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CALIFORNIA EMPLOYMENT LAW UPDATE

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Court of Appeal Clarifies Distinctions Between An Employee And An Independent Contractor

On January 23, 2009, the California Court of Appeal, Fourth Appellate District, published its decision in *Cristler v. Express Messenger Systems, Inc.*, providing further guidance on the distinctions between an employee and an independent contractor. The plaintiffs were James Cristler and a class of similarly situated persons (collectively "Cristler"), who sued a parcel delivery company, Express Messenger Systems, Inc., doing business as California Overnight ("Express Messenger"). The lawsuit contained a number of causes of actions, including failure to pay overtime wages, all based on a core contention that Express Messenger improperly classified its employees as independent contractors.

The trial court granted Cristler's motion to pursue the litigation as a class action. At the conclusion of the trial, the jury returned a special verdict finding that "the drivers in the Plaintiff-Class are Independent Contractors," not employees. Following the special verdict, the class members' various claims were dismissed.

On appeal, the Court of Appeal, like several California courts before it, emphasized that the most important factor in determining if a worker is an independent contractor is the right to control the manner and means of accomplishing the work. The Court also identified other factors to consider when making the determination: (1) whether or not the individual performing services is engaged in a distinct occupation or business; (2) whether the work is usually done under the direction of the principal or by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the principal or the worker supplies the instrumentalities, tools, and place of work; (5) the length of time for which the services are to be performed; (6) the method of payment (on a project basis, or by the hour); (7) whether or not the work is a part of the regular business of the principal; and (8) whether or not the parties believe they are creating the relationship of employer-employee.

The *Cristler* Court, applying the facts to the above factors, determined that the drivers were independent contractors. The drivers entered into a written independent contractor agreement with Express Messenger, and bid on available routes and negotiated a fee for the routes with defendant. Express Messenger did not limit the number of routes on which drivers could bid. Drivers could deliver packages at any time and in any order drivers chose, so long as packages were delivered by the time specified by the customer. The drivers had the right to perform work for other companies, including competitors. Express Messenger did not pay for the drivers' vehicles, equipment, or business expenses, and did not require the drivers to wear company uniforms. All of these significant facts led the Court to agree with the lower court's determination that Express Messenger did not have sufficient control over the details of the drivers' work to make them employees.

Notwithstanding the defense verdict in the *Cristler* case, employers should proceed with caution when retaining independent contractors. The penalties for misclassification are significant, and employers can face tax audits and lawsuits with potentially large payouts. Employers that use independent contractors should reevaluate the relationship and ensure that workers are properly classified. Employers should be mindful of the following:

- Make sure that adequate documentation is maintained to substantiate the worker's status.
- It is critical that the company and independent contractor sign an agreement laying out the conditions of work; simply calling a worker an independent contractor if he or she does not qualify is not sufficient.
- Regularly review and evaluate all independent contractors to guard against a short-term project having turned into an extended, open-ended arrangement.
- Review definitions of "employee" in benefits plans. Employers might want to exclude a certain category of worker, to make it clear that temporary workers or independent contractors do not qualify for benefits.
- Prior to engaging the services of an independent contractor, review all relevant factors and, if in doubt, obtain legal advice.

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