

INSIGHTS

## Fifth Circuit Upholds Independent Contractor Status for Highly Skilled Energy Industry Consultants

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In *Parrish v Premier Directional Drilling*, the Fifth Circuit recently rejected a group of directional driller consultants' claims for overtime under the Fair Labor Standards Act ("FLSA") finding that the directional driller consultants were properly classified as independent contractors. The decision provides significant instruction for the energy and energy services industries and beyond in applying the independent contractor test. As hundreds of FLSA collective actions have been filed in recent years, particularly challenging the independent contractor classification of highly paid, highly specialized energy sector consultants, this decision provides practical and promising guidelines for employers. [Parrish v Premier Directional Drilling, L.P.](#), No. 17-51089 (Fifth Circuit, February 28, 2019).

Vacating the district court decision below, the Fifth Circuit rendered a judgment in favor of Premier finding that its independent contractor directional drillers were properly classified as independent contractors, and not employees. Revisiting the Supreme Court's 1947 *United States v. Silk* holding, the Circuit Court explained that, while all five factors set forth in the *Silk* decision are relevant in the employment-status analysis, the worker's "economic dependence" is "the touchstone for this totality of the circumstances test." [United States v. Silk](#), 331 U.S. 704 (1947).

The Fifth Circuit's conclusion finding the absence of the economic dependence associated with employee status weighed heavily in support of classification of the consultants as independent contractors. This was at odds with the Western District of Texas District Court, which had previously held that the directional driller consultants were Premier's employees after finding only one *Silk* factor supported classification as independent contractors.

Rather than remand to the Western District for further consideration, the Court of Appeals vacated the lower Court's grant of summary judgment in favor of the Plaintiffs on "employee status" and rendered judgment in favor of Premier on "independent contractor status." Despite facts "pointing in both directions," the Fifth Circuit found that no genuinely disputed material fact precluded the Court from awarding summary judgment.

### **Parsing Between Employee Directional Drillers and Independent Contractor Directional Drillers**

As detailed in the Court's opinion, directional drillers are workers on a drilling site that provide advice on how to effectuate a well plan. Premier provides each directional driller with a well plan, the directional driller determines the course of action to take, and Premier employees

conduct the actual drilling. In some projects, a measurement-while-drilling (“MWD”) consultant provides feedback to the directional driller while the drilling takes place.

Significantly, Premier utilizes both employee directional drillers (“EE DDs”) and independent contractor directional drillers (“IC DDs”). The Court noted, “not surprisingly,” that there was no significant distinction between the duties of the two groups. Even Premier acknowledged that the “only difference between an [IC DD] and an [EE DD] . . . is their ability to turn down work” “[a]nd negotiate their pay.” Both were supervised by Premier’s coordinator, although both performed their tasks with “little to no intervention.” IC DDs were hired and paid on a day rate plus mileage reimbursement on a “project-by-project basis.” While the IC DDs had assigned shifts, the Court observed, “it is quite understandable why Premier would need to know which [directional drillers] were working at any given time.” They were free to decline work projects and accept others, and to request more work when they were “hungry.” The IC DDs had the ability to negotiate pay, but apparently few did. EE DDs had no discretion to reject projects, and were paid on a salary basis plus day bonus along with a car allowance and per diem.

Notably, despite the differences in pay structure, independent contractors and employees were both compensated according to experience-based pay grades. Independent contractors could fall into two classifications (Contract-DD2 to Contract-DD3), while employees could be either DD-2 or DD-3. Both groups of workers were asked to follow certain company policies, including drug and safety protocols and reporting requirements, and both were subject to similar schedules when assigned to a project.

#### **Considering the Five *Silk* Factors to Determine the “Totality of the Circumstances”**

The Fifth Circuit walked through each *Silk* factor in its analysis, just as the district court did previously, but, unlike the district court, determined that four out of the five *Silk* factors supported independent contractor status.

