

Eighth Circuit Holds That Independent Sales Representative Is Contractor Despite 27-Year Engagement With Company

August 17, 2012 | [Traditional Labor, Labor And Employment](#)



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In recent years, there has been a lot of attention devoted to properly designating employees as contractors. The recent spike in lawsuits and aggressive enforcement actions by state and federal agencies have made many employers edgy about whether they are misclassifying contractors.

Fortunately, the Eighth Circuit handed down a decision yesterday in *Fesler v. Whelen Engineering Co.*, No. 11-2666 (8th Cir. Aug. 16, 2012), which should provide some useful guidance on this issue, and especially for employers that engage outside sales personnel for long periods of time.

The decision involved David Fesler who worked as an independent sales representative for Whelen Engineering Company, Inc., for 27 years promoting and selling Whelen's products. After the company terminated his contract, Fesler sued, alleging that Whelen had misclassified him as a contractor and that in actuality, he had been an employee all along.

Among other things, Fesler claimed that Whelen had exerted a "significant amount" of control over his work. Specifically, he alleged that Whelen required him to make daily contact with the company on his activities, provide weekly itineraries of what he was doing, and report on sales leads within 30 days. He also claimed that Whelen occasionally had given him directions on which individuals to hire and where he should locate his office.

The trial court – the Southern District of Iowa – granted summary judgment for the company. Affirming this decision, the Eighth Circuit looked at 10 factors to determine the nature of the parties' relationship: (1) Fesler's ability to control his work; (2) whether he was on the company's payroll; (3) whether he was paid by the hour or by the job; (4) whether he supplied the necessary tools and materials to do his job; (5) whether there was a contract; (6) whether Fesler's business was independent; (7) whether Fesler employed and supervised his own workers; (8) the duration of his engagement; (9) whether his work was part of the regular business of the company; and (10) the intent of the parties.

The Eighth Circuit concluded that these factors weighed heavily in favor of contractor status. With respect to the exertion of control, the Court viewed Whelen's actions as limited, and noted that they had been geared toward ensuring that the final results contemplated by the parties were accomplished – which was permissible under the law and did not convert Fesler into an employee.

Several other factors also pointed in favor of contractor status. Among other

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things, the Court noted that Fesler performed his services through an independent company that he owned and operated. Additionally, Fesler drew his salary from this company – not Whelen – and he hired, paid and supervised his own employees, in addition to maintaining his own offices. Of all of the applicable factors, the court reasoned that only two favored Fesler: the long duration of his engagement and that his work was part of the regular business of Whelen. The remainder, however, favored Whelen and tipped the scales in favor of the company on summary judgment.

The decision should provide solace to companies with long-term outside sales representatives that they are not necessarily violating the law simply because they have been using a contractor for several years (or in this case, decades). At the same time, it nicely illustrates how a company can avoid trouble down the road.