

Commission Selling as Employment Under the Ohio Unemployment Compensation Act

An individual's services must constitute employment before he can be covered by the Ohio Unemployment Compensation Act¹ (hereinafter referred to as the Act.) The Act does not expressly define "employee," nor indicate clearly the nature and bounds of the employment relationship. The first section of the Act, however, attempts to define those basic terms which, when applied, determine whether or not an individual's work is covered by the Act. On this basis, the courts have proceeded with the task of determining the scope of the employment relationship, in a field comparatively new to Ohio. This comment will point up the judicial contributions to a solution of the problem; legislative ones may lie ahead.

Ohio General Code Section 1345-1, containing definitions, provides:

c. The term 'employment' means service performed for wages under any contract of hire . . .

C. Services . . . shall be deemed to be employment . . . unless and until it is shown to the satisfaction of the administrator that: (i) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact, and (ii) such service is outside the usual course of the business for which such service is performed, and (iii) such individual is customarily engaged in an independently established trade, occupation, profession, or business.

The negative definition of employment, contained in the above statute, is commonly called the "ABC" test. It would seem to give a wide application to the term employment, but this inference is not borne out by the cases. The Ohio Supreme Court in *Commercial Motor Freight, Inc. v. Ebright*² took the view that the "ABC" test is applied to determine whether relationships which have been held to be master-servant relationships at common law shall nevertheless be excluded from coverage. This construction of the statute is weakened by subparagraph *D* of paragraph *c* which specifically excludes from coverage certain services, indicating that it rather than subparagraph *C* is the exclusionary provision. The net result is that the paragraph containing the "ABC" test is subordinated to the paragraph containing the broad introductory definition of employment (paragraph *c*) rather than being a co-ordinate paragraph

¹ OHIO GEN. CODE §§1345-1347 (1946).

² 143 Ohio St. 127, 54 N.E. 2d 297 (1944).

as in the statutes of other states.³ Thus Ohio follows the minority view in not giving full application to the "ABC" definition.

The problem does not end with a determination that an individual would be covered under the "ABC" test, used alone. Jurisdictions generally add miscellaneous express exclusions of individuals engaged in specified employments. The usual exclusions include: farm employment; domestic service; service for the federal, state and local governments; service for non-profit organizations; service as interne or student nurse; services as news-carrier (under 18 years); and service by certain members of the employer's family. Many states also exclude service as real estate and insurance agent on a commission basis, but Ohio's provision on this point seems unusual. Section 1345-1 states:

D. The term employment shall not include:

(7) Service performed by an individual for one or more principals who is compensated on a commission basis, and who in the performance of the work is master of his own time and efforts, and whose remuneration is wholly dependent on the amount of effort he chooses to expend.

The Ohio courts have adopted the view that if an individual's services are covered by this provision, his employment is not covered even though it would be covered under the "ABC" test.⁴ It is usually patent from the terms of the employment agreement and the conduct thereunder whether or not an individual is being compensated on a commission basis. But the meaning of the control and volition features of the section is not so readily apparent. The question is factual, and depends upon the extent to which the individual is subject to the control and regulation of his superior.

In a recent Court of Appeals case⁵ it was held, upon a rehearing, that a debit agent of an insurance company is not an employee within the meaning of the Act where he works no certain hours and his compensation is computed upon the number of accounts collected and new business written for such insurance company. The court stated that in its first hearing of the case it relied too heavily upon Ohio General Code Section 1345-1-c-D. The court cited *Motor Freight v. Ebright, supra*, as calling for a restricted definition of "employment" under the statutes. If it is recognized that the court there was construing the Ohio "ABC" test, it is doubtful that the language necessarily applies, even by inference, to paragraph seven of Ohio General Code Section 1345-1-c-D. A

³ Asia, *Employment Relation: Common-Law Concept and Legislature Definition*, 55 YALE L. J. 101 (1945).

⁴ *Bowman v. Atkinson*, 136 Ohio St. 495, 26 N.E. 2d 798 (1940); *State v. Earl G. Smith, Inc.*, 79 Ohio App. 469, 72 N.E. 2d 397 (1947).

⁵ *American Life and Accident Ins. Co. of Kentucky v. Jones*, 85 N.E. 2d 593 (Ohio App. 1949).

case⁶ arising under the Ohio Workmen's Compensation Act⁷ is similarly cited in the Court of Appeals opinion, and it is to be pointed out that the court in the latter case was not faced with the same statute. Without attacking the finding on the merits, it is submitted that the reasoning used by the court of appeals and the authority cited in support thereof was not apropos. At the present time an appeal is pending before the Ohio Supreme Court.

