

Moonlighting Police Officers Are Employees, Not Independent Contractors, Says Sixth Circuit

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In yet another legal development calling into question a traditional independent contractor relationship in the U.S., the Court of Appeals for the Sixth Circuit determined that off-duty police officers were employees of a private security company for purposes of the Fair Labor Standards Act. In [Acosta v. Off Duty Police Services, Inc.](#) (6th Cir. Feb. 12, 2019), the circuit court found that the officers satisfied five of the six factors in the “economic reality” test used to determine employee status.

The defendant, Off Duty Police Services (ODPS), contracts with businesses in and around Louisville, Kentucky, to offer private security and traffic control services. ODPS provides some of these services by engaging sworn, off-duty police officers who—when they’re not working for ODPS—are employed full time or otherwise by a law enforcement agency. ODPS classified the workers as independent contractors, and did not pay them overtime wages or keep the pay and hours records required by FLSA regulations. The U.S. Department of Labor sued ODPS.

Following a bench trial, the district court concluded that the off-duty officers were independent contractors vis-a-vis ODPS because they “simply were not economically dependent on ODPS and instead used ODPS to supplement their incomes.” The district court also held that other of ODPS’s security workers—those who were not off-duty police officers—were employees of ODPS. Both parties appealed.

The Sixth Circuit applied a six-factor “economic reality” test to determine whether ODPS’s workers qualified as employees under the FLSA, noting that the ultimate question is whether a worker is economically dependent on an alleged employer. The factors considered are: (1) the permanency of the relationship between the parties, (2) the degree of skill required for the rendering of the services, (3) the worker’s investment in equipment or materials for the task, (4) the worker’s opportunity for profit or loss, depending upon his or her skill, (5) the degree of the alleged employer’s right to control the manner in which the work is performed, and (6) whether the service rendered is an integral part of the alleged employer’s business.

Integral Nature of Work

At the outset, the Court of Appeals noted that ODPS “built its business around the security and traffic control services provided by its workers,” and therefore “[t]here is no doubt that the services offered by ODPS’s workers are integral to the company.” The court rejected ODPS’s argument that it is merely “an agent between its customers and independent ... officers.”

Degree of Skill

On the degree of skill required, the court credited the officers’ trial testimony that the tasks they performed required little skill, initiative, or training. The court was less persuaded by ODPS’s argument regarding the high degree of skill and training required to become a licensed police officer, noting that this factor does not concern the skills *possessed* by the workers, but rather the degree of skill required for the *rendering* of the services. That ODPS engaged non-sworn officers further supported the conclusion that the work did not require the high degree of skill that sworn police work can require. The court determined that the facts favor employee status.

Workers’ Investment

The court discussed the limited investment by the workers, noting that ODPS periodically supplied them with basic equipment necessary for the job, including signage, reflective jackets, and badge-shaped patches with the ODPS logo. While the workers had to purchase or lease a police uniform and supply their own vehicle, the cost of those items “pale[d] in comparison to the amount ODPS spent running its business per year.” The court determined that the facts supported employee status.

Permanency of Relationship

To assess the permanency of the relationship, the court examined both its length and its regularity, noting that independent contractors “often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas employees usually work for only one employer and such relationship is continuous and indefinite in duration.” By contrast, the court observed, that a party works for more than one company is only “one factor of many to consider in determining whether a worker is economically dependent” upon one of those companies:

[W]hether a worker has more than one source of income says little about that worker’s employment status. Many workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet. An income-based rule would deny that economic reality.

The court noted that while ODPS’s workers accepted jobs intermittently, they often worked for ODPS for years—or, in some cases, decades—at a time, a fact supporting employee status.

Opportunity for Profit or Loss

The court rejected ODPS’s argument that because workers could accept or reject work, they effectively controlled their opportunities for profit or loss by maintaining ultimate control over their workload. The more relevant inquiry, in the court’s view, is whether workers can increase profits through “managerial skill” (e.g., by improving efficiency to complete more jobs per day):

It requires little skill to determine whether one is available at a certain day and time or whether inclement weather or some other factor might make a job less desirable. And while the ability to control one’s schedule may, in some circumstances, allow more efficient workers to maximize profits, ODPS’s workers had no such opportunity. ODPS’s assignments required workers to be present for set periods of time, regardless of what skills they exercised, so workers could not complete jobs more or less efficiently than their counterparts.

The court also noted that the workers received an hourly wage from set unilaterally by ODPS, regardless of the skill they exercised, and determined that the facts supported employee status.

Degree of Control

As to the degree of control exercised by ODPS, the court was less concerned with the control the company exercised than the control it retained the right to exercise. The court noted that the workers were subject to ODPS policies and procedures, non-compliance with which could result in discipline (a “time out,” or period of no work) or complete termination of the relationship. The court also noted that ODPS set the rate at which the workers were paid; told the workers where to go for the job, when to arrive, and whom they should contact when they got there; periodically checked in on the workers at the work site; and imposed dress and grooming standards. ODPS argued that it did not supervise the day-to-day performance of the workers, but the court countered that “such close supervision is not necessary to establish control.” The court found the facts not to break cleanly in favor of employee or independent contractor status.

Balancing the Factors

Because five of the six economic reality factors supported finding an employment relationship between ODPS and the workers, the Court of Appeals concluded that the workers were employees entitled to overtime wages, especially when viewing the factors in light of the FLSA’s “strikingly broad” definition of “employee” and the statute’s “remedial and humanitarian purpose.”

Final Thoughts

The legal justifications for independent contractor relationships are being scrutinized in courts and governmental agencies throughout the U.S. As a result, businesses that have relied historically on services provided by independent professionals, contractors, and consultants are increasingly under attack. The Sixth Circuit put it bluntly: “The way we work in America is changing. The relationships between companies and their workers are more fluid and varied than in decades past.”

Businesses that are not engaging in rigorous self-examination of their relationships with independent contractors are missing a potential opportunity to reduce their legal—and therefore financial—risk.

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