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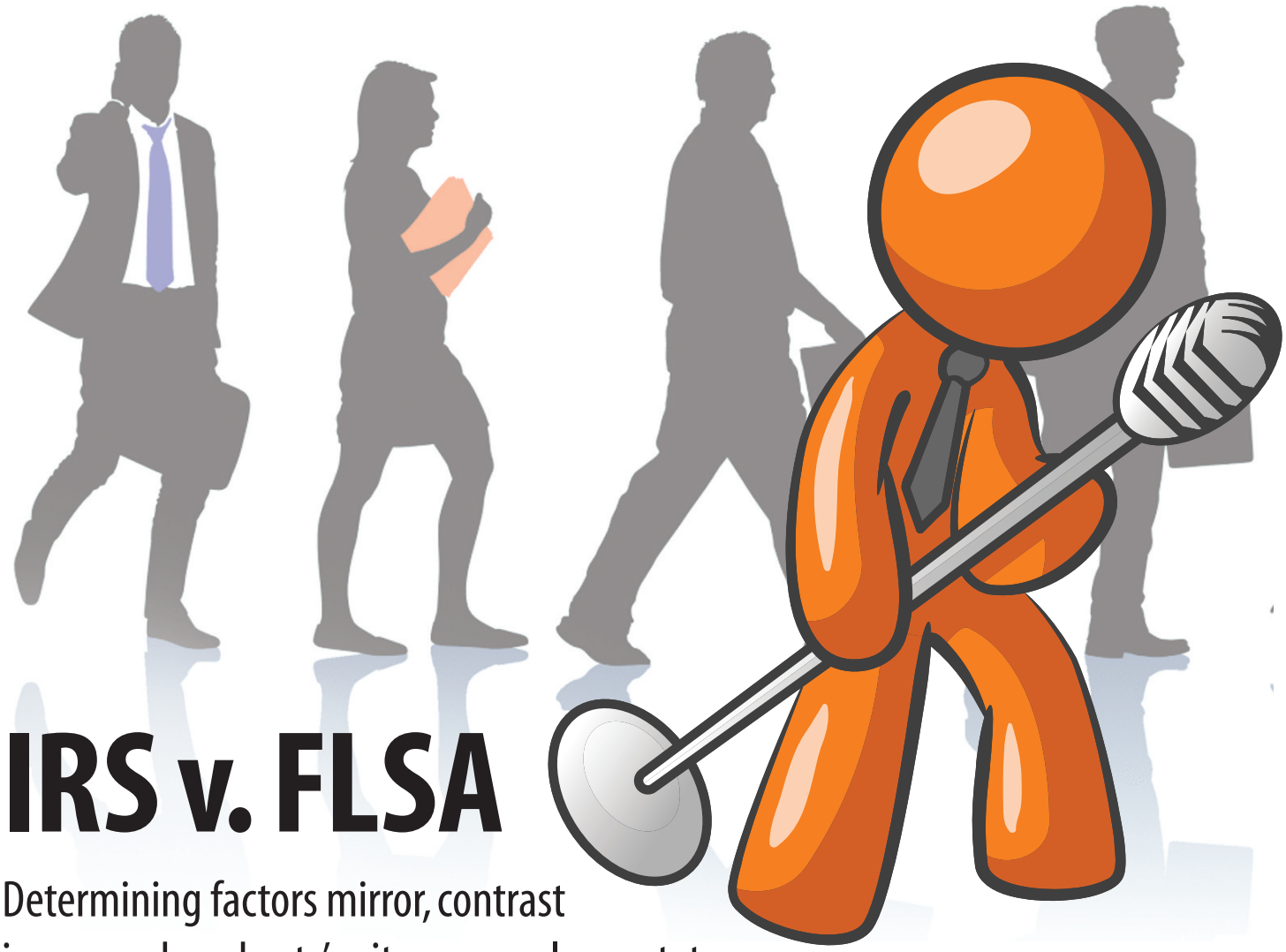

IRS v. FLSA

Determining factors mirror, contrast in game-show hosts' suit over employee status

Verdicts & Settlements Plus

By Douglas J. Levy

In terms of employee classification, does an IRS determination letter trump the Fair Labor Standards Act (FLSA) in a jury's eyes?