Whether insurance agents and the companies for which they work, are within the operation of unemployment compensation acts depends upon the facts relating to the employment and the provisions and exemptions of the act involved. In the absence of specific exemptions, insurance agents have been held to be within the coverage of such acts where they are not free from control or direction over the performance of their services, in that their services may be terminated at will and their activities are supervised, controlled and confined within specified limits.⁸ A salesman selling on a commission basis at his leisure and subject to no direction or control from the person for whom he sells has been found to be outside the Ohio Act.⁹

Any analysis of the employee versus independent contractor concepts must include a careful scrutiny of the significance of the right of control test as a determining factor in deciding the question as to whether an individual is an employee or an independent contractor in the light of intent under the statutes. Many of those who favor extended coverage under the statutes look upon the control concept as an unfortunate importation from the tort field.¹⁰ The proponents of restricted coverage have been content to rest conclusions upon a mere recital of lack of control as proved by the summary of the facts of each case.¹¹ But the restrictive tendency

⁶ Gillman v. Industrial Commission, 141 Ohio St. 373, 48 N.E. 2d 234 (1943).

⁷ OHIO GEN. CODE §§1465-37-1465-113 (1946).

⁸ Life and Casualty Ins. Co. v. Unemployment Compensation Commission, 178 Va. 46, 16 S.E. 2d 357 (1941); Unemployment Compensation Commission v. Jefferson Standard Life Ins. Co., 215 N.C. 479, 2 S.E. 2d 584 (1939); Andrews v. Commodore Knitting Mills, 257 App. Div. 515, 13 N.Y.S. 2d 577 (1939). *Re* Scotola, 257 App. Div. 471, 14 N.Y.S. 2d 55 (1939). *Contra*: Northwestern Mutual Life Ins. Co. v. Tone, 125 Conn. 183, 4 A. 2d 6 (1939); Texas Co. v. Wheelas, 185 Miss., 799, 187 So. 880 (1939); Washington Recorder Publishing Co. v. Ernst, 199 Wash. 176, 91 P. 2d 718 (1939).

⁹ Bowman v. Atkinson, 136 Ohio St. 495, 26 N.E. 2d 798 (1940).

¹⁰ Steffen, *Independent Contractor and the Good Life*, 2 U. OF CHI. L. REV. 501 (1935); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939).

¹¹ Seitz, *Rationale for Determining Newsboy and Life Insurance Solicitor Status under Employment and Workmen's Compensation Statutes*, 33 KY. L. J. 107 (1944).

seems to be gaining ground.¹² The right to control has its proper place and is included in the "ABC" test.

There is a conspicuous absence of legislative profession as to the purpose and design of the legislation calling for unemployment compensation, but it is doubtful whether spelling out such intent in the statute is particularly helpful. Ohio has no such expression in its statute, but the supreme court has said that the underlying purpose of the unemployment compensation act is to lighten the burdens which had theretofore fallen upon workmen and their families by reason of adverse business and industrial conditions which caused unemployment, and it was designed for the benefit of those whose loss of employment is involuntary and not those who are willfully and purposely unemployed.¹³ The contributions paid under the Act are in the nature of a tax, and the courts will construe the provisions of the Act, relative to liability for such contributions, most strictly against the state in favor of the taxpayer.¹⁴

To date no legislature has manifested an intent to render subject to an employment compensation act all those who contract to receive service from others. Such an aim is neither plausible nor workable. Some middle ground must be found. A solution may rest with extended coverage under the statutes combined with added responsibility assumed by employers to cure the economic ills resulting from unemployment. Employer action to solve the problem does not have to consist of periodic contributions to a fund for payments to employees temporarily out of work. Preventative measures may be taken to keep the need for such contributions and payments to a minimum.

A careful application of the "ABC" test supported by a logical rationale would do much to enhance the judicial stature of the decisions. The Ohio situation is complicated by Ohio General Code Section 1345-1-c-D-(7), which gives rise to a modified "ABC" test. A solution may lie in the legislature's selecting those employments thought desirable for exclusion and describing them specifically, thereby making the above provision unnecessary. This would leave the "ABC" test plus specific exclusions to take care of any situation which might arise.

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¹² Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COL. L. REV. 1015 (1941). It should be noted that the current Ohio General Assembly has re-enacted Ohio General Code Section 1345-33, a liberal construction clause. Am. S.B. 142, effective August 22, 1949.

¹³ *Baker v. Powhatan Mining Co.*, 146 Ohio St. 600, 67 N.E. 2d 714 (1946).

¹⁴ *State v. Earl G. Smith, Inc.*, 79 Ohio App. 469, 72 N.E. 2d 397 (1947).