The Work Week

Bassford Remele Employment Practice Group

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Welcome to another edition of *The Work Week with Bassford Remele.* Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week. This week, we bring two topics to your inbox.

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When Reality Gets Real: NLRB's Love Is Blind Case Highlights The Importance of Proper Worker Classification

Beth L. LaCanne

Reality TV isn't just about drama, heartbreak, and awkward pod proposals—it has also become the stage for a labor law reality check. Last week, the National Labor Relations Board ("NLRB") issued a Complaint against the creators and producers of *Love is Blind* alleging that they did not properly classify contestants of the show. We previously discussed worker classification in the context of the Fair Labor Standards Act ("FLSA") and Minnesota statutes. This week, we will discuss worker classification under the National Labor Relations Act ("NLRA").

The NLRB enforces the NLRA, which is intended to alleviate labor-related issues that negatively impact commerce by providing employees with protections related to unionizing and negotiating better working conditions. In the *Love is Blind* Complaint, the NLRB alleges that the creators and producers improperly classified the contestants as non-employees and, in doing so, deprived them of the rights available to them under the NLRA.

As with the FLSA and analog statutes in Minnesota, independent contractors are not protected under the NLRA. Although the tests for determining whether a worker is an employee or independent contractor are different under the FLSA, NLRA, and Minnesota-state statutes, there are some similar elements under each, such as control and who supplies the necessary tools and equipment to perform the job. You can revisit the tests under the FLSA and Minnesota statutes in our prior edition of *The Work Week*.

In the context of the NLRA, the NLRB and courts reviewing the NLRB's decisions apply the common-law-agency test. The common-law-agency test considers factors that include, but are not limited to: (a) the extent of control; (b) whether or not the person is engaged in a distinct occupation or business; (c) the kind of occupation and whether the work is usually done under the direction of the principal or by a specialist without supervision; (d) the skill required in the particular occupation; (e) who supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) whether payment is based on time or by the job; (h) whether the work performed is part of the entity's regular business; (i) the parties' understanding of the relationship; and (j) whether the principal is or is not in business.

As is often the case when there is a change in the presidential administration, the incoming administration is expected to shake up the NLRB. The shake-up may make the NLRB more employer-friendly. That said, the common-law-agency test has been the test applied under the NLRA for many years, with changes only to the emphasis placed on entrepreneurial opportunity. Time will tell whether entrepreneurial opportunity will become less important during the incoming administration.

The NLRB's case against the creators and producers of *Love is Blind* shines a spotlight on the importance of businesses properly classifying workers and the significant legal implications for failing to do so. Proper worker classification is important across many industries, whether producing a hit reality show, running a corner café, or building skyscrapers.

At Bassford Remele, our Employment Law team routinely advises and represents clients regarding worker classifications, and closely monitors changes to laws and regulations. Feel free to reach out to us for assistance in the meantime!

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