attendees are not even gay (defining as "allies," aligned with the right to be one's self) and the only common thread found is the desire to celebrate the uniform and inalienable right to be one's self, a right this committee wishes to celebrate with the very public we serve each day.

Certainly, I believe it appropriate to credit the board for having given us its time and after, consideration, for ultimately supporting this request. Though the decision was by no means unanimous and in fact, by a narrow margin, the committee is most appreciative of the board's decision.

Indeed, the committee's very existence within SCBA is symbolic of this celebration and association. Much as the original Stonewall group stood their ground and decided they would no longer be treated as underground criminals required to exist privately and on the fringe of society just for being themselves, when we initiated this committee, Judge Kelley and I chose to exist within the Suffolk County Bar Association, our Bar Association, rather than symbolically sneak off to a dark corner and form our own association. It was and remains important to the committee membership, a significant portion of which includes allies and not just LGBTQ people, that we exist as part of Suffolk County's legal community. For that reason, we continue to participate in more CLE programs than any other committee within the SCBA, and we will continue to seek new ways to increase participation and membership as a positive reflection on the SCBA.

In furtherance of our celebration this June, the SCBA LGBTQ Law Committee proudly invites anyone to join us during Long Island's LGBTQ Pride events. Details on how to become involved can be obtained by contacting me at CJC@QCLaw.com or by telephone at (631) 482-9700.

Likewise, the committee proudly invites all to the Central Islip Courthouse Central Jury Room on June 13 at 1:00 p.m. for our 3rd Annual Pride Celebration. This year, we welcome distinguished guest the Honorable Paul Feinman, Justice of the New York State Court of Appeals, and it remains the committee's hope that Suffolk County can impress the state's high court with the overwhelming support for this celebration, which includes Feinman's own identity as the first openly gay justice on the New York State Court of Appeals. Formal details on this event, sponsored in conjunction with OCA and the overwhelming and always-appreciated support of Administrative Judge C. Randall Hinrichs and his staff, will follow in the coming weeks.

Note: Christopher J. Chimeri is a partner with Quatela Chimeri PLLC, with offices in Hauppauge and Mineola, and he focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBTQ Law Committee. From 2014-2018, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star."