Court Rules Sports Officials Are Independent Contractors

By Lee Green, J.D. on October 22, 2019

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Pennsylvania Interscholastic Athletic Association v. National Labor Relations Board

On June 14, 2019, the D.C. Court of Appeals issued its decision in *PIAA v. NLRB*, a case addressing the question whether sports officials working for state associations are "employees" or "independent contractors." The dispute arose in 2015 when lacrosse officials seeking to exercise the right of employees under the National Labor Relations Act (NLRA) to unionize had a petition filed on their behalf by the Office and Professional Employees International Union (Union) with the National Labor Relations Board (NLRB) and received a favorable ruling from the Regional NLRB Director classifying the lacrosse officials as employees and directing that an election take place to determine whether they would collectively be represented by the Union.

The PIAA appealed to a three-member panel of the NLRB the decision by the Regional NLRB Director that sports officials are employees and while that review was pending, the Union conducted its election with a majority of the lacrosse officials who voted – 53 of 84 – casting ballots in favor of unionizing. In July of 2017, by a two-to-one margin, the NLRB panel upheld the Regional Director's original decision that the sports officials were employees and thus permitted to unionize.

The PIAA subsequently filed an appeal with the D.C. Court of Appeals, which has jurisdiction over appeals from the NLRB, regarding the issue whether sports officials are employees of a state athletic/activities association and the PIAA refused to collectively bargain with the Union pending resolution of the case by the appellate court. In its June 14, 2019, written opinion, a three-judge panel of the court reversed the conclusion of the NLRB and held that sports officials are independent contractors, the NLRA does not apply to them, and therefore the lacrosse refs lacked the legal authority to unionize.

In late July of 2019, the Union requested an en banc rehearing of the case by the D.C. Court of Appeals (en banc meaning that all nine active members of the appellate court would sit for a rehearing as a sort of super-panel – a request rarely granted and then only in the most exceptionally important of cases). The court has not yet ruled regarding the en banc rehearing request and, assuming it is denied, the only remaining option for the Union and the lacrosse officials would be to petition for review by the U.S. Supreme Court, a request extremely unlikely to be granted (only about 80 appeals are granted by the high court out of 7,000 to 8,000 requests each year).

Employee versus Independent Contractor Status

The classification of workers as “employees” or “independent contractors” is a highly significant determination, both for the organization and the individuals whose status is in dispute. If workers in a given occupation and circumstance are found to be employees, then the employer typically has to withhold from paychecks any federal income tax due, any applicable state income tax owed, any local income tax due, Social Security tax and Medicare tax, along with paying the necessary matching components of income taxes, and any additional taxes that fall only upon the employer such as federal unemployment tax and state unemployment tax.

The employer would also have to contribute to workers compensation systems and provide any benefits to employees mandated by federal, state and local laws. In addition, an employer must provide to employees all of the legal protections set forth in statutes such as Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act and the NLRA, which sets forth all of the procedures applicable to employees desiring to unionize. Finally, the compliance burden alone, in terms of the paperwork filings mandated by all of the federal and state agencies with jurisdiction over employees, is an overwhelming task for employers.

However, if workers are classified as independent contractors, each individual is responsible for his or her own tax issues and benefit schemes, along with being entitled to a very limited range of federal and state statutory protections, including highly restricted rights under the NLRA to unionize and collectively bargain.

With the number of sports officials who work high school athletic events in the United States presently ranging between 300,000 and 350,000 (according to data gathered by the Ohio University Masters in Athletic Administration program), the implications are dramatic for state athletic/activity associations if those individuals were to be classified as employees instead of independent contractors. Therefore, the decision by the D.C. Court of Appeals in PIAA v. NLRB was one of the most highly anticipated and most significant judicial rulings in recent years with regard to high school sports and, as such, includes some important standards of practice for all state associations.

Criteria for Classifying Workers

In broad terms, the distinction between an employee and independent contractor involves an analysis of the amount of control the parent organization has over the individual and the economic reality of the extent to which the members of the class of workers are financially dependent on the parent organization. The classification of workers is highly subjective and as the written opinion in the PIAA case stated at the beginning of its analysis of the issue as it applies to sports officials, “determining whether a worker is an employee or independent contractor for purposes of the NLRA is more art than science.”

The D.C. Court of Appeals identified 10 specific criteria that have historically been applied by courts in making the decision whether a group of workers are employees or independent contractors:

1. The extent of the employer's control over the work;

2. Whether the worker is engaged in a distinct occupation or business;

3. The type of occupation and whether it is usually done under the direction of the employer or without supervision by the worker who is a specialist;

4. The level of skill required for the occupation and whether expertise was being provided by workers in lieu of more generalized knowledge possessed by the employer;

5. Who supplies the instrumentalities, tools and the place of work;

6. The length of time for which the person is employed in terms of the percentage of the work-year and whether the person engages in work for multiple employers;

7. Whether the method of payment is based on the time expended or by the job and how often the workers are engaged in work for the employer;

8. Whether the work is part of the employer's regular business or only one small part of much larger range of work and tasks comprising the employer's business;

9. Whether the parties believe they are creating the legal relationship of master and servant related to the employer's right to direct and micro-manage the worker; and

10. Whether the employer is or is not in the business involving the skills being provided by the workers.

The D.C. Court of Appeals also stated that the classification process should involve an 11th factor of evaluation focusing on "whether the workers have a significant entrepreneurial opportunity for gain or loss" – that is, whether workers can themselves seek greater financial returns by hiring assistants, subcontracting their work, finding cheaper replacements and pocketing the difference in remuneration, or similar strategies for entrepreneurial benefit.

Applying the 10 criteria and the entrepreneurial-opportunity factor to the lacrosse officials, the appellate court concluded that the evaluation decisively favored classification as independent contractors, noting that the PIAA itself pays officials for very few games per year – only during state playoffs – and that payment is per contest, not hourly for the time expended per event (criteria 7) and that throughout the regular season, officials are paid by the individual schools hosting events, not by the state association.

Also cutting in favor of independent contractor status was the fact that the lacrosse officials typically earned money from officiating games for only 11 weeks per year and that sports officiating was a part-time sideline for almost all of them (criteria 6). Also, officiating requires skill and expertise (criteria 4); the officials

provide their own equipment (criteria 5); and the intentions of the parties regarding their relationship as reflected in the contracts signed by officials, the Officials' Manual, and the PIAA Constitution and Bylaws are that referees are independent contractors (criteria 9).

The appellate court stated that other criteria were "a mixed bag" because the control exercised by the PIAA was limited to the officials using the rules of the sports as established by the state association, but that referees nevertheless used an extensive amount of discretion throughout every contest in making calls (criteria Nos. 1 and 3) and the court also observed that some criteria cut toward employee status, such as the officials' business of enforcing uniform rules and administering education-based sports events being highly similar to the PIAA's business (criteria Nos. 2, 8 and 10) and the lack of meaningful entrepreneurial opportunity for the officials.

Finally, the D.C. Court of Appeals noted that the application of the criteria in almost every other court's decision involving the employment status of amateur sports officials has come to the same conclusion that they are independent contractors, not employees.

Recommendation

State associations should be keenly aware of the criteria set forth by the D.C. Court of Appeals in the PIAA decision and proactively exercise caution to ensure that the application of those factors to the use of officials in all sports cuts in favor of classification as independent contractors as opposed to employees.