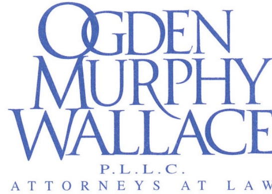

CASE REPORT

MINIMUM WAGE ACT - EMPLOYEE VS. INDEPENDENT CONTRACTOR. The Washington Supreme Court holds that under the Washington Minimum Wage Act, Chapter 49.46 RCW, Washington will utilize an "economic dependence" test to determine whether an employee relationship exists. ***Anfinson, et al v. Fed Ex Ground Package*** **System, Supreme Court of WA, en banc, 85949-3 July 19, 2012.**

I. Facts. In this class action lawsuit, delivery drivers designated by contract as independent contractors as a class, sought employee status under a lawsuit relating to overtime benefits under the Washington Minimum Wage Act (MWA).

II. Applicable Law and Authority. In the past, Washington has utilized a variety of tests, most notably a multi-factor common law test, to determine whether an individual is an employee or an independent contractor. An important factor under the common law test is the right of the employer "to control" the actions of the employee.

In its decision, the Washington Supreme Court, relying heavily on federal decisions under the FLSA, found that coverage should extend to individuals who "as a matter of economic reality are dependent upon the business to which they render services." The court found that the MWA is remedial legislation and should be liberally construed. The court distinguished prior "right to control" cases as appropriate to determine employers' liability for the torts of an individual but inappropriate given that minimum wage laws have the remedial purpose of protecting the workers' right to a living wage. The court therefore held that the definition of "employee" under RCW 49.46.010(3) incorporates the economic dependency test developed by the federal courts in interpreting the FLSA.

III. Conclusion: As the dissenting Justice Johnson noted, the economic dependency test is "unworkable" and "…by its terms sweeps too broadly and can arguably be applied to almost any work performed by one person on behalf of another."

Cities should examine their independent contractor relationships. Of particular concern are contracts with City employees to perform outside services. For example, a member of the City Clerk's office or planning department who contracts with the City by a separate agreement to take notes at a planning commission meeting may be held to be an employee given the economic dependency test. Arguably, the employee is "dependent" upon the City for his/her livelihood, and the fact that the employee may have a business license, perform other secretarial services for private clients and produce minutes without meaningful "control and direction" from the City, are now secondary under the court's new formulation.

The dissents comment that the test is unworkable, will in practice lead to further litigation and may well result in a reconsideration or limitation of this decision over time.