That's the issue Karl P. Numinen was up against in fighting claims that three independent contractors who worked for his client, an entertainment group, were entitled to overtime pay and employee benefits.

"Plaintiffs' strongest evidence was the IRS letters," said Numinen of Marquette-based Pence & Numinen, PC. "They used them repeatedly with every witness to say the IRS made the determination that you were an employee, and used them to argue to the jury, if the IRS considers them employees, *you* should consider them employees."

But the federal jury ultimately had to use the FLSA's six-prong economic realities test as the decider, and in issuing its no-cause-of-action verdict in U.S. District Court for the Western District of Michigan, determined the plaintiffs were not employees.

However, should another assessment be used in a lawsuit that seems similar, it could have a different outcome.

"In the employment area, there are probably three of four different tests to determine whether there's an employer/employee relationship, whether it's the economic realities test, the IRS tests, or the joint employment test," said Christopher M. Trebilcock of Miller, Canfield, Paddock and Stone, P.L.C.

Finding 'safe harbor'

The plaintiffs worked for Grand Rapids-based TjohnE Productions Inc. as "hosts" of games and game show-like variety acts for the college market, and would go on tours. They asserted being owed overtime pay and benefits, and that their independent contractor status was wrong.

"A couple of the road workers filed inquiries with the IRS in 2005 saying, 'We think we should have been treated as employees, not independent contractors, and we think this employer misclassified us. Would you look into that?'" Numinen explained.

"And there's a process the IRS goes through. They take the information given by the worker, then they send an inquiry letter to the employer, saying, under the IRS factors, and there are 20 of them, 'We want your information on these things.'"

The IRS concluded that the plaintiffs were indeed employees, and sent out SS-8 determination letters to TjohnE confirming it.

"It was a turning point, because the plaintiffs were using these [SS-8] letters to say, under the IRS standards, which are much more exacting than the FLSA, they're employees, and therefore, under FLSA, they should be employees," Numinen said.

However, he added, there was an exception.

"Even under the IRS rules, even if all 20 IRS factors support a determination that they're employees, the IRS has what's called a safe harbor under section 530 of the Internal Revenue Code," Numinen said. "[It] that says if an industry standard is to treat these people like independent contractors and to classify them that way, then you can continue to do so, even if our 20-factor test said they're employees."

Even so, he said, "the judge gave special instructions to the jury that said, 'You've heard evidence of SS-8 determination letters, but this is not a tax case, and you're not bound by those determinations. You can under the FLSA come to a different conclusion.' And that's what they did; they only looked at the six FLSA standards" of the economic realities test.

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— Karl P. Numinen, Pence & Numinen, PC

A matter of control

Both sides argued that the six economic realities factors — such as the degree of control over the performance of the work exercised by the employer; the permanency of the employment; and whether the worker has an opportunity to realize a profit or suffer a loss — supported their respective positions.

Each factor is "encompassed within the more specific, simpler, yet longer test that the IRS uses. But if you break down the economic realities test into parts, you can usually come up with the same 20 points the IRS uses to analyze the issue," said Dale R. Burmeister of Harvey Kruse, P.C., who, along with Jason R. Mathers, represented the plaintiffs.

In fact, Mathers added, the defendant raised the same issues to the IRS, and was rejected.

"They didn't do anything new at trial; it was the same arguments," he said.

And, Burmeister said, just before trial, the Department of Labor and IRS announced a new cooperation agreement to crack down on employee misclassification.

The plaintiffs argued that in regard to the issue of control, TjohnE would book the shows and tour schedules, so they'd control the dates, places, contact people and kinds of show getting played at each market.

"Plaintiffs said that was an indication that you're controlling the performance because it controls where we go, who we see … that we have to wear your T-shirts when we perform, this is a uniform," Numinen said.

But, he said, the defense was that TjohnE didn't control the performances themselves, only where its workers needed to go and what shows were to be done.

