

## **How the Board Applied the 11 Common-Law Principles in *Sisters' Camelot***

In [\*Sisters' Camelot\*](#), 363 NLRB No. 13 (Sept. 25, 2015), the National Labor Relations Board was asked to determine whether the company had violated the National Labor Relations Act when it terminated a canvasser. The answer turned on whether he was an independent contractor or employee. If the canvasser was deemed by the Board to be an independent contractor, there would be no violation of the Act, which does not apply to independent contractors. After a hearing, the ALJ decided that the canvassers were independent contractors and dismissed the termination allegation. However, on appeal, the Board reversed the ALJ and concluded the canvassers were employees covered by the NLRA based on its analysis of the 11 principles:

*(1) Extent of control by employer*

The Board held that canvassers were subject to significant control by the employer when they worked, based on the fact that the employer set the daily start and end times for canvassing, among other things. If canvassers were not present at the employer's facility at the appointed start time, they were generally unable to canvass that day. The Board also was influenced by the fact that, if canvassers were late in returning to the designated rendezvous point at the end of the shift, they were subject to discipline.

*(2) Whether individual is engaged in a distinct occupation or business*

Based on prior Board decisions, the Board found that the canvassers' ability to solicit on behalf of a different organization at any time when they were not actively soliciting for the employer did not supported independent-contractor status. The Board held that "key" was that canvassers, through their presentations or "raps" to prospective donors as well as the materials they used, clearly identified themselves as working for the employer. The Board also held that the importance of the canvassers' fundraising activities to the employer favored a finding of employee status.

*(3) Whether the work is usually done under the direction of the employer or by a specialist without supervision*

Although the canvassers were not generally subject to in-person supervision while working their assigned routes, the Board held this factor supported employee status. The Board decided that the nature of the canvassers' work made in-person supervision "highly impractical," and that the employer's extensive recordkeeping requirements showed that the employer closely monitored canvassers' activities on a daily basis.

*(4) Skill required in the occupation*

The employer did not require canvassers to have any specialized education or prior experience and they received minimal training. For that reason, the Board found this factor favored employee status.

*(5) Whether the employer or individual supplies the instrumentalities, tools, and place of work*

The Board found that this factor favored employee status because, among other things, the employer procured necessary permits, transported canvassers to the worksite, assigned individual canvassing areas, and provided canvassers with nearly all of the materials they used, including maps, callback sheets, informational fliers, donor receipt forms, and clipboards.

*(6) Length of time for which individual is employed*

The Board found that the employer generally allowed canvassers to retain their positions indefinitely. Thus, it held that their "potentially long-term working relationship" with the employer weighed in favor of employee status, but was inconclusive.

*(7) Method of payment*

The Board found the employer tightly controlled canvassers' compensation and that this factor weighed in favor of employees' status. Thus, the rate was non-negotiable and the employer limited the canvassers' opportunity for greater earnings through additional work by assigning each individual canvasser a strictly delineated area within which he may solicit each day. The employer generally paid its canvassers a commission of 40 percent of the donations they collected. Further, if a canvasser collected any donations outside of his assigned area, he had to turn over the corresponding commissions to the canvasser(s) properly assigned to the area.

*(8) Whether the work is part of the regular business of the employer*

The Board found that canvassing was an integral and indispensable part of the company's regular business and that this factor supported employee status.

*(9) Whether the parties believe they are creating an independent-contractor relationship*

At the end of each year, the employer issued each canvasser a 1099 tax form instead of a W-2 form. The Board found that this factor tended to support a finding of independent-contractor status.

*(10) Whether the principal is or is not in the business*

The Board held that while the employer's ultimate business purpose was the collection and distribution of free food to underserved communities, it was clear the employer had directed its own fundraising operation, which relied primarily on the financial support collected by the canvassers. Thus, the Board found that this factor supported a finding of employee status.

*(11) Whether the evidence shows the individual is rendering services as an independent business*

The Board noted that this factor encompassed whether the alleged independent contractor not only has "a significant entrepreneurial opportunity . . . , but also whether [she] (a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in her work; and (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital." Based on this, the Board decided the canvassers did not render services as independent businesses because they had no control over important business decisions, no discretion to implement a business strategy for developing a customer base, no proprietary interest in the geographical areas to which they were assigned, no influence on the selection or assignment of territory, no monetary investment in connection with their work for the employer, and they made no personnel decisions.