LAW REVIEW 1053

Calling You an Independent Contractor Does Not Make You One

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1.1.2.2—Coverage of Independent Contractors and Partners

***Evans v. MassMutual Financial Group,* 187 L.R.R.M. (BNA) 2664, 158 Lab. Cas. (CCH) Par. 10099, 2009 WL 3614534 (W.D.N.Y. Oct. 23, 2009).**

To have reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), you must have left a *position of employment* for the purpose of performing voluntary or involuntary service in the uniformed services (anything from five hours to five years), you must have given the employer prior oral or written notice, you must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service related to the employer relationship for which you seek reemployment, you must have been released from the period of service without having received a punitive or other-than-honorable discharge, and you must have made a timely application for reemployment with the pre-service employer after release from the period of service. In this case, there is no question that Andrae Evans (a Major in the New York Army National Guard) meets conditions 2-5. The big question is whether his pre-service employment as a life insurance salesman amounted to a *position of employment* for USERRA purposes.

Andrae Evans applied for a position selling life insurance for MassMutual (a corporation headquartered in Massachusetts) at its office in Rochester, New York. Like Evans, the MassMutual general agent in Rochester was a member of the Army National Guard. The form contract that Evans signed with MassMutual (a contract drafted by the company and not subject to negotiation with the individual) characterized his status as an "independent contractor" rather than an employee. He worked in that capacity for several months before he was called to active duty and deployed to Afghanistan. While he was in Afghanistan, MassMutual terminated the general agent who had hired Evans and replaced him with a man who had never served in the armed forces.

When Major Evans was released from active duty, he made a timely application for reemployment at the MassMutual office in Rochester, but he was not reemployed. MassMutual and the Rochester general agent insisted that USERRA did not apply because Evans had been an independent contractor and not an employee. This is the case that I had in mind when I wrote Law Review 0905 (Jan. 2009), titled "Do Life Insurance Agents Have USERRA Rights?" I invite the reader's attention to www.roa.org/law_review. You will find more than 700 articles about USERRA and other laws that are particularly pertinent to those who serve our nation in uniform, and you will find a detailed Subject Index to facilitate finding articles about very specific topics.

Major Evans retained Tully Rinckey PLLC, a law firm in Albany, New York and Washington, DC. I was a partner with that firm until I resigned in May 2009 to join the ROA staff as the first Director of the Service Members Law Center.

Tully Rinckey filed suit on Major Evans' behalf in the United States District Court for the Western District of New York, Rochester Division. In lieu of filing an answer, MassMutual and the Rochester general agent filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. To get a case dismissed under that rule, a defendant must demonstrate that *even assuming that everything the plaintiff alleges is true, the plaintiff is not entitled to relief that the court can award.*

In its motion to dismiss and accompanying brief, MassMutual pointed out that the agreements that Evans had signed characterized his status as that of an independent contractor, that a New York Court of Appeals (high court of the state) published decision had characterized life insurance salesmen as independent contractors for New York State law purposes, and that the Equal Employment Opportunity Commission (EEOC) had determined that life insurance salesmen were independent contractors, rather than employees, for purposes of Title VII of the Civil Rights Act of 1964 (the law that forbids discrimination in employment on the basis of race, color, sex, religion, or national origin).

In a well-written decision by Judge Charles J. Siragusa of the United States District Court for the Western District of New York, the court firmly rejected these employer arguments, at least for Rule 12(b)(6) purposes. Judge Siragusa held that he could not consider the agreements between Evans and MassMutual because Evans had not *relied on* those agreements in drafting the Complaint, although he had a copy of the agreements in his possession. More importantly, in footnote 3 Judge Siragusa wrote: "Even if the Court could consider the agreements it would still deny the motion to dismiss, since the issue is not how the parties characterized the employment relationship, but rather, is whether Plaintiff qualifies as an employee under USERRA based on the economic realities of the employment arrangement. On that point, there are issues of fact which cannot be determined from the Complaint or the agreements."

Judge Siragusa also firmly rejected MassMutual's argument that the New York Court of Appeals characterization of life insurance salesmen as independent contractors for state law purposes and the EEOC's characterization of them as independent contractors for Title VII purposes is binding on the determination of whether life insurance salesman Andrae Evans was an employee *for USERRA purposes.* "Lastly, Defendants maintain that the Complaint must be dismissed because under New York State law insurance agents are deemed to be independent contractors, and because the EEOC has determined that some MassMutual agents were not employees for purposes of Title VII. The Court rejects both arguments, since New York State law appears to have no relevance to this case, and since Title VII employs a much narrower definition of 'employee' than does the Fair Labor Standards Act (FLSA), and by extension USERRA."

Almost 800,000 National Guard and Reserve personnel have been called to the colors since the terrorist attacks of Sept. 11, 2001, and some of them (including Andrae Evans) have been called multiple times. At least a few hundred of those 800,000 individuals were employed as insurance salesmen before they were called to the colors. In its first case construing the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940, the Supreme Court held that the law is to be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Applying this liberal construction to the question of USERRA coverage of insurance salesmen like Andrae Evans, USERRA should be held to apply. Insurance salesmen like Andrae Evans should have the same rights as mobilized National Guard and Reserve personnel who had been employed as teachers, clerks, and candlestick makers, and in thousands of other occupations and job classifications.

Congress enacted USERRA in 1994, as a long-overdue recodification of the 1940 VRRA. USERRA's legislative history makes clear that the VRRA case law is to be applied in determining the meaning of USERRA provisions: "The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protections against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act [USERRA], remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.' *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2452.

USERRA's legislative history makes clear the intent of Congress that the distinction between employees and independent contractors is to be made based on the same expansive treatment afforded under the Fair Labor Standards Act (FLSA), citing *Brock v. Mr. W Fireworks, Inc.,* 814 F.2d 1042 (5th Cir. 1987). 1994 *USCCAN* at 2454. In that case, the "independent businessmen" who sold fireworks for Mr. W Fireworks Company were determined to be employees of the company. The Fifth Circuit (federal appellate court for Louisiana, Mississippi, and Texas) held that the economic realities of the arrangement controlled, not the form of the arrangement or the wording of boilerplate agreements that the fireworks stand operators had signed. Applying this same liberal construction here, Andrae Evans was an employee of MassMutual and not an independent contractor.

We will keep the readers informed of future developments in this and other cases on the important question of whether insurance salesmen have USERRA rights as employees. If you have a case involving a similar issue, please let me hear from you at 800-809-9448, extension 730, or SWright@roa.org.