



Legal Alert: Minnesota Appeals Court Clarifies Distinction Between Independent Contractor and Employee

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On July 20, 2010, the Minnesota Court of Appeals issued a decision that clarifies the standard for determining whether certain workers are properly classified as employees or independent contractors. While the Court analyzed this issue under Minnesota law, the factors are generally the same in most states and also under federal law, and courts, agencies, and plaintiffs' lawyers across the country are scrutinizing the issue of contractor vs. employee more than ever before, so the case provides valuable guidance for all employers.

In *St. Croix Sensory, Inc. v. Department of Employment and Economic Development*, the Minnesota Court of Appeals reversed the Minnesota Department of Employment and Economic Development's determination that St. Croix Sensory's "assessors" were employees rather than independent contractors. St. Croix Sensory is a sensory laboratory that specializes in odor testing of materials, products and air for private industry and governmental entities. The company hires assessors who perform independent odor evaluations and record their observations so that St. Croix Sensory can relay the test results to its customers. The assessors sign up for whichever tests they want to participate in, thereby setting their own schedules. They do the testing in whatever manner they chose, receive a lump sum for each assessment session rather than hourly pay, and are free to read the paper, play cards, knit, or just visit with the other assessors for about 50 minutes per hour during an assessment session. Nevertheless, the State ruled that the assessors were employees, and subsequently declined to reconsider its determination, leading to St. Croix Sensory's appeal.

In reversing the State's determination, the Court of Appeals examined several factors and emphasized several points. First, the Court disagreed with the State's primary finding, that St. Croix Sensory exercises so much "control" over the assessors' work that they are employees. The Court held that St. Croix's requiring the assessors to follow certain instructions "does not negate the assessors' overall right to control the method and manner of performance." The Court further explained that while St. Croix Sensory might retain control over the "end product," i.e., the odor evaluations, the assessors control the manner in which they perform those evaluations. Thus, the most important factor – control – dictated the conclusion that the assessors were independent contractors.

The Court also noted that to a large extent, St. Croix Sensory's need to control the assessors' end product is dictated by industry standards. If St.

Croix Sensory's odor evaluations do not meet industry standards, its customers cannot use the evaluations. Like any business, St. Croix Sensory has a right to ensure that it produces a product that its customers can use, and according to the Court of Appeals, its adherence to industry standards does not transform contractors into employees.

The Court also emphasized the fact that St. Croix Sensory cannot discharge an assessor in mid-assessment without incurring liability, which again dictates that they are independent contractors. The evidence showed that if St. Croix Sensory discharges an assessor (which it never has actually done), it would pay the assessor for the entire assessment session. The State had argued that such a liability is "very limited," but as the Court noted, the rules speak to liability, period, not to a certain minimum amount of liability.

The Court also addressed several other factors, and ultimately concluded that the State had erred as a matter of law, because "the strength of the factors indicating an independent contractor relationship outweigh[ed] the strength of the factors indicating an employer-employee relationship."

As noted above, this case addressed the contractor/employee issue based on Minnesota law, and was very fact-specific, but nonetheless, the case has implications for all employers, in any state. The factors the Court addressed in St. Croix Sensory are similar to the factors used in most states, and under federal law, to determine whether a worker is a contractor or employee not only for unemployment compensation purposes, but also for tax purposes, determining the worker's eligibility to bring certain legal claims, and assessing the business' liability for the worker's misconduct or negligence.

First, much of the State's case was based on the wording of St. Croix Sensory's contracts with its assessors. The right to stop an assessor's work or prescribe alterations, for example, was a right that appeared in the contract, even though it was not a right that St. Croix Sensory ever actually exercised, and was the State's primary evidence of "control." Thus, while businesses that utilize contractors are well-advised to use written contracts, they should review those contracts to ensure that they do not include language that indicates the company exerts control over the contractor.

Second, businesses utilizing contractors must be sure to avoid controlling the contractors' methods of doing their work. While every business wants to ensure that its workers are doing the job right, businesses must afford their independent contractors a great deal of autonomy, to avoid transforming them into employees. As the St. Croix Sensory decision makes clear, however, this does not mean that the company loses the right to control the ultimate "end-product" of the work or to ensure that the contractors comply with industry standards.

Finally, companies using contractors should avoid discharging the contractors without incurring liability. In other words, business should adopt a policy of paying contractors at least some fee even if they leave or are discharged before the job is done. While this policy can cost a business a small amount of money on the front end, the failure to pay a discharged contractor could ultimately cost a business much more money in the long run, by turning that contractor, and potentially every other similar contractor, into an employee.

If you have any questions regarding this decision, please contact the author

of this Alert, Andrew Tanick, atanick@fordharrison.com, who was the lead counsel for St. Croix Sensory in this case, or the Ford & Harrison attorney with whom you usually work.