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2300 Wilson Blvd., 7th Floor
Arlington, VA 22201
703.525.4000
www.beankinney.com

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MISCLASSIFYING EMPLOYEES RESULTS IN $101,000 IN BACK WAGES CHARGED TO LOCAL BUSINESS

BY ANTHONY E. COOCH, ESQUIRE

Last week, the Department of Labor Wage Hour Division found that a Woodbridge, Virginia construction company misclassified employees as contractors and failed to pay overtime in violation of the Fair Labor Standards Act ("FLSA"). According to a press release issued by the Department of Labor ("DOL"), employees of A&M Drywall were paid on a piece-rate basis. The company classified certain workers as independent contractors and failed to pay an overtime premium for hours worked in excess of 40 per week. These errors resulted in the company agreeing to pay $101,007 in back wages to 120 employees.

In its press release, the DOL expressed concern that employee misclassification is an "alarming trend" particularly in industries employing low-wage, unskilled workers. In light of the DOL concerns, businesses in these industries would be advised to evaluate their practices in determining whether a worker is an independent contractor or employee.

Employee or Independent Contractor?

There is no single rule or test that indicates whether a worker is an employee or contractor. Both the Fair Labor Standards Act ("FLSA") and Internal Revenue Code evaluate several factors in making the determination as to worker classification. These factors assist in determining whether the relationship between worker and business looks more like that of an employer/employee relationship or more like that of an independent contractor relationship.

These factors are:

- The extent to which the services performed by the worker are integral to

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the business

- Whether the relationship is temporary or permanent
- How much the worker invests in facilities and equipment
- How much control the business has over the worker
- The worker's opportunity for profit and loss
- The amount of initiative, judgment, or foresight in open market competition with others that is required in order for the worker to be successful as an independent contractor
- Whether the worker has an independent business organization and operation

Next Steps

Businesses can take several steps to protect themselves from challenges regarding employee/contractor classification.

- **Be consistent.** Establish criteria for evaluating the status of an employee. Ensure that decision makers are properly trained.

- **Be conservative.** If a worker has some characteristics of an employee and some characteristics of a contractor, they are most likely an employee. If you are still in doubt, seek advice of counsel.

- **Be comprehensive.** If choosing to classify a worker as a contractor, document all of the factors supporting the decision. Ensure that a full review into the worker's relationship with the business is conducted.

Overall, the employee/contractor distinction is based on the level of control the business has over the worker; the greater the level of control the more the worker will look like an employee. Taking the time to evaluate those persons classified as contractors to ensure they meet the criteria is essential to avoiding assessments for violating federal employment law.

Anthony E. Cooch is a shareholder with Bean, Kinney & Korman, P.C. in Arlington, Virginia, practicing in the areas of business law, employment law, government contracts, bankruptcy and creditors' rights and civil litigation. He can be reached at 703.525.4000 or acooch@beankinney.com.

SHOULD COURTS USE VARYING STANDARDS FOR SEXUAL HARASSMENT CLAIMS BASED ON INDUSTRY?

BY ARIANNA S. GLECKEL, ESQUIRE

The United States Court of Appeals for the Fifth Circuit held that it is not "the business of the federal courts generally to clean up the language and conduct of construction sites" and held that an employer who exhibited lewd behavior that was sexual in nature was simply construction site vulgarity and trash talking in "an environment where these characteristics abound." EEOC v. Boh Bros. Constr. Co., LLC, No. 11-30770 at 1-2 (5th Cir. Jul. 27, 2012) (vacating the judgment in EEOC v. Boh Bros. Constr. Co., LLC, 768 F. Supp. 2d 883 (E.D. La. 2011)).

Kerry Woods, an iron worker, alleged that Charles Wolfe, his former job superintendent, sexually harassed

Woods in violation of Title VII under a theory of "gender stereotyping" and that his former employer, Boh Brothers Construction Company, LLC, knew of the harassment, failed to discipline Wolfe and retaliated against Woods for making a complaint.

This case is one of a growing area of lawsuits involving same-sex sexual harassment cases that are based on gender stereotyping. Wolfe did not claim his actions and comments were based on his belief that Woods was homosexual, but instead were made based on what Wolfe believed were effeminate traits exhibited by Woods.

The conduct Woods complained about included Wolfe showing Woods a picture of his buttocks, calling him "faggot," standing behind Woods on the job site and simulating sexual acts with him, exposing himself to Woods numerous times and making oral sex comments to Woods.

Woods complained of the conduct to his employer who investigated the matter and reported that Wolfe's behavior was inappropriate but was not considered to be sexual harassment.

To establish a claim for sexual harassment and a hostile work environment under Title VII, an employee must show (i) they are a member of a protected group; (ii) they were the victim of uninvited sexual harassment; (iii) the harassment was based on sex; (iv) the harassment affected a term, condition or privilege of the employee's employment; and (v) must be sufficiently severe or pervasive to alter the conditions of the employee's employment and create an abusive working environment.

The EEOC alleged on Woods' behalf, that he was unlawfully harassed because he was not stereotypically masculine. The Fifth Circuit reversed the jury verdict that found in Woods' favor and held that the evidence was insufficient to support the jury's verdict that Woods was discriminated against because of sex, since little evidence was presented to show that Woods exuded non-stereotypically masculine behavior. The Court pointed out that "misogynistic and homophobic epithets were bandied about routinely among crew members, and the recipients, Woods not excepted, reciprocated with like vulgarity."

It appears that this Court applied a more lenient standard to Boh Bros. and Wolfe because this was a construction site. Both the District Court and the Court of Appeals took a "hands off" approach and a "boys will be boys" mentality in this case because of the industry involved. However, it is hard to imagine that the judges would reach the same outcome if Woods was homosexual or if the complainant was female.

Any claim by an employee that he or she is being sexually harassed should always be taken seriously and fully investigated regardless of the gender of the complainant or alleged harasser and regardless of the sexual orientations of the parties involved.

For more information on employment issues, contact Arianna S. Gleckel at agleckel@beankinney.com or 703.525.4000. Ms. Gleckel is an associate at Bean, Kinney & Korman, P.C. in Arlington, Virginia practicing in the areas of employment law and commercial and civil litigation.

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Contact Us
2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

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Check it out online at **www.virginiaemploymentlawjournal.com**.

Anthony E. Cooch is a Shareholder with Bean, Kinney & Korman, P.C. in Arlington, Virginia and Lead Editor of the firm's employment blog. He can be reached at 703.525.4000 and by email at acooch@beankinney.com.

Arianna S. Gleckel is an Associate with Bean, Kinney & Korman, P.C. and a regular contributor to the firm's employment blog. She can be reached at 703.525.4000 and by email at agleckel@beankinney.com.

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