First, considering the *degree of control exercised* by the alleged employer, the Court determined that the IC DDs’ freedom to accept or reject projects, and their relative independence in determining how to perform their “primary task” weighed in favor of independent contractor status. Notably, the Court was not persuaded by the IC DDs’ argument that by providing the already designed well plan, Premier exerted substantial control over the IC DDs. Rather the Court emphasized that the IC DDs completed their own directional-drilling calculations, and made that well plan work. These considerations outweighed the fact that Premier exhibited some degree of control, for example, in asking the IC DDs to comply with a fixed operations schedule, certain reporting formats, and the company’s safety and drug protocols. The Court also rejected the IC DDs’ argument that the non-disclosure, confidentiality agreement was a factor favoring employee status, because the agreement did not preclude work for other companies as long as the terms of the agreement were not violated.

Second, the Fifth Circuit considered the *comparative financial investment* of the company versus the worker. This was the only factor the Court of Appeals determined weighed in favor of employee status – primarily because the Fifth Circuit relies upon a side-by-side comparison focusing on the expenditures of each individual worker. The nature of the drilling operation naturally meant that Premier would spend much more at the drilling site than any single IC DD. However, the Court accorded this factor little weight in “light of the nature of the industry and the work involved.”

Third, the Court considered the degree to which Premier controlled each *worker's opportunity for profit or loss*. Despite the fact that the IC DDs were compensated at set pay grades, the Court determined that each worker had sufficient control over his/her own profits and losses to support his/her status as a contractor. Key to this analysis was the fact that contractors were only paid on a project-by-project basis. The Court also considered the workers' ability to operate side businesses as one measure of the Plaintiffs' financial independence. In the case of one Plaintiff, this meant operating losses sustained at his goat farm hindered the success of his FLSA claim. The Court rejected the IC DDs' argument that their inability to subcontract should be considered as evidence of employee status. While preventing subcontracting is an exercise of control, the Court did not consider this factor dispositive, noting that it was not unreasonable for a company to want to hire a specific person for his advanced skill and specialized expertise.

Fourth, the Court considered the relative *level of skill and initiative* required to be an IC DD. The analysis skewed heavily in favor of independent contractor status, due to the skill required in the position. Significantly, the court declined to require that the IC DDs exhibit a higher level of skill than their EE DD counterparts. This skill factor outweighed the initiative consideration, which actually favored employee status.

Fifth, the Fifth Circuit considered the *permanency on the relationship* between the workers and Premier. The Court looked at the duration of the relationship, whether the relationship was exclusive, and the nature of the payment relationship. Ultimately, this final factor was controlling as the "project-by-project basis" came out strongly in favor of independent contractor status. Significantly, the Court did not interpret prior precedent cited by the district court to establish a "bright-line" rule holding that a period of work of ten or more months resembles an employment relationship.

Finally, moving beyond *Silk*, the Fifth Circuit considered *three additional factors* analyzed by the lower court: the presence of an express agreement, the industry standard regarding directional drillers, and the purpose of the FLSA. However, none of these additional factors was weighted heavily, if at all, in the Court's analysis. The Court did not consider the IC DDs' contractor agreement to be dispositive. Nor did the Fifth Circuit accept Premier's argument that the FLSA was intended to provide relief to low paid workers, not workers making hundreds of thousands of dollars a year. The Court considered industry standard not as a standalone factor, but as a consideration encompassed by the other *Silk* factors and part of the totality of the circumstances.

### **Looking Forward: Practical Takeaways**

The ruling in *Premier Directional Drilling* provides energy sector and other employers with informative and practical guidelines when considering whether to classify workers as independent contractors. While the outcome of test is fact dependent, this decision supports the chances that an independent contractor classification will be upheld when two groups of highly skilled workers are virtually identical in terms of jobs duties and skill levels, and the employer regards some as employees and others as independent contractors.

The "touchstone" in the totality of the circumstances test to support a finding of independent contractor status is economic independence. In *Premier*, the company's decision to offer IC DDs work and payment on a project-by-project basis with the option to decline an assignment without repercussions – a pay method distinct from EE DDs – persuaded the Fifth Circuit to uphold Premier's independent contractor classification. Additionally, while the independent contractors and employees performed virtually identical tasks, the highly specialized and skilled

nature of the work meant that it was the type of work that could fall within the domain of independent contractors.