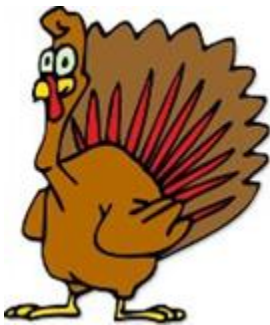




GRAVES DOUGHERTY HEARON & MOODY

Employee or Independent Contractor?

Don't be a turkey. Make Sure Your Workers Are Classified Correctly



In October, 2009, the Fifth Circuit Court of Appeals decided that proving a worker is "economically dependent" on an employer will outweigh other factors in determining a workers' status, under the Fair Labor Standards Act (FLSA).

In *Cromwell, et al. v. Driftwood Electrical Contractors Inc., et al.*, Cromwell and Bankston worked for Driftwood splicing cables post-Hurricane Katrina. They worked for 11 months, 12 hours a day, 13 days on and one day off. They were paid a fixed hourly wage for their work. They provided their own tools and work trucks with one of them making an investment in these items of \$50,000 and the other \$16,000. They provided their own insurance and paid their own taxes. They were given their assignments by Driftwood and were instructed to follow certain specifications, but otherwise were free to perform the assigned work as they chose.

Cromwell and Bankston sued Driftwood for unpaid overtime. Driftwood argued that Cromwell and Bankston were independent contractors not subject to overtime laws. However, the 5th Circuit disagreed.

According to the 5th Circuit, although there were facts supporting a finding of independent contractor status, because Cromwell and Bankston were too busy to work for anyone else, as a practical matter, they "were economically dependant" upon the defendants.

Lesson: Even if a worker is hired on a temporary basis, is not prohibited from taking other jobs and is otherwise independent, if as a practical matter the worker works for a substantial amount of time exclusively with your company, that worker may be an employee, not an independent contractor. Any mistake in determining whether a worker is

an employee may result in a collective action by every worker in a similar job classification who is not properly categorized and paid as an employee as required by the FLSA.

If you have any questions or concerns about your classification of workers as independent contractors, please contact Susan Burton at 512-480-5738, the head of GDHM's Employment Law Department.

From the lawyers and staff at Graves Dougherty, we wish you a Happy Thanksgiving.

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