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EMPLOYMENT LAW

Are Your 'Partners' Partners?

It matters if they want to bring a discrimination lawsuit

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In bygone days, law firm partners met for lunch every day, discussing their law practices, the operation of the firm and their personal lives. Formal meetings of partners often were held at posh clubs (mainly for men only). Partners even vacationed together.

Today is different. Increasingly, law firm partners meet across the table for depositions in employment discrimination lawsuits involving their own workplaces.

The statistics bear this out. From 2011 to 2012, the number of discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) by employees of law firms and other legal service providers increased nearly 140 percent, rising from 225 in 2011, to 536 in 2012. Race-related and sexual discrimination charges under Title VII more than doubled from 81 to 165, and national-origin bias allegations almost tripled.

The employment discrimination laws provide protection only for statutory "employees." For law firm partners, the legal issue is whether they are "employers" or "employees" for purposes of these statutes. In light of recent developments before the EEOC, as well as published decisions by the federal courts, law firms should take a fresh look at their structures to assess whether their "partners" are partners.

This summer, the EEOC published two informal discussion letters that offer further clarification on the analysis that the agency will apply to determine whether a partner in a professional services organization is classified as an employee for purposes of federal anti-discrimination statutes.

In responding to a request not to upend the accounting industry by treating partners as employees, the EEOC states in its July 25 informal discussion letter that it will not make the "legal assumption that an individual who holds the title of 'partner' is never an employee." Its July 29 informal discussion letter provides similar guidance in addressing an inquirer's concern about the "forced retirement" of partners at large accounting firms. Both letters explain that "in some instances individuals who have the job title 'partner' may qualify as employees for purposes of the EEO laws."

The EEOC notes that the relevant inquiry in each circumstance is "whether the individual acts independently and participates in managing the organization or whether the individual is subject to the organization's control." Both letters identify the following six nonexhaustive factors as relevant in determining whether a partner is an employer or employee:

- Whether the organization can hire or fire the individual or set the rules and regulations for the individual's work;
- Whether and, if so, to what extent, the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent, the individual is able to influence the organization;
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
- Whether the individual shares in the profits, losses and liabilities of the organization.

The U.S. Supreme Court utilized the same six factors in deciding in 2003 whether four physician director-shareholders should be considered employees of a medical practice, for purposes of the Americans with Disabilities Act. In *Clackamas Gastroenterology Assoc. v. Wells*, the court elaborated on the factors by observing that:

> [A]n employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can assign tasks to employees and supervise their performance, can decide how the profits and losses of the

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business are to be distributed.

The court explained that the answer to the employer-versus-employee question depends on "all of the incidents of the relationship…with no one factor being decisive."

Even before the EEOC's recent letters, courts have recognized that the title of law firm "partner" does not automatically result in exclusion from the application of Title VII or other statutes. In *Hishon v. King & Spalding*, for example, the Supreme Court ruled in 1984 that "an employer may not evade the strictures of [EEOC laws] simply by labeling its employees as 'partners.'" The case arose from a discrimination complaint by a former female associate of a law firm whose employment was terminated after the firm did not invite her to become a partner.

In 2002, the U.S. Court of Appeals for the Seventh Circuit held in *E.E.O.C. v. Sidley Austin Brown & Wood* that the law "does not allow firms to obtain the benefits or avoid the costs associated with particular forms of doing business by simple designation." The age discrimination case was brought on behalf of a class of 31 former partners of a law firm who were demoted and expelled from the firm partnership. More recently, the U.S. District Court for the Eastern District of Pennsylvania espoused this view in *E.E.O.C. v. Kelley Drye & Warren,* where the EEOC filed an age discrimination complaint alleging that a law firm partner was an employee who could bring a discrimination lawsuit against the firm.

Both the Third Circuit and the District of New Jersey have applied the EEOC's six-factor test to similar inquiries. The Third Circuit has done so in three cases over the past decade, most recently in *Mariotti v. Mariotti Building Prod.,* which arose from a shareholder-director's claim that he was fired from a family business on the basis of his religious beliefs. In that case, the court declined to find that the shareholder-director was an employee, focusing on "the element of control and the six factors discussed in [*Clackamas*]." In *Kirleis v. Dickie McCamey & Chilcote,* which arose from a claim by a shareholder-director of a law firm that she was paid less than her male counterparts, the Third Circuit found that the plaintiff was an "employer" who could not bring a civil rights action against her firm. Further, in *Ziegler v. Anesthesia Assoc. of Lancaster Ltd.*, the court found that 19 shareholder-physicians owned and managed the medical practice and were employers, not employees.

The District of New Jersey has noted that control is the "guidepost" in such inquiries. In *Clements v. Housing Auth. of the Borough of Princeton,* the court applied the six-factor test to determine that the plaintiff, a board member of an organization, was not an employee. The plaintiff claimed that she was wrongfully terminated because she requested extended medical leave after undergoing emergency surgery. In addition, she claimed her firing was in retaliation for filing complaints against the organization about racially disparate treatment of co-workers and of mismanagement and improprieties involving federal housing funds.

The New Jersey Supreme Court also has held that "the six-factor *Clackamas* test is an appropriate point of departure for analyzing a shareholder-director's employee status." In its 2006 ruling in *Feldman v. Hunterdon Radiological Assoc.*, the court held that the plaintiff, a physician and shareholder-director of a radiology practice, was an employer and therefore not protected by the Conscientious Employee Protection Act. The plaintiff alleged that she was marginalized by other shareholders and forced to resign from the practice as a result of a dispute over a colleague's job performance. Importantly, the court observed that it considers "control" to be the most important factor in this inquiry, explaining that:

> It is that factor that incorporates an in-depth inquiry into the dynamics of an organization and reveals which shareholder-directors are in a position to influence the operation and which are marginalized and have power in name only.

Law firms that want their partners to be deemed nonemployees should analyze their management and organizational structures in light of the six factors, paying particular attention to the degree of control that each partner has in the management or operation of the firm. Those with two-tier partnerships especially may be vulnerable to claims that nonequity partners are statutory employees. This is one trend in what is now the "legal industry" (as opposed to the "legal profession") that law firms should anticipate. ■