As for permanency of the job, Numinen said, "all of these people come and go. They're hired for one tour a time, and maybe they'll do one or two tours this year, then they won't come back. There's no permanency to this kind of job."

In addition, he said, each was contracted for each tour under a separate written contract stating they were independent contractors.

Different tests, purposes

Numinen said that Judge Robert J. Jonker, who presided over the trial, called it a "wedge" case in that, if the plaintiffs prevailed, it would have prompted national claims by similarly situated entertainment industry workers.

But Trebilcock reiterated that there's no guarantee a jury wouldn't be swayed if another test were used.

"There are lots of times when you are determined to be an employer or an employee to one statute but you're not under another, and you have to look at the purpose of the statute," he explained. "The Internal Revenue Code has a different purpose than the FLSA. … There can be someone who is an agent and bind an employer under Title VII, but they're not an employee under the FLSA."

Burmeister and Mathers said they are probably going to file a motion for judgment notwithstanding the verdict or for a new trial.

Numinen said he doesn't believe there are any grounds for an appeal, in that "the judge looked at all dispositive motions in a light most favorable to the plaintiff, and he denied summary disposition in its total. He let them go to trial and try the case."

If you would like to comment on this story, please contact Douglas J. Levy at (248) 865-3107 or douglas.levy@mi.lawyersweekly.com.

[Verdicts & Settlements]

Entertainment workers dispute status as independent contractors

Collective action asserts IRS determination letters say they are employees

Type of action: Fair Labor Standards Act

Type of injuries: Overtime pay, employee benefits

Name of case: *Troyer, et al. v. TjohnE Productions, Inc., et al.*

Court/Case no./Date: U.S. District Court, Western District of Michigan; 1:09-CV-00821; Sept. 23, 2011

Tried before: Jury

Name of judge: Robert J. Jonker

Demand: $350,000

Verdict: No cause of action

Special damages: Attorney fees

Attorneys for plaintiff: Jason R. Mathers, Dale R. Burmeister

Attorney for defendant: Karl P. Numinen

Keys to winning: Winning pre-trial motions to get eight of the original 11 plaintiffs dismissed from the case, then setting the case up so, at trial, defense counsel was able to impeach the credibility of the remaining plaintiffs by producing documentary evidence

No cause

In a lawsuit filed in U.S. District Court for the Western District of Michigan, a collective-action group of plaintiffs, led by Casey Troyer, sought compensation — including overtime pay and employee benefits — from defendants TjohnE Productions, Inc., Think Fast Corp., X-Treme Entertainment, Inc., Timothy John and Linda John, on claims of violation of the Fair Labor Standards Act (FLSA).

TjohnE, a Grand Rapids-based entertainment agency owned by Timothy John, creates, produces and books a variety of games and game show-like variety acts primarily for the college market.

Plaintiffs asserted they worked far in excess of 40 hours per week on the tours that TjohnE booked, and, despite signing written independent contractor agreements for each tour, should have been paid as employees.

Among evidence presented were defendant TjohnE's SS-8 determination letters from the IRS, wherein the IRS determined that the plaintiffs and similarly situated workers were, in fact, "employees" under the 20-factor IRS guidelines, and should have been classified as such instead of "independent contractors."

It was further contended that defendants continued to classify plaintiffs as independent contractors instead of employees, thus violating the FLSA when the defendant failed to do proper withholdings and pay overtime.

In addition, plaintiffs asserted that, because defendant never told its road workers about the IRS determination letters, the alleged FLSA violation was "willful," and that the statute of limitations must be extended from two years to three years.

Defendants contended that the SS-8 letters were not dispositive on the FLSA issue. It also was asserted that section 530 of the Internal Revenue Code provides a "safe harbor" provision, which exempts an employer if it can be shown that classification of certain workers as independent contractors is consistent with an "industry standard."

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Defendants further asserted that the entertainment industry has consistently hired workers similarly situated to the plaintiffs as independent contractors because of the sporadic nature of the work, and that the six-factor "economic realities" test under the FLSA supported the plaintiffs' classification as independent contractors.

The jury found for the defendants and issued a no-cause-of-action verdict.