Menards Saves Big Money With Independent Contractor Decision from NLRB

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Over the last few years, we've penned several Client Alerts concerning the (usually rough) treatment state and federal agencies have given businesses who have tried to treat workers as independent contractors rather than employees. The "alphabet" agencies (IRS, DOL, OFCCP, UC and others) generally take a dim view of independent contractor arrangements, and frequently find independent contract workers to be employees unless several often varying criteria are strictly complied with.

In an apparent departure from this trend, an Administrative Law Judge (ALJ) for the National Labor Relations Board (NLRB) recently found that Menards had properly classified three different categories of delivery drivers as independent contractors rather than employees, and dismissed a charge filed by Local 153, Office and Professional Employees International Union, AFL-CIO. Menard, Inc. and Local 153, Office & Professional Employees International Union, AFL-CIO, No. 18-CA-18121 (November 17, 2017).

This decision is important not only as a "win" for employers, but also because it emphasizes the importance of understanding, implementing and following the legal standards which establish an independent contractor relationship.

The Facts

Menards has three different types of contracts (known as delivery service agreements) which it uses to arrange for delivery of products to its customers. Menards has used such arrangements since the company's inception, and in only a very few cases have deliveries ever been made by acknowledged Menards employees. Under the first type, the contractor makes deliveries using the contractor's own truck, together with a contractor-owned forklift or "knuckle crane." A second type is for deliveries made using the contractor's own forklift truck and a Menards-owned trailer. The third is for deliveries the contractor makes using a contractor-owned van or straight truck. All of the contracts are of one-year duration.

In addition to operating under three different arrangements, the contractors' individual circumstances vary widely. At one end of the spectrum are contractors who personally operate a single truck, have Menards as their sole account, and

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perhaps even started their business for the sole purpose of delivering for Menards. At the other end of the spectrum are larger, established contractors with multiple trucks, employees, and clients.

The deliveries are arranged for and scheduled by Menards employees known as delivery coordinators. However, there was testimony that contractors could and often did contact Menards to rearrange the delivery schedule for greater convenience and efficiency, and that in some cases the contractor would contact the customer directly to change a delivery time.

Regarding the degree of control Menards exercised over the delivery work, the evidence showed that once it gave the contractor a delivery schedule and loaded the truck, the hauler secured the load, transported and delivered it without any further involvement of Menards other than managers occasionally participating in a "ride-along" program. Menards does track the actual location of contractor vehicles via GPS, which it required by contract.

Menards sets standard delivery fees, collects those fees from the customer, and in turn pays the contractor. Per Menards written policy and its delivery coordinator, employees are also supposed to ask customers if they need special delivery services such as placing bundles of shingles on a roof instead of on the driveway, and if they do, to make an additional charge for that service. However, some contractors testified that they were not even aware of that policy, and therefore negotiated directly with the customer for such services, for which they were paid directly by the customer.

The NLRB's General Counsel introduced evidence that Menards "encouraged" contractors to use a particular brand of lift known as "Masterlift", that Menards manufactures and installs. There was testimony that in one case this "encouragement" was coercive, and resulted in a contractor who refused to use Masterlift equipment losing a substantial amount of Menards delivery work.

Menards also required that it be named as an additional insured in contractors' liability insurance (a common practice), but exercised no control over the hiring or firing of contractors' employees other than requiring a background check.

The contractor's employees wore their employer's uniform or no uniform at all, and wore no Menards logo clothing. Trucks bore either the contractor's logo or no logo at all, although there was testimony that Menards "recommended" that contractor's vans bear the Menards logo. Some contractors went along with that "recommendation" but others did not, apparently without any negative consequences.

The Decision

The ALJ looked to the following factors in rendering his decision:

The ALJ noted that the Board considers the following nonexhaustive factors, which the United States Supreme Court has cited with approval, in determining whether an individual is an employee or an independent contractor:

1. The extent of control which, by the agreement, the master may exercise over the details of the work.
2. Whether or not the one employed is engaged in a distinct occupation or business.
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
4. The skill required in the particular occupation.
5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
6. The length of time for which the person in employed.
7. The method of payment, whether by the time or by the job.
8. Whether or not the work is part of the regular business of the employer.
9. Whether or not the parties believe they are creating the relation of master and servant.
10. Whether the principal is or is not in the business.

FedEx Home Delivery, 361 NLRB 610, 611 (2014), enf. denied, 849 F.3d 1123 (D.C. Cir. 2017).

The ALJ noted, “No single one of these factors predominates in the analysis, and the weight given to a particular factor turns on the factual circumstances of each case. In addition to these factors, the Board takes into consideration whether the individual has ‘actual’ ‘entrepreneurial opportunity for gain or loss’—an inquiry that encompasses such considerations as whether the individual can work for other clients, can hire their own employees, and has a proprietary interest in the work. ... The Board construes the independent contractor designation narrowly so as to avoid ‘deny[ing] protection to workers the Act was designed to reach.’ Id. at 618-621.”- ALJ Decision (page 4).

The ALJ engaged in a thorough analysis of the facts in light of these standards, and found that “the overwhelming majority of the factors .....favor a finding that the hauling contractors who contract with Respondent’s [Menards] stores are independent contractors and not employees.” ALJ Decision (page 18).

Lessons Learned

At the outset, it should be noted that the General Counsel took a “shotgun” approach in this case by attempting to get all of Menards delivery contractors classified as employees rather than independent contractors, regardless of what contractual arrangement they operated under, how many employees the

contractor had, etc. Had the General Counsel adopted a more selective approach, such as focusing on small contractors who delivered exclusively for Menards, the result may have been different, at least with respect to those contractors.

In this case, Menards successfully threaded the legal needle by, among other things:

- Exerting no control over the selection , retention or compensation of drivers, other than requiring that they pass a background check;
- Allowing contractors to alter the delivery schedules established by Menards;
- Allowing contractors to choose their own equipment;
- Paying the contractors strictly on a per job flat rate basis;
- Generally not being in the delivery business itself;
- Having written contracts and allied policies and for the most part following them.

If you have independent contractor arrangements, it is always a good idea to periodically review them in light of recent developments such as this interesting and helpful case.