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### **Labor and Employment Alert: Connecticut Supreme Court Clarifies the State's Independent Contractor Test**

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Connecticut uses a three-part test (the ABC test) to determine whether an individual is an employee or an independent contractor for purposes of the state unemployment compensation law. To be exempt from Connecticut's unemployment tax, all three parts of the test must be met. Part A looks at the direction and control an employer exercises over the worker. Part B concerns where the work is performed. Under part B, a worker must perform a service outside the employer's usual course of business or outside the employer's place of business to be an independent contractor. Part C looks at whether the worker is customarily engaged in an independently established trade, occupation, business, or profession that is the same as the work being performed. Recently, the Connecticut Supreme Court provided additional guidance on what factors to use when analyzing part C.

In *Southwest Appraisal Group, LLC v. Administrator, Unemployment Compensation Act*, the Connecticut Unemployment Compensation Act Administrator determined that Southwest had misclassified several individuals as independent contractors. Southwest challenged this determination in court, claiming these individuals were independent contractors with whom it contracted for a flat fee when performing services for its automatic damage appraisal business. The trial court held that the individuals were employees because there was no evidence that they worked for anyone but Southwest, and so Southwest had failed part C of the test as there was no evidence that the individuals were "customarily engaged in an independently established trade." The Connecticut Supreme Court disagreed and reversed the trial court.

The Supreme Court concluded that "evidence of the performance of services for third parties is not required to prove part C of the ABC test but, rather, is a single factor that may be considered under the totality of the circumstances analysis governing that inquiry." The Court explained that whether part C is met depends on the totality of the circumstances, with that analysis further guided by a multifactor test. These factors include:

1. the existence of state licensure or specialized skills;
2. whether the putative employee holds himself or herself out as an independent business through the existence of business cards, printed invoices, or advertising;
3. the existence of a place of business separate from that of the putative employer;
4. the putative employee's capital investment in the independent business, such as vehicles and equipment;
5. whether the putative employee manages risk by handling his or her own liability insurance;
6. whether services are performed under the individual's own name as opposed to the putative employer;
7. whether the putative employee employs or subcontracts others;
8. whether the putative employee has a saleable business or going concern with the existence of an established clientele;
9. whether the individual performs services for more than one entity; and
10. whether the performance of services affects the goodwill of the putative employee rather than the employer.

The Court explained that “just as the mere freedom to provide services for third parties is not by itself dispositive under part C, whether the individual actually provided services for someone other than the employer is not dispositive proof of an employer-employee relationship.” The Court further noted that undue weight must not be given to “the relative size or success of the putative employee's otherwise independent business.” “Giving improper primacy to this factor risks subjecting an employer unfairly to the decisions of the putative employee and an unpredictable hindsight review, without consideration of the intent of the parties, the number of weekly hours the putative employee actually worked for the employer, or whether the putative employee even sought other work in the field.”

Employers have the burden of proving each of the three-part test to establish that an individual is an independent contractor rather than an employee. Employers now have 10 additional factors from the Connecticut Supreme Court to consider when evaluating if an individual will meet part C of that test. Contact your Vorys lawyer if you have questions about engaging independent contractors in Connecticut or about independent contractor classification in general.