



Legal Alert: Ninth Circuit Finds Insurance Agent is Independent Contractor, Not Employee

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The Ninth Circuit recently held that a "career agent" who sells the financial products and services of a group of financial services companies is an independent contractor and, accordingly, cannot sue the companies for sex discrimination under Title VII because that statute only covers employees. See *Murray v. Principal Financial Group* (9th Cir. June 17, 2010). In reaching this decision, the court noted that it and "virtually every other Circuit to consider similar issues, have held that insurance agents are independent contractors and not employees for purposes of various federal employment statutes."

The Ninth Circuit also clarified the test to be used in determining whether a worker will be considered an employee or an independent contractor. Relying on the U.S. Supreme Court's 1992 decision in *Nationwide Mutual Insurance Co. v. Darden*, the court held, "when determining whether an individual is an independent contractor or an employee for purposes of Title VII, a court should evaluate 'the hiring party's right to control the manner and means by which the product is accomplished.'" The factors relevant to this inquiry are:

- the skill required;
- the source of the instrumentalities and tools;
- the location of the work;
- the duration of the relationship between the parties;
- whether the hiring party has the right to assign additional projects to the hired party;
- the extent of the hired party's discretion over when and how long to work;
- the method of payment;
- the hired party's role in hiring and paying assistants;
- whether the work is part of the regular business of the hiring party;
- whether the hiring party is in business;

- the provision of employee benefits; and
- the tax treatment of the hired party.

The court held that several of these factors favored a finding that the agent, Murray, is an independent contractor, including that she is free to operate her business as she sees fit, without day-to-day intrusions; she decides when and where to work and maintains her own office; and she schedules her own time off and is not entitled to vacation or sick days. Additionally, Murray is paid on a commission basis only, reports herself as self-employed to the IRS, and, in some circumstances, sells products other than those offered by Principal. Although the court acknowledged that there are some factors in the relationship between Murray and Principal that support the argument that Murray is an employee, these factors were not sufficient to overcome the strong indications that Murray is an independent contractor.

Employers' Bottom Line:

This decision is good news for insurance companies because it clearly sets forth the standards to be used (at least by courts in the Ninth Circuit's jurisdiction) for determining whether a worker is an employee or an independent contractor. Additionally, the court's decision is important because it emphasizes that the key issue is control and that the "minutiae" of the relationship are not determinative.

If you have any questions regarding this decision or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.