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Key FLSA Case

Ruling Preserves Industry's Ability To Employ Independent Contractors

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BATON ROUGE, LA.—The importance of independent contractors in the oil and gas industry cannot be overstated. For decades, oil and gas exploration companies and their service providers have relied on skilled independent contractors on a temporary, as-needed basis. These contractors—commonly called consultants—provide operators with the expertise needed to leverage the increasingly varied and multifaceted approaches to drilling for oil and extracting natural gas while accommodating the industry's cyclical nature. Operators and consultants, in turn, contract with consulting firms to act as matchmakers, connecting one to the other.

This strategically-oriented, triangular relationship provides significant advantages for the majority of consultants, but has been threatened by a minority. Plaintiffs' lawyers have convinced some workers to file individual and collective lawsuits seeking overtime from operators, consulting firms or both. The crux of these lawsuits is that the consultant-plaintiffs are not actually independent contractors, but rather employees entitled to overtime. If found to be true, the entire oil and gas industry would be adversely affected, because this would necessitate replacing the ubiquitous day rate with an hourly-plus-overtime pay structure, an arrangement that simply does not make economic sense for this industry.

It is against this backdrop that a jury, seated in the U.S. District Court 1 earlier this year decided the case styled as *Clay et al. v. New Tech Glob* consultants suing for overtime. It took the jury slightly more than an h

were independent contractors rather than employees of New Tech Global Ventures LLC, a Houston-based upstream oil and gas consultancy services company.

Clay has significant implications for the oil and gas industry and provides important lessons for operators and consulting firms contracting with consultants.

The Case

The plaintiffs in *Clay* filed a lawsuit under the Fair Labor Standards Act, initially as a collective action. Six other consultants opted into the lawsuit, which later was decertified by the district court and limited to the three original plaintiffs. The rig clerks contended that they were employees of New Tech, and therefore entitled to overtime for any week that they worked more than 40 hours. Independent contractors, unlike employees, are not entitled to overtime.

The line between independent contractor and employee is often blurry, but the test under the FLSA is whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer, in which case he is an employee, or is instead in business for himself, in which case he is an independent contractor. Courts analyze several factors to aid this inquiry, such as the purported employer's control over the worker, the worker's opportunity for profit or loss, the worker's investment, the permanence of the relationship, and the worker's skill and initiative.

New Tech successfully demonstrated that the plaintiffs were independent contractors rather than employees by showing that they were in no way "economically dependent" on New Tech. Each plaintiff consulted as a rig clerk for an offshore oil rig and earned well over \$100,000 in annual compensation. The evidence elicited at trial revealed that each plaintiff could cease running invoices through New Tech with no financial penalty and was free to contract at any time with a different invoice company. All three plaintiffs, outside of their invoice servicing relationship with New Tech, had formed their own businesses, writing off "hundreds of thousands of dollars" in business expenses—incurred during periods they claimed to be New Tech employees. Two of the plaintiffs' corporations even employed their spouses and paid them salaries, and one spouse filed an unemployment claim against her husband's corporation.

Each plaintiff signed a consultant agreement with New Tech expressly averring that he was an independent contractor and that New Tech's services were limited to marketing, invoicing and providing general liability insurance. However, it was shown at trial that the plaintiffs found their own work and thus did not need New Tech to market them. New Tech's business relationship with the plaintiffs was limited strictly to processing invoices and providing general liability insurance, which New Tech stressed repeatedly throughout the trial. Notably, New Tech did not:

- Invest in the offshore oil rigs on which the plaintiffs worked;
- Provide any instruction or documentation on how jobs were to be performed;
- Control hours;
- Evaluate performance; or
- Furnish equipment needed to be a rig clerk (a computer).

Considering all this evidence, the jury found that none of the three individuals were employees of New Tech, and therefore none were entitled to overtime.

The ramifications of this outcome for the industry are enormous. Larry A. Cress, president and chief executive officer of New Tech, agrees: "For us, this case was vitally important—for both New Tech individually and for the oil services industry as a whole. Our business model depends on flexibility and scalability, and our industry cherishes independence. We are a diversified company and invoice servicing is just one of our offerings. We build mutually beneficial relationships with our independent contractors, where they have the freedom to focus on their current projects while leveraging our network and relationships for future work, if they so choose."

Similarly, David O’Neil, general counsel of New Tech, explains: “This matter had huge implications—operationally and financially—for New Tech. We firmly believed in the merits of our defense and business model and are pleased that the jury quickly and decisively agreed. As oil and gas is an economic engine across the country, the clarity provided in this matter will allow innovation in exploration and production to continue. Utilizing independent contractors eases the tidal flow of energy prices and supply in the U.S. market.”

Lessons from *Clay*

The jury finding in *Clay* shows that the consultant model can beat these overtime lawsuits. But the relationship between the consultant, on the one hand, and the operator and/or consulting firm, on the other, must be structured properly. This means respecting that independent contractors are independent. Thus, operators and consulting firms should exercise as little control over the manner and method of the work performed by consultants as possible, requiring them to use their own tools of the trade (where applicable), engaging them for discrete projects (as opposed to keeping them engaged regardless of need) and allowing them to work for competitors without unreasonable restriction.

Clay also shows that careful drafting of the consultant agreement is critical. As with the consultant agreements at issue in *Clay*, any consultant agreement should, at a minimum, clearly identify the relationship as one between a contractor and an entity, negotiated at arms’ length, whereby the worker affirms that he or she is an independent contractor. While the characterization of the relationship is not dispositive, courts do take this into account. Ideally consultants will have signed through an entity that they have incorporated to sell their services, and have sources of revenue other than the independent contractor agreement.

By taking these steps, operators and consulting firms can ensure they will defeat any individual or collective overtime action brought by a consultant.



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