

## Publications

### **Labor and Employment Alert: 7,000 Insurance Agents Held to be Employees for ERISA Purposes**

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In August 2017, an Ohio federal court certified a class of 7,000 American Family Insurance agents who claimed they were misclassified as independent contractors. In *Jammal v. American Family Insurance*, the Court concluded that the agents were actually employees under the Employee Retirement Income Security Act (ERISA) because American Family retained sufficient control over the agents. The Court recognized the potential repercussions of its decision and expressly authorized American Family to file an immediate appeal with the Sixth Circuit Court of Appeals.

#### **Determining Independent Contractor Status**

To determine whether a worker is an employee under ERISA, courts examine the degree to which the hiring party retains the right to control the manner and means by which the service is accomplished. A worker can be an “employee” if the employer retains the right to direct or control the manner and means of work, even if it does not exercise this right.

Additionally, courts consider myriad non-exclusive factors in evaluating whether the right to control exists: the skill of the job; the source of the instrumentalities and tools; the location of the work; the duration of the relationship; whether the hiring party can assign additional projects; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; the provision of employee benefits; the tax treatment of the hired party; and whether there is an express agreement between the parties. The ability of the hiring party to control job performance and the employment opportunities of the worker are the most important factors.

## The Evidence Weighed in Favor of Employee Status

The Court found the evidence was almost evenly split between favoring employee status and favoring independent contractor status. In sum, the method of payment and tax treatment clearly favored independent contractor status, while the duration of the relationship and the fact that agents' work is the core business of American Family clearly favor employee status. All other factors contain a mix of characteristics between the two designations. But "the employer's ability to control job performance and the employment opportunities of the aggrieved individual are the most important of the many factors to be considered." And here, even though American Family's insurance agents had written independent contractor agreements, American Family retained enough control over the agents for them to be deemed employees.

According to the Court, "The degree of control managers were encouraged to exercise was inconsistent with independent contractor status and was more in line with the level of control a manager would be expected to exert over an employee." American Family appeared to retain at least some degree of control over their agents' decisions in nearly every category. And "if the agent did not agree with or follow American Family directives and suggestions, control would be exercised by most managers in the form of reprimands, threats, and potential termination." This was inconsistent with independent contractor status.

## Conclusion

Here, the Court concluded that the evidence supported both sides but that the amount of control American Family exercised (or could have exercised) tipped the scales in favor of employee status. At the same time, the Court noted that prior case law has been "nearly unanimous" in finding insurance agents to be independent contractors and that the resolution of damages will be "unusually complicated." So it recognized its decision has "far-reaching" repercussions. Consequently, it stayed the case and authorized American Family to file an immediate appeal with the Sixth Circuit Court of Appeals. Contact your Vorys lawyer if you have questions about the insurance agency-agent relationship or other independent contractor issues.