



HENDRICK PHILLIPS
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ATTORNEYS AT LAW

LEGAL ADVOCATES, ADVISORS & CONSULTANTS TO THE CONSTRUCTION INDUSTRY



Employment Law Issues Keeping Insulators Up at Night



Presented by Philip J. Siegel, Esq.
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1981 - 2021

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YEARS OF SERVICE

1. The Misclassification Issue: Independent Contractor v. Employee



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The Misclassification Issue

- ◆ Economic reality test rescinded as of May 6
- ◆ Common rule analysis applies, for now
- ◆ ABC Test on the horizon?



Common Law Test

◆ Seven Factors:

- the degree of control exercised by the principal over the details of the work
- which party invests in the facilities used by the worker
- the opportunity of the worker for profit or loss
- whether the principal can discharge the worker
- whether the work is part of the principal's regular business
- the permanency of the relationship
- the relationship the parties believed they were creating



The ABC Test

- ◆ A worker is an employee, unless:
 - Worker is free from control and direction of employer
 - Work performed is outside the employer's usual business
 - Worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed



Insurance and OSHA

- ◆ Worker's compensation and statutory employer liability
- ◆ Controlling employer liability



2. Davis Bacon Act Issues



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Question

I reviewed the project wage determination, and I am unsure which job classification applies to the work performed by my employees. What do I do?



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Job Classifications

- ◆ Is the prevailing wage rate the union rate or non-union rate?
- ◆ Consult with the contract administrator or regional wage and hour specialist



Wage Identifiers

- ◆ “SU” designation
- ◆ No “SU” designation?
- ◆ Classifications without the “SU” designation are defined according to the local CBA for the craft at issue
- ◆ If the “SU” designation is present, local area practice as determined by the survey results prevail



Wage Identifiers – Ex.

CARP1263-003 07/01/2009

- ◆ Identifying the international union for the local union that negotiated the listed wage rates
- ◆ Identifying the local union
- ◆ Numbers that follow are internal DOL numbers
- ◆ Date listed is the effective date of the most current negotiated rate



Question

I reviewed the project wage determination, and it does not contain a class of workers needed to complete construction. What do I do?



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Requesting Additional Classifications

- ◆ Conformance Requests
- ◆ If missing from the WD, the CA will forward the request to the DOL
- ◆ Must be finally approved by the Department of Labor, and no one else.



Requirements for Additional Classifications

- ◆ Responses generally are issued within 30 days of receipt
- ◆ Requests for Reconsideration
- ◆ Disputes proceed to the Wage and Hour Administrator
- ◆ Appeals are heard by the Administrative Review Board.



3. Wage and Hour Issues



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Wage and Hour Issues

- ◆ Paying overtime to employees paid on a piece rate basis
- ◆ Unauthorized overtime
- ◆ Early birds and time keeping
- ◆ Lunch breaks
- ◆ Rest or smoke breaks



4. Confidentiality Concerns



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Confidentiality Concerns

◆ Form I-9s

◆ Vaccination Cards



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5. H-2B Visas



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6. Medical Marijuana Issues



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High Times



- ◆ Reasonable accommodations and zero tolerance policies do not mix
- ◆ Impairment training
- ◆ Consider Off Duty Conduct laws



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Thank You!



ANY QUESTIONS?

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