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Nevada Supreme Court Adopts Economic Realities Test to Determine Employment Status

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Recently, the Nevada Supreme Court in *Terry, et al., v. Sapphire Gentlemen's Club*, reversed a lower court's ruling and held that performers at Sapphire Gentlemen's Club meet the definition of "employees" under the Nevada Revised Statutes (NRS). For the first time, the court explicitly adopted the federal Fair Labor Standards Act's (FLSA) "economic realities" test for assessing independent contractor versus employee status under Nevada law. The court concluded that as employees, these performers are entitled to be paid minimum wage for all hours worked.

Sapphire Gentlemen's Club (the "Club") has over 6,600 dancers who provide entertainment for its customers. As the court explained, the Club does not pay its performers; they are considered independent contractors, and their income is derived solely from tips and dancing fees paid by guests. On the nights they are working, dancers pay the Club a "house fee." Performers may determine their own schedules but must work at least six hours on any day they work unless they notify the Club they wish to clock-out early. The Club sets a minimum price for private performances, but allows performers to charge what they want above that set amount. The Club's D.J.s choose the music, and each performer must comply with Clark County regulations regarding physical contact with customers, but the dancers control the other artistic aspects of their performances. There are additional "house rules" that apply, including minimum body coverage for costumes, minimum heel height, and a requirement they dance on the stage at least twice, or pay an "off-stage" fee.

The lower court applied the five-factor test used to determine employment status under the Nevada Industrial Insurance Act and held the performers were properly classified as independent contractors, and not employees.

On appeal, the Nevada Supreme Court first looked to NRS 608.010, which defines employees as "persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." Accordingly, it held, whether the performers are employees depends on whether the Club is their employer. Looking at various definitions of "employer," the court concluded that none were precise enough to provide lower courts with a structure under which they could assess working relationships.

Although the NRS and FLSA definitions of “employer” are different, the court acknowledged that the Nevada legislature has often relied on federal minimum wage law in crafting related state laws. Additionally, the court noted that many other states have also adopted the economic realities test to assess employment relationships under state law. The court further explained that it has historically been guided by the FLSA except where Nevada law is explicitly contradictory. Lastly, the court stated that legislative history supports adopting the FLSA’s economic realities test.

Under the economic realities test, courts will examine a variety of factors, including: 1) the degree of the alleged employer’s right to control the manner in which the work is to be performed; 2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is an integral part of the alleged employer’s business.

The court held that the Club exercised control over and “monitor[ed]” the performers, even though the choices given to the performers included, for example, dancing on stage at least twice or paying a fee to the Club. The Club also exercised some degree of control over the dancers’ appearance, work schedules and their movements while working. The court noted that dancers’ opportunity for profit is limited, and that their financial contributions are restricted primarily to their appearance-related expenses and house fees. These factors weighed in favor of finding an employment relationship. The court was unpersuaded by the Club’s arguments that dancers have to have a special skill, “hustling,” and that dancers can perform at other clubs as well.

After examining the totality of the circumstances, the court concluded that Sapphire qualifies as an employer, and its dancers were properly classified as employees and therefore entitled to receive minimum wage.

Nevada employers are cautioned to reevaluate their independent contractor relationships in light of the Supreme Court’s adoption of the economic realities test. Indeed, the economic realities test is widely considered to be a plaintiff-friendly test and its adoption in Nevada may expand employer liability across all industries. Especially because Nevada does not reduce the minimum wage for tipped employees, this decision will likely have far-reaching and expensive consequences.

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