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EY Payroll NewsFlash™

New York City ruling shows the complexity and implications of worker classification for brokers and their agents

A recent decision by an Administrative Law Judge (ALJ) with the New York City Tax Appeals Tribunal ruled that an individual working both for himself and a broker was an employee of the broker for purposes of his commissions. As a result, his commissions were not subject to the City's unincorporated business tax (Det. TAT (H) 12-19 (UB), February 4, 2015).

The ALJ reached this conclusion despite several possible indicators of independent contractor status, such as, his formation of a limited liability company, his use of a home office (including personal income tax deductions) and his business relationships with entities unrelated to the employer.

Although this worker ultimately benefited from being classified an employee, for other purposes (e.g., income tax withholding, unemployment insurance, workers' compensation insurance) this may not be the case.

Accordingly, this case highlights the tough standards New York and its cities can apply when determining if a broker is an employee or an independent contractor.

Background

In 2005, the individual was employed as a floor clerk for a New York City broker-dealer while at the same time offering broker services to his employer and other unrelated entities through an LLC he created.

As compensation for his services to his employer, he received $20,000 in "wages, tips and other compensation" reported on Form W-2, and over $500,000 in commissions which were not reported on Form W-2 or Form 1099-MISC.

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Ernst & Young LLP insights

Worker classification is a complex and increasingly important consideration, with potential consequences for wage and hour compliance, workers' compensation and unemployment insurance (UI).

New York State, for example, created a multi-agency task force that discovered over $300 million in unreported wages and assessed over $8 million in unemployment insurance (UI) taxes during 2014.

For most occupations, New York's UI agency uses a "common law" test that examines the level of control an employer has over a worker. Separate (and more stringent) "ABC tests" apply in the construction and commercial goods transportation industries.

Read our special report on worker classification here.

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The individual filed a city unincorporated business income tax return for himself and for his LLC, asserting that his services were "akin to those of an employee, and…are not subject to the unincorporated business tax."

A City Department of Finance auditor initially disagreed and determined that, as an independent contractor, the individual's 2005 commissions were subject to New York City unincorporated business tax of $20,338.

Despite compelling facts, broker is not an independent contractor

The ALJ disagreed with the City Department of Finance, ruling instead that the individual was an employee and, therefore, not subject to the unincorporated business tax.

While the ALJ noted the existence of several possible indicators of an independent contractor relationship, the employer maintained the right to control and direct the individual's services (including the "means and methods for accomplishing the result").

For example, the worker:

- Was required to work from 8:30am to 5:00pm on weekdays
- Worked at the employer's business location
- Was subject to the specific directions of the employer's principal
- Used the employer's equipment (telephone, computer, news services, etc.)
- Received health insurance paid for by the employer
- Was covered under the employer's workers' compensation policy
- Entertained the employer's clients and had access to a company credit card
- Could only access the trading floor to perform his duties with his employer's permission and through his employer's provision of a badge and jacket

As a result, the ALJ concluded that despite some indicators of independence, there was sufficient control or right to control the worker's services in establishing an employer-employee relationship under City Rules (19 RCNY § 28-02(e)). As a result, the worker is not liable for unincorporated business tax on his 2005 earnings.
