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August 2, 2010

# Ninth Circuit Holds That Insurance Agent Is Independent Contractor, Not Employee

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**The Ninth Circuit has held that an insurance agent cannot sue for sex discrimination under Title VII because she is an independent contractor, not an employee. In doing so, the Ninth Circuit clarified the appropriate test to determine employee status under federal law. *Murray v. Principal Financial Group, Inc.*, __ F.3d __ (July 27, 2010).**

Patricia Murray is a "career agent" for Principal and sells a range of financial and insurance products. Murray sued Principal for sex discrimination under Title VII of the federal Civil Rights Act of 1964, alleging that Principal favored her male counterparts. Only employees (and not independent contractors) are entitled to relief under Title VII. The district court determined that Murray is an independent contractor, not an employee of Principal, and accordingly granted summary judgment in Principal's favor. Murray appealed.

Affirming the trial court's determination that Murray is not an employee, the Ninth Circuit wrote its concise opinion "principally to clarify the source of the appropriate test to apply in this federal statutory context." The district court had identified three possible tests for employee status within the Ninth Circuit: (1) the "common law agency" test, which is derived from the U.S. Supreme Court's opinion in *National Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) and focuses on "the hiring party's right to control the manner and means by which the product is accomplished"; (2) the "economic realities" test, which is derived from Ninth Circuit precedent and requires "a fact-specific inquiry which depends on the economic realities of the situation"; and (3) a "common law hybrid" test that combines the other two.

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The Ninth Circuit agreed with the district court that "there is no functional difference between the three formulations" because they all focus on the hiring party's control over the worker's performance. And to the extent that there is a conflict, the "common law agency" test—derived as it is from Supreme Court precedent—would control.

Under the prevailing "common law agency" test, the following twelve factors are relevant to determine employee status: (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.

Applying this test to the facts surrounding Murray's relationship with Principal, the Ninth Circuit agreed with the district court that Murray is not an employee—and therefore cannot sue Principal under Title VII.

Although *Murray* brings welcome clarity within the Ninth Circuit, it does not represent a shift in the law. As the Ninth Circuit observed, its decision is in line with "virtually every other Circuit to consider similar issues." Those courts have held that insurance agents are independent contractors and not employees under federal employment statutes such as Title VII, the Employee Retirement Income Security Act ("ERISA") and the Age Discrimination in Employment Act ("ADEA").

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**For additional information on this issue, contact:**

Joseph E. Laska Mr. Laska's practice focuses on all aspects of general business and commercial litigation in both state and federal courts. He has experience in a wide range of areas such as contractual disputes, labor and employment, corporate dissolutions, intellectual property, unfair competition, class actions, international arbitrations, and appeals. Mr. Laska also specializes in defending life and health insurance companies in "bad faith" and ERISA litigation.