

The Looming Black Hole of Federal Contractor Rights

The past decade has seen an explosion in the use of contractors by federal agencies to perform a wide variety of government functions, most notably in the defense, intelligence and healthcare industries. According to USASpending.gov, the federal government spent well over \$500 billion on contracts with private companies for products and services. This enhanced use, both in the United States and abroad, has raised numerous questions about the rights and responsibilities of these employees who work for a private company but have become an integral part of the mission of federal agencies.

As novices in the multilayered legal and regulatory construct, contract personnel are often left in the dark as to how to navigate through this environment, particularly when disputes arise.

Contract employees, regularly embedded in the agency workplace, often report to two supervisors, one in the federal agency and one from the private sector contractor. Further complicating matters, DOD contractors may also have to deal with both military and civilian employees who often view workplace issues differently. Also, federal contracting officers regularly lack the manpower or training to effectively monitor and supervise the contractor workforce.

Fundamentally, resolution of disputes between contract employees and their federal employee colleagues or supervisors often creates a conflict between protecting the rights of the contract employee versus protecting the contractor's relationship with its federal agency client for whom it is dependent upon for funding. Unlike their federal employee counterparts, contract employees have very limited avenues to obtain relief from their federal agency client/employer, especially regarding claims of discrimination or whistleblower reprisal.

The primary hurdle in seeking relief from a federal agency is for a contractor to establish that he or she is an "employee" of a federal agency under the statute from which they seek redress. Statutes such as Title VII of the Civil Rights Act of 1964, The Family Medical Leave Act of 1993, the Occupational Health and Safety Act, and the Uniformed Services Employment and Reemployment Rights Act employ different legal tests to determine whether a contractor is an "employee," for purposes of coverage.

Courts interpreting these statutes have used the common law of agency test, the economic realities test or a hybrid of the two. Courts may also find that a "joint employment" relationship exists where both the agency and the contractor may be joint employers. However, if a contractor cannot show that he or she is an employee of a federal agency, then the contractor is without a means of relief from that agency. This burden of proof is the greatest hurdle to overcome for federal contractors.

The common law of agency test, used by the Equal Employment Opportunity Commission, looks at a collection of factors that focus on whether the employer controls "the means and manner of the worker's work performance," such as: 1) whether the employer has a right to control, when where and how the worker performs the job; 2) whether the work is performed

on the employer's premises; 3) whether the employer sets the hours of work and duration of the job; and 4) the worker is paid by the hour, week or month rather than the agreed cost of performing a particular job. *Burkett v. Dep't of the Air Force*, EEOC Appeal No. 012007255 (2010). A complainant need not satisfy all of the listed criteria or even a majority of them. The question of whether a contractor is on the federal payroll is not determinative of whether they meet the definition of an employee. Administrative agencies and courts using this test look at all of the circumstances surrounding the relationship between the parties in determining whether an employer-employee relationship exists.

Alternatively, courts and administrative agencies interpreting statutes that use the economic realities test look to whether the worker is economically dependent upon the federal agency principal or is in business for himself. This test, like the common law of agency test, is not clear cut and determinations are often made on a case by case basis. Some of the factors used include the degree of control exercised by the employer over the worker, the worker's opportunity for profit or loss and whether the worker is an integral part of the business.

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